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

[REDACTED FOR PUBLIC FILING]
BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether a damages claim lies under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), when a rogue federal law enforcement officer triggers multiple unfounded investigations against a U.S. citizen as retaliation for the citizen's truthful reporting of the officer's misconduct.

2. Whether a damages claim lies under *Bivens* when a rogue federal law enforcement officer enters a U.S. citizen's private property within the United States without a warrant, conducts an unauthorized search, and assaults the citizen on his property.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

REGULATIONS AND LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

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BRIEF FOR RESPONDENT

INTRODUCTION

On November 26, 1965, federal officers entered and searched the home of Webster Bivens and arrested him, without a warrant and using excessive force. This Court held that Mr. Bivens's damages claim against the federal agents for violation of the Fourth Amendment could proceed. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). On March 20, 2014, a federal officer—petitioner Erik Egbert—entered Robert Boule's private property and searched his vehicle, without a warrant and using excessive force. JA83-84; *see* Pet.App.63a-65a. Like Mr. Bivens's claim, Mr. Boule's damages claim against

petitioner for violation of the Fourth Amendment should be allowed to proceed.

William Moore was subjected to investigation and criminal prosecution initiated by federal officers in retaliation for his criticism of the United States Postal Service. Those federal officers were, as this Court observed, properly subject to a damages action under *Bivens*. *Hartman* v. *Moore*, 547 U.S. 250, 256 (2006). Mr. Boule was subjected to unfounded investigations and an audit instigated by petitioner in retaliation for Mr. Boule's complaints about petitioner's March 2014 misconduct. JA85; Pet.App.33a-34a. Like the federal officers in *Hartman*, petitioner's actions render him "subject to an action for damages on the authority of *Bivens*." 547 U.S. at 256.

The court of appeals correctly held that, in the narrow circumstances of this specific case, Mr. Boule's *Bivens* claims may proceed. Petitioner's main contrary argument is that *Bivens* should never be extended at all. That cannot be correct—were that the law, this Court would not have established a framework expressly contemplating extensions of *Bivens* in appropriate circumstances. This is precisely such a case: Mr. Boule's claims arise out of the "common and recurrent sphere of law enforcement" in which *Bivens* remains "settled," *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1856-1857 (2017), they raise no separation-of-powers concerns when properly limited to the facts at hand, and there are no alternative remedies.

The rest of petitioner's challenge rests on mischaracterizations. Although petitioner argues (at 5, 29-30, 37) that Mr. Boule's claims implicate "'cross-border smuggling,'" "counterterrorism," and the "'conduct of agents at the border'" who face "dangerous, isolated

conditions," this case involves none of that. Petitioner entered the partially fenced driveway surrounding Mr. Boule's home—constitutionally protected curtilage—on domestic soil without a warrant, searched his vehicle without authorization, employed excessive force in carrying out this unconstitutional search, and later retaliated against Mr. Boule for reporting petitioner's misconduct. It hardly matters that petitioner also checked the immigration status of Mr. Boule's guest while on Mr. Boule's property; Mr. Boule seeks a remedy for his own injuries, not the guest's.

Nor does it matter that Mr. Boule's home is close to the border. The very statute on which petitioner heavily relies requires Customs and Border Protection (CBP) agents to obtain a warrant to enter a "dwelling[]"—which has been defined to include the curtilage of a home—whether that home is 10 miles or 10 feet from the border. 8 U.S.C. §1357(a)(3). Further, that same statute authorizes warrantless entries only for the purpose of preventing illegal entry of non-citizens into the United States. Petitioner's inquiry of Mr. Boule's guest had nothing to do with that, since the guest had already lawfully entered the country the day before. Separation of powers goes both ways. The Court should not withhold a *Bivens* remedy in the face of a policy judgment by Congress that is directly to the contrary.

The judgment should be affirmed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourth Amendments to the U.S. Constitution, U.S. Const. amends. I, IV, and 8 U.S.C. §1357(a) are reproduced in the appendix to this brief.

STATEMENT

A. Background

1. Mr. Boule is a U.S. citizen who, since 2000, has owned land in Blaine, Washington abutting the U.S.-Canada border. Blaine overlooks the picturesque Drayton Harbor and is the home of Peace Arch Historical State Park, a monument and garden on the border dedicated to peace between the United States and Canada.

Mr. Boule owns, operates, and resides at a small bed-and-breakfast called the Smuggler's Inn, Pet.App.32a, a top-rated hotel in the area, *see* Smuggler's Inn Bed & Breakfast, https://tinyurl.com/2km22xzc (visited Jan. 18, 2022). Despite the tongue-in-cheek name of his business—which has themed rooms named after infamous smugglers and other notorious individuals such as Al Capone and local legend "Dirty Dan" Harris, Dkt. 110, Ex. E at 66, 68[1]—Mr. Boule has a longstanding cooperative relationship with the U.S. government. Pet.App.32a-33a.

Within months of purchasing his property, Mr. Boule discovered that people used the property for illicit border crossings. JA144. [redacted] JA145-146. [redacted] JA145. [redacted] JA146-148;

[1] "Dkt." refers to the district court docket. "ER" refers to the excerpts of record in the Ninth Circuit.

Pet.App.32a. [redacted] JA91-92; Pet.App.32a. [redacted] JA153-154, [redacted] JA91-92; JA102. Thus, although petitioner trumpets (at 6-7) the fact that drugs have been seized on Mr. Boule's property and that he has "arrested people illegally crossing the border there," petitioner fails to mention that those actions occurred [redacted] *See* JA92.[2] [redacted] JA91-92. [redacted] *See* JA140-141.[3]

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[2] Petitioner's assertion that Mr. Boule "facilitate[d] international smuggling and impede[d] lawful investigations" is likewise unsupported. Pet. Br. 38 (citing JA115-116). To the contrary, [redacted] JA115-117.

[3] Recently, Mr. Boule pled guilty in a Canadian court, and was sentenced to probation, for providing information to individuals who made unauthorized crossings from the United States into Canada. Providing information to individuals seeking to *leave* the United States outside a port of entry does not violate U.S. law.

2. a. [redacted] JA98. Nonetheless, on the morning of March 20, 2014, petitioner twice stopped Mr. Boule in town, searched his car, and inquired about guests staying at Mr. Boule's bed-and-breakfast. JA92. Petitioner had never before searched Mr. Boule's car or inquired about Mr. Boule's guests. *Id.* Mr. Boule told petitioner that a guest was arriving that day who had flown from Turkey to New York the day before, and that two of Mr. Boule's employees were picking the guest up at the Seattle-Tacoma airport. *Id.*; Pet.App.50a.[4]

Despite the information conveyed by Mr. Boule, petitioner "intentionally stayed nearby" Mr. Boule's home so that he could see when Mr. Boule's employees arrived with the guest. JA104-105. When petitioner saw Mr. Boule's employees approach, he did not stop them on a public road. Instead, petitioner followed the vehicle onto Mr. Boule's property passing a "no trespassing" sign, traveling down a private road, entering Mr. Boule's private property and parking in a portion of the driveway directly in front of Mr. Boule's home and inn. JA90; JA93; *see* Pet.App.65a. Mr. Boule's employee, who had been driving the car, exited the vehicle, leaving the guest in the back seat. JA93; JA105-106.

See U.S. Customs & Border Protection, *Crossing the border via foot, vehicle, or air without visiting an official port of entry* ("There is no regulation that requires a traveler departing the U.S. to exit through an open port of entry staff[ed] with CBP Officers.") (emphasis omitted), https://tinyurl.com/2chpuusu (visited Jan. 18, 2022).

[4] Petitioner asserts that Mr. Boule told him that "CBP might be interested in" the guest. JA103; *see also* JA130. Mr. Boule disputes that assertion.

Petitioner did not have a warrant, nor did he have Mr. Boule's permission to be on his property or search the vehicle. JA83-84; JA89-94; JA122-123; JA159. Mr. Boule asked petitioner to leave; petitioner refused. Pet.App.33a. [redacted] JA123.[5] [redacted] Mr. Boule told petitioner that he could not search Mr. Boule's car without a warrant or a supervisor present, reminding petitioner that "the guest had been through security at the airport, [and] had come from New York to Seattle." JA159; *see* JA122-123.

Mr. Boule stepped between petitioner and the car and again asked petitioner to leave or ask a supervisor to come to the scene. Pet.App.33a; JA159-160. Awaiting a supervisor posed no risk of imminent flight—the car had no driver and was blocked in by petitioner's parked vehicle. JA93; JA105; JA123. Petitioner instead shoved Mr. Boule against the car, grabbed him, and threw him to the ground. JA160-164; Pet.App.33a. Mr. Boule landed on his hip and shoulder on the concrete driveway, JA163, and suffered back injuries from petitioner's assault for which Mr. Boule required medical treatment, Pet.App.33a.

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[5] Prior to this incident, petitioner had been instructed by his superiors not to enter Mr. Boule's property without specific permission except in an emergency. JA83. Mr. Boule explained at his deposition that [redacted] Boule Dep. 182, 184-185.

Petitioner proceeded to search Mr. Boule's car. JA89-90. He asked the guest about his immigration status, and the guest provided his passport and visa. JA93-94; JA106-108. Petitioner (unsurprisingly) concluded that the guest was in the country lawfully, as Mr. Boule had previously told him. JA108; JA135. Petitioner then promptly left Mr. Boule's property, without inquiring further about any supposed criminal activity. Pet. Br. 8.

b. Mr. Boule reported petitioner's misconduct to petitioner's supervisors and filed an administrative tort claim under the Federal Tort Claims Act (FTCA). In response, petitioner retaliated against Mr. Boule. Pet.App.33a.

[redacted] JA136-138; JA177. Petitioner then contacted the Internal Revenue Service (IRS), the Social Security Administration, the Washington State Department of Licensing, and the Whatcom County Assessor's Office and asked them to investigate Mr. Boule. Pet.App.33a-34a. Petitioner subsequently explained that he initiated those investigations because he believed that Mr. Boule's practice [redacted] was "antithetical to Border Patrol's Mission" and "didn't sit well with [him] or [his] fellow Border Patrol Agents"—even though petitioner admitted that [redacted] Mr. Boule's actions; petitioner also [redacted] JA110; JA168-169. Petitioner alerted the agencies of a public news article in which Mr. Boule allegedly discussed "illegal border crossings on his property." JA110; JA168.

Petitioner's retaliation had its desired effect. Each agency conducted formal inquiries into Mr. Boule's

business at petitioner's instigation. Pet.App.34a. Mr. Boule was required to pay his accountant over $5,000 to respond to the IRS audit. *Id.* In the end, no agency found that Mr. Boule had done anything wrong. The IRS, for example, audited several years of Mr. Boule's tax returns, which confirmed that Mr. Boule had correctly paid his taxes. JA178.

Mr. Boule's FTCA claims were denied.

c. [redacted] JA177; JA183.

JA177.

[redacted] JA182-188.

[redacted] JA182-183.

[redacted]

[redacted]

JA183-184. [redacted]

JA184.

Petitioner's union—the National Border Patrol Council, which filed an amicus brief in support of petitioner here—[redacted]

JA192.

B. District Court Proceedings

In January 2017, Mr. Boule sued petitioner for damages for his violations of Mr. Boule's Fourth and First Amendment rights. The operative complaint alleged that petitioner entered Mr. Boule's private property without a warrant and in violation of an order by petitioner's supervisors not to enter the property without permission except in an emergency, and that petitioner used excessive force against Mr. Boule. JA83-84. Mr. Boule's complaint also alleged that petitioner retaliated for Mr. Boule's report of petitioner's misconduct to his supervisors by making unsubstantiated com-

plaints to the IRS and other government agencies and intimidating potential guests to discourage business. JA85. In response to Mr. Boule's complaint, the United States declined to defend petitioner in the district court or in the court of appeals.

The district court granted summary judgment for petitioner. At the outset, the court determined that the portion of the driveway in question is protected curtilage, noting that it is "near the front steps to" Mr. Boule's home and "is enclosed on two sides by a white, wooden fence that appears to be the height of a car." Pet.App.64a-65a. The court explained that "[w]hen a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred" and that this "conduct thus is presumptively unreasonable absent a warrant." Pet.App.64a (citing *Florida* v. *Jardines*, 569 U.S. 1, 11 (2013)). Accordingly, the district court held, "[i]n physically intruding on the curtilage of Plaintiff's home/inn to stop and search the vehicle, Defendant Egbert not only invaded Plaintiff's Fourth Amendment interest in the item searched, i.e., the vehicle, but also invaded Plaintiff's Fourth Amendment interest in the curtilage of his home/inn." Pet.App.65a.

The district court nonetheless denied a *Bivens* remedy. The court stated that Mr. Boule's Fourth Amendment claim represents a "'modest extension'" of *Bivens* because, although "the alleged conduct has the recognizable substance of Fourth Amendment violations," petitioner was a Border Patrol agent, rather than "the officials outlined in the 'traditional' *Bivens* claims." Pet.App.67a. The court also found Mr. Boule's First Amendment claim novel because this Court has not previously held that *Bivens* extends to First Amendment claims. Pet.App.55a. The district court

then noted that separation of powers counseled hesitation in applying *Bivens* to Mr. Boule's claims. Pet.App.56a; Pet.App.68a-69a.

Because petitioner did not argue that Mr. Boule had any alternative remedies besides *Bivens*, ER135-159, the district court assumed that no alternative remedy existed, even while holding that a *Bivens* remedy was unavailable. Pet.App.44a.

C. Court Of Appeals Proceedings

The Ninth Circuit reversed. The court of appeals noted the narrowness of the case, deciding only "whether a *Bivens* damages remedy is available to a United States citizen plaintiff who contends that a border patrol agent, acting on the plaintiff's property within the United States, violated his rights under the First and Fourth Amendments." Pet.App.31a. The court held that a *Bivens* remedy is "still available in appropriate cases" like this one and "there are 'powerful reasons' to retain it in its 'common and recurrent sphere of law enforcement.'" Pet.App.31a-32a (quoting *Abbasi*, 137 S. Ct. at 1857).

Applying the framework established by this Court, the court of appeals stated that Mr. Boule's Fourth Amendment claim is a "'modest extension'" of *Bivens* because petitioner is a border patrol agent, even though, as the court acknowledged, border patrol agents are "federal law enforcement officials" and Mr. Boule's excessive force claim "is indistinguishable from Fourth Amendment excessive force claims that are routinely brought under *Bivens* against" other federal law enforcement officers. Pet.App.36a.

The court of appeals held that no special factors counseled hesitation because "Boule, a United States

citizen, is bringing a conventional Fourth Amendment excessive force claim arising out of actions by a rank-and-file border patrol agent on Boule's own property in the United States." Pet.App.36a. The court explained that, unlike in *Abbasi*, Mr. Boule did not challenge "high-level Executive Branch decisions involving issues of national security," and, unlike in *Hernandez* v. *Mesa*, 140 S. Ct. 735 (2020), Mr. Boule's claim did not implicate "foreign relations" or "national security." Pet.App.37a. The court further noted that while "the plaintiffs in *Hernandez* were foreign nationals, complaining of a harm suffered in Mexico," Mr. Boule "is a United States citizen, complaining of harm suffered on his own property in the United States." Pet.App.38a. And while the agent in *Hernandez* was "literally 'at the border,' tasked with policing the border and preventing illegal entry of goods and people," petitioner "had already been informed" by Mr. Boule that the foreign-national guest "had been driven from SeaTac airport after arriving on a flight from New York." *Id.* The court thus concluded that, in this "'run-of-the-mill' Fourth Amendment case," "any costs imposed by allowing a *Bivens* claim to proceed are outweighed by compelling interests in favor of protecting United States citizens on their own property in the United States from unconstitutional activity by federal agents." Pet.App.39a-40a.

Addressing Mr. Boule's First Amendment claim, the court of appeals noted that, in *Hartman*, this Court "explicitly stated, as part of its reasoning during the course of a *Bivens* analysis, that such a claim may be brought." Pet.App.41a. But because this Court had "not expressly … held" that "*Bivens* extends to First Amendment retaliation claims," the court of appeals

stated that Mr. Boule's First Amendment claim arose in a new context. Pet.App.42a.

The court concluded that no special factors counseled hesitation with regard to Mr. Boule's First Amendment claim. It explained that Mr. Boule's claim is "quite unlike" the First Amendment claim this Court declined to recognize in *Bush* v. *Lucas*, 462 U.S. 367 (1983), which arose from "an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States." Pet.App.42a-43a (quoting *Bush*, 462 U.S. at 368). Rather, the court of appeals found, Mr. Boule's claim is "on all fours with the First Amendment retaliation claim described in *Hartman*, where the Court wrote that '[w]hen the vengeful officer is federal, he is subject to an action for damages on the authority of *Bivens*.'" Pet.App.43a (quoting *Hartman*, 547 U.S. at 256). In the court of appeals' view, moreover, there was "even less reason to hesitate" in extending *Bivens* to the First Amendment claim here because petitioner "was not carrying out official duties in asking for investigations of" Mr. Boule. *Id.*

Although he had not raised any such argument in the district court, petitioner cursorily argued on appeal that alternative remedies were available to Mr. Boule, such as "intentional-tort claims under the [FTCA], *see* 28 U.S.C. §2680(h), a trespass claim against Agent Egbert, or injunctive relief." Appellee's C.A. Br. 26. The court of appeals held that the FTCA did not foreclose a *Bivens* remedy, citing this Court's explanation that "Congress views FTCA and *Bivens* as parallel, complementary causes of action." Pet.App.45a (quoting *Carlson* v. *Green*, 446 U.S. 14, 19-20 (1980)). The court rejected the possibility of a state-law trespass claim because it would be barred by the Westfall Act.

Pet.App.46a. And the court held that injunctive relief is an "inadequate remedy, for Boule is seeking damages for Agent Egbert's completed actions rather than protection against some future act." *Id.*

The court of appeals denied rehearing en banc over the dissent of twelve judges.

SUMMARY OF ARGUMENT

I. This Court has repeatedly held that a *Bivens* remedy is available in appropriate circumstances and provided guidance on discerning them. This case comfortably fits within the factual circumstances in which *Bivens* claims have been found available by this Court: Mr. Boule alleges unlawful search and seizure and retaliation that are not meaningfully different from *Bivens* itself and the Court's observation in *Hartman*, respectively; Mr. Boule challenges the types of individual instances of law enforcement overreach that *Bivens* is designed to remedy; and Mr. Boule's claims do not implicate any separation-of-powers concerns that have caused the Court's hesitation in prior cases. Petitioner asks this Court to retreat from its holdings and eliminate all *Bivens* extensions. But this Court has eschewed such a categorical approach—including declining to take up petitioner's request to reconsider *Bivens* altogether—and instead established a framework to evaluate the appropriateness of a *Bivens* claim on a case-by-case basis.

II. Mr. Boule's claims readily satisfy that framework. Mr. Boule's Fourth Amendment claim presents no new context because he was subject to unlawful search and seizure on his private property, which is materially indistinguishable from *Bivens*. Even if it were a new context, there are no reasons counseling

hesitation in applying *Bivens* because, unlike in recent cases where the Court has found a *Bivens* remedy unavailable, no separation-of-powers concerns exist: this case does not challenge a national security policy or the conduct of an officer stationed at the border actively trying to prevent illegal entry into the United States. Notwithstanding petitioner's attempt to associate his misconduct with border security and immigration enforcement, Mr. Boule's claim implicates neither. Mr. Boule, a U.S. citizen, seeks a remedy for petitioner's misconduct against him at his dwelling on U.S. soil, which Congress has specifically carved out from no-warrant immigration enforcement authority. And there are no alternative remedies: as the Court has repeatedly recognized, Congress intended to allow *Bivens* claims alongside FTCA claims, and the administrative channel that petitioner identifies has no substantive remedial provision.

This Court has long assumed that a First Amendment retaliation claim like Mr. Boule's is cognizable under *Bivens*. But again, even if Mr. Boule's retaliation claim presented a new context, no special factor counsels hesitation because petitioner's vengeful actions in retaliation for Mr. Boule's reporting of his misconduct have no discernible connection to national security or immigration enforcement. Contrary to petitioner's argument, Mr. Boule's retaliation claim is narrowly confined and does not implicate the line-drawing difficulty that this Court has identified in other contexts. There are also no alternative remedies: state-law tort claims would be barred under the Westfall Act; the Privacy Act and the Tax Code are not designed to remedy retaliatory conduct like petitioner's; administrative investigations provide no remedy for Mr. Boule; and the remote possibility of a criminal conviction (which is pre-

sent in every *Bivens* case) is not a reason to deny a *Bivens* remedy.

ARGUMENT

I. THIS COURT HAS CONSISTENTLY AFFIRMED THE AVAILABILITY OF A *BIVENS* REMEDY IN APPROPRIATE CASES LIKE THIS ONE

A. This Case Presents Paradigmatic *Bivens* Claims

1. In one of the earliest cases to define the Court's role in our system of government, this Court declared that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). *Bivens* has vindicated that principle for the past fifty years, by allowing courts to remedy injuries resulting from a federal officer's violation of the Constitution.

The claim in *Bivens*, like Mr. Boule's claims, involved an unlawful search and seizure. The plaintiff there alleged that Federal Bureau of Narcotics agents "acting under claim of federal authority" entered and searched his apartment and arrested him, without a warrant and using unreasonable force, thereby inflicting "great humiliation, embarrassment, and mental suffering." 403 U.S. at 389-390. The Court allowed the plaintiff to seek damages under the Fourth Amendment, explaining that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.* at 395-396. It did not matter that the Fourth Amendment—like other provisions of the Constitution—"does not in so many words provide for its enforcement by an award of mon-

ey damages"; there was "no explicit congressional declaration" prohibiting such remedy and "no special factor[] counseling hesitation in the absence of affirmative action by Congress." *Id.* at 396-397. Justice Harlan further explained in his concurrence that a damages remedy is particularly necessary where, as here, the victim of a constitutional violation cannot "obviate the harm by securing injunctive relief"—i.e., in cases where it is "damages or nothing." *Id.* at 409-410 (Harlan, J., concurring). The Court thus held that a federal officer's unlawful search and seizure may be remedied through a damages action "normally available in the federal courts." *Id.* at 397.

Since *Bivens*, the Court has recognized damages claims against federal officers under the Fifth and Eighth Amendments. In *Davis* v. *Passman*, 442 U.S. 228 (1979), the Court held that a plaintiff may seek damages under the Fifth Amendment from a Member of Congress for sex discrimination in an employment decision. *Id.* at 245-249. In *Carlson*, the Court held that a prisoner may seek damages against federal prison officials for failing to provide adequate medical care in violation of the Eighth Amendment's ban on cruel and unusual punishment. 446 U.S. at 18-25. And although the Court has called *Bivens* a "'disfavored' judicial activity," it has repeatedly affirmed that *Bivens* applies in appropriate circumstances. *Abbasi*, 137 S. Ct. at 1856-1857. Indeed, the Court declined petitioner's request for certiorari on the question whether *Bivens* should simply be overruled.

Of the guidelines the Court has provided for the availability of *Bivens* today, four govern this case.

First, the Court has emphasized "the continued force, or even the necessity, of *Bivens* in the search-

and-seizure context in which it arose." *Abbasi*, 137 S. Ct. at 1856. The Court explained that *Bivens* "vindicate[s] the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward." *Id.* at 1856-1857. Thus, the Court noted, "[t]he settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere." *Id.* at 1857.

Second, in determining whether a claim goes beyond the search-and-seizure context (or any other contexts to which the Court has applied *Bivens*), the Court has cautioned that any difference from "previous *Bivens* cases decided by the Court" must be "meaningful" to warrant further scrutiny regarding *Bivens*'s applicability. *Abbasi*, 137 S. Ct. at 1859-1860. As the Court explained, "[s]ome differences … will be so trivial that they will not suffice to create a new *Bivens* context," *id.* at 1865, rejecting the contrary view—also pressed by petitioner here—that "*Bivens* and its progeny" are "relic[s]" that should be limited "to the precise circumstances that they involved," *id.* at 1869-1870 (Thomas, J., concurring in part and concurring in the judgment) (quotation marks omitted).

Third, to the extent a difference from past cases is "meaningful" such that further analysis is warranted, the Court has proceeded to determine whether the judiciary is "well suited" to "weigh the costs and benefits of allowing a damages action to proceed" in the specific confines of each case. *Abbasi*, 137 S. Ct. at 1857-1858. For example, citing separation-of-powers concerns, the Court has disallowed *Bivens* actions for injuries arising out of activities incident to military service, *United States* v. *Stanley*, 483 U.S. 669, 681, 683-684 (1987), rea-

soning that the military has a unique "hierarchical structure of discipline and obedience to command," "wholly different from civilian patterns," and thus "'courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have,'" *Chappell* v. *Wallace*, 462 U.S. 296, 300, 305 (1983).[6]

In *Abbasi*, the Court disallowed foreign nationals' "*Bivens* claims challenging the conditions of confinement imposed … pursuant to the formal policy adopted by the Executive Officials in the wake of the September 11 attacks" because they would "interfere in an intrusive way with sensitive functions of the Executive Branch." 137 S. Ct. at 1858, 1861. In particular, the Court noted that a *Bivens* claim in that context "would necessarily require inquiry and discovery into the whole course of the discussions and deliberations that led to" the national security policies in question. *Id.* at 1860.

In *Hernandez*, the Court likewise denied a *Bivens* remedy based on "the distinctive characteristics" of that case: the suit was brought by Mexican nationals over a cross-border shooting by a border patrol agent who was "stationed right at the border" and actively "attempting to prevent illegal entry" into the United States. 140 S. Ct. at 740, 746. Critical to the Court's reasoning was "the potential effect on foreign relations." *Id.* at 744. Indeed, the bullet struck the victim on Mexican soil and became "an international incident, with the United States and Mexico disagreeing about

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[6] Petitioner's union's argument that Border Patrol is a "paramilitary force," National Border Patrol Council Br. 15 (Dec. 22, 2021), is not serious. Notably, the United States does not describe CBP that way.

how the matter should be handled." *Id.* at 740. The Executive Branch had concluded that the agent acted consistently with the "'policy or training regarding use of force'" and thus should not face charges anywhere, while the Government of Mexico supported the *Bivens* suit and requested the agent's extradition for prosecution in Mexico. *Id.* at 744-745.

In contrast, this Court has never rejected a *Bivens* remedy based on abstract complaints such as those raised by petitioner and his amici, including bare incantation of national security concerns or the unchecked discretion of federal agents to carry out their daily functions. To the contrary, the Court has admonished that "national-security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'" *Abbasi*, 137 S. Ct. at 1862. That is particularly so in cases within the United States, given the "difficulty of defining the security interest" within our borders and the "heightened" "danger of abuse." *Id.* (quotation marks omitted).

Fourth, the Court has emphasized that a *Bivens* action is particularly appropriate where it would further the "'purpose of *Bivens* … to deter the *officer*'" and where it targets an "individual instance[] of … law enforcement overreach" that, by nature, would be "difficult to address except by way of damages actions after the fact." *Abbasi*, 137 S. Ct. at 1860, 1862 (reiterating importance of *Bivens* in "damages or nothing" cases). Each of the three instances in which this Court has recognized the viability of a *Bivens* claim—*Bivens*, *Davis*, and *Carlson*—shared those characteristics because the claims there challenged "individual instances" of federal officers' constitutional violations. *See id.* at 1862-1863. By contrast, the Court has denied *Bivens* claims

against a private company, *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61, 69-71 (2001), a federal agency, *FDIC* v. *Meyer*, 510 U.S. 471, 485-486 (1994), and high-level government officials that formulated national-security policy, *see Abbasi*, 137 S. Ct. at 1860, because allowing *Bivens* claims against those defendants would not serve as a deterrent against individual federal officer misconduct.

2. This case falls readily within the circumstances this Court has recognized justify a *Bivens* remedy. It arises out of a single agent's unlawful search and seizure, for which *Bivens* has "continued force[] or even … necessity." *Abbasi*, 137 S. Ct. at 1856. As the district court determined, petitioner "invaded [Mr. Boule's] Fourth Amendment interest in the curtilage of his home/inn" and "the item searched, *i.e.*, the vehicle." Pet.App.65a. Petitioner also used excessive force against Mr. Boule, inflicting physical injuries. Pet.App.33a. Mr. Boule's First Amendment claim is similarly justified because this Court has acknowledged that a federal officer who, like petitioner, engages in "[o]fficial reprisal for protected speech" is "subject to an action for damages on the authority of *Bivens*." *Hartman*, 547 U.S. at 256.

Furthermore, this case raises none of the separation-of-powers concerns the Court has identified in prior cases: Mr. Boule does not challenge military discipline, *e.g.*, *Stanley*, 483 U.S. at 683-684, a national security policy, *Abbasi*, 137 S. Ct. at 1860-1861, or an action that harmed a foreign national on foreign soil and "became an international incident," *Hernandez*, 140 S. Ct. at 740, 744-745. *See also* U.S. Br. 22, *Hernandez* v. *Mesa*, No. 17-1678 (U.S. Sept. 30, 2019) (distinguishing "cases involving aliens injured *abroad* by Border Patrol agents" from "the ordinary domestic activities per-

formed by law enforcement (including Border Patrol agents) in the United States"). Mr. Boule is a U.S. citizen who was assaulted on his own property in the United States by a rogue agent who abused his power and later retaliated when Mr. Boule reported his misconduct. These are precisely the type of "individual instances of … law enforcement overreach" for which *Bivens* remains an important remedy. *Abbasi*, 137 S. Ct. at 1862.

The circumstances of this case likewise refute petitioner's efforts to wrap himself in national security and immigration enforcement considerations. *E.g.*, Pet. Br. 29-31, 37-39. This Court's precedents "rebuff[ing]" *Bivens* (*id.* at 18) based on those concerns involved foreign-national plaintiffs. *See Abbasi*, 137 S. Ct. at 1851-1853; *Hernandez*, 140 S. Ct. at 740. This case involves petitioner's misconduct against a U.S. citizen that merely happened to occur in conjunction with petitioner's inquiry of the guest's immigration status—which itself was unwarranted because, as Mr. Boule had told petitioner that morning, the guest was lawfully admitted into the United States the day before. JA84; JA92. The government is wrong that Mr. Boule was attempting to "thwart" petitioner's immigration inquiry (U.S. Br. 30-31); rather, Mr. Boule was acting [redacted] JA123, and otherwise asserting his constitutional right to exclude an unauthorized federal agent from entering and interfering with his property.

Nor does this case involve the "'conduct of agents at the border,' whose core functions" may otherwise implicate border security (Pet. Br. 29; *see* U.S. Br. 29). While petitioner touts (at 4) CBP agents' "broad authority to conduct warrantless interrogations, searches,

and arrests when operating near the border," Congress specifically carved out an exception to that authority in requiring officers to obtain a warrant to enter a "dwelling[]," consistent with the strictures of the Fourth Amendment. 8 U.S.C. §1357(a)(3).[7] Petitioner has not denied that the curtilage of a home is part of a "dwelling[]," nor could he, as the Ninth Circuit has so held. *See* Appellee's C.A. Br. 30 (arguing only that, although §1357(a)(3) protects "dwellings," the driveway that petitioner intruded upon is not curtilage, contrary to the district court's finding); *United States* v. *Romero-Bustamente*, 337 F.3d 1104, 1110 (9th Cir. 2003) ("Congress intended to exempt the residential curtilage from the Border Patrol's warrantless search authority" in §1357(a)(3) because the word "dwelling[]" in that statutory provision "has the legal meaning of the word 'home,' with its concomitant constitutional protections"). Moreover, §1357(a)(3) authorizes agents' warrantless entries only "for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States." 8 U.S.C. §1357(a)(3). Whatever else he might claim, petitioner cannot credibly argue that he was acting to "prevent the illegal entry" of Mr. Boule's guest who had already lawfully entered the country. Since *Congress* has excluded intrusion into a dwelling from its authorization of ordinary border enforcement (irrespective of the dwelling's proximity to the border), it would make little sense for the *Court* to conflate the two—contrary to Congress's judgment.

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[7] Petitioner acknowledges (at 4, 37-38) that his authority is governed by 8 U.S.C. §1357(a). *See* 8 C.F.R. §287.5(b)-(c).

B. Petitioner's Sweeping Effort To Bar *Bivens*'s Application To New Contexts Mischaracterizes The Court's Precedents

Petitioner asks the Court to categorically foreclose all further extensions of *Bivens*. Pet. Br. 14-24. The United States does not embrace that extraordinary position, and for good reason: petitioner's argument would require overruling several of this Court's precedents, including from recent years, and is demonstrably wrong.

1. Petitioner pretends (at 14) that *Bivens* and its progeny are dead, such that recognizing *Bivens* claims in new contexts "would breathe new life into doctrines the Court has extinguished." This Court has already rejected that very view, which was articulated by the concurrence in *Abbasi*. *Compare Abbasi*, 137 S. Ct. at 1865 ("trivial" differences from the Court's *Bivens* precedents do not create a new *Bivens* context), *with id.* at 1869-1870 (Thomas, J., concurring in part and concurring in the judgment) (stating that "*Bivens* and its progeny" are "relic[s]," limited "to the precise circumstances" of those cases (quotation marks omitted)).

Nor has the Court "extinguished" the *Bivens* doctrine or "demolished" its foundations (Pet. Br. 14, 16). To the contrary, the Court has emphasized that *Bivens* "vindicate[s] the Constitution by allowing some redress for injuries," that "no congressional enactment has disapproved of" *Bivens*, and that the Court was not "cast[ing] doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context," which is the context in which this case arises. *Abbasi*, 137 S. Ct. at 1856-1857. Petitioner tries to dismiss (at 17) this guidance as "long-buried doctrines" undermined by "intervening precedents," but much of the

guidance that petitioner now belittles was provided just five Terms ago in *Abbasi*.

2. Likewise, in suggesting that the criteria for applying *Bivens* can never be satisfied, petitioner denigrates this Court's precedents. Were petitioner correct, the Court's criteria for applying *Bivens* would yield only one answer—that *Bivens* does not apply to new contexts—and make the Court's decisional framework wholly superfluous.

At any rate, petitioner is simply wrong that "every *Bivens* extension raises sound reasons for hesitation" (Pet. Br. 11). As an initial matter, petitioner's unqualified assertion (at 19) that "[c]reating causes of action is up to Congress" is unsupported. Not only would petitioner's argument eliminate all *Bivens* claims entirely—contrary to this Court's precedents—but it would undermine the uncontroversial court-made cause of action allowing litigants to enjoin a federal officer's violation of the Constitution. *See Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010); *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326-327 (2015) (injunction suits are "judge-made remed[ies]").

Moreover, this Court has never held that "*Bivens* extensions always threaten separation of powers" (Pet. Br. 11), instead opting for a careful examination of the facts to prevent the "danger of abuse." *Abbasi*, 137 S. Ct. at 1862. For example, even in cases involving the military, which raise sensitive separation-of-powers concerns, *supra* pp. 19-20, the Court assessed "varying levels of generality at which one may apply 'special factors' analysis" and chose to disallow *Bivens* claims only when the conduct occurs "'incident to service,'" as opposed to "disallow[ing] [claims] by servicemen entire-

ly." *Stanley*, 483 U.S. at 681. Likewise, in *Hernandez*, the Court highlighted "the distinctive characteristics of cross-border shooting claims" that have "foreign relations and national security implications," 140 S. Ct. at 739, rather than hold categorically, as petitioner suggests (at 19; *accord id.* at 37), that a damages remedy for any conduct by Border Patrol agents would be an unwarranted *Bivens* extension.

Similarly, although petitioner questions (at 19-20) courts' ability to weigh the costs and benefits of a damages remedy, courts have "[h]istorically" regarded damages "as the ordinary remedy for an invasion of personal interests in liberty." *Bivens*, 403 U.S. at 395; *accord Davis*, 442 U.S. at 245. As a result, judges have long been "capable of making the types of judgment … necessary to accord meaningful compensation for invasion of Fourth Amendment rights," as they have dealt with "private trespass and false imprisonment claims" that present similar considerations. *Bivens*, 403 U.S. at 408-409 (Harlan, J., concurring). Courts also regularly engage in similar balancing outside the *Bivens* context. To determine the application of the exclusionary rule, courts ask whether "the benefits of deterrence … outweigh the costs." *Herring* v. *United States*, 555 U.S. 135, 141 (2009). In applying qualified immunity, courts seek "a proper balance" between "'the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties.'" *Abbasi*, 137 S. Ct. at 1866-1867. Petitioner's litany of questions about "the judicial ken" (Pet. Br. 20) provides no basis to doubt courts' ability to conduct similar balancing only when determining the appropriateness of a damages remedy.

Finally, "no congressional enactment has disapproved of" *Bivens*, despite many opportunities to do so.

Abbasi, 137 S. Ct. at 1856. As this Court has explained, the relevant inquiry is whether there is reason "to infer that Congress expected the Judiciary to stay its *Bivens* hand." *Wilkie* v. *Robbins*, 551 U.S. 537, 554 (2007). The Court may infer such a reason when "Congress chose specific forms and levels of protection for the rights of persons affected," *Schweiker* v. *Chilicky*, 487 U.S. 412, 426 (1988), or otherwise devoted "careful attention to conflicting policy considerations" implicated by the subject at hand, *Bush*, 462 U.S. at 388. In *Hernandez*, for instance, the Court inferred Congress's "hesitan[ce] to create claims based on allegedly tortious conduct abroad," because Congress expressly made 42 U.S.C. §1983—the state analog to, and broader in scope than, *Bivens*—"available only to 'citizen[s] of the United States or other person[s] within the jurisdiction thereof.'" 140 S. Ct. at 739, 747. Absent such specific indications, this Court does not infer congressional disapproval, and certainly not in every case, as petitioner argues.

To the extent petitioner asserts that Congress's awareness of *Bivens* gives meaning to its inaction in affirmatively providing for a damages remedy, that too is wrong. Congressional silence can just as easily mean that Congress *approves* of this Court's precedents. The twenty-one failed legislative proposals "[b]etween 1973 and 1985" (Pet. Br. 21) do not suggest otherwise; those bills sought to "replace individual liability under *Bivens* with direct governmental liability," as is permitted for non-constitutional torts under the FTCA. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 Geo. L.J. 65, 98 (1999). As petitioner's own authority explains, therefore, the bills' failures suggest only that, for constitutional claims, Congress "prefer[s] individual

rather than governmental liability," in part because the former "permit[s] the government to raise qualified immunity in its own defense." *Id.* at 98-99.

II. MR. BOULE'S *BIVENS* CLAIMS SATISFY THIS COURT'S FRAMEWORK

Applying this Court's *Bivens* framework, the court of appeals correctly held that Mr. Boule's claims may proceed. The Court first determines whether a claim arises in a new context due to a "meaningful" difference from the Court's prior *Bivens* precedents. *Abbasi*, 137 S. Ct. at 1859-1860. If the answer is yes, the Court then asks whether there are "special factors counselling hesitation" in allowing the *Bivens* claim to proceed. *Id.* at 1857-1858. Mr. Boule's claims pass both parts of this inquiry: they do not present a meaningfully new context and, even if they did, they do not implicate any special factors counseling hesitation.

A. *Bivens* Is Available To Remedy Violation Of A U.S. Citizen's Fourth Amendment Rights By Immigration Officers Conducting Ordinary Law Enforcement

1. Mr. Boule's Fourth Amendment Claim Presents No New Context

Mr. Boule's Fourth Amendment claim is unremarkable, arising from the "common and recurrent sphere" of an unlawful search and seizure by an individual law enforcement officer. *Abbasi*, 137 S. Ct. at 1857. Indeed, there is no "meaningful" difference from *Bivens* itself: Mr. Boule is a U.S. citizen who was subject to unreasonable force during an unlawful search and seizure conducted on his private property on U.S. soil. *Compare Bivens*, 403 U.S. at 389-390. As the

court of appeals noted, those facts are materially "indistinguishable" from the Fourth Amendment excessive force claims that are "routinely brought … under *Bivens*." Pet.App.38a (citing cases); *see also, e.g.*, *Pagán-González* v. *Moreno*, 919 F.3d 582, 596-601 (1st Cir. 2019) (*Bivens* claim for warrantless home entry and search); *Big Cats of Serenity Springs, Inc.* v. *Rhodes*, 843 F.3d 853, 858-869 (10th Cir. 2016) (*Bivens* claim for warrantless search of commercial premises).

The fact that petitioner works for CBP, not the Federal Bureau of Narcotics like the defendants in *Bivens*, is a "trivial" difference that does not make this a new context. *Abbasi*, 137 S. Ct. at 1865. The "rank of the officers involved" (*id.* at 1860) is the same—like the defendants in *Bivens*, petitioner is a line-level officer. Although petitioner emphasizes (at 12, 35) that he is in "a 'new class of defendants,'" if that were enough to create a new context, it would suggest a *Bivens* remedy is limited to the precise circumstances involving officers in the now-defunct Federal Bureau of Narcotics (*Bivens*), Members of Congress (*Davis*), and Federal Bureau of Prisons officials (*Carlson*), contrary to this Court's caution not to rely on "trivial" differences. *Abbasi*, 137 S. Ct. at 1865. Indeed, lower courts routinely recognize that standard search-and-seizure cases like this one do not extend *Bivens*, even where the officer works for a different agency. *See, e.g.*, *Hicks* v. *Ferreyra*, 965 F.3d 302, 311 (4th Cir. 2020) (U.S. Park Police); *Jacobs* v. *Alam*, 915 F.3d 1028, 1038 (6th Cir. 2019) (U.S. Marshal Service); *Ioane* v. *Hodges*, 939 F.3d 945, 952 (9th Cir. 2018) (IRS). CBP agents are no different; as the United States recognized recently, "Border Patrol agents" perform "ordinary domestic activities" like other law enforcement officers. U.S. Br. 22, *Hernandez* v. *Mesa*, No. 17-1678 (U.S. Sept. 20, 2019).

Petitioner's assertion (at 36) that "the Fourth Amendment inquiry is 'qualitatively different' at the border" does not help him. Congress has already determined when proximity to the border does and does not broaden an officer's authority: agents may enter "private lands" within 25 miles of the border without a warrant, but they must obtain a warrant to enter a "dwelling[]," which includes the partially fenced curtilage surrounding Mr. Boule's home. 8 U.S.C. §1357(a)(3); *see supra* pp. 23-24. That distinction makes eminent sense. After all, the "'very core'" of the Fourth Amendment is "'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Collins* v. *Virginia*, 138 S. Ct. 1663, 1670 (2018). Contrary to petitioner's assertion (at 36), adhering to that distinction would not treat "Fourth Amendment claims against all law-enforcement officers" the same. It would merely credit Congress's judgment that, while an agent's conduct at or near the border in other circumstances may require different controls, petitioner's warrantless entry into Mr. Boule's dwelling in the United States and use of excessive force is no different from the "unconstitutional arrest and search carried out" in Mr. Bivens's apartment "in New York City" (*id.*). Mr. Boule did not surrender his constitutional rights and remedies simply by living near the border.

Petitioner's contention (at 36) that no other circuit has "extended *Bivens* to officers enforcing immigration laws" is both irrelevant and misleading. Only this Court's precedents can determine whether a context is new, not the views of the lower courts. *Abbasi*, 137 S. Ct. at 1859 (anchoring "new context" assessment on "cases decided by this Court"). Moreover, petitioner identifies no case comparable to this one. The court of

appeals cases that petitioner and the United States cite involved some combination of a foreign-national plaintiff, immigration proceedings against noncitizens, and conduct right at a port of entry, none of which is present here.[8] Notably, in cases involving claims brought by a U.S. citizen that implicated the border only tangentially or not at all, courts of appeals have *allowed* *Bivens* claims against immigration officers.[9] Petitioner identifies no case that barred a *Bivens* remedy where, as here, a federal officer who happens to be employed in a border-related role violates the Fourth Amendment rights of a U.S. citizen on private property on domestic soil, especially when the U.S. citizen was not attempting to enter the United States or helping anyone else do so.

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[8] *See Elhady* v. *Unidentified CBP Agents*, 18 F.4th 880, 881-882 (6th Cir. 2021) (claim challenging detention at the border during reentry from abroad); *Maria S. ex rel. E.H.F.* v. *Garza*, 912 F.3d 778, 784 (5th Cir. 2019) (injury abroad against a deceased noncitizen); *Tun-Cos* v. *Perrotte*, 922 F.3d 514, 526, 528 (4th Cir. 2019) (claims by nine plaintiffs, including one citizen, challenging the legality of their stops, detention, and home invasions, for which the court cited "remedial structure" available in removal proceedings); *Alvarez* v. *ICE*, 818 F.3d 1194, 1208 (11th Cir. 2016) (noncitizen's claims that detention exceeded the applicable statutory period); *De La Paz* v. *Coy*, 786 F.3d 367, 369, 374 (5th Cir. 2015) (noncitizens' claims arising from allegedly illegal traffic stops and detentions).

[9] *See Morales* v. *Chadbourne*, 793 F.3d 208, 214-219 (1st Cir. 2015) (citizen's claim against ICE official for unlawful detention absent probable cause could proceed); *Chavez* v. *United States*, 683 F.3d 1102, 1111-1112 (9th Cir. 2012) (citizens' claim against border patrol agents for illegal traffic stops could proceed); *cf. Lanuza* v. *Love*, 899 F.3d 1019, 1029 (9th Cir. 2018) (rejecting the view that "all actions taken by immigration officials in the course of their duties … are necessarily intertwined with the execution of immigration policy").

2. No Special Factor Counsels Hesitation

Even if Mr. Boule's Fourth Amendment claim presented a new context—though it does not—no special factor warrants denial of a *Bivens* remedy.

a. This case does not implicate national security, foreign relations, or any of the other separation-of-powers concerns that this Court has identified in prior cases. Although petitioner argues (at 35) that Mr. Boule's Fourth Amendment claim "plainly implicate[s] … national security concerns," petitioner wisely does not analogize this case to *Abbasi*, which the court of appeals correctly held is "a far cry" from this case, Pet.App.36a.

Petitioner's sole basis for invoking national security or immigration enforcement is that, in his view, Mr. Boule's claim would risk "'undermining border security,'" as in *Hernandez*. Pet. Br. 37; U.S. Br. 29. But *Hernandez* involved an agent who was "stationed right at the border" and shot a Mexican national on Mexican soil. 140 S. Ct. at 740, 746. Petitioner, by contrast, was not stationed at the border at the time of his misconduct, nor was he patrolling the border "to prevent the illegal entry of aliens into the United States," 8 U.S.C. §1357(a)(3); *see also* 8 C.F.R. §287.1(c) (defining "[p]atrolling the border" as conducting activities "to prevent the illegal entry of aliens into the United States"). Petitioner had already been informed by Mr. Boule that morning that the guest arrived in New York from Turkey the day before. JA92-93; *see* JA84.

Likewise, "[c]onsidered at the appropriate level of generality" (U.S. Br. 31), which examines "the distinctive characteristics" of each case (*Hernandez*, 140 S. Ct. at 739), Mr. Boule's claim has nothing do with Border Patrol's "'primary responsibility'" of preventing illegal

entry of noncitizens or terrorists (U.S. Br. 28) or the "'split-second decisions'" agents make in emergency situations when guarding the border (Pet. Br. 37). Since the guest was necessarily admitted to the United States upon arrival the previous day, petitioner had no reasonable basis to suspect "potential immigration-law violations" (U.S. Br. 31). In any event, petitioner had plenty of time to consider his actions and, if he truly suspected illegal activity, to either obtain a warrant to enter Mr. Boule's property or stop the vehicle on the public road outside Mr. Boule's home. And there was no need for petitioner's use of force because the driverless car in which the guest was present was blocked in Mr. Boule's driveway. JA93; JA123.

Insofar as petitioner suggests (at 7; *see* U.S. Br. 2-3, 18) that he was attempting to prevent illegal cross-border activity based on his purported suspicion of the guest's intent, that is incorrect both legally and factually. The agent in *Hernandez* faced the risk that the victim, who had had just "r[u]n back across" the border "onto Mexican soil," might unlawfully recross the border back into the United States. 140 S. Ct. at 740. By contrast, the most that petitioner faced here was the possibility that the guest might *leave* the United States and enter Canada outside a port of entry, which does not violate U.S. law, *see supra* n.3, much less have a "clear and strong connection to national security," *Hernandez*, 140 S. Ct. at 746. As another CBP agent explained, there was "nothing else [they] needed to do" "as border patrol agents" once the guest's immigration status was confirmed. JA135. Petitioner's conduct confirms this—he left Mr. Boule's home after verifying the guest's visa, apparently without concern for any potential departure from the United States. Pet. Br. 8; JA108. That the guest allegedly entered Canada that

night (Pet. Br. 38) is immaterial: petitioner's duties were complete when he verified the guest's visa status. Petitioner was evidently unconcerned about where the guest might travel at the time of his misconduct, and at any rate there is no evidence that Mr. Boule had anything to do with the guest's alleged entry into Canada.

Petitioner tacitly acknowledges the mismatch between this case and cases like *Hernandez*, styling the issue in this case as whether a *Bivens* remedy is available against "federal officers engaged in immigration-*related* functions." Pet. I (emphasis added). But this Court has never insulated all "immigration-related functions" from liability, as that vague phrase could cover just about any misconduct by federal agents empowered to enforce the immigration laws. For example, CBP officers have "broad law enforcement authorities," including the power to arrest U.S. citizens sought by other law enforcement agencies. U.S. Customs & Border Protection, *CBP Enforcement Statistics Fiscal Year 2022*, https://tinyurl.com/yt2kvcfu (visited Jan. 18, 2022); *see also* 8 U.S.C. §1357(a)(5)(A) (authorizing immigration officers to "make arrests" in certain circumstances); 8 C.F.R. §287.5(c)(3)(i) (providing "Border patrol agents" with arrest authority under §1357(a)(5)).[10]

Moreover, insulating CBP agents' "immigration-related functions" from *Bivens* remedies could expose large swaths of the country's population to unremedied abuses. The 25-mile zone that petitioner repeatedly emphasizes as giving officers "robust enforcement powers" (Pet. Br. 38; *see* U.S. Br. 28-29) includes the roughly three million residents of the cities of Buffalo,

[10] Further, a wide range of agents have the authority to enforce 8 U.S.C. §1357(a)(3), including "[a]ir and marine agents" and "[s]pecial agents." 8 C.F.R. §287.5(b).

Detroit, El Paso, and San Diego—all within 25 miles of a land border. *See* U.S. Census Bureau, *Quick Facts*, https://tinyurl.com/2p86fyzd. Agents also have expanded authority within "a reasonable distance" of the border, *see* 8 U.S.C. §1357(a)(3), which CBP defines as 100 miles, 8 C.F.R. §287.1(a)(2), and which covers about 200 million people, *see* ACLU, *The Constitution in the 100-Mile Border Zone*, https://tinyurl.com/yc45pu3b (visited Jan. 18, 2022). Petitioner cannot reasonably claim that national security insulates conduct that could affect nearly two-thirds of the country's population, or that *courts* should decide who lives sufficiently close to the border to implicate national security.

Petitioner is equally wrong in arguing (at 37) that a *Bivens* remedy here would "inject uncertainty into an area with little room for error." Courts have allowed Fourth Amendment *Bivens* claims against immigration officers, with no evident detriment to national security. *See supra* n.9. And while it may well be that an agent "arresting 100 people at once cannot afford to hesitate" in exigent circumstances (Pet. Br. 37 (citation omitted)), the Court should *want* a federal agent who has hours to consider how to investigate a U.S. citizen's home on U.S. soil to take the steps needed to comply with the Fourth Amendment. *Cf. Mitchell* v. *Forsyth*, 472 U.S. 511, 523 (1985) (guarding against the "sufficiently real" "danger that high federal officials will disregard constitutional rights in their zeal to protect the national security").

b. Petitioner's fallback is his argument that Congress intended to deny a *Bivens* remedy. Pet. Br. 38-39. As explained above, however, the 25-mile-zone provision that petitioner relies on (at 38) undermines his argument because Congress afforded full Fourth Amendment protection for "dwellings," which includes

the partially fenced curtilage surrounding Mr. Boule's home. *See* 8 U.S.C. §1357(a)(3). Indeed, the relevant distinction here is not between an agent "literally 'at the border'" and on "private land abutting the border," as petitioner argues (at 38; *accord* Pet. Br. 31), but rather between an agent at the border and at a U.S. citizen's dwelling—where Congress has diminished an officer's authority to proceed without a warrant.

Similarly, the "'complex and comprehensive' immigration scheme" (Pet. Br. 38-39) actually supports Mr. Boule. The Immigration and Nationality Act provides that state officials who perform the duties of federal immigration officers "shall be considered to be acting under color of Federal authority *for purposes of determining the liability* ... of the officer or employee in a civil action brought under Federal or State law." 8 U.S.C. §1357(g)(8) (emphasis added). In other words, "Congress contemplated that civil actions would be maintained against both federal immigration officers and state employees acting in the capacity of federal immigration officers when their actions allegedly violate the Constitution or other laws." *Lanuza* v. *Love*, 899 F.3d 1019, 1031 (9th Cir. 2018). That legislative guidance suggests that Congress intended to allow actions like this to redress an officer's wrongful acts, even in situations more closely related to immigration than this case.

c. There are no alternative remedies.

Federal Tort Claims Act. This Court has repeatedly observed that the FTCA does not support denying a *Bivens* remedy. *E.g.*, *Wilkie*, 551 U.S. at 553, 555; *Malesko*, 534 U.S. at 68. The FTCA permits plaintiffs to assert non-constitutional claims directly against the United States for "torts committed by federal

employees acting within the scope of their employment." *Levin* v. *United States*, 568 U.S. 503, 509 (2013). Following the enactment of the Westfall Act in 1988, the FTCA is now ordinarily the exclusive remedy for wrongful acts of government employees. *Id.* Critically, however, the exclusivity provision does not cover claims against a government employee for "a violation of the Constitution of the United States"—i.e., *Bivens* claims. 28 U.S.C. §2679(b)(2)(A). Indeed, in the decades since *Bivens*, Congress has repeatedly considered but declined to subject constitutional claims to a governmental liability regime like the FTCA. *See supra* pp. 28-29. Instead, when amending the FTCA, Congress reiterated that the FTCA "should be viewed as a counterpart to … *Bivens*," S. Rep. No. 93-588, at 3 (1973), and that the Westfall Act was not intended to "affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights," H.R. Rep. No. 100-700, at 6 (1988).

Congress's intent was not lost on this Court. In multiple cases spanning decades, the Court emphasized that it is "'crystal clear' that Congress intended the FTCA and *Bivens* to serve as 'parallel' and 'complementary' sources of liability." *Malesko*, 534 U.S. at 68 (quoting *Carlson*, 446 U.S. at 19-20); *see also Wilkie*, 551 U.S. at 553, 555. Moreover, and contrary to the United States' argument, this Court has never suggested that the FTCA evinces congressional intent to confine *Bivens* to the facts "recognized in *Bivens*, *Davis*, and *Carlson*" (U.S. Br. 33). To the contrary, in 1988 when Congress enacted the Westfall Act, *Bivens* was broader in scope than it is under this Court's more recent precedents that confine *Bivens* to those factual circumstances satisfying the framework articulated in

Abbasi. And just two Terms ago, the Court declared again that, in enacting the FTCA, "Congress made clear that it was not attempting to abrogate *Bivens*." *Hernandez*, 140 S. Ct. at 743, 748 n.9. For similar reasons, petitioner's attack on *Carlson* that the Court no longer requires Congress's explicit recognition of an equally effective alternative remedy (Pet. Br. 24, 40) does not affect this Court's repeated explanations that Congress has intended *Bivens* and the FTCA to coexist. A straightforward reading of the statutory text and history support the Court's reading.[11]

Administrative Investigations. Petitioner and the United States argue that Department of Homeland Security (DHS) regulations provide for expedited review of excessive force claims. Pet. Br. 39; U.S. Br. 32 (citing 8 C.F.R. §287.10). As an initial matter, Petitioner forfeited this argument; he never raised it below, and the court of appeals did not address it. *See United States* v. *Jones*, 565 U.S. 400, 413 (2012).

In any event, DHS's internal review process does not offer any remedy to Mr. Boule. This Court has identified administrative remedies as alternatives to *Bivens* only when the administrative scheme "encompasses substantive provisions … by which improper action may be *redressed*." *Bush*, 462 U.S. at 389 (emphasis added) (administrative and judicial review provisions of civil service system); *see also Schweiker*, 487

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[11] Petitioner's reliance (at 40) on the administrative claims that Mr. Boule filed under the FTCA fails on the same ground. Litigants should not be forced to choose between the FTCA's administrative review and *Bivens* for the same reasons that they should not have to choose between an FTCA claim in court and *Bivens*—Congress intended the two remedies to be "complementary." *Malesko*, 534 U.S. at 68.

U.S. at 424 ("administrative structure and procedures of the Social Security system," under which "a claimant is entitled to seek judicial review"). The DHS regulations that petitioner cites offer no "redress[]" to individuals like Mr. Boule. Those regulations do not provide complainants any right to participate in the investigation process or to obtain judicial review. *See* 8 C.F.R. §287.10(c). They merely provide that any investigative report concerning excessive force "shall be referred promptly for appropriate action in accordance with the policies and procedures of the Department." *Id.* Those policies and procedures, in turn, explicitly "do[] not … create any right or benefit, substantive or procedural, enforceable at law or in equity." DHS, *Department Policy on the Use of Force*, §X, Policy Statement 044-05 (Sept. 7, 2018), https://tinyurl.com/2s439xzy; *see also* U.S. Customs & Border Protection, *Use of Force—Administrative Guidelines & Procedures Handbook* i (Jan. 2021) (same), https://tinyurl.com/2p85fcdm. Accordingly, the DHS regulations provide no basis "to infer that Congress expected the Judiciary to stay its *Bivens* hand." *Wilkie*, 551 U.S. at 554.

B. *Bivens* Is Available To Remedy Unlawful First Amendment Retaliation

Mr. Boule's First Amendment claim is also cognizable under *Bivens*. After Mr. Boule reported petitioner's misconduct to CBP supervisors, petitioner retaliated by making meritless reports to the IRS and other government agencies which caused them to conduct time- and resource-consuming inquiries into Mr. Boule's business. That is exactly the type of vengeful individual action that *Bivens* is designed to remedy.

1. The Court Has Repeatedly Assumed That A First Amendment Retaliation Claim Would Be Cognizable

Mr. Boule's First Amendment claim does not present a meaningfully new context given the Court's repeated assumption that such claims are cognizable under *Bivens*. In *Hartman*, this Court addressed "a *Bivens* action" against federal officers for "inducing prosecution in retaliation for speech." 547 U.S. at 252. Although the Court focused on the elements of a retaliatory prosecution claim, the Court explained that "the law is settled that … the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for speaking out. 547 U.S. at 256; *see also Crawford-El* v. *Britton*, 523 U.S. 574, 592 (1998) ("the general rule has long been clearly established" that "the First Amendment bars retaliation for protected speech"). The Court further noted that "[w]hen the vengeful officer is federal, he is subject to an action for damages on the authority of *Bivens*." *Hartman*, 547 U.S. at 256.

Given that longstanding understanding, it matters little that this Court has not expressly *held* that *Bivens* applies to First Amendment claims. That is all the more so, since the Court has "several times assumed without deciding that *Bivens* extends to First Amendment claims." *Wood* v. *Moss*, 572 U.S. 744, 757 (2014) (citing *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009)). *Reichle* v. *Howards*, 566 U.S. 658 (2012), which petitioner invokes (at 26), does not suggest otherwise; the Court stated only that it "need not (and do[es] not) decide here whether *Bivens* extends to First Amendment retaliatory arrest claims." 566 U.S. at 663 n.4. That leaves undisturbed the Court's repeated assumption, including in *Wood*, which post-dates *Reichle*, that

Bivens would be available for a typical First Amendment claim.

Petitioner's reliance (at 25-26) on *Bush* is unavailing. There a government aerospace engineer claimed that his supervisor took an adverse employment action in retaliation for his speech. The Court held that a *Bivens* remedy was inappropriate, not because the claim alleged a violation of the First Amendment, but because the claim arose in "an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States." 462 U.S. at 368-369. In particular, the Court cataloged "the history of the development of civil service remedies and the comprehensive nature of the remedies … available" then, and explained that *Bivens* should not augment such "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." *Id.* at 388. Petitioner notably does not argue—because he cannot—that Mr. Boule has a comparable remedial scheme available to him.

2. No Special Factor Warrants Hesitation

Even if Mr. Boule's First Amendment claim presented a new context, no special factor warrants hesitation in allowing it to proceed.

a. Most of petitioner's separation-of-powers arguments against Mr. Boule's retaliation claim track his arguments regarding the Fourth Amendment claim, and fail for the same reasons detailed above. *See supra* pp. 33-37. If anything, petitioner's arguments are even less persuasive here, because retaliation for speech by a U.S. citizen has no concrete nexus to the "'conduct of agents at the border'" that petitioner seeks to tie to na-

tional security and immigration enforcement (Pet. Br. 29). Try as petitioner might, his retaliatory misconduct does not concern "[i]nteragency information-sharing … central to effective counterterrorism" (*id.* at 30). Petitioner stated that he "Google[d] phone numbers" of various agencies because he wanted to alert them to a news article he read online about Mr. Boule's vanity license plate, because Mr. Boule's practice [redacted] "didn't sit well with [him] or [his] fellow" agents (even though [redacted]), and because he [redacted] JA110; JA121; JA168. In other words, petitioner plainly acted out of retaliatory motive and is the archetypical "vengeful [federal] officer" who engaged in "[o]fficial reprisal for protected speech" by an ordinary citizen. *Hartman*, 547 U.S. at 256.

Petitioner's other arguments are equally unconvincing. Petitioner contends (at 27-28) that "retaliation claims are unusually broad" because "the defendant's 'state of mind' is all that differentiates lawful and unlawful conduct." But the same is true of discrimination claims under the Fifth Amendment, which require the plaintiff to "prove that the defendant acted with discriminatory purpose." *Iqbal*, 556 U.S. at 676. Yet this Court extended *Bivens* to such a claim in *Davis*, even explaining that a damages remedy was "judicially manageable" because the case presented "a focused remedial issue without difficult questions of valuation or causation." 442 U.S. at 245. Although the government presses (U.S. Br. 22) that the Court has recognized the "difficulty" with certain retaliation claims, those cases involved claims of retaliatory *arrest* or *prosecution*, which present the possibility of an independently sufficient probable cause that would support arrest or pros-

ecution. *Nieves* v. *Bartlett*, 139 S. Ct. 1715, 1724 (2019); *Hartman*, 547 U.S. at 265-266. But Mr. Boule was neither arrested nor prosecuted; his retaliation claim rests on petitioner's baseless triggering of investigations as punishment for reporting petitioner's misconduct to his superiors. As this Court has observed, "[f]or a number of retaliation claims, establishing the causal connection between a defendant's animus and a plaintiff's injury is straightforward." *Nieves*, 139 S. Ct. at 1722. Mr. Boule's claim is just such a straightforward retaliation claim without any complex causation issues posed by the "'evidence of the presence or absence of probable cause'" that is "'available in virtually every retaliatory arrest'" or prosecution case. *Id.* at 1724.

For similar reasons, upholding Mr. Boule's retaliation claim would not "balloon the range of potential defendants and conduct potentially subject to damages" (Pet. Br. 27). This case concerns only the specific claim Mr. Boule brought, which this Court has already indicated would be cognizable. *Hartman*, 547 U.S. at 261; *cf. Hand* v. *Young*, 2021 WL 5234429, at *1 n.1 (E.D. Cal. Nov. 10, 2021) (concluding court of appeals' decision below did not open the door to retaliation claims brought by prisoners).

b. There is no alternative remedy. Petitioner forfeited many of his proposed alternatives by failing to raise them below (except for an FTCA claim and a state-law trespass claim), and the court of appeals did not address them. *See* Pet.App.46a. In any event, the theories petitioner belatedly invokes in this Court do not present a viable alternative remedy.

State Tort Claims. Any state privacy tort or defamation claim against petitioner would be barred by the Westfall Act. As explained above, the Westfall Act

amended the FTCA to bar tort suits against federal government employees in their individual capacities when the employees were "acting within the scope of their employment" at the time of the conduct in question, thereby making a suit against the United States the only available tort suit by default. *Levin*, 568 U.S. at 509. Thus, a state-law tort claim is *not* a viable alternative to Mr. Boule's retaliation claim if petitioner was acting within the scope of his employment in reporting Mr. Boule to various agencies.[12]

Here, petitioner himself insists that his retaliatory conduct was *within* the scope of his employment. Pet. Br. 31; *see, e.g.*, JA169 (petitioner stating that he reported Mr. Boule because, in his view, Mr. Boule's conduct "is antithetical to Border Patrol's mission"); Pet.App.43a (petitioner "identified himself as a border patrol agent when he contacted" the IRS). And although petitioner contends (at 31-33; *see* U.S. Br. 26) that a state tort suit is nonetheless available because Mr. Boule "portrayed these particular actions as outside the scope of … employment," that misapprehends Mr. Boule's position and the relevant legal standard. Mr. Boule stated only that petitioner's retaliatory actions were not among petitioner's "official duties." Br. in Opp. 14 (citing Pet.App.43a). But an action that is outside an agent's "official duties" may still fall within the scope of his employment, thereby triggering the Westfall Act bar.

The scope-of-employment standard is governed by state law, *e.g.*, *Jacobs* v. *Vrobel*, 724 F.3d 217, 221 (D.C.

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[12] The possibility of an FTCA claim against the United States for acts committed within petitioner's scope of employment does not counsel hesitation for the reasons discussed above. *See supra* pp. 37-39.

Cir. 2013), and is often broad. Under Washington law (which would govern any state tort suit Mr. Boule would file against petitioner), an employee is acting within the scope of employment if the employee "was engaged at the time in the furtherance of the employer's interest," *Dickinson* v. *Edwards*, 716 P.2d 814, 819 (Wash. 1986) (emphasis omitted), regardless of whether the employee's "authorized act was improperly or unlawfully performed," *De Leon* v. *Doyhof Fish Prods. Co.*, 176 P. 355, 357 (Wash. 1918). Even if the employee engaged in an unauthorized act, moreover, it can fall within the scope of employment if it is performed "in conjunction with other acts which were within the scope of the [employee's] duties." *Smith* v. *Leber*, 209 P.2d 297, 303 (Wash. 1949). In short, the "proper inquiry is whether the employee was fulfilling his or her functions *at the time* he or she engaged in the injurious conduct." *Robel* v. *Roundup Corp.*, 59 P.3d 611, 621 (Wash. 2002) (emphasis added) (outrage claim within scope of employment because conduct occurred "on company property during work hours").

Washington law accordingly treats petitioner's retaliation—which petitioner claims to have done in furtherance of CBP's interests (JA169)—as falling within the scope of his employment. That petitioner's retaliation may not have been part of his "official duties" (Pet.App.43a) and thus was unauthorized does not take it outside the scope of employment for Westfall Act purposes, particularly given that [redacted] *See* JA136-137. Addressing other state laws that apply similarly broad scope-of-employment standards, courts have rejected the argument that law enforcement officers act outside the scope of their employment when they attempt to frame or defame members of the public. *See, e.g.*,

Bolton v. *United States*, 946 F.3d 256, 259-261 (5th Cir. 2019); *Barnes* v. *United States*, 707 F. App'x 512, 517-519 (10th Cir. 2017).

Privacy Act. The Privacy Act is designed to ensure that "'federal agencies … maintain their records accurately.'" *Mobley* v. *CIA*, 806 F.3d 568, 585 (D.C. Cir. 2015). The statute "come[s] into play only with respect to information that is maintained in a 'system of records,'" *Maydak* v. *United States*, 630 F.3d 166, 178 (D.C. Cir. 2010), which the statute defines as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some … identifying particular assigned to the individual," 5 U.S.C. §552a(a)(5). Thus, a "system of records exists only if the information contained within the body of material is both '*retrievable* by personal identifier' and 'actually *retrieved* by personal identifier.'" *Maydak*, 630 F.3d at 178.

Mr. Boule's retaliation claim does not involve any information that CBP maintains in a system of records. *See* JA85. Petitioner himself has stated that he alerted various government authorities of a publicly available news article and nothing else. *See* JA170-171. Petitioner is wrong that this makes Mr. Boule's claim less "serious" than Privacy Act-covered conduct (Pet. Br. 34). Rather, the point is that the Privacy Act was not designed to redress misconduct like petitioner's, which does not involve misuse of government records.

Tax Code. For similar reasons, the Tax Code is plainly not an alternative remedy. *Contra* Pet. Br. 33-34; U.S. Br. 24-25. Unlike the cases petitioner invokes (at 33), Mr. Boule does not "'allege[] constitutional violations *by IRS officials* involved in the process of assessing and collecting taxes.'" *Hudson Valley Black*

Press v. *IRS*, 409 F.3d 106, 113 (2d Cir. 2005) (emphasis added). Mr. Boule instead asserts a claim against a non-Treasury official for misconduct unaddressed by the Tax Code. There is no reason to believe that Congress devoted any "attention" to retaliatory misconduct by non-tax officials like petitioner when it enacted any tax laws, *Bush*, 462 U.S. at 388, much less "chose" to shield conduct like petitioner's from liability, *Schweiker*, 487 U.S. at 426.

Administrative Investigations. As explained above, an internal DHS investigation is not an alternative remedy to a *Bivens* claim. DHS's investigative procedures do not afford complainants the right to obtain any remedy or seek judicial review, which makes DHS investigations worlds apart from the administrative remedies that this Court has deemed alternatives to *Bivens* claims. *See Bush*, 462 U.S. at 389; *Schweiker*, 487 U.S. at 426.

Criminal Liability. Finally, the faint possibility of criminal prosecution—which, if it were to happen at all, would have happened by now, given that petitioner engaged in retaliatory behavior in 2014—does not provide a basis for denying Mr. Boule's claim. *Contra* Pet. Br. 35. Were it otherwise, *every* claim under *Bivens* would be subject to this argument, since every violation of constitutional rights under color of law is a federal crime. 18 U.S.C. §242. Indeed, although §242 has been in effect since Reconstruction, *United States* v. *Lanier*, 520 U.S. 259, 264 (1997), this Court has never suggested that the possibility of criminal prosecution weighs against recognizing a *Bivens* claim. Nor could criminal liability provide "'meaningful safeguards [and] remedies'" (Pet. Br. 35), since §242 liability is "quite limited," with the Justice Department bringing "a relatively small number of cases—at least relative to what are

likely the far more numerous instances of … rights-violating misconduct by officials at all levels of government," Richman, *Defining Crime, Delegating Authority—How Different are Administrative Crimes?*, 39 Yale J. Regul. (forthcoming Jan. 2022) (manuscript p. 20), https://tinyurl.com/4d8nawrp.

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In appropriate cases, *Bivens* has been critical to upholding the founding promise that for every "'legal right, there is also a legal remedy.'" *Marbury*, 5 U.S. (1 Cranch) at 163. Mr. Boule's narrow claims present precisely such an appropriate case for a *Bivens* remedy. He is a U.S. citizen who was subject to an unlawful search and seizure on his private property and was retaliated against for his truthful reporting of petitioner's constitutional violations. Mr. Boule's claims implicate no identifiable separation-of-powers considerations and present a "damages or nothing" case for which *Bivens* is critical. *Bivens*, 403 U.S. at 410 (Harlan, J., concurring); *accord Abbasi*, 137 S. Ct. at 1862. Petitioner asks this Court to shut the door to *Bivens* extensions altogether, or effectively in all cases involving CBP agents, subjecting countless individuals to law enforcement abuses with no remedy. The Court should not accede to petitioner's unreasonable demand to set back half a century of its precedents.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

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U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

8 U.S.C. §1357(a)

§1357. Powers of immigration officers and employees

(a) Powers without warrant

Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant-

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States;

(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion, or removal of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States; and

(5) to make arrests—

(A) for any offense against the United States, if the offense is committed in the officer's or employee's presence, or

(B) for any felony cognizable under the laws of the United States, if the officer or employee has reasonable grounds to believe that the person to be arrested has committed or is committing such a felony,

if the officer or employee is performing duties relating to the enforcement of the immigration laws at the time of the arrest and if there is a likelihood of the person escaping before a warrant can be obtained for his arrest.

Under regulations prescribed by the Attorney General, an officer or employee of the Service may carry a firearm and may execute and serve any order, warrant, subpoena, summons, or other process issued under the authority of the United States. The authority to make arrests under paragraph (5)(B) shall only be effective on and after the date on which the Attorney

General publishes final regulations which (i) prescribe the categories of officers and employees of the Service who may use force (including deadly force) and the circumstances under which such force may be used, (ii) establish standards with respect to enforcement activities of the Service, (iii) require that any officer or employee of the Service is not authorized to make arrests under paragraph (5)(B) unless the officer or employee has received certification as having completed a training program which covers such arrests and standards described in clause (ii), and (iv) establish an expedited, internal review process for violations of such standards, which process is consistent with standard agency procedure regarding confidentiality of matters related to internal investigations.