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 U.S. Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF 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.

3. Whether the Court should reconsider *Bivens*.

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INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute[1] ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated both to litigating immigration-related cases in the interests of United States citizens and to assisting courts in understanding federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of immigration-related cases. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization.

STATEMENT OF THE CASE

IRLI adopts the facts as stated by the petitioner, Erik Egbert, a Border Patrol agent with U.S. Customs & Border Protection. *See* Pet. 4-5. In summary, Agent Egbert was investigating potential criminal conduct outside the Smuggler's Inn, just inside the U.S.-Canadian border. The Inn's proprietor, respondent Robert Boule, asked Agent Egbert to leave the premises and stepped between Agent Egbert and a foreign national who was the investigation's focus. Agent Egbert allegedly pushed Mr. Boule aside to continue the lawful investigation. As a result of this encounter, Mr. Boule allegedly sustained a back injury.

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[1] *Amicus* files this brief with all parties' written consent, with more than 10 days' written notice. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus* and its counsel—contributed monetarily to preparing or submitting the brief.

Mr. Boule complained to Agent Egbert's superiors and further alleges that Agent Egbert retaliated by reporting Mr. Boule to the Internal Revenue Service ("IRS") and other government agencies. These reports allegedly occasioned the IRS to audit Mr. Boule and the other agencies to investigate him.

Mr. Boule did not file a claim under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 ("FTCA"), but instead proceeded straight to court with a two-count complaint under *Bivens v. Six Unknown Named Agents of the Fed'l Bureau of Narcotics*, 403 U.S. 388 (1971), for the alleged push and retaliatory reports. The district court granted Agent Egbert summary judgment, but the Ninth Circuit reversed.

SUMMARY OF ARGUMENT

The Court should overrule *Bivens*, which was based not only on a subsequently rejected implied-right-of-action theory, Pet. 21-23, but also on an implausibly broad interpretation of federal-question jurisdiction that would empower federal courts to fashion any remedy for any federal question (Section I.A.1). This reading of federal-question jurisdiction would render the seminal Civil Rights Act of 1871—specifically, 42 U.S.C. § 1983—superfluous (Section I.A.2). Whatever the principles that justify *stare decisis*, they cannot justify the Due Process violation of applying a plainly wrong *Bivens* holding to a *Bivens* non-party like Agent Egbert (Section I.B). Moreover, no factors warrant retaining *Bivens* as a precedent under *stare decisis* because: (i) *Bivens* is unworkable, badly reasoned, and inconsistent not only with this Court's rejection of implying causes of action but also with amendments to the FTCA; and (ii) no party

reasonably relies on *Bivens* in either taking action or ordering their affairs (Section I.C). Finally, Congress has not ratified *Bivens* (Section I.C.4).

If this Court nonetheless reviews this action under *Bivens*, this Court should not expand *Bivens* to this case because Mr. Boule had an adequate alternate remedy under the FTCA (Section II.A) and special factors—such as the immigration-enforcement context and the separation-of-powers violation inherent in *Bivens*—counsel against extending *Bivens* further (Section II.B).

ARGUMENT

I. THIS COURT SHOULD ABANDON *BIVENS*.

"*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). But *stare decicis* sometimes must give way to other considerations: "'*Stare decisis* is not an inexorable command.'" *Id.* at 828 (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)); *Hertz v. Woodman*, 218 U.S. 205, 212 (1910) (*stare decisis* "is not inflexible" and "[w]hether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided"). This is one of the times when *stare decisis* cannot allow an obviously wrong precedent to stand.

A. Far from a mere "relic," *Bivens* is plainly wrong.

This Court has politely called *Bivens* "a relic of the heady days in which this Court assumed common-law

powers to create causes of action" and an "*ancien regime* [under which] the Court assumed it to be a proper judicial function to provide such remedies as are necessary to make effective a statute's purpose." *Hernandez v. Mesa*, 140 S.Ct. 735, 741, 750 (2020) (interior quotation marks omitted) ("*Hernandez II*"). *Bivens* is much worse: it is and was wrongly decided.

1. ***Bivens* rests on misinterpreting federal-question jurisdiction.**

The Court's post-*Bivens* decisions not to extend *Bivens* have focused on Article III courts' lack of common law or legislative power to create causes of action implied by a substantive provision such as the Fourth or Fifth Amendment. *Hernandez II*, 140 S.Ct. at 742. But *Bivens* relied on two ingredients to fashion its damages remedy: not only the Fourth Amendment but also federal-question jurisdiction. While this Court has withdrawn from implying causes of action from substantive texts, the Court also should recognize that the *Bivens* view of federal-question jurisdiction is wildly flawed.

As the *Bivens* majority made clear, *Bivens* held what *Bell v. Hood*, 327 U.S. 678 (1946), prefigured: "'where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'" *Bivens*, 403 U.S. at 396 (quoting *Bell*, 327 U.S. at 684). And *Bell* made clear that the entire enterprise was based on federal-question jurisdiction: "Whether the petitioners are entitled to recover depends upon an interpretation of [the federal-question statute] and on a determination of the scope of the Fourth and Fifth Amendments'

protection[.]" *Bell*, 327 U.S. at 684-85. The rationale behind *Bivens* is as breathtakingly broad as it is simple:

> Our authority to imply a new constitutional tort, not expressly authorized by statute, is anchored in our general jurisdiction to decide all cases "arising under the Constitution, laws, or treaties of the United States."

Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001) (quoting 28 U.S.C. § 1331); *accord Schweiker v. Chilicky*, 487 U.S. 412, 420-21 (1988); *Bush v. Lucas*, 462 U.S. 367, 378 (1983) ("federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation"); *Bivens*, 403 U.S. at 398-99 (Harlan, J., concurring in the judgment). In short, when Congress enacted the federal-question statute in 1875, Congress authorized federal courts to adopt any remedy for any federal question.

That cannot be right. While our legal generation is accustomed to federal-question jurisdiction, it was not until 1875 that Congress gave federal district courts jurisdiction over federal questions. *Merrell Dow Pharm., Inc. v. Thompson,* 478 U.S. 804, 807 (1986). Nothing has happened since 1875 to expand the scope of the statutory grant of jurisdiction to the lower courts: "no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." *Fourco Glass Co. v. Transmirra Products Corp.,* 353 U.S. 222, 227 (1957). So *Bivens* rests in part on the

assumption that federal courts can infer any remedy for cases within federal-question jurisdiction.

2. *Bivens* renders 42 U.S.C. § 1983 mere surplusage.

Other than overstating the congressional grant of federal-question jurisdiction, *see* Section I.A.1, *supra*, a second problem is that *Bivens* renders seminal civil-rights legislation mere surplusage:

> [T]wo [post-Civil War] statutes, together, after 1908, with the decision in *Ex parte Young,* established the modern framework for federal protection of constitutional rights from state interference.

Perez v. Ledesma, 401 U.S. 82, 106-07 (1971). First, the Civil Rights Act of 1871, 17 Stat. 13, provided what now are 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). *Id.* Second, the Judiciary Act of 1875, 18 Stat. 470, provided what now is 28 U.S.C. § 1331. *Id.* The problem is that, if a plaintiff needed only § 1331 to sue federal violators of constitutional rights, then a plaintiff plainly does not need § 1343(3) and § 1983 to sue state or local violators of constitutional rights. *Bivens* would make a key provision of the Civil Rights Act of 1871 a nullity.

Indeed, this Court has recognized the possibility that *Bivens* could have expanded "until it became the substantial equivalent of 42 U.S.C. §1983." *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1855 (2017) (interior quotation marks omitted). Although that expansion did not happen because this Court ceased implying private rights of action, the possibility also reveals a fatal *Bivens* defect on federal-question jurisdiction.

As Justice Sotomayor has explained, traditional equity review under federal question jurisdiction and *Young* differs from Section 1983 and implied rights of action:

> Suits for redress designed to halt or prevent the constitutional violation rather than the award of money damages seek traditional forms of relief. By contrast, a plaintiff invoking §1983 or an implied statutory cause of action may seek a variety of remedies—including damages—from a potentially broad range of parties. Rather than simply pointing to background equitable principles authorizing the action that Congress presumably has not overridden, such a plaintiff must demonstrate specific congressional intent to *create* a statutory right to these remedies. For these reasons, the principles that we have developed to determine whether a statute creates an implied right of action, or is enforceable through §1983, are not transferable to the *Ex parte Young* context.

Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 340 (2015) (Sotomayor, J., dissenting) (interior quotation marks, citations, and alterations omitted, emphasis in original). And yet *Bivens* would find all that remedy-creating power tucked away in federal-question jurisdiction.

Indeed, in the immediate aftermath of *Bivens*, "it was widely assumed among lower courts and commentators that *Bivens* remedies would be available for all constitutional rights." Andrew Kent,

Are Damages Different?: Bivens and National Security, 87 S. CAL. L. REV. 1123, 1139-1140 (2014) (citing Alexander A. Reinert, *Measuring the Success of Bivens Litigation and its Consequences for the Individual Liability Model*, 62 STANFORD L. REV. 809, 822 (2010)). Again, that cannot be right. This Court should not read the Judiciary Act of 1875 as rendering key parts of the Civil Rights Act of 1871 superfluous.

B. Applying the *Bivens* holding to a *Bivens* non-party violates Due Process.

While Mr. Boule may feel wronged if this Court overrules *Bivens* in his case, Agent Egbert has an even stronger Due Process entitlement to have this Court consider his claims independent of the holding for Mr. Bivens 50 years ago. Quite simply, the law changed in that interval, and each party has a Due Process right to his or her day in court *today*, based on all the legal arguments available *today*.[2]

This Court has recognized an "institutional bias inherent in the judicial system against the retrial of issues that have already been decided," on which the "doctrines of *stare decisis*, res judicata, the law of the case, and double jeopardy all are based, at least in part." *United States v. Goodwin*, 457 U.S. 368, 376 (1982). With respect to preclusion, this Court has long held that the law is "subject to due process limitations," *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008), so that "extreme applications" of preclusion law "may be inconsistent with a federal right that is

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[2] Mr. Boule would not be wronged by a wholesale overruling of *Bivens* because Mr. Boule is not entitled to invoke *Bivens* in the immigration context, even under *Bivens* and its progeny. *See* Section II.B.1, *infra*.

'fundamental in character.'" *Richards v. Jefferson Cty.*, 517 U.S. 793, 797 (1996) (quoting *Postal Tel. Cable Co. v. Newport*, 247 U.S. 464, 476 (1918)); *Newport*, 247 U.S. at 476 ("opportunity to be heard is an essential requisite of due process of law in judicial proceedings"). Of course, the Due Process limits are even stronger with *stare decisis*, which applies to non-parties to the earlier litigation: "In no event … can issue preclusion be invoked against one who did not participate in the prior adjudication." *Baker v. Gen'l Motors Corp.,* 522 U.S. 222, 237-38 & n.11 (1998). If today's party seeks to make an argument not reached in the earlier decision, *stare decisis* cannot—consistent with Due Process—doom today's party to yesterday's ruling.

In 1971, this Court applied its *Bivens* holding to "six unknown named agents of [the] Federal Bureau of Narcotics." 403 U.S. at 389. There is no basis to think that Agent Egbert was one of those agents 50 years ago, so *Bivens* cannot apply here by *res judicata*. If *Bivens* applies, it applies under the doctrine of *stare decisis*—namely, what the Court held in 1971 about those unknown agents applies equally to Agent Egbert because that is what the Court held in 1971.

For a decision as spectacularly wrong as *Bivens*, *see* Section I.A, *supra* (overstating federal-question jurisdiction); Pet. 21-23 (this Court's rejection of implying rights of action), *stare decisis* cannot extend that far:

> [D]istinctions between preclusion by judgment and the use of judgments, or more accurately, decisions, as precedent should be noted. The common law doctrine of stare

> decisis is a mandate that courts should apply precedent by giving appropriate weight to the prior determinations of courts on issues of law. Preclusion is not a concept associated with this doctrine[.] … "A state court's freedom to rely on prior precedent in rejecting a litigant's claims does not afford it similar freedom to bind a litigant to a prior judgment to which he was not a party." Care should be taken not to blur the line between the doctrines of preclusion and *stare decisis*[.]

Katherine C. Pearson, *Common Law Preclusion, Full Faith And Credit, And Consent Judgments: The Analytical Challenge*, 48 CATHOLIC UNIV. L. REV. 419, 446-47 (1999) (footnotes omitted) (quoting *Richards*, 517 U.S. at 805). This Court cannot apply *Bivens* to a new party without addressing the flaws of *Bivens*.

Indeed, by including the special-factors analysis, *Bivens* contained the seeds of its own undoing: "The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396. Here, separation-of-powers doctrine and a reasonable interpretation of federal-question jurisdiction should cause this Court to reject *Bivens*. Regarding the former, Agent Egbert has standing to press the Constitution's structural protections because he has a concrete interest in defending his actions and avoiding tort liability. *Bond v. United States*, 564 U.S. 211, 222-23 (2011). Agent Egbert has the Due Process right to challenge *Bivens* for all the reasons that motivated this Court, since 1980, to decline to extend *Bivens*.

C. No factors warrant keeping *Bivens*.

In Section I.A, *supra*; IRLI explains that *Bivens* is and was wrongly decided. Section I.B, *supra*, explains that the Due Process Clause forbids applying *Bivens* to Agent Egbert. The present section evaluates *Bivens* under this Court's factors for deciding whether follow *stare decisis*:

> Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: the quality of [a prior decision's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.

Janus v. AFSCME, Council 31, 138 S.Ct. 2448, 2478-79 (2018). None of these factors counsels for continuing *Bivens*, which is untenable as a precedent. Rather than narrow—or expand—*Bivens* to the new factors at issue here, the Court should simply abandon the enterprise.

1. ***Bivens* is unworkable and badly reasoned.**

Bivens fails the first and second *Janus* factors because *stare decisis* does not constrain this Court when "decisions are unworkable or are badly reasoned." *Payne*, 501 U.S. at 827. To the extent that "any departure from the doctrine demands 'special justification'—something more than 'an argument that the precedent was wrongly decided,'" *Kisor v. Wilkie*, 139 S.Ct. 2400, 2422 (2019), the procedural Due Process argument against applying *Bivens* to

Bivens non-parties supplies a "special justification." *See* Section I.B, *supra*. At bottom, "the Constitution does not conflict with itself by conferring, upon the one hand, a … power, and taking the same power away, on the other, by the limitations of the due process clause." *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 24 (1916). As applied here, that means whatever degree of *stare decisis* is implicit in the Judicial Power in Article III and in Due Process under the Fifth Amendment must yield to the right Agent Egbert has to Due Process under the Fifth Amendment, as explained in Section I.B, *supra*.

2. *Bivens* is inconsistent with this Court's decisions on implied rights of action.

Bivens easily fails the third and fourth *Janus* factors because this Court has rejected the idea that Article III courts have the constitutional authority to create causes of action. *Hernandez II*, 140 S.Ct. at 741. Indeed, with respect to the particular constitutional violations in *Bivens*, Congress has amended the FTCA to allow recovery under the FTCA. *See* Section II.A, *infra* (citing 28 U.S.C. § 2680(h), as amended). Under the circumstances, it is no longer true to say that "it is damages or nothing" under the inferred *Bivens* cause of action. *See Bivens*, 403 U.S. at 410. Unlike in *Bivens*, Mr. Boule could have invoked the FTCA.

3. Government actors and potential plaintiffs do not reasonably rely on *Bivens*.

In the parties' initial tussle, Mr. Boule did not rely on *Bivens* in a meaningful or reasonable way. First, he likely did not think to himself "if I try to block Agent

Egbert and he pushes me away, I will be able to sue him under *Bivens*." Second, if he had thought that way, his thinking was unreasonable. *See* Section II, *infra* (*Bivens* does not extend here). Defendants like Agent Egbert similarly do not *rely* on *Bivens* in conducting their jobs. Quite the contrary, if anything, the prospect of *Bivens* liability would tend to make them less willing to do their jobs. But that is not reliance under *Janus*.

4. Congress has not ratified *Bivens*.

Although Congress has been aware of *Bivens* from the start and has *legislated around* it twice—in 1974 and 1988—Congress has never affirmatively *ratified* it. After all, exercising the judicial power under *Bivens* in lieu of an act of Congress is a *judicial act*. The only way for Congress to ensure a cause of action for these kinds of torts would be to enact an affirmative cause of action. The special-factor analysis that has limited *Bivens* expansions in this Court since 1980 was included in *Bivens* itself, 403 U.S. at 396, so—without an affirmative act by Congress—the judiciary can terminate *Bivens* for its own reasons.

This Court assumes congressional awareness of its important decisions, *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.,* 470 U.S. 116, 128 (1985), so it should be no surprise that Congress was indeed aware of *Bivens* when amending the FTCA in 1974 and 1988. But in both instances, Congress did not enact *Bivens* into law. Instead, Congress noted *Bivens*' existence and attempted to get out of the way.

In 1974, Congress amended the FTCA exclusion for intentional torts that had prevented Mr. Bivens' assertion of an FTCA action. PUB. L. NO. 93-253, § 2,

88 Stat. 50 (1974); *compare* 28 U.S.C. § 2680(h) (1970) *with* 28 U.S.C. § 2680(h). In the process, the Senate was aware of the potential effect on *Bivens* and stated how the 1974 amendment "should be viewed":

> [T]his provision should be viewed as a counterpart to the *Bivens* case and its [progeny], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved).

S. REP. NO. 93-588, at 3 (1973). In waiving the United States' sovereign immunity for its agents' intentional torts, Congress did not want to go on record as getting in the way of judicial action to fashion remedies directly against the individual agents under *Bivens*.

In 1988, when Congress made the FTCA exclusive *vis-à-vis* state torts, Congress again avoided *Bivens*—this time legislatively—by excepting *Bivens*-style actions from the FTCA's new exclusivity clause. *See* PUB. L. NO. 100-694, § 5, 102 Stat. 4563, 4564 (1988); 28 U.S.C. § 2679(b)(2)(A) (FTCA exclusivity "does not extend or apply to a civil action against an employee of the Government … which is brought for a violation of the Constitution of the United States"). In 1988, it was the House that discussed *Bivens* in its report:

> The second major feature of section 5 is that the exclusive remedy expressly does not extend to so-called constitutional torts. *See Bivens v. Six Unknown Agents of the*

> *Federal Bureau of Narcotics*, 403 U.S., 388 (1971). Courts have drawn a sharp distinction between common law torts and constitutional or *Bivens* torts. Common law torts are the routine acts or omissions which occur daily in the course of business and which have been redressed in an evolving manner by courts for, at least, the last 800 years. … A constitutional tort action, on the other hand, is a vehicle by which an individual may redress an alleged violation of one or more fundamental rights embraced in the Constitution. Since the Supreme Court's decision in *Bivens*, supra, the courts have identified this type of tort as a more serious intrusion of the rights of an individual that merits special attention. *Consequently, H.R. 4612 would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights*.

H. REP. NO. 100-700, at 6 (1988) (emphasis added); *see also* 134 CONG. REC. 15,597, 15,600 (Oct. 12, 1988) ("I would like to emphasize that this bill *does not have any effect* on the so-called *Bivens* cases or Constitutional tort claims.") (emphasis added) (Sen. Grassley). As in 1974, the 1988 FTCA amendment did not foreclose judicial action to fashion a damages remedy directly against individuals under *Bivens*, but Congress also did not *affirmatively* enact a remedy for constitutional torts.

To be sure, this Court has "found it 'crystal clear' that Congress intended the FTCA and *Bivens* to serve as 'parallel' and 'complementary' sources of liability," *Malesko*, 534 U.S. at 68, but that in no way ratifies—or freezes in place—*Bivens* circa 1971 in the sense of legislatively mandating *Bivens* remedies in any given case or context. Indeed, Congress lacks constitutional authority to "requir[e] the federal courts to exercise 'the judicial Power of the United States' in a manner repugnant to the text, structure, and traditions of Article III." *Plaut v. Spendthrift Farm*, 514 U.S. 211, 217-18 (1995).[3] But the 1974 and 1988 FTCA actions and inactions did no such thing: Instead, Congress merely left a judicial issue to the judiciary, without any legislative imprimatur or mandate. *Bivens* itself included the "special-factors" narrowing, 403 U.S. at 396, so the congressional action and inaction here leave this Court free to conclude—based on the separation-of-powers issue alone, *see* Section II.B.2, *infra*—that *Bivens* actions no longer are viable.

II. IF *BIVENS* SURVIVES, THIS COURT MUST NOT EXTEND IT HERE.

If *Bivens* remains extant as a precedent, this Court nonetheless should not extend *Bivens* here because special factors counsel against that extension and Mr. Boule had alternate remedies:

> In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a

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[3] Unlike in *Plaut*, no one is seeking to re-open the *judgment* on remand under which Mr. Bivens presumably recovered. The question is whether the *Bivens* holding can apply prospectively, even if subsequent decisions undermine the holding's validity.

> convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.

Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (interior quotation marks and citations omitted). Each inquiry works against Mr. Boule here.

A. Mr. Boule had an alternate remedy.

Although the absence of an alternate remedy is no "special factor" for extending *Bivens*, *see United States v. Stanley*, 483 U.S. 669, 683 (1987) ("it is irrelevant to a 'special factors' analysis whether the laws currently on the books afford Stanley … an 'adequate' federal remedy for his injuries"), the presence of an alternate remedy can preclude resort to *Bivens*:

> In the first place, there is the question 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.

Wilkie, 551 U.S. at 550. An adequate remedy outside *Bivens* is enough for this Court to withhold *Bivens* relief: "if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of

action." *Ziglar*, 137 S.Ct. at 1858. Certainly, a *Bivens* action "is not an automatic entitlement no matter what other means there may be to vindicate a protected interest," *Wilkie*, 551 U.S. at 550, and Mr. Boule could have sued under the FTCA. *Compare* 28 U.S.C. § 2680(h) (1970) (FTCA barred assault suits when Mr. Bivens sued) *with* 28 U.S.C. § 2680(h) (FTCA no longer bars assault suits); PUB. L. NO. 93-253, § 2, 88 Stat. at 50.[4] Mr. Boule elected to proceed under *Bivens*, avoiding the FTCA's limitations. That is reason enough to decline to extend *Bivens*.

B. Special factors counsel against extending *Bivens*.

While no factors counsel for continuing *Bivens* as a precedent, *see* Section I.C, *supra*, and the remedy that Congress provided Mr. Boule is reason enough to deny him a *Bivens* remedy, *see* Section II.A, *supra*, it is fatal to Mr. Boule's *Bivens* claim that special factors counsel against this Court's extending *Bivens* here.

1. Immigration enforcement is a special factor against extension.

Agent Egbert was investigating a foreign national just inside the U.S. border who was coordinating with

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[4] Ironically, because the FTCA now includes a damages claim for the type of Fourth Amendment claims at issue in *Bivens*, this Court should not even extend *Bivens* circa 1971 to *Bivens* today. To be sure, this Court rejected the idea that the 1974 amendment displaced a *Bivens* claims on the *Bivens* facts: ""We … found it 'crystal clear' that Congress intended the FTCA and *Bivens* to serve as 'parallel' and 'complementary' sources of liability." *Malesko*, 534 U.S. at 68 (quoting *Carlson v. Green*, 446 U.S. 14, 19-20 (1980)). But the history on which *Carlson* relied was inconclusive. *See* Section I.C.4, *supra*.

others on foreign soil to commit crimes in the U.S. That context warrants judicial deference *vis-à-vis* Congress:

> Since regulating the conduct of agents at the border unquestionably has national security implications, the risk of undermining border security provides reason to hesitate before extending *Bivens* into this field.

Hernandez II, 140 S.Ct. at 747. Also, "[f]oreign policy and national security decisions are delicate, complex, and involve large elements of prophecy for which the Judiciary has neither aptitude, facilities, nor responsibility." *Id.* at 749 (interior quotation marks and alterations omitted); *see also Arizona v. United States*, 567 U.S. 387, 409 (2012) (immigration-related decisions and enforcement "touch on foreign relations"). Especially where the FTCA applies, courts should not entangle themselves—without express congressional authorization—in immigration matters close to the nation's international borders.

2. <u>Separation of Powers is a special factor against extension.</u>

Although it applies in *every* decision on whether to extend *Bivens*, Separation of Powers doctrine is another special factor that counsels against extension: "When evaluating whether to extend *Bivens*, the most important question is 'who should decide' whether to provide for a damages remedy, Congress or the courts?" *Hernandez II*, 140 S.Ct. at 750 (interior quotation marks omitted). The fact that the "correct answer most often will be Congress," *id.* (interior

quotation marks omitted), does not make the factor any less special.

Extending *Bivens* undermines our governmental system, which requires the political branches to resolve political issues. *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 311-12 (2014). The failure to extend *Bivens* further after 1980 reflects a concern about the separation of powers: "when a court recognizes an implied claim for damages on the ground that doing so furthers the 'purpose' of the law, the court risks arrogating legislative power." *Hernandez II*, 140 S.Ct. at 741. There is no reason for the Court to continue the practice without Congress taking the hint and enacting legislation allowing or barring such actions: "Having sworn off the habit of venturing beyond Congress's intent," the Court should no longer "accept respondents' invitation to have one last drink." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). Recognizing the separation-of-powers conflict inherent in *Bivens* as a special factor would justify a decision either overruling *Bivens* entirely or refusing to extend it further.

In addition to the core decision of whether to allow a private right of action at all, the question of how to address constitutional torts presents many subsidiary questions—such as limits on attorneys' fees—that only Congress can answer:

- The Equal Access to Justice Act includes many limits on attorney-fee awards, including an hourly cap of $125—inflation adjusted from 1996—for actions against the United States, whereas civil-rights litigation against state and local government pays market rates, which can exceed

$1,000 hourly. *Compare* 28 U.S.C. § 2412(d)(1) *with* 42 U.S.C. § 1988(b); *Murphy v. Smith*, 138 S.Ct. 784, 789 (2018) ("strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate—represents a 'reasonable' fee") (interior quotation marks omitted).

- The FTCA caps attorney-fee awards at 25% for litigation and 20% for settled cases, but there is no limit—apart from ethical standards in the relevant jurisdiction—for *Bivens* actions. *See* 28 U.S.C. § 2678.

When it comes to such issues, to ask the question "who should decide," *Hernandez II*, 140 S.Ct. at 750, is to answer it: Congress.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

September 2, 2021

Respectfully submitted,

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