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

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QUESTIONS PRESENTED

1. Whether a cause of action exists under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), for First Amendment retaliation claims.

2. Whether a cause of action exists under *Bivens* for claims against federal officers engaged in immigration-related functions for allegedly violating a plaintiff's Fourth Amendment rights.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE**

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

Like all Americans, Border Patrol agents must comply with the Constitution and federal law. They do a remarkable job of fulfilling that duty under extreme conditions. But they are humans. And humans make mistakes. That does not mean, however, that Border Patrol agents are personally liable when people allege that they violated the Constitution. Rather, as with any area of law, plaintiffs can sue for damages only when Congress or the Court has created a cause of action.

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

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

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

For decades, this Court has declined to create new damages actions from thin air. And for good reason. After a brief foray into making law—the "bad old" days—this Court realized that judge-made damages actions violate core separation-of-powers principles. In short, this Court no longer believes that federal courts have unilateral authority to "make good the wrong done." *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 396 (1971) (quotation omitted).

The Ninth Circuit, however, stubbornly has declined to follow this Court's lead, finding new implied cause of action after new implied cause of action. When possible, it drapes the veil of precedent over what is in reality a newly created cause of action. That is the tack it took here by holding that Boule's claims fit within this Court's precedent. They do not. The Ninth Circuit's refusal to heed this Court's warnings about creating new damages actions warrants reversal.

SUMMARY OF ARGUMENT

I.A. The Court has extended *Bivens* only twice since 1971—both times in the decade following that case. Over the past forty years, the Court has not created a single cause of action for money damages under the Constitution. Although this Court declined to consider overturning *Bivens* here, the problems with *Bivens* counsel against extending it in any case.

B. One special factor that the Court has long considered is separation-of-powers principles. And the failure to recognize new *Bivens* actions is grounded in these concerns. For over thirty years, the Court has recognized that it deviated from the proper

judicial role in the mid-20th century. By implying damages actions under the Constitution, the Court violated key separation-of-powers principles. Since then, the Court has returned to its proper function of interpreting—not making—laws.

C. Separation-of-powers concerns are not the only special factor that counsels against expanding *Bivens* further. Lower courts have proven incapable of deciding when a specific factual scenario arises in a new context. Some activist judges—particularly in the Ninth Circuit—try to shoehorn every case possible into an existing *Bivens* category. Thus, the Court should not expand the *Bivens* remedy further.

II.A. The national security concerns that inhere in keeping our borders safe preclude any expansion of *Bivens* here. Boule's argument that this case does not involve border security or national security is laughable. Border Patrol agents are charged with one task—protecting our nation's ports of entry and borders. And if the case did not involve these sensitive areas, Boule would not have filed a heavily redacted brief in opposition.

At least four times, the Court has declined to create new *Bivens*-type actions or refused to apply such an action to a new context because of security concerns. The security concerns that inhere in finding constitutional causes of action against Border Patrol agents protecting our nation's borders are even more serious. *Bivens* claims are unavailable in cases raising security concerns.

B. The First Amendment is particularly inapt for *Bivens* remedies. Allowing *Bivens* claims for First Amendment violations could thus lead to a flood of

lawsuits against government officials acting in good faith. The Court should not open this Pandora's Box.

ARGUMENT

I. THIS COURT SHOULD NOT EXTEND *BIVENS* BEYOND THE THREE CATEGORIES OF CLAIMS IT HAS RECOGNIZED.

Egbert's petition asked this Court to reconsider *Bivens*. Pet. i. This Court demurred and granted certiorari only on whether to expand *Bivens* to two new contexts. But the concerns that Egbert and IWLC raised at the certiorari stage should still play a role in how the Court decides the two questions presented because those concerns establish that *Bivens* actions should be sharply limited to the three contexts in which this Court has previously recognized them.

A. *Bivens* Was Decided During An Era That Misunderstood Separation-Of-Powers Issues.

It was 1971 and a much different time when this Court created the first implied cause of action under the Constitution. *See Bivens*, 403 U.S. at 391-97. There, the Court found that an individual could sue Federal Bureau of Narcotics agents for violating his Fourth Amendment right to be free from unreasonable searches and seizures because there was no "explicit congressional declaration" barring claims for money damages. *Id.* at 397.

About ten years later, the Court implied two similar causes of action under the Constitution. First, it created a cause of action under the Fifth Amendment for a congressman's sex discrimination against a federal employee. *See generally Davis v. Passman*, 442 U.S. 228 (1979). Second, it created a cause of action under the Eighth Amendment for

failing to provide prisoners appropriate medical care. *See generally Carlson v. Green*, 446 U.S. 14 (1980). In both cases, the Court created the causes of action because Congress had failed to *bar* them. *Davis*, 442 U.S. at 246-47 (citation omitted); *Carlson*, 446 U.S. at 19.

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

When considering extending *Bivens* to a new context, the Court looks at whether there are "any special factors" showing that Congress might not want a *Bivens* remedy in that context. *See Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). This includes an inquiry into "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* (citation omitted). If there is any reason to think Congress may not want a *Bivens* remedy, the Court will not create one.

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

The Constitution vests "[a]ll legislative Powers" with Congress. U.S. Const. art. I, § 1; *see Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475-76 (2018). The Judiciary, on the other hand, exercises judicial power. U.S. Const. art. III, § 1. The distinction between the legislative power and the judicial power

disappears when courts imply damages actions that Congress did not create.

1. "[T]he separation of powers is itself a special factor" that counsels against extending *Bivens*. *Oliva v. Nivar*, 973 F.3d 438, 444 (5th Cir. 2020) (citing *Abbasi*, 137 S. Ct. at 1862). And this factor alone counsels in favor of limiting *Bivens* actions to the specific and limited circumstances in which this court has already implied constitutional causes of action.

By considering special factors, the Court ensures that there are no collateral effects from implying a cause of action for money damages under the Constitution. *See Elhady v. Unidentified CBP Agents*, 18 F.4th 880, 883 (6th Cir. 2021) (citing *Abbasi*, 137 S. Ct. at 1857-58). Although it may have ultimately made the wrong decision, the *Bivens* Court itself considered separation-of-powers principles as a special factor.

The *Bivens* Court held that one special factor that would counsel against implying a cause of action for money damages was if the issue involved "federal fiscal policy." *Bivens*, 403 U.S. at 396 (quotation omitted). The Court explained that it is inappropriate to imply causes of action in those cases. *See id.* (citing *United States v. Standard Oil Co.*, 332 U.S. 301, 311 (1947)). As the Court recognized, the Constitution leaves questions about fiscal policy to the political branches. *E.g.*, U.S. Const. art. I, § 8 cls. 1, 2. In other words, the Court recognized that the separation of powers is a special factor that courts must consider before implying a cause of action for money damages under the Constitution.

That was not the only separation-of-power concern that the *Bivens* Court considered as a special factor

when deciding whether to imply a cause of action. It stated that it is improper to allow suits for congressmen exceeding the authority delegated to them by Congress. *Bivens*, 403 U.S. at 396-97 (citing *Wheeldin v. Wheeler*, 373 U.S. 647 (1963)). Allowing those suits would infringe on Congress's authority to sanction its members. *See* U.S. Const. art. I, § 5 cl. 2.

So the Court in *Bivens* had the right idea. It considered whether recognizing a cause of action for money damages under the Constitution violates the separation of powers. If it does, that is a special factor that should foreclose suit. The only thing that has changed is the Court's understanding of separation-of-powers principles. Now, the Court better understands how the Judiciary can also violate those principles by taking from Congress the duty to create damages actions. This understanding precludes any further expansion of *Bivens*.

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

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

The Court has since abandoned that "*ancien regime*[] and ha[s] not returned to it since." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). Now the Court charts a "far more cautious course before finding implied causes of action." *Abbasi*, 137 S. Ct. at 1855.

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

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

Since then, the Court has emphasized that, like with statutes, when creating new causes of action under the Constitution, "'central to [the] analysis' are 'separation-of-powers principles.'" *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020) (quoting *Abbasi*, 137 S. Ct. at 1857). The Court therefore "consider[s] the risk of interfering with the authority of the other branches" when asking "whether 'there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy.'" *Id.* (quoting *Abbasi*, 137 S. Ct. at 1858).

If anything, the Court should be warier of implying causes of action under the Constitution than

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

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

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

Yet the Ninth Circuit disapproved of that policy decision and read causes of action into the Constitution. If the Ninth Circuit was trying to "exercise[] a degree of lawmaking authority" as a common-law court, that attempt fails because there is no federal common law. *Hernandez*, 140 S. Ct. at 742 (citations omitted).

The best way to reaffirm core separation-of-powers principles is to reject further expansion of *Bivens*. Whenever the Court implies a cause of action for

money damages under the Constitution, it infringes on Congress's and the President's constitutional authority. That is a special factor that strongly cautions against extending *Bivens*. By extending *Bivens*, a ruling for Boule would chip away at the foundations of our constitutional republic. Thus, the Court should limit *Bivens*'s scope to the three specific categories of cases that the Court recognized over forty years ago.

C. Courts Would Struggle To Limit Any New Category Of *Bivens* Actions.

Courts struggle to limit *Bivens*. Lower courts frequently use *Bivens* to create new damages actions whenever they think that plaintiffs deserve recourse for constitutional violations.

The Ninth Circuit, for example, "could think of no reasons to hesitate" before creating these causes of action. Pet. App. 17a (Bumatay, J., dissenting). There are at least five: "(1) congressional silence, (2) [this] Court['s] precedent, (3) the precedent of [other] circuits, [] (4) the various potential alternative remedies available to Boule," and (5) security concerns. *Id.* The disconnect between the Ninth Circuit's decision and the dissent from denial from rehearing *en banc* shows how courts struggle to apply *Bivens*.

So too for the *nine* times lower courts have (erroneously) allowed *Bivens* suits in new contexts that this Court has reviewed. Each time the Court has reviewed those decisions, it has found that the plaintiffs could not bring *Bivens* suits.

Twice the Court reversed creation of an implied constitutional cause of action because Congress had provided other remedies. In *Hui v. Castaneda*, 559

U.S. 799 (2010), the Ninth Circuit found that, under *Bivens*, a detained immigrant could sue a U.S. Public Health Service doctor for ignoring his medical needs. Reversing, this Court held that 42 U.S.C. § 233(a) precluded the *Bivens* action because the Federal Tort Claims Act was the exclusive cause of action against PHS doctors. *Hui*, 559 U.S. at 805-07.

Although the Court used slightly different reasoning, the result was the same in *Schweiker v. Chilicky*, 487 U.S. 412 (1988). There, a claimant sued Social Security officials for improperly revoking her benefits. The Ninth Circuit created a claim for her under the Fifth Amendment. This Court reversed because the Social Security statute allowed her to pursue remedies through the administrative process and federal appeal. *See id.* at 424-29.

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

In three cases—two from the Ninth Circuit—the Court reversed extending *Bivens* to new classes of defendants. Most recently, in *Minneci v. Pollard*, 565 U.S. 118 (2012), a prisoner sued private individuals for violating the Eighth Amendment by providing him inadequate medical care. The Ninth Circuit created an implied cause of action for Eighth Amendment claims against non-government actors. This Court

reversed and held plaintiffs may not bring *Bivens* suits against non-government workers. *Id.* at 126-31.

Similarly, in *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001), a prisoner sued a halfway house operator for allegedly violating his constitutional rights. The Court held that plaintiffs cannot bring *Bivens* actions against private corporations. *Id.* at 70-74. And in *FDIC v. Meyer*, 510 U.S. 471 (1994), the plaintiff sued a federal agency for allegedly infringing his due-process rights. The Ninth Circuit found that *Bivens* allowed such an implied cause of action. This Court reversed because *Bivens* does not extend to suits against federal agencies. *See id.* at 483-86.

Relevant here, the Court has declined to extend *Bivens* actions because of security concerns. *Hernandez*, 140 S. Ct. at 746, 749; *Abbasi*, 137 S. Ct. at 1861; *United States v. Stanley*, 483 U.S. 669, 678-86 (1987); *Chappell v. Wallace*, 462 U.S. 296, 298-305 (1983).

The gap between how the Court thought *Bivens* would operate and the on-the-ground reality shows that lower courts would struggle with applying a ruling extending *Bivens* to two new contexts. The Court has limited *Bivens* claims to three narrow classes of cases and has instructed lower courts on how to apply that precedent. Yet nine times over the past several decades the Court has found that the lower courts overstepped their bounds and improperly expanded *Bivens*'s scope. It will face even more of these erroneous decisions if it extend *Bivens* in two new contexts.

II. THE NINTH CIRCUIT ERRED BY EXPANDING *BIVENS* IN THESE TWO NEW CONTEXTS.

Even if the Court declines to hold that *Bivens* claims are limited to the three narrow circumstances that it recognized decades ago, it should still reverse. Extending *Bivens* to claims involving searches at the border would harm our nation's security. And Boule has other remedies for his First Amendment claim.

A. The Ninth Circuit Ignored The Security Concerns Inherent With Creating *Bivens* Claims Against Border Patrol Agents.

Despite the veritable mountain of authority from this Court that forbids the expansion of *Bivens*-type actions, especially when doing so would pose grave security risks, the Ninth Circuit created not one but *two* such actions here. The lower court inferred a *Bivens*-type action for alleged constitutional violations of not only the First but also the Fourth Amendment against Border Patrol agents.

1. In his cert-stage brief, Boule argues that this case does not involve security concerns. BIO 15-17, 29-30. But the rest of the brief reveals the weakness of the argument. Although Egbert filed an unredacted public copy of the petition, Boule thought it necessary to redact whole pages of his brief. Other parts of the brief are also redacted in the public filing. Why? The answer is clear: There are security concerns with releasing some case details. There is no way to reconcile the filing of such a heavily redacted brief with the arguments the brief contains.

Boule's argument also conflicts with the overwhelming weight of authority from the courts of appeals. These courts hold that any action by Border

Patrol agents that can reasonably be linked to protecting our nation's borders raises national security concerns. For example, in *Elhady* the plaintiff argued that he could bring a *Bivens* claim for how Border Patrol agents treated him in a detention cell. 18 F.4th at 881-82. Under Boule's reasoning, that claim would not raise national security concerns because it didn't happen while actively patrolling the northern border. But the Sixth Circuit had no trouble holding that the case implicated national security concerns. *Id.* at 886-87.

The Fourth Circuit's decision in *Tun-Cos v. Perrotte*, 922 F.3d 514 (4th Cir. 2019), shows just how far national security concerns extend. There, a group of men who lived in Virginia—far from any border—sued Immigration and Customs Enforcement agents for allegedly violating their Fourth Amendment rights. *Id.* at 517. Still, the Fourth Circuit held that the claims raised national security concerns that counseled against extending *Bivens* to that new context. *See id.* at 525-26.

This case raises more direct national security concerns than did *Elhady* or *Tun-Cos*. Egbert's actions happened near the nation's northern border while he was investigating illegal smuggling activities. His work is unquestionably linked to national security. Thus, the Court should brush aside Boule's specious arguments that this case does not involve border security.

2. This Court's precedent confirms the circuit courts' analysis about why affirming the Ninth Circuit's decision would raise serious security concerns. "Since regulating conduct of agents at the border unquestionably has national security implications, the risk of undermining border security

provides reason to hesitate before extending *Bivens* into this field." *Hernandez*, 140 S. Ct. at 747. The Court therefore declined to extend *Bivens* to the context of a cross-border shooting because border-related issues are always national security issues. As it explained, the "daunting task" of protecting our nation's borders "has a clear and strong connection to national security." *Id.* at 746; *see Elhady*, 18 F.4th at 885.

The Constitution leaves to Congress and the President "delicate[and] complex" national security issues "for which the Judiciary has neither aptitude, facilities, nor responsibility." *Hernandez*, 140 S. Ct. at 749 (cleaned up). Permitting suits for money damages would discourage agents from doing everything possible—consistent with federal law—to protect our nation's borders. Personal liability would hang over the heads of agents whose very job description includes intercepting drugs, human smugglers, and terrorists every day. Such liability would cause well-meaning agents to err on the side of caution while protecting our nation.

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

Hernandez was just another in a line of cases holding that security concerns counsel hesitancy before extending *Bivens*. In *Abbasi*, the plaintiffs sued for the treatment they received while detained after the September 11 terrorist attacks. Even though the plaintiffs' case appeared to fit within the four corners

of *Carlson*, this Court found a *Bivens* action was impermissible where such claims would interfere with "sensitive issues of national security." *Abbasi*, 137 S. Ct. at 1861.

Four years prior, in *Chappell*, the Ninth Circuit had held that a seaman could sue Navy officers for racial discrimination under *Bivens*. The Court reversed because Congress heavily regulates military affairs, which are key to national security. *See Chappell*, 462 U.S. at 298-305; *see also Stanley*, 483 U.S. at 678-86 (miliary affairs key to national security).

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

The Ninth Circuit stubbornly continues to create new causes of action for money damages under the Constitution. This time, it once again waded into a sensitive area—our nation's border security. This interference with Border Patrol agents' ability to protect Americans conflicts with this Court's recent *Bivens* decisions that decline to create *Bivens*-type actions because of national security concerns. Thus, the Court should reverse the Ninth Circuit's decision.

B. This Court's Precedent Forecloses *Bivens* Claims For First Amendment Retaliation Claims.

Boule's First Amendment *Bivens* claim is invalid because he has other potential remedies. When considering extending *Bivens* to a new context, the Court reviews "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550. Boule has other potential remedies for the First Amendment retaliation claim. He could sue Customs and Border Protection for a Privacy Act violation. *See* 5 U.S.C. § 552a(g)(1)(D). Or he could sue under 26 U.S.C. § 6103 for improperly disclosing tax information.

In his brief in opposition, Boule contends that Egbert forfeited this argument. BIO 20. This contention lacks merit. As the Fifth Circuit has explained, a party cannot forfeit or waive an argument that courts should not recognize a *Bivens* claim. *See Oliva*, 973 F.3d at 444 n.2. This is because the Court requires the inquiry before extending *Bivens*. *See Hernandez*, 140 S. Ct. at 743.

Realizing the weakness of his argument, Boule also argues that he could not successfully obtain relief in these potential actions. BIO 20-21. But this argument fares no better. As the D.C. Circuit has explained, just because an individual cannot recover under possible alternatives does not mean that those alternatives are unavailable. *See Loumiet v. United States*, 948 F.3d 376, 382-83 (D.C. Cir. 2020). Thus, Boule cannot clear this hurdle to extending *Bivens* to First Amendment retaliation claims.

But even if he could, the Court should still decline to extend *Bivens* to First Amendment retaliation claims because special factors counsel against expansion. First, as noted above, the separation of powers is one such concern. Security concerns are another reason to hesitate before extending *Bivens* in this especially sensitive context. Even in the First Amendment context, CBP's "role in securing public safety is so significant that [courts] ought not create a damages remedy in this context." *Vanderklok v. United States*, 868 F.3d 189, 209 (3d Cir. 2017).

The courts of appeals have recognized that First Amendment retaliation claims are easy to make against federal officers. *See, e.g.*, *Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 533 (6th Cir. 2020). This is particularly true in the rural areas that many Border Patrol agents work. Unlike in the prison context or normal search-and-seizure context, rarely are other federal officers present to observe an interaction. This means that plaintiffs like Boule can file *Bivens* suits and survive a motion to dismiss and motion for summary judgment as the case often turns on credibility of the two parties.

So besides the normal difficulty deciding whether a *Bivens* claim arises in a new context, *see* § 1.C *supra*, First Amendment retaliation claims present their own workability concerns. The claims will be difficult to prove—and disprove. This is a special factor counseling against expanding *Bivens* to this new context.

* * *

Lower courts continue to ignore this Court's decisions limiting *Bivens* to three narrow classes of cases. Some do their best to allow suits for money damages anytime a federal officer allegedly violates

someone's constitutional rights. This flouting of the Court's jurisprudence will continue unless the Court stops extending *Bivens*.

This Court should make clear that *Bivens* actions may not be extended beyond those three narrow classes of cases. But even if the Court does not go that far, it should reject extending the remedy to First and Fourth Amendment violations at the border. Doing so would have disastrous consequences for our nation's security.

CONCLUSION

This Court should reverse.

Respectfully submitted,

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