No. 21-147

In The
Supreme Court of the United States

ERIK EGBERT,

,

Petitioner,

v.

ROBERT BOULE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF INDEPENDENT WOMEN'S LAW CENTER AS *AMICUS CURIAE* SUPPORTING PETITIONER

JOHN M. MASSLON II
Counsel of Record
PO Box 113343
Pittsburgh, PA 15241
(703) 791-9483
john@johnmasslon.com

August 30, 2021

QUESTIONS PRESENTED

1. Whether the Ninth Circuit impermissibly expanded *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) to situations involving the sensitive area of border security.

2. Whether this Court should reconsider *Bivens*.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(*continued*)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Constitutional Provisions

Statutes

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Other Authorities

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[*]

Every day, thousands of brave men and women risk their lives to protect America's borders. Facing threats from terrorists, gangs, and others trying to smuggle goods or people into the United States, Customs and Border Protection agents risk everything for their fellow Americans.

CBP agents must comply with the Constitution and federal law. They do a remarkable job of fulfilling their duty under extreme conditions. But they are humans. And humans make mistakes. That does not mean, however, that CBP agents can face suit every time someone alleges that they violated the Constitution. Rather, as with any area of law, plaintiffs can sue only when Congress has created a cause of action.

Independent Women's Law Center is a project of Independent Women's Forum, a nonprofit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic issues. IWF promotes policies that advance women's interests by expanding freedom, encouraging personal responsibility, and limiting the reach of government. IWLC supports this mission by advocating—in the courts, before administrative agencies, in Congress, and in the media—for

---

[*] No party's counsel authored any part of this brief. No person or entity, other than *amicus* and its counsel, paid for the brief's preparation or submission. After timely notice, all parties consented to IWLC's filing this brief.

individual liberty, equal opportunity, and respect for the American constitutional order.

For decades, this Court has declined to create new causes of action from thin air. And for good reason. After a brief foray into making law—the "bad old" days—this Court realized that judge-made causes of action violate core separation-of-powers principles. This pattern of rejecting implied causes of action has gained momentum in recent years—not slowed down—as this Court has time and again rejected expanding *Bivens* to other constitutional amendments, other contexts, or other defendants. In short, this Court no longer believes "that federal courts have the authority to "make good the wrong done." *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 396 (1971) (quotation omitted).

The Ninth Circuit, however, has stubbornly declined to follow this Court's lead. It has in fact gone in the opposite direction and found more implied causes of action than ever before. When possible, it hammers a square peg into a round hole by draping the veil of precedent over what is in reality a newly created cause of action. That is the tact it took here by holding that Boule's claims fit within this Court's precedent. But they do not. The Ninth Circuit's refusal to head this Court's warnings about creating new causes of action deserves this Court's attention.

This case also warrants review so that this Court can correct a previous egregious error. In *Bivens*, the Court created a new cause of action out of whole cloth. Over the past five decades, the case has become unworkable and an easy out for those courts set on legislating from the bench. Fixing that mistake

now will help settle the law and provide certainty moving forward.

SUMMARY OF ARGUMENT

1.A. The Court has extended *Bivens* only twice since 1971—both times in the decade following that case. Over the past forty years, the Court has not created a single cause of action for money damages under the Constitution. But that does not mean that the issue presented here is a new one. During that four-decade span, the Court has considered creating *Bivens*-type actions in at least eleven cases. Each time, the Court declined to find a new cause of action for money damages under the Constitution. Of those, five times the Court reversed the Ninth Circuit.

B. At least four times, the Court declined to create new *Bivens*-type actions or refused to apply such an action to a new context because of security concerns. The security concerns that inhere in finding constitutional causes of action against CBP agents protecting our nation's borders are even more serious. The Ninth Circuit's evasion of this Court's precedent cries out for review.

II.A. For the past three decades, the Court has recognized that it deviated from the proper judicial role in the mid-20th century. By implying causes of action under statutes and the Constitution, the Court violated key separation-of-powers principles. Since then, the Court has returned to its proper function of interpreting—not making—laws.

Bivens is egregiously wrong. Rather than leave the creation of causes of action and remedies to

Congress, the *Bivens* Court acted as a superlegislature by creating a claim for money damages out of whole cloth. This has given lower federal courts—particularly the Ninth Circuit—cover to ignore the Court's more recent precedents which counsel caution in implying causes of action and extending *Bivens* to new contexts. These courts cite *Bivens*, ignore the Court's more recent precedents, and create brand new causes of action for money damages under the Constitution. The only way to correct the error and stop further expansion of *Bivens* is to overrule that decision.

B. The Court considers several factors when deciding whether to overrule prior decisions. Those factors support reconsidering *Bivens*. First, *Bivens* is unworkable. Second, the decision is poorly reasoned. Third, the decision conflicts with related decisions and more recent legal developments. Fourth, the decision damages the integrity of the Courts. Finally, there are no reliance interests in keeping the status quo. Thus, the Court should reconsider *Bivens*.

ARGUMENT

I. THE NINTH CIRCUIT ERRED BY EXPANDING *BIVENS*.

A. The Court Has Limited *Bivens* To Three Narrow Factual Scenarios.

1. It was 1971 and a much different time when this Court created the first implied cause of action under the Constitution. *See Bivens*, 403 U.S. at 391-97. There, the Court found that an individual could sue Federal Bureau of Narcotics agents for violating

his Fourth Amendment right to be free from unreasonable searches and seizures because there was no "explicit congressional declaration" barring claims for money damages. *Id.* at 397.

About ten years later, the Court implied two similar causes of action under the Constitution. First, it created a cause of action under the Fifth Amendment for a congressman's sex discrimination against a federal employee. *See generally Davis v. Passman*, 442 U.S. 228 (1979). Second, it created a cause of action under the Eighth Amendment for failing to provide prisoners appropriate medical care. *See generally Carlson v. Green*, 446 U.S. 14 (1980). In both cases, the Court created the causes of action because Congress had failed to *bar* them. *Davis*, 442 U.S. at 246-47 (citation omitted); *Carlson*, 446 U.S. at 19.

Yet for the past forty years, the Court has not created another cause of action under the Constitution. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017). This is not for lack of trying by *pro se* prisoners and the creative plaintiffs' bar. At least eleven times, the Court has considered whether to create a new cause of action under the Constitution. Each time, it demurred.

The Court now uses a three-part test for deciding whether to expand *Bivens*. First, is there "a constitutionally recognized interest" that "is adversely affected by the actions of federal employees." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). If the answer is yes, the next step examines "whether any alternative, existing process for protecting the interest amounts to a convincing

reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* (citation omitted). If the answer is no, the final step is examining whether "any special factors counsel[] hesitation before authorizing a new kind of federal litigation." *Id.* (quotation omitted). If the answer is no, then courts may consider creating a cause of action. But failure to satisfy any of the three requirements forecloses expanding *Bivens*.

2. Although the Court's rationale for refusing to create new causes of action has, on the surface, varied, in each case the Court recognized that judge-made causes of action violate core separation-of-powers principles. *See* § II.A, *infra*.

Three times the Court declined to create an implied constitutional cause of action because Congress had provided other remedies. In *Hui v. Castaneda*, 559 U.S. 799 (2010), the Ninth Circuit found that, under *Bivens*, a detained immigrant could sue a U.S. Public Health Service doctor for ignoring his medical needs. Reversing, this Court held that 42 U.S.C. § 233(a) precluded the *Bivens* action because the Federal Tort Claims Act was the exclusive cause of action against PHS doctors. *Hui*, 559 U.S. at 805-07.

Although the Court used slightly different reasoning, the result was the same in *Schweiker v. Chilicky*, 487 U.S. 412 (1988). There, a claimant sued Social Security officials for improperly revoking her benefits. The Ninth Circuit created a claim for her under the Fifth Amendment. This Court reversed because the Social Security statute allowed her to

pursue remedies through the administrative process and federal appeal. *See id.* at 424-29.

Similarly, in *Bush v. Lucas*, 462 U.S. 367 (1983), the Court declined to find an implied cause of action for a supervisor violating a subordinate's First Amendment rights. As the Court recognized, an extensive administrative process protected the subordinate's rights. *Id.* at 380-90.

In other cases, the Court has been more specific about the separation-of-powers concerns inherent in judicially created causes of action. In *Wilkie*, a rancher alleged federal employees extorted him to give the federal government an easement over his land. The Court declined to find an implied cause of action because "Congress is in a far better position than a court to evaluate the effect of a new species of litigation against those who act on the public's behalf." *Wilkie*, 551 U.S. at 562 (cleaned up).

In three cases—two of which reversed the Ninth Circuit—the Court declined to extend *Bivens* to new classes of defendants. Most recently, in *Minneci v. Pollard*, 565 U.S. 118 (2012), a prisoner sued private individuals for violating the Eighth Amendment by providing him inadequate medical care. True to form, the Ninth Circuit created an implied cause of action for Eighth Amendment claims against non-government actors. This Court reversed and held plaintiffs may not bring *Bivens* suits against non-government workers. *Id.* at 126-31.

The Court has also consistently declined to allow *Bivens* suits against new types of defendants. In *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001), a

prisoner sued a halfway house operator for allegedly violating his constitutional rights. The Court held that plaintiffs cannot bring *Bivens* actions against private corporations. *Id.* at 70-74. And in *FDIC v. Meyer*, 510 U.S. 471 (1994), the plaintiff sued a federal agency for allegedly infringing his due-process rights. The Ninth Circuit found that *Bivens* allowed such an implied cause of action. This Court reversed because *Bivens* does not extend to suits against federal agencies. *See id.* at 483-86.

Relevant here, the Court has declined to extend *Bivens* actions because of security concerns. In *Abbasi*, the plaintiffs sued for the treatment they received while detained after the September 11 terrorist attacks. Even though plaintiffs' case appeared to fit within the four corners of *Carlson*, this Court found a *Bivens* action was impermissible where such claims would interfere with "sensitive issues of national security." *Abbasi*, 137 S. Ct. at 1861.

Abbasi's focus on security concerns was not new. In *United States v. Stanley*, 483 U.S. 669 (1987), a former soldier sued for injuries he allegedly suffered when administered LSD as part of a medical experiment. The Court found that the judiciary should not interfere with military affairs by implying *Bivens* actions. *Id.* at 678-86.

Four years prior, in *Chappell v. Wallace*, 462 U.S. 296 (1983), the Ninth Circuit had held that a seaman could sue Navy officers for racial discrimination under *Bivens*. The Court reversed because Congress heavily regulates military affairs, which are key to national security. *See id.* at 298-305.

Most recently, in *Hernandez v. Mesa*, 140 S. Ct. 735 (2020), this Court rejected extending *Bivens* to a CBP agent. In that case, parents sued a CBP agent under *Bivens* for shooting their son across the U.S.-Mexican border. The Court explained that creating a new cause of action for cross-border shootings would "implicate[] an element of national security." *Id.* at 746. Because courts are not the proper forum for resolving national security concerns, "respect for the separation of powers" meant the parents could not sue under *Bivens*. *Id.* at 749 (citation omitted).

At least eleven times, this Court made clear that *Bivens* suits are limited to the three classes of claims the Court recognized over forty years ago. Acknowledging that "Congress is in a far better position" to create causes of action, *Wilkie*, 551 U.S. at 562 (quotation omitted), this Court has whittled away at even those three classes of claims refusing to extend *Bivens* beyond the specific facts of those cases. The Ninth Circuit, however, has not internalized the separation-of-powers requirement that it is for Congress, and not the federal courts, to create law.

3. Special factors show why the Ninth Circuit erred in creating new causes of action here. For example, "(1) congressional silence, (2) [this] Court['s] precedent, (3) the precedent of [other] circuits, [] (4) the various potential alternative remedies available to Boule," and (5) security concerns all weigh against creating new causes of action. Pet. App. 17a.

First, for over 230 years, Congress has chosen to not create a cause of action against those protecting our nation's borders. This despite Congress knowing

that agents sometimes cross the line and violate the Constitution. The silence over such a long period means that a court-created cause of action would disregard Congress's policy choice for that preferred by some Ninth Circuit jurists.

As described above and below, creating new causes of action also violates, at a minimum, the spirit of this Court's decisions. Most courts of appeals have recognized that this Court's reluctance to create new constitutional claims for money damages is not an accident. But the Ninth Circuit hasn't gotten the memo. This also is why decisions from other courts of appeals counsel against creating new causes of action here. *See* Pet. App. 21a & nn.6-7. (collecting cases declining to create nearly identical causes of action). Even the Ninth Circuit's past precedent declined to create *Bivens*-type claims for First Amendment violations. *See Vega v. United States*, 881 F.3d 1146, 1154-55 (9th Cir. 2018).

Boule also has other potential remedies for the constitutional violations here. He could sue Customs and Border Protection for a Privacy Act violation. *See* 5 U.S.C. § 552a(g)(1)(D). Or he could sue under 26 U.S.C. § 6103 for improperly disclosing tax information. In short, there were other potential remedies that the Ninth Circuit ignored. Most importantly, however, the Ninth Circuit glossed over serious security concerns.

B. The Ninth Circuit Ignored The Security Concerns Inherent With Creating *Bivens* Claims Against CBP Agents.

Despite the veritable mountain of authority from this Court that forbids the expansion of *Bivens*-type actions, especially where doing so would pose grave security risks, the Ninth Circuit created not one but *two* such actions here. The lower court inferred a *Bivens*-type action for alleged constitutional violations of not only the First but also the Fourth Amendment against CBP agents. These causes of action raise serious security concerns. Permitting money damages would discourage agents from doing everything possible—consistent with federal law—to protect our nation's borders. Personal liability would hang over the heads of agents whose very job description includes intercepting drugs, human smugglers, and other dangerous situations every day. Such liability will cause well-meaning agents to err on the side of caution while protecting our nation.

If Congress wants CBP agents to err on the side of caution, it can create an action for constitutional violations. Yet, to date, it has declined to enact such a law. The Ninth Circuit disagreed with this policy decision. It declared itself a superlegislature and created causes of action for those constitutional violations. This it could not do.

As mentioned above, security concerns counsel hesitancy before extending *Bivens*. *Abbasi*, 137 S. Ct. at 1861. But the Ninth Circuit avoided these national security concerns by creating causes of action for Boule. The Ninth Circuit therefore failed to follow

four on-point decisions from this Court about when it is appropriate to create new *Bivens*-type claims. *See Hernandez*, 140 S. Ct. at 743 ("if [a court has] reason to pause before applying *Bivens* in a new context" it must "reject the request"). Despite this Court not creating a new cause of action for the past four decades, the Ninth Circuit created new causes of action here.

The Ninth Circuit's creation of new causes of action under the Constitution is no surprise. As described above, eleven times the Court has rejected attempts at extending *Bivens* into new contexts. Five of those times it reversed the Ninth Circuit, which had created new causes of action. So despite being just one of thirteen courts of appeals, the Ninth Circuit accounts for almost half the cases in which this Court rejected new causes of action.

This pattern of ignoring four decades of precedent is the obstinance that leads this Court to reverse courts of appeals. Whether it be the Sixth and Ninth Circuits' refusal to properly apply habeas case law or the Fifth Circuit's refusal to properly apply qualified-immunity precedent, this Court does not hesitate to grant certiorari and reverse.

The Court should do so here. The Ninth Circuit stubbornly continues to create new causes of action for money damages under the Constitution. This time, it once again waded into a sensitive area—our nation's border security. This interference with CBP agents' ability to protect Americans conflicts with all eleven of this Court's recent *Bivens* decisions and directly conflicts with the four that decline to create *Bivens*-type actions because of national security

concerns. So the Petition's first two questions presented are certiorari worthy.

II. THIS COURT SHOULD RECONSIDER *BIVENS*.

This case also presents a perfect vehicle to reconsider *Bivens*. And the Court should take this chance to overturn a decision that created both structural and practical problems.

A. *Bivens* Violates Core Separation-Of-Powers Principles.

1. The "Constitution explicitly disconnects federal judges from the legislative power and, in doing so, undercuts any judicial claim to derivative lawmaking authority." John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 59 (2001). This "sharp separation of legislative and judicial powers was designed, in large measure, to limit judicial discretion—and thus to promote governance according to known and established laws." *Id.* at 61.

But for a brief time last century, the Court assumed it was "a proper judicial function to provide such remedies as are necessary to make effective a statute's purpose." *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1015 (2020) (cleaned up). "[T]he Court would imply causes of action not explicit in the statutory text itself." *Abbasi*, 137 S. Ct. at 1855 (citations omitted).

The Court has since abandoned that "*ancien regime*[] and ha[s] not returned to it since." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). Now the Court

charts a "far more cautious course before finding implied causes of action." *Abbasi*, 137 S. Ct. at 1855.

This change is grounded in the Constitution. "When a party seeks to assert an implied cause of action * * * separation-of-powers principles" must "be central to the analysis." *Abbasi*, 137 S. Ct. at 1857. The Court's old practice of recognizing implied causes of action created "tension" with "the Constitution's separation of legislative and judicial power." *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1938 (2021) (plurality) (quotation omitted).

The Constitution vests "All legislative Powers" with Congress. U.S. Const. art. I, § 1; *see Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475-76 (2018). The Judiciary, on the other hand, exercises judicial power. U.S. Const. art. III, § 1. The distinction between the legislative power and the judicial power disappears when courts imply causes of action that Congress did not create.

2. Unfortunately, the Court did not stop at implying causes of action under federal statutes. For the first time in the 180-year history of our nation, in *Bivens* the Court recognized an implied cause of action for money damages under the Constitution. And then twice in the next decade, the Court extended *Bivens* to new contexts.

In *Hernandez*, the Court emphasized that, like with statutes, when creating new causes of action under the Constitution, "'central to [the] analysis' are 'separation-of-powers principles.'" *Hernandez*, 140 S. Ct. at 743 (quoting *Abbasi*, 137 S. Ct. at 1857). The Court therefore "consider[s] the risk of interfering with the authority of the other branches" when asking

"whether 'there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy.'" *Id.* (quoting *Abbasi*, 137 S. Ct. at 1858).

If anything, the Court should be warier of implying causes of action under the Constitution than it is of implying causes of action under statutes. When Congress passes a statute, it recognizes that plaintiffs should sometimes recover damages. Although the Court interferes with Congress's power when it implies a cause of action under a statute, it is at least doing so in an area where Congress has created a cause of action.

When courts imply a cause of action under the Constitution, Congress has not recognized plaintiffs' right to recover. So rather than extending a cause of action that Congress created, courts are creating causes of action with no congressional direction. And they do so despite Congress having over 230 years to pass laws creating causes of action for constitutional violations. This creation of causes of action under the Constitution thus raises grave separation-of-powers concerns.

3. Congress chose not to create a cause of action for Boule's claims. It may think that allowing such suits would lead to increased drug and human trafficking across the border. Or it may think that it would make it easier for terrorists to infiltrate America. Either way, Congress has made a policy decision.

Yet the Ninth Circuit disapproved of that policy decision and read causes of action into the Constitution. If the Ninth Circuit was trying to

"exercise[] a degree of lawmaking authority" as a common-law court, that attempt fails because there is no federal common law. *Hernandez*, 140 S. Ct. at 742 (citations omitted).

Bivens provides the Ninth Circuit—and other lower courts—cover to create new causes of action. These courts can cite *Bivens* and then hold that no special circumstances weigh against creating a new constitutional cause of action. If this Court reconsiders *Bivens*, it will eliminate this cover and force the lower courts to realize that plaintiffs cannot sue for money damages under the Constitution absent a statute allowing such suits. This would restore the proper balance between the political branches and the judicial branch. Rather than creating new causes of action, federal courts could once again decide cases or controversies under the laws Congress passes.

B. The Factors This Court Considers When Overruling Precedent Do Not Counsel Against Reconsidering *Bivens*.

The Court considers several factors when deciding whether to overrule a case. The factors include the decision's "workability"; *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009), the "quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019) (citation omitted). These factors, and others, support overruling *Bivens*.

1. *Bivens* has proven unworkable. The Court thought that considering special factors before implying a constitutional claim for money damages would limit the decision's scope. But this restraint in

creating new constitutional actions has not materialized. Rather, courts use *Bivens* to create new causes of action whenever they think that plaintiffs deserve recourse for constitutional violations.

The Ninth Circuit "could think of no reasons to hesitate" before creating these causes of action, however, there are at least five: "(1) congressional silence, (2) [this] Court['s] precedent, (3) the precedent of [other] circuits, [] (4) the various potential alternative remedies available to Boule," and (5) security concerns. Pet. App. 17a. The disconnect between the Ninth Circuit's decision and the denial from rehearing *en banc* shows why *Bivens* is unworkable. It allows courts to flip the burden and force defendants to show the existence of special factors counseling against creating new causes of action. This permits courts to ignore this Court's precedent and continually create new causes of action.

The gap between how the Court thought *Bivens* would operate and the on-the-ground reality is the same unworkability that led to the Court overruling precedent in *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162 (2019). In *Williamson Cty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Court "envisioned that takings plaintiffs would ripen their federal claims in state court and then, if necessary, bring a federal suit under [42 U.S.C.] § 1983." *Knick*, 139 S. Ct. at 2178-79. But the reality was different because of *res judicata*. *See id.* at 2179. *Williamson County* thus deprived most takings' plaintiffs of a federal remedy—the *San Remo* preclusion trap. The Court therefore found that *Williamson County* was unworkable and overruled it

in *Knick*. Because *Bivens* is similarly unworkable, the Court should overrule it, too.

2. *Bivens* is egregiously wrong and poorly reasoned. Much of the opinion focused on the fact that the Fourth Amendment protects against intrusions by state actors—not private actors. *See Bivens*, 403 U.S. at 390-94. This is irrelevant when deciding whether courts should create causes of action for money damages after a constitutional violation. Although the Fourth Amendment prohibits the Federal Government from unreasonably searching citizens' property, it does not follow that citizens can sue for money damages if a Fourth Amendment violation occurs.

The next part of *Bivens* is similarly off base. The Court found that state law sometimes conflicts with the Fourth Amendment and, under the Supremacy Clause, federal law must prevail. *See Bivens*, 403 U.S. at 394-95. This too is immaterial when deciding whether courts should create actions for money damages.

Bivens relied on the fact that Congress had not prohibited a cause of action for money damages. But that gets the constitutional inquiry backwards. The proper inquiry under separation-of-powers principles is whether Congress *provided* a cause of action for money damages.

The poor quality of *Bivens*'s reasoning supports overruling that decision. This Court, for example, overruled *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) in *Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31* because the former erroneously relied on two cases. *See* 138 S. Ct. 2448, 2479 (2018).

In *Bivens*, the Court similarly relied on two inapposite considerations. So this factor mandates reconsidering *Bivens*.

3. *Bivens* also conflicts with related decisions, both before and after *Bivens*. These cases show that "from 'the beginning of the nation's history,' federal courts have recognized that federal officials were subject to 'common law suits,' which served as the remedy to their legal violations 'as if they were private individuals.'" Pet. App. 11a (quoting Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 531 (2013)); *see* Note, *Developments in the Law: Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 831-32 (1957). For example, in *Little v. Barreme*, 6 U.S. 170 (1804), a naval officer illegally seized a Danish ship. The Court held that the ship's owner could sue the officer for trespass. *See id.* at 179. It did not create a separate cause of action for the constitutional violation.

Just eight years before *Bivens*, the Court held that "[w]hen it comes to suits for damages for abuse of power, federal officials are usually governed by local law." *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963) (citing *Slocum v. Mayberry*, 15 U.S. 1, 10, 12 (1817)). So the Court declined to create a separate cause of action for constitutional violations. *See id.* at 649-50.

Bivens departed from these decisions and created a new cause of action for constitutional violations. Because *Bivens* conflicts with related

decisions, this factor does not counsel against reconsideration.

As described in § II.A, *supra*, the Court has changed course since *Bivens* and is now hesitant to imply causes of action. This was a big change in the legal landscape. During the mid-20th century, the Court often implied causes of action to further a statute's or the Constitution's purpose. The era gave us *Bivens* and the two cases that extended it to new contexts.

But since then, the Court has shunned implying causes of action under statutes and the Constitution. In the past four decades, the Court has not extended *Bivens* further. When considering possible implied causes of action, the focus now is on whether it violates separation-of-powers principles. The answer is almost always yes. The Court's proper role is to interpret the law—not make it. This monumental change in the way the Court approaches these questions suggests that it is time to revisit *Bivens*.

4. *Bivens* also hurts the integrity of the judicial branch. As the Court has explained, few things "undermine public confidence in the neutrality and integrity of the Judiciary" more than acting as "a Council of Revision." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 145-46 (2011). But that is what happens under *Bivens*. A single person can sue and ask a court to create a new cause of action. So rather than petitioning Congress and the President to pass needed reforms, citizens see judges as quasi-legislators and direct their request for new laws to the courts. The only way to ensure the judiciary's integrity is to reconsider *Bivens* and return courts to

their traditional role of saying what the law is—not what it should be.

5. Finally, there are no reliance interests that counsel against reconsidering *Bivens*. People do not order their daily lives around the availability of money damages for a potential constitutional violation. Citizens have not structured their businesses or otherwise relied on *Bivens*. The remedy the Court created only becomes relevant if a federal officer violates someone's constitutional rights. Then, the plaintiffs' bar relies on *Bivens* to collect large contingency fees. But the plaintiffs' bar's ability to rake in fees is not the type of reliance interests that the Court weighs when deciding whether to overrule precedent. Thus, these five factors all show that the Court should reconsider *Bivens*.

* * *

Bivens is an outlier in the Court's jurisprudence. Like other cases reconsidering precedent, the *stare decisis* factors do not support keeping the incorrect decision. This Court should therefore grant certiorari and reconsider *Bivens*.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

JOHN M. MASSLON II
Counsel of Record
PO Box 113343
Pittsburgh, PA 15241
(703) 791-9483
john@johnmasslon.com

August 30, 2021