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 THE NATIONAL ICE COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE NATIONAL ICE COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The National ICE Council ("Council") represents approximately 6,000 officers and employees who work for the United States Immigration and Customs Enforcement ("ICE") throughout the continental United States, Alaska, Hawaii, Puerto Rico, the Virgin Islands, Guam, and Saipan. Its members include thousands of officers who work on Fugitive Operations Teams, other at-large Arrest Teams, federal, state, and local task forces, as well as joint FBI Terrorism Task Forces and other operations. The Council's approximately 5,000 ICE officers routinely detain or make arrests of aliens-at-large in the community, including convicted criminal aliens, fugitives evading final orders of removal, and others either known or suspected of being in the country illegally.

SUMMARY OF ARGUMENT

The Council's members' work is critical to the enforcement of immigration law against those who present a danger to our national security, are a threat to

[1] Counsel for all parties have consented in writing to the filing of this brief. Pursuant to Supreme Court Rule 37.6, the *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

public safety, or who otherwise undermine our immigration system. Because "[i]t is well established in the law that federal government officials have broad discretion to decide who should be subject to arrest, detainers, removal proceedings, and execution of removal proceedings" (Alejandro Mayorkas, Secretary of Homeland Security, Sept. 30, 2021 Memorandum *www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf*), ICE officers are subject to various directives based on shifting enforcement priorities and foreign policy, and application of available resources, as well as superseding directives withdrawing discretion to arrest, detain, or engage in enforcement activities. At the same time, basic academy and continuous annual training instill in officers a requirement to be mindful of the civil rights and liberties of those whom they confront in carrying out their duties. Policy changes and interim guidance come with each change in administration and directly from the Secretary of Homeland Security, who is appointed by the President of the United States and acts to implement Executive Orders of the President revising policy. (*https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf*) Enforcement of immigration laws is thus a component of foreign policy.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court acknowledged a cause of action directly under the Constitution for damages against agents of the Federal Bureau of Narcotics for allegations of Fourth Amendment violations. Only twice since then—the last

time 40 years ago—has the Court extended *Bivens* to a Fifth Amendment due-process claim and an Eighth Amendment deliberate indifference claim. For sound reasons, this Court has since rejected each opportunity to extend such claims.

In the decision below, the Ninth Circuit created *Bivens* claims against Border Patrol agents for alleged First Amendment retaliation and Fourth Amendment violations. Pet.App.36a, 42a. The panel soft-pedaled national security concerns raised by this Court in recent cases, including *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) and *Hernandez v. Mesa*, 140 S. Ct. 735 (2020). The Ninth Circuit denied rehearing *en banc*, but twelve judges dissented over three opinions, emphasizing the "many reasons counseling hesitation[.]"

Because *Bivens* claims encroach upon separation of power issues, when considering such claims in a new context, such claims must be rejected if "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." *Abbasi*, 137 S. Ct. at 1858. Thus, the considerations recognize a court is ill-advised to step into the shoes of Congress to speculate about whether a legislative body might think a damages remedy is wise policy. Congress can and should speak for itself in its representative capacity.

As discussed below, reasons in addition to those argued in Petitioner's merits brief and those in the well-reasoned dissents to the denial of rehearing *en banc* caution against extension of *Bivens*. First, the increase in potential liability will cause hesitation in the

performance of important duties which impact national security performed not only by Border Patrol agents, but by numerous federal officers, including those represented by *amicus* National ICE Council. Second, internal processes for discipline and accountability, which Congress is responsible to monitor and evaluate, counsels against alteration of that framework by the Judiciary through an extension of *Bivens*. *Hernandez*, 140 S. Ct. at 746.

ARGUMENT

As noted above, when the Supreme Court is asked to extend *Bivens*, which it has not done in over four decades, the Court engages in a two-step inquiry:

> We first inquire whether the request involves a claim that arises in a 'new context' or involves a 'new category of defendants.' And our understanding of a 'new context' is broad. We regard a context as 'new' if it is 'different in a meaningful way from previous *Bivens* cases decided by this Court.'
>
> When we find that a claim arises in a new context, we proceed to the second step and ask whether there are any '"'special factors [that] counse[l] hesitation'"' about granting the extension. If there are—that is, if we have reason to pause before applying *Bivens* in a new context or to a new class of defendants—we reject the request.

Hernandez v. Mesa, 140 S. Ct. at 743, citations omitted. As this Court then explained, in assessing the special factors, the Court conducts the following limited inquiry:

> We thus consider the risk of interfering with the authority of the other branches, and we ask whether 'there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy,' [citation omitted] and '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.'

Ibid. Here, there exist two special factors militating against the conclusion that Congress would have permitted a damages remedy against Federal Border Patrol agents:

First, the increase in potential liability will cause hesitation in the performance of important duties which impact national security. Those duties are performed not just by Border Patrol agents, but by numerous federal officers, including those represented by *amicus* National ICE Council. The reasoning in the Ninth Circuit's decision may open the door to *Bivens* claims against nearly all federal agents and officers. Thus, in tens of thousands of cases and interactions, federal agents and officers may well now hesitate in the face of potential liability and possible financial ruin caused by litigation.

Second, the internal processes for discipline and accountability, which Congress is responsible to monitor and evaluate, counsels against alteration of that framework by the Judiciary through an extension of *Bivens*. Hernandez, 140 S. Ct. at 746. Neither the officers represented by the Council, nor officers and agents in the Customs and Border Patrol are free from internal controls and training; the addition of direct civil liability for purported Constitutional violations changes the calculus by which these components of the Department of Homeland Security may enforce, perhaps disparately, employee accountability, potentially leading to disruptions and undermining the front line of border security and enforcement of immigration policy and law.

I. The Ninth Circuit's decision adversely impacts national security, affecting how federal officers and agents perform their duties by causing hesitancy in those engaged in important and potentially dangerous work

Border Patrol agents perform a unique and important function, providing border security and often serving on the front lines of many of our Nation's most important national security initiatives. As the Supreme Court stated in *Hernandez*:

> [T]here is also a large volume of illegal cross-border traffic. During the last fiscal year, approximately 850,000 persons were apprehended attempting to enter the United States

> illegally from Mexico, and large quantities of drugs were smuggled across the border. In addition, powerful criminal organizations operating on both sides of the border present a serious law enforcement problem for both countries.
>
> On the United States' side, the responsibility for attempting to prevent the illegal entry of dangerous persons and goods rests primarily with the U. S. Customs and Border Protection Agency, and one of its main responsibilities is to 'detect, respond to, and interdict terrorists, drug smugglers and traffickers, human smugglers and traffickers, and other persons who may undermine the security of the United States.' 6 U. S. C. §211(c)(5). While Border Patrol agents often work miles from the border, some, like Agent Mesa, are stationed right at the border and have the responsibility of attempting to prevent illegal entry. For these reasons, the conduct of agents positioned at the border has a clear and strong connection to national security

Hernandez, *supra*, 140 S. Ct. at 746. The Petition for Writ of Certiorari accurately summarizes how far the decision of the Ninth Circuit could reach if not reversed by this Court. As set forth therein:

> The practical consequences of leaving the decision below intact are enormous. The country's borders are protected by 25,756 Customs and Border Protection officers covering 328 points of entry, and another 19,740 Border Patrol agents based at 131 Border Patrol

> stations. U.S. Customs & Border Prot., Snapshot: A Summary of CBP Facts and Figures (Mar. 2021), *https://ti-nyurl.com/xren6f6z* [hereinafter CBP Facts & Figures]. And the Ninth Circuit houses the majority of those agents. See U.S. Customs & Border Prot., U.S. Border Patrol Fiscal Year Staffing Statistics (FY1992-FY 2019) (2020), *https://tinyurl.com/mjnnn6n6*. . . .
>
> . . . Every day, 650,178 passengers and pedestrians cross America's borders. CBP Facts & Figures, *supra*. On the average day during fiscal year 2020, Border Patrol agents and Customs and Border Protection officers apprehended 1,107 of those individuals, arrested 39 wanted criminals, seized 3,677 pounds of narcotics, and confiscated $386,195 of undeclared or illicit currency. *Id*. This fiscal year, apprehensions have grown to an average of 4,000 people per day. See U.S. Customs & Border Prot., CBP Enforcement Statistics Fiscal Year 2021, *https://tinyurl.com/8xe2x4mh*.

(Petition for Writ of Certiorari, pp. 35-36.)

Despite the unique and important role played by Border Patrol agents, the Ninth Circuit extended *Bivens* to authorize actions against those federal agents for possible violations of the First and Fourth Amendments. Taken to its logical conclusion, its reasoning suggests that *Bivens* could now be extended to nearly all federal officers and agents who are involved in enforcing this Nation's immigration laws and protecting our national security.

The Ninth Circuit acknowledged that it was extending *Bivens* by permitting the action to go forward against a Border Patrol agent, but justified this extension as follows: "But it is a modest extension, in that border patrol and F.B.I. agents are both federal law enforcement officials." *Boule v. Egbert*, 998 F.3d 370, 387 (9th Cir. 2021). No other explanation or analysis is performed. This sparse legal reasoning could directly lead to the extension of *Bivens* to all federal agents who provide some measure of law enforcement functions; a tremendous expansion of a doctrine that has been cabined by this Court for over four decades. Amongst those who would be caught up in this expanded net of liability are those officers represented by *amicus* National ICE Council.

It therefore cannot be understated how consequential the Ninth Circuit's extension of *Bivens* would be. Now, federal agents, including Border Patrol and ICE officers, who face numerous dangers and threats every day in their multiple interactions with both citizens and non-citizens alike, must confront those potential threats with the knowledge that they may face liability for performing those duties. This knowledge creates a substantial risk that agents could hesitate in the performance of their duties, putting not only their own safety at risk, but also the security of the United States.

An analogy may be made to the factors considered by courts in assessing whether peace officers violate an individual's Fourth Amendment rights through the use of unreasonable force. As the Supreme Court long ago

recognized in its seminal decision in *Graham v. Connor*, 490 U.S. 386 (1989), the calculus in examining the reasonableness of a use of force "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97. That same allowance must be given here to federal officers engaged in the enforcement of our Nation's immigration laws, and it militates against extending *Bivens* to Border Patrol agents such as Petitioner.

Indeed, even the Ninth Circuit has cautioned against interpreting the "reasonableness" requirement in such a way that would cause tentativeness in officers, thereby endangering their safety. For example, in *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1992), officers were confronted with a man firing a rifle from an apartment building. *Id*. at 914. The officers approached the door and banged on it; when the door opened, the suspect pointed the gun at the officers who then responded with deadly force. *Ibid*. The plaintiff in *Scott* contended that "the officer should have used alternative measures before approaching and knocking on the door" behind which the suspect was located. This Court rejected a requirement that officers "find and choose the least intrusive alternative," stating: "Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves." *Id*. at 915.

Similarly, in *Fisher v. City of San Jose*, 558 F.3d 1069 (9th Cir. 2009), the Court there again rejected an attempt to impose additional requirements on officers facing critical situations. In that case, the Ninth Circuit weighed the police response to an armed standoff. *Id*. at 1075-76. The plaintiff contended police were required to obtain a warrant before entering the residence because the exigency that previously existed had dissipated by the time entry was made. *Ibid*. In rejecting the plaintiff's argument, the Ninth Circuit concluded:

> . . . Fisher's dissipation theory would have serious consequences beyond simply forcing police to engage in the empty gesture of obtaining a warrant in the midst of a dangerous and volatile standoff. It would introduce yet another element of uncertainty into the already complex and dangerous calculus confronting law enforcement in armed standoff situations. At minimum, the officers on the scene would be unable to devote their full attention to the actual threat and to ensuring public safety.

Id. at 1079.

The same concerns that animated the decisions in *Scott* and *Fisher* should lead this Court to reject the Ninth Circuit's latest decision extending *Bivens*. The risk and dangers federal officers engaged in immigration enforcement face every day is exactly the type of special factor this Court has relied upon and

cited—again and again—in declining to extend *Bivens* beyond its very limited scope.

Indeed, the costs imposed by an extension of *Bivens* to federal officers are substantial. Each of the hundreds of thousands of daily interactions between agents and individuals could give rise to expensive litigation and monetary damages—even when defending claims lacking merit. This case is a prime example: there has of yet been no determination whether Agent Egbert violated Boule's rights under the First or Fourth Amendments. Nevertheless, Egbert has now had to defend himself in District Court, to defend against the appeal filed by Boule to the Ninth Circuit, to seek a rehearing *en banc* from the Ninth Circuit, and lastly to petition this Court to reverse the erroneous decision of the appellate court. These are not minor costs; and if the decision below is not reversed, agents of the Border Patrol and ICE will now undertake their daily duties with the knowledge that one wrong action could lead to years of financially ruinous litigation—even if the agent did nothing wrong.

As this Court aptly stated two terms ago in *Hernandez*, "our watchword is caution" because when a court extends *Bivens* and "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*, *supra*, 140 S. Ct. at 742, 741. Moreover, it is Congress, and neither this Court nor the Ninth Circuit, who "is best positioned to evaluate 'whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers

and employees of the Federal Government' based on constitutional torts." *Id*. at 742 (internal citation omitted).

Here, given the possible effect an extension of *Bivens* to Border Patrol agents could have on their ability and the ability of all federal officers engaged in the enforcement of this Nation's immigration laws to quickly and safely perform their essential duties, the task of determining whether a damages remedy should be available against those agents should be left to Congress, especially given the national security interests implicated by the Ninth Circuit's unprecedented and aberrant extension of *Bivens*.

II. Structured accountability overseen by Congress exists to ensure officers conduct themselves ethically and in accordance with the civil rights and liberties of members of the public

In addition to alternative remedies available to redress injuries as discussed in Petitioner's merits brief, thus militating against authorization of a *Bivens* action (Pet. Br. pp. 32-35, 39-40; *Abbasi*, 137 St. Ct. at p. 1865), internal checks exist to enforce compliance with ethical duties and the civil rights and liberties of members of the public in carrying out official duties; indeed, that happened here when Boule filed a complaint, initiating a DHS investigation of Egbert. ER507.

U.S. Immigration and Customs Enforcement has policies requiring accountability of its employees,

including an Employee Code of Conduct setting forth "general standards of conduct" all employees are expected to follow, and a Table of Offenses and Penalties identifying the most common types of misconduct and a suggested range of penalties commensurate with the misconduct. (*https://www.oig.dhs.gov/sites/default/files/assets/2020-07/OIG-20-54-Jul20.pdf*)

Each component of DHS has a process to receive, investigate, and adjudicate allegations of employee misconduct occurring on and off duty, which may result in discipline up to and including termination. (See, e.g., 5 C.F.R. Part 2635, and *id*. at §2635.105) According to the statute, this includes investigations of allegations of possible "abuses of civil rights or civil liberties." (6 U.S.C. §345(a)(6)) Allegations are investigated by the DHS Office of Inspector General ("OIG"), established by the Homeland Security Act of 2002 (Public Law 107-296). If OIG declines, the matter is handled by the DHS component (6 U.S.C. §345(a)(6)), who refers the remaining misconduct cases to its respective Office of Professional Responsibility ("OPR"). OPR's stated responsibility is "upholding the agency's professional standards" through a "multi-disciplinary approach" of security, inspections, and investigation, including "impartially investigating" allegations of serious employee misconduct. (*https://www.ice.gov/about-ice/opr*) During the adjudication process, delegated officials or a central office group, are required to consider and decide discipline using their respective Table of Offenses and Penalties in conjunction with relevant mitigating and aggravating circumstances, and established criteria

known as *Douglas Factors*. (*Douglas v. Veterans Admin*., 5 M.S.P.R. 280 (1981))

"On a cyclical basis," OIG's Office of Investigations conducts "quality assurance reviews of the internal affairs unit" in component agencies of DHS to address handling of allegations, the quality and timeliness of investigations, and reports the results. (*https://www.oig.dhs.gov/sites/default/files/assets/2020-07/OIG-20-54-Jul20.pdf*) Congress conducts oversight by way of the Committees on the Judiciary, Homeland Security and Governmental Affairs, and Subcommittee on Oversight and Management Efficiency to ensure the quality, independence, and timeliness of investigations in employee misconduct with periodic reporting through the U.S. Government Accountability Office—the audit, evaluation, and investigative arm of Congress. This includes review of CBP's, ICE's, and TSA's employee misconduct investigation and adjudication process, as well as reviewing policies and procedures regarding the process, management directives, conducting site visits and reviewing physical files, and interviewing officials from each component involved in the process, including CBP's and ICE's Offices of Professional Responsibility. (See, e.g., *July 2018, GAO-18-405, Department of Homeland Security, Report to Congressional Requesters*)

The Department of Homeland Security and its components, including ICE and CBP, have structures to enforce accountability of their officers, through ethical standards, avenues for receiving complaints or allegations of misconduct, investigations, corrective and

disciplinary action, and oversight of those procedures, investigations, and adjudications through the Office of Inspector General, and, through its various committees, Congress. In addressing "whether the Judiciary should alter the framework established by the political branches for addressing cases [of misconduct]" of officers and agents engaged in national security, *Hernandez*, 140 S. Ct. at 746, the foregoing counsels against such interference.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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