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 COUNCIL ON AMERICAN-ISLAMIC RELATIONS AND ANAS ELHADY AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE[1]

A. The Council on American-Islamic Relations

Founded in 1994, the Council on American-Islamic Relations has a mission to enhance understanding of Islam, protect civil rights, promote justice, and ensure the constitutional rights of Muslim Americans. Unfortunately, the Government often targets innocent Muslim-Americans for surveillance, enhanced screening, and other measures.

The result is that Muslim-Americans stand a better than average chance of being detained at the border. And while the decision to detain or search an individual may have implicate policy, how agents treat those individuals does not.

These are not theoretical concerns. CAIR is aware of or has litigated a slew of cases involving border patrol agents violating Muslim-Americans' constitutional rights. From placing them in freezing conditions after taking away items of clothing,

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici and their counsel funded its preparation or submission. Both parties have consented to the filing of this brief.

to holding them at gunpoint for no discernible reason, CBP agents have a bad record of showing little to no respect for constitutional rights.

B. Anas Elhady

Anas Elhady is a Yemeni-born United States citizen. Elhady was a 22-year-old student at Henry Ford University in the spring of 2015 when he went to Canada for a brief vacation. A border patrol agent detained Elhady when he returned to the United States, and took him to a stateside facility for interrogation. The agent took his jacket and shoes, and placed him into a freezing cold cell and left him there for hours. Elhady continually asked for a blanket and was ignored. His condition deteriorated. Eventually, after asking for medical attention several times, he passed out due to hypothermia. Agents then handcuffed an unconscious Elhady and took him to a nearby hospital for treatment.

The district court ruled that Elhady could pursue a *Bivens* claim, because no special factors counseled otherwise. But, citing *Hernandez*, the Sixth Circuit ruled that this Court has barred all claims from anything involving agents at the border under all circumstances.

SUMMARY OF ARGUMENT

The Court in *Hernandez* ruled that a cross-border shooting committed by a Customs and Border Protection agent could not give rise to a *Bivens* claim. Foreign policy and national security considerations justified that decision. The United States and Mexico took polar opposite positions on how the situation should be handled. *Hernandez v. Mesa*, 140 S. Ct. 735, 744-745 (2020). (citations omitted). The Court also decided that attempting to regulate the conduct of an agent stationed "right at the border" who had "the responsibility of prevent[ing]" illegal entry implicated national security concerns. *Id.* at 746. "Foreign policy and national security decisions are 'delicate, complex, and involve large elements of prophecy,'" which counseled hesitation. *Id.* at 749.

But *Hernandez* does not say that *Bivens* will never be available just because a CBP agent is involved. Nor does it say that it will never be available at the border or when a federal agent is performing an "immigration related function." In this case, a CBP agent assaulted a United States citizen, on his own property, when that citizen exercised his constitutional right to ask that government agent

to leave. The Ninth Circuit properly ruled that *Hernandez* does not bar a *Bivens* claim in this context.

This Court should take the opportunity to clarify *Hernandez*'s contours. Lower courts are overreading its holding. Elhady's case is perhaps the best example.

Also, courts that have limited *Bivens* in immigration related matters have always done so because of the particularities of immigration policy, congressionally enacted remedial schemes, and demonstrable national security concerns. None of those things are present here nor are they present in Elhady's.

ARGUMENT

I. Most "Immigration Related Functions" Resemble Routine Law Enforcement and Will Not Concern Policy Choices.

The Court's primary concern in *Hernandez* was the act of securing the border itself. *Hernandez*, 140 S. Ct. at 747. Preventing things like drug smuggling, illegal entry, and such counseled hesitation.

But just like something occurring at a port of entry is different than something occurring across the

border, immigration is different than border security. For starters, it is currently estimated that there are almost 45 million immigrants living in the United States. Abby Budiman, *Key Findings about U.S. Immigrants,* Pew Research (Aug. 20, 2020) https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/. Most are here legally. The United States boasts the largest immigrant community on the planet, and the largest in recorded human history.

This Court has recognized that those immigrants comprise "the people protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments…" *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)(rejecting claim that Fourth Amendment applied to search in Mexico).

While protected by the Constitution, those immigrants are also subject to the various federal laws and regulations about immigration. "Federal governance of immigration and alien status is extensive and complex." *Arizona v. United States*, 567 U.S. 387, 395 (2020). That governance runs the gamut from mundane (immigrants must keep proof of status on their person 8 U.S.C. § 1304(e)) to extraordinary (asylum available to individuals who

are subject to political persecution 8 U.S.C. § 1158(b)(1)(B)(i)).

And multiple agencies engage in "immigration related activities." CBP are responsible "for determining the admissibility of aliens and securing the country's borders." *Arizona*, 567 U.S. at 397. Immigration and Customs Enforcement has broader authority, and conducts investigations within the United States itself.

ICE often partners with other federal agencies – and state agencies – through the Homeland Security Investigations. Immigration and Customs Enforcement, https://www.ice.gov/features/partnerships-work (last visited January 25, 2022). Under 8 U.S.C. § 1357(g), the Attorney General and state or local law enforcement agencies can enter into agreements that allow those state or local agencies to perform immigration related functions. ICE also operates the Law Enforcement Support Center that provides immigration status information to "federal, state, and local officials around the clock." *Arizona,* 567 U.S. at 397.

This means that any number of state and local agencies could do something "immigration related" at any given time thousands of miles from the borders. And it is easy to distinguish the sort of snap decisions that may be made to stop a sudden, illegal

border crossing, and the kind of routine, far more common "every day" type functions.

For example, as mentioned above, aliens are required to carry proof of registration. Failure to do so is a misdemeanor subject to a maximum $100 fine or thirty days in jail.

This is not something that is unique to immigration. Carrying identification is a common requirement in various contexts. A person driving must have a driver's license on them to both prove they are qualified to drive and to give law enforcement the ability to verify their identity if stopped. Law enforcement officers know how to request identification and know what to do if a person either does not have an I.D., or refuses to provide it. An ICE agent requesting that identification is doing something that law enforcement officers across the country do each day. There's nothing about it being immigration related that creates a "new context."

It is important to note that, were this Court to rule for Boule, it will not open a floodgate of *Bivens* claims on immigration-related matters. Most claims will be covered under the remedial scheme in the Immigration and Naturalization Act. Courts have recognized that Bivens should not be extended in the immigration context **to situations when the INA provides a remedy**.

For example, in *Maria S. v. Garza*, 912 F.3d 778 (5th Cir. 2019) a Mexican national's estate sought a *Bivens* remedy for procedural due process violations in her removal. *Id.* at 784. The Fifth Circuit declined because the INA provides a mechanism for bringing that claim administratively. "Thus, if individuals' rights are violated, they will generally have recourse under existing law." *Id.* Similarly, the Fourth Circuit held that the INA included "provisions specifically designed to protect the rights of illegal aliens," and that this suggested a *Bivens* remedy should not be available when INA enforcement is at issue. *Tun-Cos v. Perrotte*, 922 F.3d 514, 526 (4th Cir. 2019)(citations omitted). The INA's "elaborate remedial scheme" counsels against a *Bivens* remedy. An illegal alien who seeks to challenge an immigration action can bring their claims under the INA.

But Boule's claim is not based on anything related to immigration. Boule is a United States citizen who was assaulted on his private property. Because of that he cannot bring any claims under the INA. The same is true of Elhady.

II. The Special Factors Counseling Hesitation Present in *Hernandez* are Not Always Present in Situations at or near the Border

Congress and the Department of Homeland Security have likewise recognized the difference between the border and immigration. For example, 8 U.S.C. § 1357(a)(3) provides that a warrant is not needed to enter private lands only for "patrolling the border to prevent the illegal entry of aliens into the United States." This warrant exception is limited to places 25 miles from "any such external boundary. . ." But the warrant exception itself is limited to patrolling the border itself. It is not a blanket exception to enter private lands for any purpose.

This statute also provides that a warrant is not needed to search a vehicle "for aliens" a "reasonable distance" from the border. 8 C.F.R. 287.1 defines that distance as 100 miles. But, again, the exception is limited. A warrantless search can be conducted within that 100 miles only for people who may be here illegally. This further shows an appreciation of the difference between securing the border and immigration more generally. No court has ever held, nor has Congress ever suggested, that

immigration generally poses the same concerns as securing the border itself.

On top of that, immigration and the border are different from things that occur cross-border. The primary driver in *Hernandez* was the fact that the cross-border context put two special factors at play: foreign policy and national security.

a) Foreign Policy

A "potential effect on foreign relations" will be implicated by a cross border shooting. *Hernandez*, 140 S. Ct. at 741. "A cross-border shooting is by definition an international incident; it involves an event that occurs simultaneously in two countries and affects both countries' interests." *Id.* And it did lead to vehement disagreement between the United States and Mexico about what to do.

The United States Department of Justice took the position the agent "did not act inconsistently with [CBP] policy or training regarding use of force." *Id.* The Government of Mexico, by contrast, sought extradition for criminal prosecution. This led the two governments to seek a diplomatic solution. In the context of *Hernandez*, the Court felt that providing a *Bivens* remedy could lead to "embarrassment of our government abroad through multifarious pronouncements by various depart-

ments on one question." *Id* (citing *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209, 248 U.S. App. D.C. 146 (D.C. Cir. 1985)(quotations omitted).

This simply will not be the case every time a federal agent does something that touches on immigration or at the border itself. Put another way, a rogue federal agent manhandling a 30-year resident from Belize because he didn't get out his papers quickly enough will not implicate larger foreign policy concerns.

This case shows that. The Turkish and Canadian governments have no interest here on the availability in this case. Same with Elhady's situation. There is no other government to weigh in there, either – he's a citizen, and there are no non-citizens involved.

b) National Security

Hernandez also looked to national security. The Court noted one of the CBP's 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." *Id.* at 746 (citation omitted). Some agents, like the agent in *Hernandez,* "are stationed right at the border and have the responsibility of attempting to prevent illegal

entry…" Preventing illegal entry "of dangerous goods and persons" presented a national security concern.

Two primary points need to be made here.

First, Boule's case does not present those concerns and, as will be discussed, neither does Elhady's. The Turkish national had already cleared through borders and customs. Elhady was a United States citizen, with an absolute right to enter the country, not reasonably suspected of any crime or carrying any contraband. And even if the fact of Elhady's detention had some national security implication, but the conditions of his confinement do not.

Second, while certain border situations involve national security interests, the vast majority of border and general immigration work does not. While this Court has not commented on this specifically, there has always been a delineation between day-to-day civilian policing and matters of national security. See e.g., *Jacobs v. Alam*, 915 F.3d 1028, 1038 (6th Cir. 2019)("standard law enforcement operations" do not present national security issues present in *Hernandez* and *Ziglar*).

Admittedly, there is a lot of work at the border and ports of entry. According to the CBP's own numbers, nearly 500,000 people, $7.6 billion in im-

ported products, and 101,000 entries of merchandise are processed through the border every *day*. U.S. Customs and Border Protection, *On a Typical Day in Fiscal Year 2021, CBP...,* https://www.cbp.gov/newsroom/stats/typical-day-fy2021 (last accessed January 25, 2022. But compare this to 25 arrests of wanted criminals and around $342,000 of allegedly illicit currency. endeavor. The work overwhelmingly involves law abiding civilians, perhaps more than any other law enforcement agency in the United States. After all, the police don't normally interact with civilians unless there has been some kind of alleged infraction. CBP engages with hundreds of thousands of civilians – many of them United States citizens - every day. And while there may be dramatic situations that sometimes present themselves (someone making a run for the border, for example), the vast majority of CBP work is mundane, and no different in either form or effect from any number of federal agents already subject to Bivens claims. And as this Court correctly noted, many CBP agents work "miles from the border," and will never be forced to make a snap decision that concerns national security or foreign policy.

III. Courts are Misconstruing *Hernandez*

Although this Court did not state – or even imply – that *Hernandez* would extend to purely domestic matters, that is what some courts are doing. The Sixth Circuit recently held that *Hernandez* meant that a United States citizen who was held for hours in freezing temperatures had no Bivens remedy.

Elhady, a United States citizen originally from Yemen, was detained at the Ambassador Bridge checkpoint between the United States and Canada. *Elhady v. Bradley*, 438 F. Supp. 3d 797, 801 (E.D. Mich. 2020).

Although Elhady was a United States citizen with an absolute right of entry into the country, the *Bivens* claim in Elhady did not involve the decision to detain him. Instead, it solely involved the conditions of his confinement while detained.

The CBP took his shoes and jacket away and placed him into a freezing cell. *Id.* at 803. For four hours. CBP refused to provide him with a blanket, despite being both aware of the conditions in the cell and his requests. Elhady eventually passed out and was later hospitalized. *Id.* at 806.

The district court found that Elhady had a Bivens claim, and then, after discover, found that

the officer who supervised his detention was not entitled to qualified immunity at the summary judgment stage. *Id.* at 816. The defendant appealed the qualified immunity determination. But the court, sua sponte, raised and decided the *Bivens* issue, ruling that *Hernandez* barred Elhady's claim.

The Sixth Circuit felt that the simple fact that the claim was against "agents at the border" meant that it "unquestionably [had] national security implications." *Elhady v. Unidentified CBP Agents,* 2021 U.S. App. LEXIS 34407, *12 (6th Cir. 2021)(*reh'g en banc pending).* It was also of no moment that Elhady himself is a United States citizen. *Id.* It did not matter that Hernandez "involved a cross-border shooting whereas this case concerns conditions of confinement in a stateside facility…" All that mattered to the court was "that [*Hernandez* and *Elhady*] involve claims against border-patrol officers serving in their capacity as agents protecting the border. In this context, the Supreme Court has spoken: Bivens is unavailable." *Id.*

In response to the district court's point that the defendants "offered no plausible explanation why intentionally placing a detainee in a freezing-cold holding cell protects national security," the court again cited *Hernandez.* The question, according to the court, "is not whether national security requires such conduct—of course, it does not—but whether

the Judiciary should alter the framework established by the political branches for addressing cases . . . at the border." *Id.* (citations omitted).

The Sixth Circuit overreached. First, the court is omitting a crucial part of that quote. The entire quote asks whether the judiciary should "alter the framework established by the political branches for addressing cases **in which it is alleged that lethal force was unlawfully employed by an agent** at the border." *Hernandez*, 140 S.Ct. at 746 (emphasis added). This Court did not create a blanket rule for the border. In fact, that statement is informed by the subsequent discussion about Congress' long history of providing statutory remedies for acts on foreign soil. *Id.* at 747-749.

Second, that quote arose from an argument raised by the *Hernandez* petitioner. The petitioner argued that "'shooting people who are just walking down a street in Mexico' does not involve national security…" *Id.* at 747. This is, again, where context becomes crucial. Agent Mesa alleged that he had been attacked by the victim during a attempt to illegally cross the border, and that he defended himself. *Id.* at 740. The decision to employ force, in that setting, is what was at issue. While the decision could have been incorrect, or even malicious, the fact is that the agent alleged he was in the act of defending the border when he pulled the trigger.

By contrast, Elhady was detained within the United States. The border was secure. He never sought to flee or resist. That was why the district court ruled that national security was not at issue. In fact, the dissent noted that the government itself did not argue "any national security or foreign relations circumstances impacted this case in particular. The facts indicate that Elhady was an American college student who was detained within the United States without any explanation or apparent justification." *Elhady,* 2021 U.S. App. LEXIS at 18 (J. Rogers, dissenting).

Perhaps recognizing that *Hernandez* was not quite on point, the court then cited both *Tun-Cos* and *Maria S*, stating that those cases put the court in "good company" by refusing to extend *Bivens* remedies to the "immigration context." *Id.*

But both *Tun-Cos* and *Maria S* involved cases in which illegal aliens had remedies they could pursue under the INA. Elhady does not. He is a United States citizen. He has an unquestioned right to enter and live in the United States. And because of that he cannot use "the comprehensive administrative and remedial procedures of the" INA. *Maria S.,* 912 F.3d at 784. It would be extraordinarily ironic if Elhady could not have any remedy because he is a citizen. Congress did not intend to provide more protection to non-citizens than citizens.

In any event, the panel did not cite a single case that stood for the notion that *Bivens* claims are never available when CBP agents are involved. To the undersigned's knowledge, none exist. And while this Court has "recently limited the reach of Bivens" *Hernandez* does not hold that "U.S. citizens have no remedy if they are abused within the United States by their own border patrol officials." *Elhady*, 2021 U.S. App. LEXIS at 18 (J. Rogers, dissenting).

The mistake the Sixth Circuit made in *Elhady* is the same mistake Egbert asks this Court to make here. Just like *Elhady* took the Supreme Court's ruling in *Hernandez* and assumed it would apply to any case involving the border, Egbert asks this Court to apply *Hernandez* reflexively to any case that involves immigration, even tangentially. But the *Hernandez* Court specifically contrasted the actions border patrol agents took in securing the border from illegal entry from other routine conduct the agents take performing their mission. *Hernandez,* 140 S. Ct. at 746. ("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."). The Court should not incautiously dispense with the limitations to the *Hernandez* holding the Court so carefully crafted.

CONCLUSION

If Egbert had shot and killed Boule, what result? Would he have a remedy? If *Hernandez* extends to this context, purely because Egbert was doing something "immigration related," then the answer has to be no. This cannot be the case. The Constitution does not allow for government agents to kill United States citizens on their private property for having the temerity to ask them to leave. That is just as true for a physical assault. We do not have to wait for Congress to make such a pronouncement to say that is the law. That kind of thinking renders the Bill of Rights a Bill of General Guidelines and Helpful Suggestions. And if there is no remedy then there is no right.

This is not just an argument that comes from pie in the sky judicial policy making. John Marshall *himself* said that the federal courts, in implementing the new constitution, would *never* allow a federal agent to do this. In response to George Mason's fear that federal laws would enable federal agents to commit such acts, Marshall essentially mocked the idea:

> To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the Judiciary? There is no

> other body that can afford such a protection. But the Honorable Member objects to it, because, he says, that the officers of the Government will be screened from merited punishment by the Federal Judiciary. The Federal Sheriff, says he, will go into a poor man's house, and beat him, or abuse his family, and the Federal Court will protect him. Does any Gentleman believe this? Is it necessary that the officers will commit a trespass on the property or persons of those with whom they are to transact business? Will such great insults on the people of this country be allowable? Document 26 John Marshall, Virginia Ratifying Convention 20 June 1788 Papers 1:275--85

Yet this is precisely what is occurring here. Egbert trespassed on a United States citizen's land and assaulted him. Even worse, he then sent state and federal government agencies after him. The notion that Egbert could do that, and that a federal court would provide no remedy, is more extreme than something John Marshall said a federal court *would never allow*.

In *Hernandez*, this Court properly rejected the argument that Mesa's status as a border patrol agent should per se bar a Bivens claim. Rather, the Court held that "the conduct of agents positioned at the border has a clear and strong connection to national security," and that this "counseled hesitation" in the context of a cross border shooting. *Hernandez*, at 746-747. But the Court did not bar all potential Bivens claims against CBP. The Court should decline the invitation to make an even more sweeping ruling than was invited before.

The Court should uphold the Ninth Circuit's ruling.

Respectfully submitted,

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