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

**[REDACTED FOR PUBLIC FILING]**
**BRIEF IN OPPOSITION**


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## QUESTIONS PRESENTED

1. Whether a damages claim lies under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), when a rogue federal law enforcement officer triggers multiple unfounded investigations against a U.S. citizen as retaliation for the citizen's truthful reporting of the officer's misconduct.

2. Whether a damages claim lies under *Bivens* when a rogue federal law enforcement officer assaults a U.S. citizen on his own property within the United States.

3. Whether *Bivens* should be overruled.

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## BRIEF IN OPPOSITION

## INTRODUCTION

This action arises out of idiosyncratic and unique misconduct by petitioner Erik Egbert against respondent Robert Boule. Mr. Boule, a native-born U.S. citizen, owns, operates, and lives in a small bed-and-breakfast in Blaine, Washington, on property abutting the U.S.-Canada border. In March 2014, Agent Egbert, a U.S. Customs and Border Patrol (CBP) officer, entered Mr. Boule's property without a warrant—purportedly to inspect a foreign guest whom Agent Egbert knew had entered the country via a lawful port of entry a day earlier and thousands of miles away—and assaulted Mr. Boule, causing serious injury. When Mr. Boule complained to Agent Egbert's supervisors,

Agent Egbert retaliated by causing the Internal Revenue Service (IRS) and other federal and state agencies to open expensive and time-consuming investigations into Mr. Boule—investigations that uncovered no wrongdoing. [redacted] It is no wonder that the United States has never defended Agent Egbert in this proceeding.

Try as Agent Egbert might, this is not a case about "national security," "immigration enforcement," or "securing the border," or one involving separation-of-powers concerns. It is about a federal law enforcement agent who manifestly abused his authority by assaulting and retaliating against a U.S. citizen and now seeks to escape accountability. Agent Egbert attempts to distract this Court from the actual facts, but the court of appeals was careful to limit its ruling to the unique circumstances of Agent Egbert's extreme misconduct. And as this Court recently admonished, Agent Egbert may not incant national security as a "talisman used to ward off inconvenient claims." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1862 (2017). Moreover, the Petition ignores the case's interlocutory posture and significant remaining factual disputes on issues core to the questions presented. The Petition's efforts to twist the record to try to entice the Court to overrule a longstanding precedent should not be countenanced, particularly because Agent Egbert's conduct presents exactly the situation in which a *Bivens* remedy should lie.

The petition for a writ of certiorari should be denied.

## STATEMENT

### A. Background

1. Mr. Boule is a U.S. citizen who, since 2000, has owned land in Blaine, Washington abutting the U.S.-Canada border. Mr. Boule owns, operates, and resides at a small bed-and-breakfast called the Smuggler's Inn. Pet. App. 32a. Despite the tongue-in-cheek naming of his business—which has themed rooms named after infamous smugglers and other notorious individuals such as Al Capone and local legend "Dirty Dan" Harris, Dkt. 110, Ex. E at 66, 68[1]

Within months of purchasing his property, Mr. Boule discovered that people used the property for illicit border crossings in both directions. Dkt. 110, Ex. E at 17.

*Id.* at 18-19.

*Id.* at 18.

*Id.* at 23-26.

Pet. App. 32a; ER495-496, 538.

ER659; Dkt. 110, Ex. E at 35-37.

[1] "Dkt." refers to the district court docket, "ER" to the Ninth Circuit excerpts of record.

[redacted] ER496.

2. This case arises out of misconduct by Agent Egbert so troubling that the United States not only has never defended him in this litigation, [redacted]

a. [redacted] Agent Egbert twice stopped Mr. Boule on the morning of March 20, 2014, searched his car, and inquired about guests staying at the bed-and-breakfast. ER496. Agent Egbert had never before searched Mr. Boule's car or inquired about Mr. Boule's guests. *Id.* Mr. Boule told Agent Egbert that a guest was arriving that day who had flown from Turkey to New York the day before, and that two of Mr. Boule's employees were picking the guest up at the airport. *Id.*; Pet. App. 50a.[2]

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[2] Although not in the summary judgment record, Mr. Boule explained at his deposition that [redacted] Boule Dep. 182, 184-185. [redacted] *Id.* at 213-214.

Later that day, when Mr. Boule's employees arrived with the guest, Agent Egbert followed them onto Mr. Boule's property and parked in Mr. Boule's private driveway. Pet. App. 33a; ER496-497. Mr. Boule asked Agent Egbert to leave, but Agent Egbert refused. Pet. App. 33a. Mr. Boule told Agent Egbert that he could not search Mr. Boule's car without a warrant or a supervisor present. Dkt. 104, Ex. A at 136. Mr. Boule stepped between Agent Egbert and the car and again asked Agent Egbert to leave. Pet. App. 33a. Agent Egbert shoved Mr. Boule against the car, then grabbed him and pushed him onto the ground. *Id.* Agent Egbert opened Mr. Boule's car door and asked the guest about his immigration status. Agent Egbert concluded that the guest was in the country lawfully—which is unsurprising given that Mr. Boule had already told Agent Egbert that the guest entered at New York's John F. Kennedy airport, a lawful point of entry—and then departed. *Id.* The back and hip injuries caused by Agent Egbert's assault were sufficiently severe that Mr. Boule was required to seek medical treatment for them. *Id.*

b. After Mr. Boule complained to Agent Egbert's supervisors about this incident, Agent Egbert retaliated. Pet. App. 33a. Agent Egbert contacted the IRS, the Social Security Administration, the Washington State Department of Licensing, and the Whatcom County Assessor's Office about Mr. Boule. *Id.* 33a-34a. Each agency conducted formal inquiries into Mr. Boule's business. As a result of Agent Egbert's retaliation, for example, the IRS audited several years of Mr. Boule's tax returns, *id.*, which confirmed that Mr. Boule had correctly paid his taxes, ER104. Mr. Boule was required to pay his accountant over $5,000 to respond to the IRS audit. *Id.* 34a.

c. [redacted] ER104.

*Id.* [redacted] ER109-110.

*Id.* at 109. [redacted]

[redacted]

*Id.* at 110. [redacted]

[redacted] *Id.*

Agent Egbert's union, the National Border Patrol Council—which has filed an *amicus* brief here[redacted]

[redacted] ER115.

**B. District Court Proceedings**

In January 2017, Mr. Boule filed suit against Agent Egbert, seeking damages for Agent Egbert's violation of his First and Fourth Amendment rights. Following discovery, the district court granted summary judgment for Agent Egbert.

As to Mr. Boule's Fourth Amendment claim, the district court recognized that "Egbert not only invaded Plaintiff's Fourth Amendment interest in the item searched, *i.e.*, the vehicle, but also invaded Plaintiff's Fourth Amendment interest in the curtilage of his home/inn." Pet. App. 65a.

Nonetheless, the district court held that a *Bivens* claim was unavailable. First, the court reasoned that Mr. Boule's claim would represent a "modest extension" of *Bivens* in a "new context" because Agent Egbert was

"a U.S. Border Patrol Agent" who was "purporting to operate under a different 'statutory or other legal mandate' than the officials outlined in the 'traditional' *Bivens* claims." Pet. App. 67a. Second, the court ruled that *Bivens* claims were categorically unavailable against CBP agents, because "the risk of personal liability would cause [CBP] 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." *Id.* 68a-69a.

As to Mr. Boule's First Amendment claim, the district court held the claim was novel, because this Court has not previously applied *Bivens* to First Amendment claims. Pet. App. 55a.

As Agent Egbert did not argue to the district court that an alternative remedy was available to redress Mr. Boule's injuries, ER135-159; Dkt. 131; Dkt. 144, the district court assumed that no alternative remedy was available. Pet. App. 44a.

### C. Court Of Appeals Proceedings

1. The Ninth Circuit reversed the district court's grant of summary judgment and remanded for further proceedings. The court first recognized that, although "'expanding the *Bivens* remedy is now a disfavored judicial activity,' a *Bivens* remedy is still available in appropriate cases and there are 'powerful reasons' to retain it in its 'common and recurrent sphere of law enforcement.'" Pet. App. 31a-32a (quoting *Abbasi*, 137 S. Ct. at 1857). The Ninth Circuit applied this Court's two-step inquiry, asking first whether the claim presented a new *Bivens* context, and second whether any special factors counseled hesitation about recognizing the claim.

As to the Fourth Amendment claim, the court of appeals held that Mr. Boule's claim "is a modest extension, in that border patrol and F.B.I. agents are both federal law enforcement officials, and in that Boule's Fourth Amendment excessive force claim is indistinguishable from Fourth Amendment excessive force claims that are routinely brought under *Bivens* against F.B.I. agents." Pet. App. 36a. The court also found that no factors counseled hesitation in this particular context where "Boule, a United States citizen, is bringing a conventional Fourth Amendment excessive force claim arising out of actions by a rank-and-file border patrol agent on Boule's own property in the United States." *Id.* Unlike *Abbasi*, this case did not challenge "high-level Executive Branch decisions involving issues of national security," and unlike *Hernandez* v. *Mesa*, 140 S. Ct. 735 (2020), there were no potential "effect[s] on foreign relations" or "implications for national security," nor did the harm occur "in another country." Pet. App. 37a. In particular, unlike the agent in *Hernandez*, Agent Egbert "had already been informed" that the "arriving guest in whom Egbert was interested had ... arriv[ed] on a flight from New York." *Id.* 38a.

The court of appeals thus concluded this was a "conventional Fourth Amendment excessive force claim indistinguishable from countless such claims brought against federal, state, and local law enforcement officials, except for the fact that Egbert is a border patrol agent." *Id.* Because numerous courts had recognized *Bivens* claims against CBP officers, and invoking this Court's warning in *Abbasi* that "national-security concerns must not become a talisman used to ward off inconvenient claims — a label used to cover a multitude of sins," the court of appeals held that "any costs imposed by allowing a *Bivens* claim to proceed are

outweighed by compelling interests in favor of protecting United States citizens on their own property in the United States from unconstitutional activity by federal agents." *Id.* 39a-40a.

As to the First Amendment claim, the Ninth Circuit reasoned that, while this Court "has never actually *held* that a First Amendment retaliation claim may be brought under *Bivens*[,] ... in *Hartman* v. *Moore*, 547 U.S. 250 (2006), the Court explicitly stated, as part of its reasoning during the course of a *Bivens* analysis, that such a claim may be brought." Pet. App. 41a. Because this Court had "not expressly ... held" that "*Bivens* extends to First Amendment retaliation claims," despite so indicating in *Hartman*, the Ninth Circuit held that Mr. Boule's claim arose in a new context. *Id.* 42a.

The Ninth Circuit next found that no special factors counseled hesitation regarding Mr. Boule's First Amendment claim. The claim is "quite unlike" the claim this Court declined to recognize in *Bush* v. *Lucas*, 462 U.S. 367 (1983), which arose from an employment relationship "that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States." Pet. App. 43a (quoting *Bush*, 462 U.S. at 368). Rather, Mr. Boule's claim is "on all fours with the First Amendment retaliation claim described in *Hartman*, where the Court wrote that '[w]hen the vengeful officer is federal, he is subject to an action for damages on the authority of *Bivens*.'" *Id.* (quoting *Hartman*, 547 U.S. at 256). The Ninth Circuit held there was "even less reason to hesitate" in extending the First Amendment claim here, as Agent Egbert's retaliatory actions were not part of his official duties. *Id.*

For the first time on appeal, Agent Egbert cursorily argued that alternative remedies were available, mentioning without elaboration "intentional-tort claims under the Federal Tort Claims Act, *see* 28 U.S.C. § 2680(h), a trespass claim against Agent Egbert, or injunctive relief." C.A. Br. 26. Citing *Carlson* v. *Green*, 446 U.S. 14 (1980), the court of appeals held that the FTCA did not foreclose a *Bivens* remedy. The Ninth Circuit further noted that a state-law trespass claim would be barred by the Westfall Act and, in any event, Agent Egbert's entry was "almost certainly a privileged entry under state law." Pet. App. 46a. Finally, the Ninth Circuit held that injunctive relief is an "inadequate remedy, for Boule is seeking damages for Agent Egbert's completed actions rather than protection against some future act." *Id.*

2. The Ninth Circuit denied rehearing en banc, over three dissenting opinions.

Judge Bumatay, writing for six other judges, argued that the panel decision diverged from other circuits and presented separation of powers concerns. Judge Bumatay also referred to supposed alternative remedies never raised by Agent Egbert, including the Privacy Act, 26 U.S.C. § 6103, and state law claims such as "outrage," a "privacy tort[]," an anti-harassment statute, and a defamation claim. Pet. App. 24a-25a & n.8.[3]

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[3] Judge Bumatay further asserted, and Agent Egbert reasserts in the Petition, that Canadian authorities charged Mr. Boule with "human trafficking." Pet. 5 (citing Pet. App. 9a). Not so. Mr. Boule was never charged with human trafficking, which is covered by Canada's Immigration and Refugee Protection Act § 118. Rather, the Canadian proceedings against Mr. Boule were resolved by his plea to providing information to seven individuals who then

Judge Owens separately dissented, advocating for "new legislation that permits plaintiffs to vindicate their rights." Pet. App. 29a. Judge Bress, writing for three other judges, argued that the Ninth Circuit's decision conflicted with this Court's recent cases. *Id.* 30a-31a.

## REASONS FOR DENYING THE PETITION

### I. THE PETITION IS FACTBOUND AND CASE-SPECIFIC AND DOES NOT MERIT REVIEW

#### A. The Ninth Circuit's Decision Is Limited To The Unusual Facts Of This Case

The Ninth Circuit decision is bound to this case's unique facts, and—contrary to Agent Egbert's assertion (Pet. 3)—will not have broad application to other cases.

Regarding the Fourth Amendment claim, the Ninth Circuit held only that a *Bivens* claim lies where "a United States citizen[] is bringing a conventional Fourth Amendment excessive force claim arising out of actions by a rank-and-file border patrol agent on [the citizen's] own property in the United States." Pet. App. 36. The Ninth Circuit's decision is carefully limited to the specific facts of this case, not to actions taken in actually securing the border; Agent Egbert was

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crossed the border into Canada and did not promptly report to an authorized port of entry; Mr. Boule provided this information believing that the individuals would be arrested by Canadian police upon crossing the border or would present themselves within a day or two to initiate refugee claims in Canada. Providing information to someone who seeks to *leave* the United States, even if outside of a lawful Canadian port of entry, is not a violation of U.S. law. *See* U.S. Customs and Border Protection, *Crossing the border via foot, vehicle, or air without visiting an official port of entry*, https://tinyurl.com/2chpuusu (accessed Oct. 1, 2021).

investigating a foreign national whom he knew had already entered the country through a lawful port of entry thousands of miles away. *Id.* 38a; *see also id.* 40a ("[I]n the 'run-of-the-mill' Fourth Amendment case now before us, we hold that any costs imposed by allowing a *Bivens* claim to proceed are outweighed by compelling interests in favor of protecting United States citizens on their own property in the United States from unconstitutional activity by federal agents.").

The Ninth Circuit in no way authorized claims seeking to change immigration enforcement policy or claims brought by noncitizens subject to removal proceedings. *E.g.*, *Tun-Cos* v. *Perrotte*, 922 F.3d 514 (4th Cir. 2019); *De La Paz* v. *Coy*, 786 F.3d 367 (5th Cir. 2015). Nor would it permit claims by someone alleging injury by CBP officers at the U.S.-Mexico border while returning from a trip to Mexico. *Angulo* v. *Brown*, 978 F.3d 942 (5th Cir. 2020). It also would not permit claims that CBP officers violated a Mexican citizen's due process rights during removal proceedings, *Maria S.* v. *Garza*, 912 F.3d 778, 784 (5th Cir. 2019), or claims by a Cuban national held in custody for a year after being found removable, *Alvarez* v. *ICE*, 818 F.3d 1194, 1195 (11th Cir. 2016).

The Ninth Circuit has subsequently made plain that, contrary to Agent Egbert's overheated predictions, its decision here did not open the door to every claim against a CBP officer. In *Quintero Perez* v. *United States*, 8 F.4th 1095 (9th Cir. 2021), the court rejected a Fourth Amendment claim by the family of a noncitizen who was shot and killed after throwing rocks from a fence along the Mexican border, finding that special factors, including national security concerns, counseled hesitation. *Id.* at 1106-1107. Accordingly, the Ninth Circuit's factbound decision will not prevent

courts from dismissing claims based on conduct that—unlike Agent Egbert's—actually implicates national security or border protection.

Regarding the First Amendment claim, the Ninth Circuit similarly restricted its holding to the situation where a CBP officer willfully retaliates against a U.S. citizen for exercising his First Amendment right to report misconduct where the retaliatory activity was outside of the scope of the officer's official duties. Pet. App. 40a, 43a. Again, the decision below is narrowly tailored to these specific facts. This decision would not, for example, permit First Amendment claims against a CBP officer who induced removal proceedings against a noncitizen, even if he did so in retaliation for the individual's protected activity. And the Ninth Circuit recently rejected a First Amendment retaliation claim against prison guards, reasoning that the availability of alternative remedies and the fact that Congress addressed prisoners' remedies in legislation counseled hesitation, *Buenrostro* v. *Fajardo*, 770 F. App'x 807, 808 (9th Cir. 2019). The Ninth Circuit has also repeatedly refused to recognize First Amendment *Bivens* claims in other contexts.[4] And in the nearly one year

[4] *See Reid* v. *United States*, 825 F. App'x 442, 446 (9th Cir. 2020) (no First Amendment *Bivens* retaliation claim where the plaintiff's Eighth Amendment excessive force claim would vindicate the same injuries); *Schwarz* v. *Meinberg*, 761 F. App'x 732, 734-735 (9th Cir. 2019) (no First Amendment *Bivens* claim by a prison inmate against regional and national Bureau of Prison officials who were not directly connected to the alleged misconduct, because the plaintiff had alternative remedies and permitting the claims would not serve *Bivens*'s deterrent purpose); *Vega* v. *United States*, 881 F.3d 1146, 1150, 1154-1155 (9th Cir. 2018) (no First Amendment *Bivens* claim by a plaintiff who was moved from a residential reentry facility to federal prison without sufficient evidence of wrongdoing, where the plaintiff had alternative state law

since the panel decision, not a single court has cited it to recognize a First Amendment claim in *any* context. Agent Egbert's suggestion that the Ninth Circuit's decision will open the floodgates is thus unsupported; the floodgates remain securely closed.

### B. This Case Does Not Involve National Security

Agent Egbert's assertion that the Ninth Circuit's decision will "undercut the ability of Border Patrol agents to fulfill their basic mission of securing the border, enforcing the immigration laws, and protecting national security" (Pet. 26) likewise rings hollow, especially in light of the United States' decision not to defend Agent Egbert in this action [redacted]

When Agent Egbert pushed Mr. Boule to the ground, Agent Egbert was not securing the border or promoting national security. If Agent Egbert legiti-

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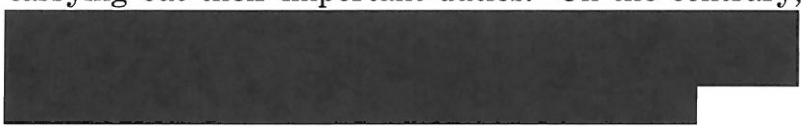
and administrative remedies); *Western Radio Servs. Co.* v. *U.S. Forest Serv.*, 578 F.3d 1116, 1125 (9th Cir. 2009) (no First Amendment *Bivens* retaliation claim where the plaintiff had alternative remedies under the Administrative Procedure Act); *Adams* v. *Johnson*, 355 F.3d 1179, 1187-1188 (9th Cir. 2004) (no First Amendment *Bivens* claim against IRS agents because the Internal Revenue Code included a comprehensive remedial scheme providing alternative remedies against IRS officials); *Bricker* v. *Rockwell Int'l Corp.*, 22 F.3d 871, 875-879 (9th Cir. 1993) (no First Amendment *Bivens* retaliation claim by whistleblower at nuclear site where there was reason to think Congress's failure to provide whistleblower protections at such facilities was intentional, not inadvertent); *Berry* v. *Hollander*, 925 F.2d 311, 315-316 (9th Cir. 1991) (no First Amendment *Bivens* retaliation claim where Veterans Affairs physician had alternative remedies, including under Civil Service Reform Act's whistleblower protections); *Karamanos* v. *Egger*, 882 F.2d 447, 451-452 (9th Cir. 1989) (no First Amendment *Bivens* retaliation claim by IRS agent who had remedies under Civil Service Reform Act).

mately thought Mr. Boule's guest was in the country unlawfully, Agent Egbert could have attempted to secure a warrant—he had plenty of time to do so. Likewise, if Agent Egbert had reasonable suspicion of an immigration violation, he could have stopped the vehicle as he followed it, Pet. App. 33a, before it entered Mr. Boule's property. Instead, Agent Egbert invaded a U.S. citizen's property on U.S. soil, ignored requests to leave, and assaulted the landowner on his own property, all supposedly to investigate someone whom he knew had entered the country via a lawful port of entry thousands of miles away. *Id.* 33a, 38a. Agent Egbert was also not securing the border or promoting national security when, weeks later, he maliciously contacted the IRS and other agencies to induce them to initiate unwarranted investigations of a U.S. citizen. *Id.* 33a-34a, 43a.

Nor will the Ninth Circuit's decision "expose[] thousands of potential defendants to unforeseen personal exposure for damages suits." Pet. 27. To avoid facing a Fourth Amendment *Bivens* claim, a CBP officer need simply refrain from attacking a U.S. citizen on his own property when the officer has no valid reason for being there. And, to avoid a First Amendment *Bivens* claim, a CBP officer need simply refrain from vengefully retaliating against a U.S. citizen who lodges a valid complaint regarding the officer's misconduct. Neither requirement will interfere with CBP officers carrying out their important duties. On the contrary,



Effectively, Agent Egbert seeks a categorical rule barring *Bivens* claims against CBP officers in any circumstance. This Court could have imposed such a rule

in *Hernandez*, but wisely did not. 140 S. Ct. at 739 ("*Because of the distinctive characteristics of cross-border shooting claims*, we refuse to extend *Bivens* into this new field." (emphasis added)). To the contrary, the Court indicated that only claims against *some* CBP agents—namely those like the officer in *Hernandez* "stationed right at the border" attempting to prevent foreign nationals from illegally crossing into the United States—would implicate national security. *Id.* at 746; *see also id.* at 740 (Hernandez ran across the border from Mexico to United States at a location where the CBP officer defendant was stationed). While "regulating the conduct of *agents at the border* unquestionably has national security implications," *id.* at 747 (emphasis added), a CBP agent willfully violating the Fourth Amendment while not policing a border crossing does not create any national security concerns. Agent Egbert cannot claim that, simply because CBP hired him, everything he does—even a flagrant and willful abuse of authority—is a matter of national security.

### C. The Ninth Circuit's Narrow Decision Is Correct

This case also does not merit review because the Ninth Circuit was right to hold that Mr. Boule's claims are cognizable under *Bivens*.

1. Mr. Boule's Fourth Amendment claim does not extend *Bivens* to a new context, and therefore no further analysis is needed. Mr. Boule's claim is a standard Fourth Amendment claim in the "common and recurrent" "sphere of law enforcement"—search and seizure. *Abbasi*, 137 S. Ct. at 1857. Indeed, this Court emphasized just four years ago the "continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." *Id.* at 1856.

Mr. Boule's claim here, a common Fourth Amendment claim against a line law enforcement officer based on the officer's assault on a U.S. citizen, is well within the original bounds of *Bivens*. The fact that Agent Egbert works for CBP, and not the "Federal Bureau of Narcotics" like the defendants in *Bivens*, does not matter. Numerous circuits have recognized *Bivens* claims against officers of other agencies without a special factors analysis where, as here, the claims arose when the officers were conducting standard law enforcement operations. *See, e.g.*, *Jacobs* v. *Alam*, 915 F.3d 1028, 1038 (6th Cir. 2019) (U.S. Marshal Service); *Hicks* v. *Ferreyra*, 965 F.3d 302, 311 (4th Cir. 2020) (U.S. Park Police); *McLeod* v. *Mickle*, 765 F. App'x 582, 583 (2d Cir. 2019) (U.S. Forest Service). Agent Egbert's assertion that he is not a law enforcement officer, Pet. 19, is contrary to the pronouncements of his own agency, [redacted] Because Mr. Boule's Fourth Amendment claim is not meaningfully different from the claim recognized in *Bivens*, that should end the analysis.

2. This Court has also suggested that a claim like Mr. Boule's First Amendment retaliation claim is cognizable under *Bivens*. In *Hartman* v. *Moore*, 547 U.S. 250 (2006), the Court explained: "Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right,' and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions ... for speaking out." *Id.* at 256 (alteration in original) (quoting *Crawford-El* v. *Britton*, 523 U.S. 574, 588 n.10 (1998)); *see also, e.g.*, *Crawford-El*, 523 U.S. at 592 ("[T]he general rule has long been clearly established" that "the

First Amendment bars retaliation for protected speech ...."). The Court further explained that, "[w]hen the vengeful officer is federal, he is subject to an action for damages on the authority of *Bivens*." *Hartman*, 547 U.S. at 256.

3. Moreover, even were the Court to conclude, as the Ninth Circuit did, that any new fact means that the *Bivens* claim arises in a "new context," no special factors counsel hesitation in recognizing a *Bivens* remedy for either of Mr. Boule's claims. Agent Egbert's arguments to the contrary lack merit.

a. Agent Egbert asserts, without citation, that "[t]his Court's unwillingness to extend *Bivens*" is a reason counseling hesitation. Pet. 21. This Court has never suggested that its decisions declining to extend *Bivens* in certain contexts were a thumb on the scale in different circumstances. Were that the case, no new *Bivens* claim would ever be recognized. There is no reason to think that the Court created a test that was impossible to pass.

b. Agent Egbert asserts, also unburdened by citation, that other circuits' purported refusal to recognize *Bivens* claims counsel hesitation. Pet. 21. But no other court has considered a *Bivens* claim in the specific context at issue here. *See infra* 24-31. In any event, this Court has never suggested that non-binding decisions from other circuits on different facts are a reason counseling hesitation. To the contrary, this Court directed consideration of special factors that concern whether "the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Abbasi*, 137 S. Ct. at 1858. Other lower court decisions have no relevance to this inquiry.

c. Agent Egbert claims that recognizing *Bivens* claims here would impact national security and interfere with decision-making of CBP agents. Pet. 21. That is wrong because, as discussed above (at 15-17), this is not a national security case, and the Ninth Circuit's reasoning was carefully limited to the unusual facts here.

d. Also wrong is Agent Egbert's reliance on purported alternative remedies. Abandoning trespass and injunctive relief, which he urged in the Ninth Circuit, Agent Egbert now invokes administrative processes, Privacy Act claims, and the Federal Tort Claims Act. Pet. 21. Agent Egbert waived such arguments by failing to press them before the district court or to meaningfully develop them on appeal. Indeed, Agent Egbert never mentioned administrative processes or Privacy Act claims before, and the Petition invokes them only cursorily. *See Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below, it is waived."); *Hicks*, 965 F.3d at 305 (standard waiver rules apply to *Bivens* defendants' failure to raise arguments about special factors counseling hesitation).

Although Agent Egbert's new alternatives are not properly before the Court, they fail in any event. The Privacy Act generally prohibits disclosure of a record contained in a system of records, such as a database, under the control of a government agency. 5 U.S.C. § 552a(a)(5), (b). A Privacy Act claim might be available if, for example, Agent Egbert accessed records [redacted] and provided those records to the IRS and the other regulatory agencies. But according to Agent Egbert's sworn statements, the only information he provided to the other agencies was about the existence of an online news article about Mr. Boule, ER29, ER130-131—

plainly not a record contained in a system of records under the control of an agency. Thus, unless Agent Egbert wishes to admit that he perjured himself, he cannot argue that a Privacy Act claim is available.

Second, the FTCA—standing alone—does not counsel hesitation regarding a *Bivens* claim. Nothing in the FTCA or its legislative history "show[s] that Congress meant to pre-empt a *Bivens* remedy." *Carlson*, 446 U.S. at 19. To the contrary, as this Court has held, when Congress amended the FTCA in 1974, "the congressional comments ... made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Id.* at 19-20. By contrast, when Congress "means to make FTCA an exclusive remedy" it "explicitly" so states. *Id.* at 20. Moreover, when Congress again amended the FTCA in the Westfall Act in 1988 to make the remedies under the FTCA exclusive, it provided an "explicit exception for *Bivens* claims." *Hui* v. *Castaneda*, 559 U.S. 799, 807 (2010). This Court has reaffirmed that reasoning time and again. *See Wilkie* v. *Robbins*, 551 U.S. 537, 555 (2007); *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67-68 (2001); *Bush*, 462 U.S. at 377-378.

Third, Agent Egbert never specifies which "administrative remedies" he believes would be available to Mr. Boule. It appears, however, that he refers only to an administrative claim under the FTCA. Pet. 21 (citing Pet. App. 28a-29a); Pet. App. 28a (arguing that Mr. Boule availed himself of "the administrative remedy provided by the FTCA"). Since a claim under the FTCA does not counsel against finding a *Bivens* claim, the same is

true of an administrative claim under the FTCA. Agent Egbert cites no case suggesting otherwise.[5]

* * *

Because the Ninth Circuit's factbound decision correctly recognized the availability of *Bivens* claims in the unusual circumstances of this case, certiorari is not warranted.

## II. THE INTERLOCUTORY POSTURE MAKES THIS CASE A POOR VEHICLE

This case's interlocutory posture also weighs strongly against certiorari. *See Bhd. of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case" and it was thus "not yet ripe for review"). The Ninth Circuit reversed the district court's grant of summary judgment and remanded for further proceedings. There are significant factual disputes in need of resolution. *See Kennedy* v. *Bremerton Sch. Dist.*, 139 S. Ct. 634, 635 (2019) (Alito, J., concurring in denial of certiorari) ("[I]mportant unresolved factual questions would make it very difficult if not impossible at this stage to decide the free speech question that the petition asks us to review."); *Wrotten* v. *New York*, 560 U.S. 959 (2010) (Sotomayor, J., concurring in denial of certiorari). Moreover, because key facts remain sealed, this case is a poor vehicle for providing guidance to lower courts and unrelated parties. To the extent this Court wishes to consider the issues presented in this case, it should await a

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[5] Indeed, exhaustion of administrative remedies is required to file a claim under the FTCA, 28 U.S.C. § 2675(a), so there can be no FTCA claim without an administrative process.

final judgment in a case in which the factual underpinning can be publicly disclosed.

The factual uncertainties and disputes in this case are both readily apparent and critical to the Court's assessment of the case. Contrary to Agent Egbert's claims that Mr. Boule's bed-and-breakfast is a "notorious site for illegal border crossing" that "attracts drug traffickers," Pet. 4 (quoting Pet. App. 9a), the evidence shows that Mr. Boule [redacted] Pet. App. 32a; ER495-496; Dkt. 110, Ex. E at 10-12, 18-19, 23-26, 35-37. Agent Egbert's portrayals of Mr. Boule as a bad actor are contrary to the evidence, and the Court should await a fully developed record before wading into Agent Egbert's self-serving advocacy.

There are also factual disputes regarding the purpose of Agent Egbert's entry onto Mr. Boule's property. In trying to convince the Court that this case involves national security, Agent Egbert claims that he suspected Mr. Boule's Turkish guest "might ... meet with associates entering the United States from Canada for a criminal purpose." Pet. 5. The record provides no support for this assertion. Rather, it shows that Agent Egbert was investigating whether Mr. Boule's guest was lawfully present in the United States and indeed, after confirming the guest was lawfully in the country, Agent Egbert left. Pet. App. 33a. And because Agent Egbert already *knew* the Turkish guest had entered the country via a lawful port of entry, his conduct does not implicate national security concerns. *Id.* 38a; ER496.

In addition to mischaracterizing key facts, Agent Egbert also wrongly ignores inconvenient ones, most notably that he [redacted] ER110, [redacted] *Id.*

These are material facts affecting whether special factors counsel hesitation in recognizing the availability of a *Bivens* claim. Accordingly, even if the Court is interested in the issues presented in Agent Egbert's petition, it should wait for a case not presenting the vehicle problems presented in this case (including that the key facts in the case are under seal) or, at a minimum, for final judgment in this case rather than reviewing the case in an interlocutory posture.

## III. THERE IS NO CIRCUIT SPLIT

### A. Agent Egbert Cites No Case Inconsistent With the Ninth Circuit's First Amendment Decision

Contrary to Agent Egbert's suggestion, this Court has not "expressly disavowed recognizing any First Amendment *Bivens* claims." Pet. 14. Rather, in the case Agent Egbert cites, the Court explicitly declined to decide the issue. *Reichle* v. *Howards*, 566 U.S. 658, 663 n.4 (2012) ("We need not (and do not) decide here whether *Bivens* extends to First Amendment retaliatory arrest claims."). Agent Egbert does not cite a single case where a court has held that a First Amendment

claim is categorically not cognizable under *Bivens*. Rather, each of Agent Egbert's cases evaluates whether there are factors counseling hesitation based on the particulars of the case—considering, for example, whether an alternative remedial scheme is available and whether Congress has indicated that money damages should be unavailable in that particular context. And because no other case Agent Egbert cites arises in the same, or even an analogous, context, Agent Egbert's purported "6-1" split, Pet. 10, is no split at all.

Agent Egbert himself recognizes that his supposedly conflicting cases are distinguishable. He describes only one case as presenting "allegations similar to Boule's," Pet. 11, yet even that case presents significant differences that Agent Egbert ignores. In that decision, *Bivens* was unavailable because a *tax law* remedy was available to redress an IRS agent's misconduct. *Hudson Valley Black Press* v. *IRS*, 409 F.3d 106, 111-113 (2d Cir. 2005). And the Second Circuit relied on a Ninth Circuit case making the same point—the comprehensiveness of the remedial provisions in the Internal Revenue Code made *Bivens* unavailable as to IRS officials. *See id.* at 113 (citing *Adams* v. *Johnson*, 355 F.3d 1179, 1184-1185 (9th Cir. 2004)). Agent Egbert does not suggest that Mr. Boule has an alternative remedy under the tax law.

Likewise, in the other cases Agent Egbert cites in support of a supposed circuit split, the courts did not hold that First Amendment claims were categorically unavailable, but rather held only that they were unavailable under the particular circumstances of the cases at hand. Like *Hudson Valley Black Press*, many of Agent Egbert's cases declined to recognize First Amendment *Bivens* claims because an alternative remedial scheme was available. In *Loumiet* v. *United*

*States*, for example, the D.C. Circuit found there was an obvious special factor "counseling hesitation" in extending *Bivens*—the plaintiff had brought claims under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) against officials in the Office of the Comptroller of the Currency. 948 F.3d 376, 384 (D.C. Cir. 2020) (quoting *Abbasi*, 137 S. Ct. at 1865). The court recognized that FIRREA provided a comprehensive administrative enforcement scheme permitting imposition of civil penalties for only certain enumerated defenses. *Id.* at 384. The other D.C. Circuit cases on which Agent Egbert relies are equally inapposite: each involved injuries subject to a comprehensive remedial scheme. *See Davis* v. *Billington*, 681 F.3d 377, 388 (D.C. Cir. 2012) (Civil Service Reform Act provided a comprehensive remedial scheme); *Spagnola* v. *Mathis*, 859 F.2d 223, 224-225 (D.C. Cir. 1988) (en banc) (same); *Wilson* v. *Libby*, 535 F.3d 697, 710-711 (D.C. Cir. 2008) (comprehensive remedial scheme available to CIA employee and her husband under Privacy Act). No such alternative structure is available here. Accordingly, the decisions relied upon by Agent Egbert are wholly distinguishable from the Ninth Circuit's decision here.

Agent Egbert cites a series of inapposite cases considering the availability of a *Bivens* remedy to inmates in the prison context. For example, in *Bistrian* v. *Levi*, 912 F.3d 79, 84 (3d Cir. 2018), the Third Circuit considered a plaintiff's retaliation claim based on his placement in the prison's Special Housing Unit. The Third Circuit concluded that the prison context was a special factor counseling hesitation because the plaintiff's claim was "grounded in administrative detention decisions" involving "real-time and often difficult judgment calls about disciplining inmates, maintaining order, and

promoting prison officials' safety and security." *Id.* at 96; *see also Mack* v. *Yost*, 968 F.3d 311, 321-323 (3d Cir. 2020) (*Bivens* unavailable in prison work-assignment context due to concern of judicial intrusion on Bureau of Prisons' administrative decisions and availability of alternative remedial scheme). *Earle* v. *Shreves* similarly involved a retaliation claim in the prison grievance process, raising a "serious question relating 'to ... prison discipline.'" 990 F.3d 774, 780 (4th Cir. 2021), *pet. for cert. docketed*, No. 21-5341 (U.S. Aug. 11, 2021) (citation omitted). The Fifth and Sixth Circuits likewise rejected *Bivens* actions for "retaliation claims against prison officials." *Watkins* v. *Three Admin. Remedy Coordinators of Bureau of Prisons*, 998 F.3d 682, 685 (5th Cir. 2021); *Callahan* v. *Federal Bureau of Prisons*, 965 F.3d 520, 525 (6th Cir. 2020). Both courts emphasized that the Prison Litigation Reform Act, governing lawsuits by prisoners, precludes "standalone damages remed[ies]," and that Congress's decision to limit damages remedies was a special factor counseling hesitation regarding a *Bivens* remedy. *Watkins*, 998 F.3d at 685; *Callahan*, 965 F.3d at 524. "Prison-based claims" present a unique "risk of interference with prison administration"—a factor not present here. *Callahan*, 965 F.3d at 524.

The other retaliation cases Agent Egbert cites arise in similarly inapposite contexts. *Vanderklok* v. *United States*, 868 F.3d 189, 209 (3d Cir. 2017), rejected a retaliation claim against TSA agents relating to an incident with a security screening, due to the "specific context of airport security screeners." And in *Cioca* v. *Rumsfeld*, 720 F.3d 505, 510 (4th Cir. 2013), the court emphasized the "military context," ruling that claims for money damages "are uniquely problematic in the context of claims against the military." Nothing in the

decision below suggests that the Ninth Circuit would have diverged from those decisions if presented with their very different facts.

Moreover, the circuits Agent Egbert suggests have "declined to expand" *Bivens* to First Amendment retaliation claims have explicitly left that possibility open. For example, the Second Circuit—in a case more recent than the two Agent Egbert relies on—explicitly "assum[ed] without deciding that a First Amendment claim is cognizable under *Bivens*." *Gonzalez* v. *Hasty*, 802 F.3d 212, 222 n.10 (2d Cir. 2015). There, the claim was barred simply because it was untimely. *Id.* at 222-223. And while Agent Egbert suggests that three other circuits have "expressed skepticism" that *Bivens* can provide a remedy for a First Amendment claim (Pet. 13), all three circuits declined to decide the issue, with two assuming that a remedy was available. *Air Sunshine* v. *Carl*, 663 F.3d 27, 35 (1st Cir. 2011) (declining to decide the issue because the complaint was deficient); *Pahls* v. *Thomas*, 718 F.3d 1210, 1226 n.6 (10th Cir. 2013) (noting that it "need not decide," but assuming for purposes of that case that the remedy is available); *Walden* v. *CDC*, 669 F.3d 1277, 1284 n.3 (11th Cir. 2012) (same).

Far from the "consensus" Agent Egbert suggests, the cases considering the availability of a First Amendment *Bivens* remedy arise in a host of different contexts, none of which mirrors the highly unusual circumstances of Agent Egbert's misconduct. Agent Egbert has not remotely shown that the Ninth Circuit would have resolved any of those other cases differently from other circuits, or that any other circuit would have treated Mr. Boule's specific claims differently from the Ninth Circuit.

### B. This Case Does Not Involve "Immigration Enforcement" And Does Not Conflict With Cases That Do

Contrary to Agent Egbert's assertion of a 3-1 circuit split regarding Fourth Amendment claims "involving immigration enforcement," Pet. 15-16, there is no such split, because this case does not involve immigration. Agent Egbert assaulted Mr. Boule, whom he knew to be a U.S. citizen, on Mr. Boule's own property within the United States. Agent Egbert's conduct had no relation to immigration enforcement, as he was at most investigating the status of a guest at Mr. Boule's bed-and-breakfast whom Agent Egbert already knew had entered the country lawfully. Agent Egbert's efforts to manufacture a conflict fail, as his cases posed a host of national security and immigration concerns not present here.

Unlike this case, Agent Egbert's cited authorities involved core immigration functions including immigration detention of noncitizens, injury at a port of entry while crossing the border, or injury suffered as a result of an allegedly unlawful removal. In *Maria S.* v. *Garza*, 912 F.3d 778 (5th Cir. 2019), the court rejected a *Bivens* claim that a CBP agent coerced a noncitizen into signing a voluntary removal form. *De La Paz* v. *Coy*, 786 F.3d 367 (5th Cir. 2015)—which Agent Egbert misleadingly describes as "a case notably similar to this one" (Pet. 17)—involved two noncitizens asserting *Bivens* claims for allegedly illegal stops and detentions. In that case, the Fifth Circuit held a *Bivens* remedy unavailable for claims that could be addressed "in civil immigration removal proceedings." 786 F.3d at 369, 378; *see also Alvarez*, 818 F.3d at 1208 (rejecting a *Bivens* claim by a Cuban national—who alleged that his detention exceeded the statutory period and that federal officers

improperly prolonged it—given the existing remedial scheme under the INA). Those cases involve claims by noncitizens (or their estates) against federal officers for core immigration functions, a far cry from Mr. Boule's claims here.

In *Tun-Cos* v. *Perrotte*, 922 F.3d 514, 528 (4th Cir. 2019), nine plaintiffs (only one of whom was a U.S. citizen) brought claims against several ICE agents challenging the legality of their stops, detentions, and home invasions. The court recognized that "[i]mmigration enforcement is by its nature addressed toward noncitizens, which raises a host of considerations and concerns." *Id.* at 524. The court also noted that the plaintiffs there sought to use *Bivens* to challenge "the Trump Administration's immigration enforcement policy with the purpose of altering it," and that "attack on executive policy" represent[ed] another factor counseling hesitation. *Id.* at 527-528. Mr. Boule's claims involve nothing of the sort.

A final case cited by Agent Egbert for his proposition that "proximity to the border alone is sufficient to qualify as a 'new context,'" *Angulo* v. *Brown*, 978 F.3d 942, 948 n.3 (5th Cir. 2020), was decided on qualified immunity grounds. There, the Fifth Circuit "assume[d] without deciding that a *Bivens* remedy [wa]s available." *Id.* Moreover, the plaintiff in that case alleged he was injured by federal officers while *crossing* the border at a port of entry when returning from a visit to Mexico—another critical difference from this case, where a U.S. citizen was attacked on his own land where neither he nor anyone else was seeking to enter the United States. *Id.* at 945.

Agent Egbert has not shown that any other circuit would address Mr. Boule's claims any differently from

how the Ninth Circuit did, or that the Ninth Circuit would address a case that actually did involve immigration enforcement differently from other circuits. Accordingly, there is no circuit conflict warranting this Court's attention.

## IV. THERE IS NO REASON TO RECONSIDER *BIVENS*

As recently as 2017, this Court recognized *Bivens* as "settled law" and emphasized the "powerful reasons to retain" *Bivens*, in particular for search-and-seizure claims like Mr. Boule's. *Abbasi*, 137 S. Ct. at 1857. The Court emphasized that its opinion in *Abbasi* "[wa]s not intended to cast doubt on the continued force, or even necessity of *Bivens*." *Id.* Nevertheless, ignoring that pronouncement from just four years ago, Agent Egbert asks this Court to overturn *Bivens*.

Agent Egbert exaggerates the difficulty in applying *Bivens*, suggesting that the Court has repeatedly "overhaul[ed]" its test for deciding whether to extend *Bivens* to new contexts. Pet. 23. But this Court has simply restated a test that has been in place since 1980. The Court first asks whether the claim arises "in a 'new context,'" *Hernandez*, 140 S. Ct. at 743 (citing *Malesko*, 534 U.S. at 68), and then considers "whether there are any 'special factors [that] counse[l] hesitation'" regarding recognition of a *Bivens* claim in that context, *id.* (quoting *Carlson*, 446 U.S. at 18).

Even as this Court has clarified the metes and bounds of *Bivens*, it has underscored its importance as a fundamental check on constitutional violations by rogue federal agents. The Court has emphasized *Bivens*'s central role in "deterring individual officers from engaging in unconstitutional wrongdoing," *Malesko*, 534 U.S. at 74, and providing an opportunity

for redress where an individual lacks an "alternative remedy against individual officers," *Minneci* v. *Pollard*, 565 U.S. 118, 127 (2012). The need for a remedy to vindicate "the most flagrant abuses of official power" for individuals who have no other form of redress remains. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment); *see id.* ("For people in Bivens' shoes, it is damages or nothing."); *Abbasi*, 137 S. Ct. at 1862 ("individual instances of ... law enforcement overreach" "are difficult to address except by way of damages actions after the fact").

While Agent Egbert suggests that the "prospect of *Bivens* suits" may "undercut[]" federal officers' ability to perform their jobs, Pet. 27, this Court has emphasized that *Bivens* actually "provides instruction and guidance to federal law enforcement officers" in the contexts this Court has recognized. *Abbasi*, 137 S. Ct. at 1856-1857. Far from hampering law enforcement officers' ability to do their jobs, this Court has recognized *Bivens* as a settled, "fixed principle" that garners reliance and guides behavior. *Id.* at 1857.

In addition to the Court's repeated reaffirmations of *Bivens*, Congress has deliberately preserved it for a half-century to allow redress for constitutional violations by federal agents. In its 1974 amendment to the FTCA, Congress explicitly rejected proposed legislation that would have substituted the government for individual officers in suits alleging constitutional violations. *See e.g.*, *Carlson*, 446 U.S. at 19-20 & n.5 (legislative amendment process made it "crystal clear" that Congress intended to maintain *Bivens* actions against individual officers); *see also* Pfander & Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 131 (2009) (in rejecting pro-

posal to make FTCA claims exclusive of *Bivens* remedies, "Congress deliberately retained the right of individuals to sue government officers for constitutional torts").

Similarly, in enacting the Westfall Act in 1988, Congress expressly preserved the right of individuals to sue federal officers for constitutional violations by specifying that immunity for common law torts committed within the scope of federal officials' employment did not apply to claims "brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A).

When Congress made those determinations, this Court had already made clear that Congress had the authority to displace the *Bivens* remedy. *See e.g.*, *Lucas*, 462 U.S. at 378; *Carlson*, 446 U.S. at 18-20. Yet Congress chose not to do so. Rather, "[b]y accepting *Bivens* and making it the exclusive mode for vindicating constitutional rights, Congress ... joined the Court in recognizing the importance of the *Bivens* remedy in our scheme of government accountability law." Pfander & Baltmanis, *supra*, at 132-135 & n.100.

Both this Court and Congress have recognized the importance of the *Bivens* remedy in ensuring that constitutional rights are meaningfully vindicated. *Bivens* has long been settled law and this case presents no occasion to change that.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2021