No. 21-147

In the
Supreme Court of the United States

ERIK EGBERT,

Petitioner,

v.

ROBERT BOULE,

Respondent.

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

BRIEF OF *AMICI CURIAE* FORMER U.S. ATTORNEYS GENERAL JOHN D. ASHCROFT, WILLIAM P. BARR, ALBERTO R. GONZALES, EDWIN MEESE III, MICHAEL B. MUKASEY, AND JEFFERSON B. SESSIONS III IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are six former Attorneys General of the United States. Each of the *amici* had the privilege of serving as the Nation's chief law enforcement officer, an experience that left them acutely aware of the responsibilities vested in law-enforcement and national-security officials, as well as the need to ensure that fulfillment of these critical responsibilities is not chilled by the threat of civil litigation, particularly litigation seeking remedies that have not been authorized by Congress.

This case concerns a claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), brought against a U.S. Customs and Border Protection agent based on an encounter near an international border. *Amici* are concerned that the Ninth Circuit's expansion of *Bivens* departs from forty years of this Court's precedents and, if left in place, would interfere with the Executive's performance of vital law-enforcement and national-security functions.

This Court has clearly and consistently directed lower courts not to compound the original error of *Bivens* by expanding that decision into novel contexts. Article I of the Constitution vests power to create legal remedial actions in Congress alone, and respecting the boundaries among the branches is most important in cases bearing on foreign affairs and national security.

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[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae* and their counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this *amicus* brief.

Having served in high executive office, *amici* know firsthand the importance of protecting executive discretion in the enforcement of our laws and the protection of our national security.

The Honorable John D. Ashcroft served as Attorney General of the United States from 2001 to 2005. He was also United States Senator from Missouri from 1995 to 2001, Governor of Missouri from 1985 to 1993, and Attorney General of Missouri from 1977 to 1985.

The Honorable William P. Barr served as Attorney General of the United States from 2019 to 2020 and from 1991 to 1993. He also served as Assistant Attorney General for the Office of Legal Counsel from 1989 to 1990 and Deputy Attorney General from 1990 to 1991.

The Honorable Alberto R. Gonzales served as Attorney General of the United States from 2005 to 2007. He also served as White House Counsel from 2001 to 2005 and as Associate Justice of the Supreme Court of Texas from 1999 to 2001.

The Honorable Edwin Meese III served as Attorney General of the United States from 1985 to 1988. He also served as Counselor to President Ronald Reagan from 1981 to 1985.

The Honorable Michael B. Mukasey served as Attorney General of the United States from 2007 to 2009. He also was a judge on the United States District Court for the Southern District of New York from 1987 to 2006.

The Honorable Jefferson B. Sessions III served as Attorney General of the United States from 2017 to

2018. He was also a United States Senator from Alabama from 1997 to 2017, Attorney General of Alabama from 1995 to 1997, and United States Attorney for the Southern District of Alabama from 1981 to 1993.

INTRODUCTION AND SUMMARY OF ARGUMENT

For nearly two centuries, this Court left it to Congress to define the legal remedies for constitutional violations. That is because Article III grants federal courts the "judicial power" to decide cases or controversies within their jurisdiction, while Article I vests in Congress the "legislative power" to craft legal remedies for the violation of constitutional rights.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Court discovered in the Fourth Amendment an "implied" right to collect damages when certain federal officers violate its terms. 403 U.S. 388 (1971). The Court admitted that "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages," *id.* at 396, and it understood that Congress had not chosen to include federal officers when it created a civil damages action for constitutional wrongs under 42 U.S.C. § 1983, *see id.* at 429–30 (Black, J., dissenting).

Without support in constitutional text, structure, or history, the Court grounded *Bivens* in "the amorphous belief that federal courts have the authority to 'make good the wrong done.'" *Boule v. Egbert*, 998 F.3d 370, 374 (9th Cir. 2020) (Bumatay, J., dissenting from the denial of rehearing en banc)

(quoting *Bivens*, 403 U.S. at 396). Relying on a view of judicial lawmaking that had elsewhere been discarded, *see, e.g.*, *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), the Court created a right of action and a damages remedy that Congress had not previously seen fit to add to the United States Code.

The Court did not take long "to appreciate more fully the tension between this practice and the Constitution's separation of legislative and judicial power." *Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020). After extending *Bivens* twice in the decade after the decision, the Court has unfailingly rejected any new expansion over the past forty years, returning to an understanding of the judicial power that leaves the creation of new remedies to Congress.

In so doing, the Court has increasingly characterized *Bivens* as a judicial usurpation of the legislative power. The Court has called *Bivens* remedies "disfavored," *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009), and the product of a since-deposed "*ancien regime*," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1851 (2017) (citation omitted). With some degree of understatement, the Court has called it "doubtful" that it "would have reached the same result" if the case arose today. *Hernandez*, 140 S. Ct. at 742–43 (citing *Abbasi*, 137 S. Ct. at 1856).

While the Court has not taken the additional step of overruling *Bivens*, it has directed lower courts not to compound the error by inferring causes of actions in cases that "differ in a meaningful way" from the three scenarios this Court has directly endorsed. *Abbasi*, 137 S. Ct. at 1860. For cases that involve a new context or a new category of defendants, courts must

consider whether "special factors" counsel against extension. *Id.* at 1859.

In this case, the Ninth Circuit blew through forty years of precedent that stood against inferring new causes of action. *Amici* agree with Petitioner that the decision below ignores at least two special factors counseling against a novel expansion of *Bivens*: the separation of powers and the implications this case has on national security and foreign affairs. *Amici* write separately to emphasize that regardless of the "special factor" framework, *any* expansion of *Bivens* contravenes the separation of powers under the Constitution itself. And such expansion is even more disconcerting when, as here, it touches on national security and foreign affairs, inviting the judiciary to second-guess the judgment of executive officers in these critical areas.

ARGUMENT

I. Only Congress Has Authority To Create New Legal Remedies.

Petitioner has more than adequately demonstrated that the Ninth Circuit's expansion of *Bivens* infringes on the separation of powers. *Amici* write separately to emphasize two critical points.

First, the separation of powers is not just one of several "special factors counseling hesitation" in *Bivens* expansions. Instead, it is the linchpin of the analysis. This Court's precedents demonstrate that a proper respect for the separation of powers should be the primary reason for hesitation in expanding *Bivens*. And, although for now, the Court has declined certiorari on the question whether to do away with *Bivens* altogether, it may and should hold that *any*

further expansion of *Bivens* to encompass new causes of action violates the separation of powers. *Bivens* itself expanded judicial power into the incontrovertibly legislative task of remedy creation. This Court has refused invitation after invitation to compound the damage. It should unequivocally instruct lower courts that they must do the same.

One of the great innovations of our Constitution is the separation of powers among the three branches. *See Boule*, 998 F.3d at 374 (Bumatay, J., dissenting from the denial of rehearing en banc) (citing Neil Gorsuch, *A Republic, If You Can Keep It* 40 (2019)). The Framers designed Articles I and III "to separate the legislative from the judicial power." *Id.* (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995)). Article I vests "[*a*]*ll* legislative powers" in "a Congress of the United States." U.S. Const. art. I, § 1 (emphasis added). Article III in contrast vests the "judicial power of the United States" in this Court and the lower federal courts.

This separation gave the United States an independent judiciary that, time and again, has proven itself an essential check on overreaching by the political branches. But with that great power comes a concomitant responsibility for the federal judiciary to eschew quintessentially legislative policy judgments. That includes the various policy judgments necessary to determine who may sue for constitutional violations, who the appropriate defendants in such cases are, and what damages or other legal remedies may be available.

Bivens itself was an act of judicial lawmaking that sought to improve on the text of the Fourth

Amendment by adding a damages remedy that did not previously exist. The Court took the same step in *Davis v. Passman*, 442 U.S. 228 (1979), by crafting a Fifth Amendment right to sue a member of Congress for employment discrimination, and in *Carlson v. Green*, 446 U.S. 14 (1980), by creating an Eighth Amendment right for federal prisoners to sue for mistreatment. But *Bivens* has had all of nine good years and forty-odd bad ones. This Court's most recent precedents have emphatically rejected the intellectual premise of these three decisions and rejected any attempt to expand them to new claims.

In *Ziglar v. Abbasi*, the Court declined to extend *Bivens* to Fourth and Fifth Amendment claims brought by aliens detained after the September 11 terrorist attacks. 137 S. Ct. at 1851. In so doing, the Court discussed the strict limits of its *Bivens* jurisprudence. It recounted Congress's decision in 1871 to enact 42 U.S.C. § 1983, which authorized money damages against state officials who violate constitutional rights, but pointedly withheld that remedy against federal officials. Despite that legislative determination, one hundred years later, *Bivens* found "general principles of federal jurisdiction" sufficient to authorize an implied cause of action for certain Fourth Amendment violations. *Id.* at 1854. Even so, as soon as 1975, the Court began pulling back on implied causes of action, "adopt[ed] a far more cautious course." *Id.* at 1855 (citing *Cort v. Ash*, 422 U.S. 66, 68–69 (1975)). By 2012, the Court

had rejected implied damages remedies in no fewer than eight constitutional contexts. *Id.* at 1857.[2]

The Court's explanation for this course correction was simple: "when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis." *Id.* That is because "an issue [that] involves a host of considerations that must be weighed and appraised . . . should be committed to those who write the laws rather than those who interpret them." *Id.* (citation omitted; cleaned up). "In most instances, the Court's precedents now instruct, the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability. As a result, the Court has urged 'caution' before extending Bivens remedies into any new context." *Id.* (citations omitted; cleaned up). These separation-of-powers concerns are not merely "special factors counselling hesitation," *id.*, but are the

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[2] *See Bush v. Lucas*, 462 U.S. 367, 390 (1983) (declining to create an implied damages remedy in a First Amendment suit against federal employer); *Chappell v. Wallace*, 462 U.S. 296 (1983) (race-discrimination claims against military officers); *United States v. Stanley*, 483 U.S. 669 (1987) (substantive due process claim against military officers); *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (due process claim against Social Security officials); *FDIC v. Meyer*, 510 U.S. 471 (1994) (wrongful-termination claims against federal agency); *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) (Eighth Amendment claim against private prison); *Wilkie v. Robbins*, 551 U.S. 537 (2007) (due process claim against federal officials); *Minneci v. Pollard*, 565 U.S. 118 (2012) (Eighth Amendment claim against private prison guards).

animating principle weighing strongly against *every* potential expansion of *Bivens*.

The Court's opinion in *Hernandez v. Mesa*, 140 S. Ct. 735 (2020), picked up where *Abbasi* left off. *Hernandez* rejected expanding *Bivens* to Fourth and Fifth Amendment claims arising from a cross-border shooting. The Court affirmed that the separation of powers is not a mere "special factor." Instead, all the "multiple factors that counsel hesitation about extending *Bivens*" are "condensed to one concern—respect for the separation of powers." *Id.* at 749 (citing *Abbasi*, 137 S. Ct. at 1857–58). The Court reaffirmed that the central question is whether it is Congress or the Court who has the authority to fashion new remedies. And as in *Abbasi*, the Court recognized that "[t]he correct 'answer most often will be Congress.'" *Id.* at 750 (quoting *Abbasi*, 137 S. Ct. at 1857). The Court should now confirm that the correct answer will always be Congress, because the power to create new remedies is a legislative power.

These cases inch closer and closer to the simple acknowledgment that *Bivens* itself was a mistake. Fifty years after its genesis, it has served only to invite a series of misadventures into judicial legislating, including in the decision below. It has forced this Court repeatedly to confront unwarranted extensions of the doctrine, and it has allowed lower courts to impinge Congress's singular power to legislate. At minimum, this Court should not expand it here—or anywhere else.

Second, apart from the *Bivens* context, this Court has repeatedly recognized that the power to create new legal remedies lies solely with Congress. In

Armstrong v. Exceptional Child Center, Inc., the Court held that the Supremacy Clause does not confer a private right of action to enforce federal statutes against state actors. 575 U.S. 320 (2015). The Court explained that the necessary-and-proper clause grants Congress "broad discretion" to determine how to carry out its enumerated powers. *Id.* at 325. If the Supremacy Clause included a private right of action, it would mean the Constitution "*requires* Congress to permit the enforcement of its laws by private actors." *Id.* at 326 (emphasis in original). And this sort of "mandatory private enforcement" would impermissibly limit Congress's power to designate its own statutory enforcement mechanisms. *Id.*

The Court has reached the same conclusion with respect to statutory construction. For example, in *Alexander v. Sandoval*, the Court held that Title VI of the Civil Rights Act of 1964 does not authorize a private civil action for disparate-impact discrimination. 532 U.S. 275 (2001). Justice Scalia's opinion for the Court recognized that "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Id.* at 286 (citation omitted). The Court's task is to "interpret the statute Congress has passed," and without congressional creation of a cause of action, "courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286–87 (citations omitted).

The Court's recent opinions interpreting the Alien Tort Statute ("ATS") are to the same effect. *See Jesner v. Arab Bank*, 138 S. Ct. 1386 (2018); *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021). In both cases, several

Justices expressed doubt that the ATS's general grant of jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," authorized the Court to fashion novel causes of action for violations of international law.

Writing for the majority in *Jesner*, Justice Kennedy reiterated that "[t]he Court's recent precedents cast doubt on the authority of courts to extend or create private causes of action." 138 S. Ct. at 1402 (citations omitted). That is because the expansion of causes of action is a job for Congress, which "is in the better position to consider if the public interest would be served by" such decisions. *Id.* (quoting *Abbasi*, 137 S. Ct. at 1857). In a portion of his opinion joined by the Chief Justice and Justice Thomas, Justice Kennedy further explained that "the political branches are better equipped to make the preliminary findings and consequent conclusions that should inform this determination." *Id.* at 1408 (plurality op.).

Concurring in part, Justice Gorsuch similarly emphasized that the judicial power does not include the authority to fashion new legal remedies. The Constitution's structure "insulat[es]" federal courts from democratic accountability and vests Congress with the power held by common-law courts. *Id.* at 1413. Citing *Abbasi*, Justice Gorsuch reiterated that "when confronted with a request to fashion a new cause of action, 'separation-of-powers principles are or should be central to the analysis.'" *Id.* (quoting *Abbasi*, 137 S. Ct. at 1857).

The proposed expansion of the ATS in *Jesner* involved deciding whether "persons like A who engage in certain conduct will be liable to persons like B." *Id.* This exercise is "just like enacting a new law," a task that "belongs to Congress, not the courts." *Id.* For that reason, "separation of powers considerations ordinarily require us to defer to Congress in the creation of new forms of liability." *Id.* at 1414.[3]

In *Nestle USA, Inc. v. Doe*, the Court similarly rejected expanding the ATS to cover injuries that occurred overseas. 141 S. Ct. 1931 (2021). While the majority rested this decision on the presumption against extraterritoriality, as section of Justice Thomas's lead opinion joined by Justices Gorsuch and Kavanaugh also concluded that the task for "creat[ing] a cause of action" under the ATS belongs to Congress. *Id.* at 1937 (plurality op.). Justice Thomas expressed serious doubt that causes of action under the ATS could extend past the three historical torts recognized at the time of its adoption, *id.* at 1938, and concluded that "our precedents already make clear that there always is a sound reason to defer to Congress," *id.* at 1940. Therefore, the question whether to permit additional causes of action "lies within the province of the Legislative Branch." *Id.*

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[3] Justice Thomas's and Justice Alito's opinions similarly emphasized separation-of-powers concerns. *See Jesner*, 138 S. Ct. at 1408 (Thomas, J., concurring) ("Courts should not be in the business of creating new causes of action under the Alien Tort Statute . . . ." (citations omitted)); *id.* (Alito, J., concurring) (outcome "compelled not only by judicial caution, but also by the separation of powers" (citation and quotation marks omitted)).

Justice Gorsuch's concurrence reached the same conclusion, recognizing that nothing in the ATS "deputizes" this Court to innovate new causes of action or legal remedies. *Id.* at 1942–43 (Gorsuch, J., concurring). The ATS merely grants the Court jurisdiction to hear preexisting tort claims. Before the Constitution, common-law courts bore responsibility for creating and defining new legal remedies. But the Constitution withheld that function from the federal courts. *Id.* at 1942 (citing *Sandoval*, 532 U.S. at 287).

The Court's approach in these cases applies with equal, if not greater, force to the Ninth Circuit's novel expansion of *Bivens*. The plaintiffs in those cases asked this Court to do precisely what the lower court did here: to fashion new rights and remedies absent congressional authorization. As in those cases, here, the Court should reaffirm the foundational principle that the power to create new legal remedies rests solely with Congress and accordingly reject the Ninth Circuit's arrogation of congressional authority.

II. Expanding *Bivens* To Border Enforcement Jeopardizes National Security.

Petitioner is also correct that the Ninth Circuit's expansion of *Bivens* to First Amendment and border-involved Fourth Amendment claims could chill decisions needed to protect our national security and thus implicate another "special factor" under *Bivens*. Indeed, any intrusion on the sensitive area of immigration policy violates the separation of powers twice-over. Because suits challenging border enforcement actions necessarily implicate national security, *Hernandez*, 140 S. Ct. at 746, any expansion of *Bivens* in this context would encroach on

prerogatives entrusted to the Executive under Article II, as well as Congress under Article I. *See Boule*, 998 F.3d at 382–83 (Bumatay, J., dissenting from the denial of rehearing en banc). That double intrusion on the separation of powers makes this case "an easy call." *Id.* at 382.

The United States' foreign relations and national security are committed to the political branches. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). It follows that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981). Accordingly, *Abbasi* and *Hernandez* both establish that *Bivens* should not be expanded to claims that would jeopardize the political branches' autonomy in these arenas. As both cases explain, "'courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs' unless 'Congress specifically has provided otherwise.'" 137 S. Ct. at 1861 (quoting *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988))); *Hernandez*, 140 S. Ct. at 744 (same).

The Ninth Circuit ignored this consideration, concluding that "run-of-the-mill immigration proceeding[s]" were "unrelated to any other national security decision or interest." *Boule*, 998 F.3d at 389 (panel op.) (quoting *Lanuza v. Love*, 899 F.3d 1019, 1030 (9th Cir. 2018)). But that facile distinction squarely conflicts with this Court's precedents. The Court has held that the judiciary must respect "the framework established by the political branches" regarding foreign relations and national security. *Hernandez*, 140 S. Ct. at 746. Here, Congress has

clearly granted authority over immigration matters to the Department of Homeland Security and, in turn, the U.S. Customs and Border Protection ("CBP"). *See* 6 U.S.C. §§ 111(b)(1)(A), 111(b)(1)(E). The border-control policies at issue "are of crucial importance to the national security and foreign policy of the United States," regardless of whether the facts in a particular case implicate that subject. *See United States v. Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004).

Expanding *Bivens* here would threaten real-world harm to national security and to border-enforcement efforts. Subjecting border patrol agents to judicial second-guessing risks clouding their judgment and encumbering important split-second decisions. As the Court has explained, "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (citation omitted). In addition, the costs of complying with judicially invented remedies (or those yet to be invented) and of defending against a slurry of new lawsuits will redirect executive resources that could be better used to protect our borders. *See, e.g.*, *id.* (detailing costs of expanded officer liability including "the expenses of litigation"); *Pearson v. Callahan*, 555 U.S. 223, 237–38 (2009) (discussing importance of quick disposition of *Bivens* claims to avoid "wast[ing] the parties' resources").

Those harms are hardly theoretical in this case. Petitioner is a member of a CBP unit that focuses specifically on "counterterrorism, cross-border crime,

and drug and human trafficking." *Boule*, 998 F.3d at 383 (Bumatay, J., dissenting from the denial of rehearing en banc). The site of the incident was a known hub for smugglers and illegal migrants. And Respondent himself "has since been arrested by Canadian authorities and charged with human trafficking." *Id.* at 375 n.3. Rather than allow the Executive Branch to protect our borders against these threats, the Ninth Circuit would have the judiciary second-guess critical actions in the field.

Moreover, as this Court has recognized, protecting the Nation's physical borders is a profoundly important aspect of national security. In *Hernandez*, for example, the Court likened interference in border security to interfering with "system[s] of military discipline." 140 S. Ct. at 746–47 (citing *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United States v. Stanley*, 483 U.S. 669 (1987)). Because "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." *Id.* at 747 (citing *Abbasi*, 137 S. Ct. at 1861).

The Founders understood these threats. Hamilton wrote in The Federalist No. 70 that "[e]nergy in the Executive . . . is essential to the protection of the community against foreign attacks." The Federalist No. 70, at 469 (Jacob E. Cooke ed., 1961). That is because "[d]ecision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number." *Id.* The separation of powers is therefore "most important in the national-security and

foreign-affairs contexts." *Hamdi v. Rumsfeld*, 542 U.S. 507, 581 (2004) (Thomas, J., dissenting). And, while Congress "has a substantial and essential role in both foreign affairs and national security," judicial review of these matters, absent legislative sanction, "destroys the purpose of vesting primary responsibility in a unitary Executive." *Id.* at 582; *see also Chi. & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948) (recognizing that foreign-policy decisions "are wholly confided by our Constitution to the political departments of the government, Executive and Legislative").

Amici thus urge this Court to be especially reticent to extend *Bivens* to claims involving important issues of national security. The separation-of-powers concerns that have restricted this Court's expanding *Bivens* in every other context apply with special force where, as here, national security and foreign affairs are on the line.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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