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

REPLY BRIEF FOR PETITIONER

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This Court has already recognized that *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), hangs by a thread. *Bivens* created constitutional damages actions against individual officers under reasoning that this Court has repudiated. Any new extension of *Bivens* would clash with modern precedents recognizing that only Congress, not courts, can create damages remedies. This Court has steadily increased the hurdles for *Bivens* extensions, insisting that courts halt if they can conceive of any "sound reasons to think Congress might doubt the efficacy or necessity of a damages action." *Hernández v. Mesa*, 140 S. Ct. 735, 743 (2020) (quoting

Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017)). But every *Bivens* extension raises grounds for pause, including respect for the separation of powers, judicial capacity, and Congress' refusal to codify *Bivens*. This Court has rejected attempts to extend *Bivens* in ten straight cases and varied contexts.

This case should not break that streak. First Amendment retaliation claims and Fourth Amendment claims arising from immigration investigations present a litany of reasons to think Congress would doubt the wisdom of a damages remedy. First Amendment retaliation claims raise thorny policy questions and risk chilling everyday governmental conduct. Both claims arise in the border context and implicate national-security and immigration-policy judgments. Judicial intervention is especially unwarranted given the myriad alternative remedies to vindicate the constitutional interests at stake.

Boule's brief conspicuously omits this Court's any-sound-reason-for-doubt test for *Bivens* extensions. Instead, Boule (at 18-22) proposes for-this-case-only "guidelines." He emphasizes that *Bivens* is "settled law" in the search-and-seizure context, and that claims with only "trivial" differences from *Bivens*, *Davis v. Passman*, 442 U.S. 228 (1979), or *Carlson v. Green*, 446 U.S. 14 (1980), do not extend *Bivens*. Based on those "guidelines," Boule denies trying to extend *Bivens* at all.

That position defies credulity. As every judge to address the issue below agreed, First Amendment retaliation claims and Fourth Amendment claims at the border are novel. Br. 25, 35. This Court has never extended *Bivens* to First Amendment retaliation claims. And, while *Bivens* itself involved a Fourth Amendment search-and-seizure claim, that claim arose from a domestic investigation by Federal Bureau of Narcotics officers. Boule's

claim involves a Border Patrol agent enforcing immigration law steps from the border. If Boule's claims fit within *Bivens* itself, any Fourth Amendment claim against law enforcement that perform "ordinary domestic activities," Resp. Br. 30—namely, all 83 federal law-enforcement agencies—would be open season.

As for analyzing *Bivens* extensions, Boule (at 2) rewinds the VHS to 1980, when *Bivens* was at its zenith and implied damages actions purportedly "raise[d] no separation-of-powers concerns when properly limited to the facts at hand." Under Boule's "guidelines," *Bivens* applies until proven otherwise: courts conduct case-specific cost-benefit analysis, with a thumb on the scale for extension if individual-officer misconduct is alleged. Resp. Br. 19-22. That approach would transform *Bivens* extensions into an everyday occurrence, not "a disfavored judicial activity." *Hernández*, 140 S. Ct. at 742 (citation omitted).

I. This Court Should Not Extend *Bivens*

This Court should put an end to *Bivens* extensions.

A. Extending *Bivens* Would Defy Current Law

Any *Bivens* extension would chart a collision course with modern precedents. Br. 14-17; Att'ys Gen. Br. 9-13. *Bivens* rested on the twin assumptions that jurisdictional grants authorize damages remedies and that federal courts can imply damages actions for statutory and constitutional violations alike. *Bivens*, 403 U.S. at 396-97; *see Abbasi*, 137 S. Ct. at 1854-55. But today, damages actions require "a clearer manifestation of congressional intent" than a jurisdictional grant. *Hernández*, 140 S. Ct. at 742. And implied statutory damages actions are an "abandoned" "*ancien regime*" this Court has "sworn off." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001).

Boule counters that every right must have a remedy. Resp. Br. 17, 49 (citing *Marbury v. Madison*, 1 Cranch 137, 163 (1803)). But this Court has already held that "Congress's decision not to provide a judicial remedy does not compel [courts] to step into its shoes." *Hernández*, 140 S. Ct. at 750; *cf. Abbasi*, 137 S. Ct. at 1874 (Breyer, J., dissenting). Otherwise, courts would always extend *Bivens* whenever no alternative remedy exists.

Boule lauds damages as "the ordinary remedy for an invasion of personal interests in liberty." Resp. Br. 17 (quoting *Bivens*, 403 U.S. at 395). But suits for invasions of liberty were historically brought via state common-law actions like trespass or assumpsit. Mascott Br. 8-17; *Hernández*, 140 S. Ct. at 748; *see* Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts*, 101 Va. L. Rev. 609, 633-35 (2015). Rather than hewing to those traditional actions, *Bivens* "broke new ground" by improvising a damages action for constitutional violations. *Hernández*, 140 S. Ct. at 741. Indeed, *Bivens* justified that innovation based on the purported inadequacy of common-law remedies. 403 U.S. at 394-95.

Boule (at 26) erroneously analogizes *Bivens* to "the uncontroversial court-made cause of action allowing litigants to enjoin a federal officer's violation of the Constitution." That equitable power shares no roots with *Bivens*. Mascott Br. 30-31. Since 1789, Congress' grant of equity jurisdiction has allowed federal courts to provide remedies "traditionally accorded by courts of equity," including injunctive relief. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999); *accord Whole Women's Health v. Jackson*, 142 S. Ct. 522, 540 (2021) (Thomas, J., concurring in part and dissenting in

part); *id.* at 536 (plurality opinion); *see* Bellia & Clark, *supra*, at 675-76. Federal courts lack any power to create causes of action at common law, *i.e.*, for damages. *See Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638, 640-41 (1981).

Boule (at 18, 25) contends that *Abbasi* "rejected th[e] very view" that *Bivens* should be limited to its facts, and endorsed *Bivens*' applicability "in appropriate circumstances." *Abbasi* merely disclaimed any intent "to cast doubt on the continued force, or even the necessity, of *Bivens in the search-and-seizure context in which it arose*" when explaining why the Court was willing to retain *Bivens* "*in that sphere*." 137 S. Ct. at 1856-57 (emphasis added). Thus, *Abbasi* viewed "settled law" and "reliance" as reasons to consider retaining *Bivens* itself, while expressing skepticism of any extensions. *Id.* at 1856-57, 1865.

Since *Abbasi*, the Court has gone further, "doubt[ing] that [it] would have reached the same result" in *Bivens* today. *Hernández*, 140 S. Ct. at 742-43. *Hernández* also analogized *Bivens* to Alien Tort Statute cases, where this Court has been "equally reluctant to create new causes of action," *id.* at 742, and has "cast doubt on the authority of courts to extend or create private causes of action," *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018). Thus, it is Boule's position that "would require overruling several of this Court's precedents," Resp. Br. 25, all the way back to the Miracle on Ice.

B. The Court's Special-Factors Test Forecloses *Bivens* Extensions

Even if modern precedents did not bar implied damages actions, this Court's current framework precludes further *Bivens* extensions. Br. 18-24. "A court must not

create a private right of action if it can identify even one sound reason to think Congress might doubt the efficacy or necessity of the new remedy." *Nestlé USA, Inc. v. Doe,* 141 S. Ct. 1931, 1938-39 (2021) (plurality opinion) (cleaned up); U.S. Br. 15. At least three sound reasons for hesitation apply to any *Bivens* extension:

Separation of Powers. In every *Bivens* case, the key question is "who should decide"—Congress or courts. *Abbasi*, 137 S. Ct. at 1857 (citation omitted). Because no statute authorizes damages actions against individual federal officers, every *Bivens* extension "arrogat[es] to the Court a power the Constitution vests solely with Congress." Mascott Br. 22; *see* Br. 18-19; IWLC Br. 5-10. At minimum, the separation of powers provides powerful reason to think Congress might doubt the need for judicial intermeddling.

Boule (at 26) calls "unsupported" the principle that "[c]reating causes of action is up to Congress," but this Court's cases say exactly that. Take *Hernández*: "[A] federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress." 140 S. Ct. at 742. Or *Nestlé*: "We cannot create a cause of action that would let [respondents] sue petitioners. That job belongs to Congress, not the Federal Judiciary." 141 S. Ct. at 1937 (plurality opinion). As *Comcast Corp. v. National Association of African American-Owned Media* put it: "[P]rivate rights of action to enforce federal law must be created by Congress." 140 S. Ct. 1009, 1015 (2020) (quoting *Sandoval*, 532 U.S. at 286-87).

Boule (at 15) is thus incorrect that his "claims do not implicate any separation-of-powers concerns that have caused the Court's hesitation in prior cases." Separation-of-powers concerns do not involve fact-specific examinations "to prevent the danger of abuse." *Contra* Resp. Br.

26 (citation omitted). Rather, "[w]hen a party seeks to assert an implied cause of action under the Constitution . . . separation-of-powers principles are or should be central to the analysis" in *every* case. *Abbasi*, 137 S. Ct. at 1857. Implying damages actions always causes "tension" with "the Constitution's separation of legislative and judicial power." *Hernández*, 140 S. Ct. at 741.

Boule objects that this Court has not categorically rejected *Bivens* claims even in contexts (like the military) that raise heightened separation-of-powers concerns. Resp. Br. 26-27 (citing *United States v. Stanley*, 483 U.S. 669 (1987)). But the Court has sounded separation-of-powers alarms about *Bivens* for decades. Just because the Court has not rendered the broadest possible holdings in rejecting specific claims does not make those concerns fact-specific. No "facts at hand," Resp. Br. 2, can possibly justify an exception to the rule that Congress, not courts, creates damages actions.

Judicial Competence. Courts must also reject *Bivens* extensions unless "the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Abbasi*, 137 S. Ct. at 1858. Courts are inherently ill suited to gauge the "impact on governmental operations systemwide" or burdens on morale, "time[,] and administrative costs." *See id.* at 1856, 1858; Br. 19-20.

Boule disagrees, citing courts' experience adjudicating state-law "trespass and false imprisonment claims." Resp. Br. 27 (citation omitted). But applying existing causes of action in individual cases is a quintessential judicial function. Mascott Br. 24-25. The difficulty for courts comes in deciding whether damages actions should exist at all. Boule does not explain how courts could obtain the

facts or expertise necessary to predict the consequences for any *Bivens* claim, let alone his own.

Boule (at 27) compares new damages actions to the exclusionary rule and qualified immunity. But in exclusionary-rule cases, the "principal cost" courts weigh is the risk of "letting guilty and possibly dangerous defendants go free." *Herring v. United States*, 555 U.S. 135, 141 (2009). Judges weigh that risk every day. *E.g.*, 18 U.S.C. § 3142 (pretrial detention). And the benefit—whether exclusion will deter future police misconduct—depends on whether the misconduct at issue is culpable and deliberate. *Herring*, 555 U.S. at 144. Again, courts apply those concepts routinely.

As for qualified immunity, courts assess whether officials violated "clearly established law." *Abbasi*, 137 S. Ct. at 1866 (citation omitted). Saying "what the law is" is a job for courts. *Marbury*, 1 Cranch at 177. Surveying "burdens on Government employees," "administrative costs," and effects on "the proper formulation and implementation of public policies" is a job for Congress. *See Abbasi*, 137 S. Ct. at 1856, 1858.

Congressional Inaction. Congress' "inaction" in not codifying *Bivens* while comprehensively regulating federal-officer torts offers further reason for hesitation. Br. 20-24; *see Abbasi*, 137 S. Ct. at 1862 (citation omitted).

Boule (at 27-28) claims that inaction matters only when Congress enacts other specific protections or weighs competing policy considerations. Boule (at 28) even speculates that inaction might signal congressional approval of *Bivens*. Those inferences clash with recent cases, which consider both a "pattern of congressional action" and "the silence of Congress" as "relevant." *Hernández*, 140 S. Ct. at 749; *Abbasi*, 137 S. Ct. at 1862. Silence is especially

"telling" when "Congressional interest has been frequent and intense." *Abbasi*, 137 S. Ct. at 1862 (citation omitted). That description fits constitutional torts to a T: Congress has considered codifying *Bivens* but failed to do so, while regulating the field.

For starters, 18 U.S.C. § 242 subjects state and federal officers to criminal liability for constitutional violations. But 42 U.S.C. § 1983 provides civil liability for constitutional violations against only *state* officers. Br. 22; U.S. Br. 11-12. Boule (at 48) objects that no previous *Bivens* case mentions section 242. But past special factors are not "exhaustive." *Hernández*, 140 S. Ct. at 743 (citation omitted). Boule (at 48) deems section 242 too "limited" to provide meaningful relief. But any limitation is a policy choice. Congress' decision to hold federal officers criminally liable for certain constitutional violations underscores that Congress' 150-plus years of inaction on civil liability is not "inadvertent." *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988).

The Federal Tort Claims Act (FTCA) also reflects comprehensive legislative judgments about when and how to compensate tort victims. Br. 22-24. Boule reiterates that *Carlson* and two later cases portrayed *Bivens* and the FTCA as "complementary" remedies. Resp. Br. 38 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) (quoting *Carlson*, 446 U.S. at 20), and citing *Wilkie v. Robbins*, 551 U.S. 537, 553, 555 (2007)). But the FTCA warrants pause under more recent precedent.

First, *Carlson* assumed that Congress must "explicitly declare[]" *Bivens* inapplicable; exhaustive related remedies would not suffice. 446 U.S. at 18; *see* Br. 24. Later cases echoed *Carlson* without further analysis. *See Wilkie*, 551 U.S. at 553, 555; *Malesko*, 534 U.S. at 68. The Court has since jettisoned that approach, instead asking

whether "congressional silence might be more than inadvertent." *Abbasi*, 137 S. Ct. at 1862 (citation omitted).

Second, Boule overreads *Carlson*, which treated the FTCA and *Bivens* as complementary in that the FTCA did not abrogate *Bivens* in contexts involving "the same type of conduct that is alleged to have occurred in *Bivens*." 446 U.S. at 20 (quoting S. Rep. No. 93-588, at 3 (1973)). Acknowledging *Bivens*' application to existing contexts does not support extending *Bivens* to new contexts. U.S. Br. 33; IRLI Br. 4-8.

Boule (at 39) suggests that the 1988 Westfall Act, 28 U.S.C. § 2679, which amended the FTCA, signals that "Congress has intended the FTCA and *Bivens* to coexist." Boule (at 39) does not identify any supporting statutory text for this argument, which the Court has already rejected. The Westfall Act "simply left *Bivens* where it found it. It is not a license to create a new *Bivens* remedy in a context [the Court has] never before addressed." *Hernández*, 140 S. Ct. at 748 n.9.

Finally, Boule (at 26) contends that it would have been superfluous for this Court to set forth an insurmountable test for implying new damages actions. But sometimes, experience shows that the Court's most stringent tests are in fact unattainable. *E.g.*, *Edwards v. Vannoy*, 141 S. Ct. 1547, 1559-60 (2021). The current "extraordinarily strict" test for *Bivens* extensions—that courts "must" halt if they "can identify even one sound reason to think Congress might doubt the efficacy or necessity of the new remedy," *Nestlé*, 141 S. Ct. at 1938-39 (plurality opinion) (cleaned up)—is such a test. That test applies to Alien Tort Statute actions too, and in that context, a plurality has recognized: "[O]ur precedents already make clear that there always is a sound reason to defer to Congress." *Id.* at 1940. The same holds here.

II. This Court Should Reject *Bivens* Claims for First Amendment Retaliation

First Amendment retaliation claims are particularly unsuitable *Bivens* extensions.

A. These Claims Involve a New Context

Boule's First Amendment claim presents a new frontier for *Bivens*. Br. 25-26; U.S. Br. 15-17. That claim "is different in a meaningful way from previous *Bivens* cases," namely *Bivens*, *Davis*, and *Carlson*. *See Abbasi*, 137 S. Ct. at 1859. Most obviously, First Amendment *Bivens* claims put a new "constitutional right at issue." *See id.* at 1860. This Court has "never held that *Bivens* extends to First Amendment claims." *Reichle v. Howards*, 566 U.S. 658, 663 n.4 (2012). That should end the new-context inquiry.

Boule argues that previous cases have "assumed without deciding that *Bivens* extends to First Amendment claims." Resp. Br. 41 (citation omitted). In Boule's view, it "matters little" that this Court has never so held. *Id.* Boule overreads those cases, which concerned pleading requirements, *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009); *Hartman v. Moore*, 547 U.S. 250, 256-57 (2006); *Crawford-El v. Britton*, 523 U.S. 574, 577-78 (1998), or qualified immunity, *Wood v. Moss*, 572 U.S. 744, 759 (2014); *Reichle*, 566 U.S. at 663; *see* U.S. Br. 16-17. The new-context analysis looks to *Bivens*, *Davis*, and *Carlson*, not other cases answering different questions. *See Hernández*, 140 S. Ct. at 743-44.

Regardless, Boule's claim also involves a "new class of defendants": Border Patrol agents. *See Hernández*, 140 S. Ct. at 743. Boule (at 30) dismisses as "trivial" the differences between Border Patrol agents and the Federal Bureau of Narcotics agents in *Bivens*. Border Patrol

agents and their employer, the United States, disagree. NBPC Br. 15-18; U.S. Br. 17-18. "The United States Border Patrol is a uniformed, mobile, paramilitary force." *INS v. FLRA*, 12 F.3d 882, 883 (9th Cir. 1993). Agents perform the "daunting task" of protecting our borders—conduct with a "clear and strong connection to national security." *Hernández*, 140 S. Ct. at 746.

Boule (at 30) notes that Border Patrol agents perform some "ordinary domestic activities," but omits that they also conduct "border-security activities." U.S. Br. 22, *Hernández*, 140 S. Ct. 735 (No. 17-1678). Were Boule right that performing some "ordinary" law-enforcement duties makes any federal agent the equivalent of the officers in *Bivens*, officers in all 83 federal law-enforcement agencies would be fair game. Even the Secret Service investigates crimes and makes arrests. 18 U.S.C. § 3056(b). Under Boule's view, *Bivens* claims against agents protecting the President would not present a new context.

The lower-court cases Boule (at 30) invokes do not support an expansive view of when a case is on all fours with *Bivens*. Far from holding that the U.S. Park Police are just like Federal Bureau of Narcotics agents, *Hicks v. Ferreyra*, 965 F.3d 302, 309-12 (4th Cir. 2020), held that the officers forfeited any argument to the contrary. Far from holding that Deputy U.S. Marshals are indistinguishable law-enforcement personnel, *Jacobs v. Alam*, 915 F.3d 1028, 1036 (6th Cir. 2019), followed pre-*Abbasi* circuit precedent recognizing the specific claims there. Finally, *Ioane v. Hodges*, 939 F.3d 945, 952 (9th Cir. 2018), concluded without analysis that IRS agents function like narcotics agents. Those cases do not show that Border Patrol agents, who perform sensitive border-security functions, are indistinguishable from agents engaged in domestic policing. "[B]order-related disputes always present a new

Bivens context." *Elhady v. Unidentified CBP Agents*, 18 F.4th 880, 885 (6th Cir. 2021).

B. Special Factors Abound

Congress has many reasons to doubt the wisdom of First Amendment retaliation *Bivens* claims.

Judicial Administrability. First Amendment retaliation claims would throw open courthouse doors to amorphous suits without judicial guideposts to "weigh the costs and benefits" of damages actions. Br. 27-29; *see Abbasi*, 137 S. Ct. at 1858. Virtually any governmental action could be alleged to violate the First Amendment if done for improper reasons. Thus, recognizing retaliation suits would open countless federal officials to "hard to disprove, insubstantial claims" with concomitant chilling effects. *See Crawford-El*, 523 U.S. at 585 (citation omitted).

For law enforcement, retaliation claims could turn daily functions into "overwhelming litigation risks." *See Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019). Claims like Boule's risk chilling routine information sharing between law-enforcement agencies—"a serious cost." U.S. Br. 23. Whether to impose such costs, and if so, whether to protect officers performing "official duties" or draw some other line, are policy choices for Congress. U.S. Br. 23-24.

Boule (at 44) demurs that "[t]his case concerns only the specific claim [he] brought" and his claim involves no "complex causation issues." That misstates the inquiry. This Court asks whether there are reasons to hesitate before extending *Bivens* to a "categor[y] of cases," not to the plaintiff's precise allegations. *See Abbasi*, 137 S. Ct. at 1858; *Wilkie*, 551 U.S. at 550. Boule has no response to the morass of litigation that would result if plaintiffs could seek damages by alleging that federal officers took legitimate, commonplace actions out of animus. Br. 27-29.

Boule (at 43) contends that First Amendment retaliation claims involve the same motive-based analysis as the Fifth Amendment claim in *Davis*. But *Davis* was decided "before the Court's cautionary instructions with respect to *Bivens* suits," *Abbasi*, 137 S. Ct. at 1859, and did not consider the systematic consequences of such claims. This Court has since limited *Davis*' application to "sex discrimination on Capitol Hill." *Hernández*, 140 S. Ct. at 744.

Boule (at 43-44) argues that First Amendment retaliation claims are problematic only in cases involving arrests or prosecutions. Boule never explains this dividing line, which would leave every other action open to suit. The fundamental problem with retaliation claims is that retaliatory motive is "easy to allege and hard to disprove." *Crawford-El*, 523 U.S. at 584-85 (citation omitted). Federal officials can arrest or prosecute people for legitimate or retaliatory reasons, and federal officials can initiate investigations or commit other adverse actions for legitimate or retaliatory reasons. Only Congress can "weigh[] and appraise[]" the consequences of such a broad extension. *Abbasi*, 137 S. Ct. at 1857 (citation omitted).

National Security and Immigration Enforcement. *Bivens* claims against Border Patrol agents also implicate national security and immigration policy—areas constitutionally committed to the political branches. Br. 29-31; U.S. Br. 22-23; Att'ys Gen. Br. 13-17; IWLC Br. 13-16; NBPC Br. 9-14. Of course, "national-security concerns must not become a talisman used to ward off inconvenient claims." *Abbasi*, 137 S. Ct. at 1862; Resp. Br. 21. But these concerns do not just arise from "distinctive . . . cross-border shooting claims." Resp. Br. 27 (quoting *Hernández*, 140 S. Ct. at 739). Rather, "regulating the conduct of agents at the border unquestionably has national

security implications" and "the risk of undermining border security provides reason to hesitate before extending *Bivens* into this field." *Hernández*, 140 S. Ct. at 747.

Boule (at 42-43) argues that his allegations raise no national-security or immigration concerns because Agent Egbert "plainly acted out of retaliatory motive" by "Googl[ing] phone numbers" to report Boule's unlawful license plate and potential tax violations. But the inquiry is not whether the alleged misconduct advances national security or immigration enforcement. What matters is whether individual damages suits for the *type* of claim would harm national security or immigration enforcement. To illustrate: "[S]hooting people who are just walking down a street in Mexico"—the *Hernández* plaintiffs' version of events—"of course" "does not involve national security." 140 S. Ct. at 746. The question in *Hernández* was "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." *Id.* Answer: no.

Here too, national-security and immigration concerns turn on whether First Amendment retaliation suits against Border Patrol agents would "deter" officials from carrying out their duties "in future cases." *See Bush v. Lucas*, 462 U.S. 367, 389 (1983). At bottom, Agent Egbert allegedly shared information with other agencies to trigger investigations. Federal officers should not have to fear that courts will second-guess whether "prompt information sharing"—an "indispensable" aspect of "protecting national security and preventing and solving crime," U.S. Br. 22—was really petty payback.

Alternative Remedies. Far from presenting a "damages or nothing" scenario, Resp. Br. 49, many alternative

remedies deter federal officers' retaliatory misconduct, Br. 32-35; U.S. Br. 24-27.

Boule (at 44-49) argues he would not prevail under those mechanisms. But it is "irrelevant to a 'special factors' analysis whether the laws currently on the books afford [a *Bivens* plaintiff] an 'adequate' federal remedy for his injuries." *Stanley*, 483 U.S. at 683; *see* U.S. Br. 24, 27. What matters is that plaintiffs have means "[t]o address th[e] *kinds* of decisions" at issue. *Abbasi*, 137 S. Ct. at 1862 (emphasis added). *Abbasi* thus treated the mere possibility of a habeas remedy as relevant, despite noting that habeas relief might not exist under the circumstances. *Id.* at 1863.

Because Boule applies the wrong legal standard, his remedy-by-remedy responses miss the point:

State Tort Law. Boule previously argued, and the Ninth Circuit concluded, that Agent Egbert's alleged retaliation fell "outside of the scope of [his] official duties." Br. in Opp. 14; *accord* Pet.App.43a. If so, Boule had state tort remedies. Br. 32-33.

Now, Boule (at 44-47) asserts that Washington State tort law would treat Agent Egbert's purported retaliation as within the "scope of employment." The upshot, Boule contends, is that the Westfall Act would convert Boule's claims against Agent Egbert into claims against the United States and bar most intentional-tort suits. Resp. Br. 45; *see* 28 U.S.C. §§ 2679(b)(1), 2680(h). But Washington law describes unauthorized acts as within the scope of employment when "done in conjunction" with official acts. *Smith v. Leber*, 209 P.2d 297, 303 (Wash. 1949). Boule claimed that Agent Egbert's retaliation was "entirely unconnected to his official duties." C.A. En Banc Opp. 5.

Even if Boule forswears tort claims, "[s]tate-law remedies and a potential *Bivens* remedy need not be perfectly congruent." *Minneci v. Pollard*, 565 U.S. 118, 129 (2012). Here, "state tort law provides an 'alternative, existing process' capable of protecting the constitutional interests at stake" and thus precludes *Bivens*. *Id.* at 125 (quoting *Wilkie*, 551 U.S. at 550).

Tax Code and Privacy Act. Boule (at 47-48) asserts that the Tax Code and Privacy Act do not offer relief because the former only covers IRS misconduct and the latter only covers government records. Again, Congress' design of "comprehensive statutory schemes" forecloses *Bivens* whether or not Boule can recover. *Schweiker*, 487 U.S. at 428; *see* U.S. Br. 24-25. Congress' choice to limit tax remedies to the officials directly responsible and to limit the Privacy Act to actual privacy violations does not make Boule's claim—that a third party retaliatorily sent the IRS a news clipping—uniquely worthy of judicial redress. *See* Resp. Br. 47.

Administrative Investigations. Boule (at 39-40, 48) discounts Department of Homeland Security (DHS) administrative investigations—a remedy he utilized, U.S. Br. 4-5—because agency regulations do not provide for complainant participation or judicial review. This Court has never deemed those features mandatory. *Contra* Resp. Br. 39-40. What matters is that the administrative scheme provides "meaningful safeguards or remedies." *See Schweiker*, 487 U.S. at 425. The ability to get someone fired amply qualifies, and DHS "takes reports of misconduct seriously." U.S. Br. 27; *see* Nat'l ICE Council Br. 13-16. Boule is not entitled to a damages action just because CBP investigated and found "insufficient evidence of any wrongful or negligent act." U.S. Br. 4.

Criminal Law. Boule (at 48) calls the "possibility" of criminal prosecution too "faint" because any charges would have been brought by now. The government's decision not to pursue charges reflects the thinness of Boule's allegations, not criminal law's inadequacy. Criminal law's powerful deterrent effect still "protect[s] the interest" at stake. *See Wilkie*, 551 U.S. at 550.

Boule (at 39, 44) also contends that Agent Egbert forfeited arguments about some alternative remedies by not making them below. But such arguments are not forfeitable. Courts have "a concomitant responsibility to 'ask whether there are any special factors that counsel hesitation.'" *Oliva v. Nivar*, 973 F.3d 438, 443 n.2 (5th Cir. 2020) (quoting *Hernández*, 140 S. Ct. at 743); *accord Elhady*, 18 F.4th at 884-85.

Regardless, parties forfeit "claim[s]," not "argument[s]." *Hemphill v. New York*, 142 S. Ct. 681, 689 (2022) (citation omitted). Agent Egbert has consistently argued that a *Bivens* remedy is unavailable. D. Ct. Dkt. 107, at 10-14; C.A. Br. 17-29. Having preserved that issue, he is "not limited to the precise arguments . . . made below." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008).

III. This Court Should Reject Fourth Amendment *Bivens* Claims in the Immigration-Enforcement Context

Bivens also has no place in the Fourth Amendment immigration-enforcement context.

A. These Claims Involve a New Context

As the Ninth Circuit recognized, Boule's Fourth Amendment claim extends *Bivens* in several respects. Pet.App.36a; Br. 35-36; U.S. Br. 17-19. First, Border Patrol agents are a "new class of defendants." *See Hernán-*

dez, 140 S. Ct. at 743; *supra* pp. 12-13. Even were "immigration officers conducting ordinary law enforcement" the equivalent of *Bivens'* narcotics agents, Resp. Br. 29, Boule (at 23) admits his Fourth Amendment claim stems from an "immigration status" "inquiry."

Further, the "border context" is new. *Elhady*, 18 F.4th at 886. A different "statutory or other legal mandate under which the officer was operating" makes a context new. *Abbasi*, 137 S. Ct. at 1860. Boule's agreement (at 24 & n.7) that Agent Egbert was operating under 8 U.S.C. § 1357(a)—a "statutory . . . mandate" not invoked in prior cases—dooms his no-new-context argument.

The border context also differs in the "extent of judicial guidance" because the Fourth Amendment standard is "qualitatively different" at the border. *Abbasi*, 137 S. Ct. at 1860; *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). Thus, claims against Border Patrol agents performing immigration-enforcement functions at the border are not the "common and recurrent sphere of law enforcement" covered by *Bivens*. Br. 36.

Boule (at 23-24, 31) argues that Agent Egbert needed a warrant to enter the Smuggler's Inn driveway. Boule reasons that that immigration officers need warrants to access "dwellings," 8 U.S.C. § 1357(a)(3); the Ninth Circuit interprets "dwelling[]" to include "curtilage"; and the district court thought that the Inn's open driveway fell within the curtilage, Pet.App.65a.

Where to begin? The relevant "judicial guidance" for *Bivens* purposes is the Fourth Amendment, not the statutory standard. *See Abbasi*, 137 S. Ct. at 1860. Congress' decision to require warrants does not add to the Fourth Amendment's "simple baseline." *See Florida v. Jardines*, 569 U.S. 1, 5 (2013). Further, the Ninth Circuit admits

that its definition of "dwelling" to include "curtilage" conflicts with the "plain meaning" of the statute, and reached that interpretation based on legislative history and policy arguments. *United States v. Romero-Bustamente*, 337 F.3d 1104, 1109-10 (9th Cir. 2003). Even if the Inn's driveway counts as a "dwelling," the fact that this incident did not occur in "a private home" is still a "meaningful" distinction from *Bivens*. *Oliva*, 973 F.3d at 442-43.

Boule's contention (at 24) that this case does not implicate the border because 8 U.S.C. § 1357(a)(3) authorizes patrols only to prevent illegal entry is equally spurious. The Border Patrol's mandate encompasses "interdicting persons attempting to illegally enter *or exit* the United States." 6 U.S.C. § 211(e)(3)(A) (emphasis added); *accord* U.S. Br. 28. Boule's Turkish guest traveled 7,500-plus miles to reach Blaine, Washington, and the suspicious circumstances prompted Agent Egbert to investigate both illegal entry and exit (indeed, the guest illegally entered Canada that night). Pet.App.27a; J.A.108.

B. Special Factors Abound

National Security and Immigration Enforcement. Fourth Amendment claims trample sensitive areas committed to the political branches by jeopardizing officers' ability to investigate individuals who present serious risks. Br. 37-38; U.S. Br. 27-32; Nat'l ICE Council Br. 9. Boule does not dispute that liability could prompt agents to hesitate in the field. Instead, he insists (at 33-36) his "claim has nothing [to] do with" immigration or national security by rehashing why he thinks an incident yards from the border has nothing to do with the border.

To reiterate: "[T]he conduct of agents at the border[] is a red light to *Bivens* extensions." Pet.App.27a (Bumatay, J., dissenting). Flyspecking whether Border Patrol

agents should have stopped suspects "on the public road" or not used force because a suspect's vehicle was "driverless," Resp. Br. 34, is exactly the kind of judicial "regulating [of] the conduct of agents at the border" that this Court forbids. *Hernández*, 140 S. Ct. at 747. This case does not need to be a "carbon copy of *Hernández*" for similar concerns to apply. *Elhady*, 18 F.4th at 886. *Contra* Resp. Br. 33-34.

Regardless, Boule's fact-specific distinctions do not help him. Boule (at 33) contends that Agent Egbert was preventing unlawful *exit*, not entry. But the flow of persons and illegal goods into Canada still undermines national security and foreign policy. Smugglers trafficking people to Canada can reenter with drugs the next day. And foreign relations would suffer if the United States turned a blind eye to suspicious foreign nationals illegally entering Canada. Congress accordingly tasked the Border Patrol with preventing "illegal[] ent[ry] *or* exit." 6 U.S.C. § 211(e)(3)(A) (emphasis added).

Boule (at 23, 35) distinguishes "immigration-*related* functions" from immigration enforcement and invokes his U.S. citizenship. But Boule (at 7, 23) admits that Agent Egbert was conducting an "inquiry" into "immigration status" and that he "stepped between" Agent Egbert and the target. Boule's opinion that Agent Egbert's actions were "rogue" or "unwarranted," Resp. Br. 23, does not negate that Boule "attempted to thwart" an immigration investigation. U.S. Br. 31. If U.S. citizens can disrupt immigration investigations and then sue for damages, "the Border Patrol's national-security mission could be compromised." *Id.*

Boule (at 35-36) worries about "unremedied abuses" on "large swaths of the country's population" if *Bivens* does not reach immigration-related functions. But ample

remedies exist, just not individual damages, and Congress could provide more. Br. 39-40. No circuit besides the Ninth has recognized *Bivens* claims against immigration officers, yet Boule presents no evidence that agents rain havoc on the people of Buffalo, Detroit, or El Paso. Conversely, Boule's assertion (at 36) that liability will produce no "detriment to national security" is hard to credit when his evidence features two cases about qualified immunity, not *Bivens*. Resp. Br. 32 n.9 (citing *Morales v. Chadbourne*, 793 F.3d 208, 211-12 (1st Cir. 2015), and *Chavez v. United States*, 683 F.3d 1102, 1111-12 (9th Cir. 2012)).

Congressional Choices. Congress' failure to provide individual liability in the densely regulated immigration sphere further counsels hesitation. Br. 38-39.

Boule (at 37) identifies an immigration-law provision treating state officers as "acting under color of Federal authority" for purposes of liability. 8 U.S.C. § 1357(g)(8). Boule claims that subsection shows Congress' desire for damages against state and federal officers. But that provision protects state officers performing immigration functions from damages suits otherwise available under 42 U.S.C. § 1983. *See Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 463 (4th Cir. 2013). Limiting state officers' liability does not *expand* federal officers' liability.

Boule (at 36-37) reiterates the warrant requirement for "dwellings." 8 U.S.C. § 1357(a)(3). Congress' desire for warrants does not mean Congress wanted damages actions. Congress omitted any damages remedy from the Immigration and Nationality Act. *De La Paz v. Coy*, 786 F.3d 367, 377 (5th Cir. 2015). Such "'[l]egislative action suggesting that Congress does not want a damages remedy' counsels against judicial do-it-yourself projects." *Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 524 (6th Cir. 2020) (quoting *Abbasi*, 137 S. Ct. at 1865).

Alternative Remedies. Individuals alleging Fourth Amendment violations in the immigration context can also pursue administrative investigations and FTCA claims. Br. 39-40; U.S. Br. 32-33. Indeed, Boule pursued both remedies here. After CBP rejected his complaints on the merits, Boule failed to file a timely FTCA lawsuit. U.S. Br. 4-5. As above, Boule disregards both alternatives. Resp. Br. 37-40. But again, Boule misses the bottom line: alternative remedies only need to protect "the constitutional *interests* at stake." *Minneci*, 565 U.S. at 125 (emphasis added). Whether particular plaintiffs' injuries "must now go unredressed" is irrelevant. *Schweiker*, 487 U.S. at 425.

* * *

For 40 years, this Court has rejected all calls to extend *Bivens*. This case should be no exception.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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