No. 21-1492

In the Supreme Court of the United States

ANAS ELHADY, PETITIONER

v.

BLAKE BRADLEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, on interlocutory appeal of an order denying qualified immunity, a court of appeals may also consider whether the district court properly inferred the existence of a cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

2. Whether the court of appeals erred in declining to recognize a cause of action under *Bivens* for petitioner's claim that a U.S. Customs and Border Protection officer violated the Fifth Amendment by temporarily detaining petitioner in a cold cell after stopping him at the border.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 18 F.4th 880. The opinion of the district court (Pet. App. 21a-71a) is reported at 438 F. Supp. 3d 797.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 2021. A petition for rehearing was denied on January 25, 2022 (Pet. App. 72a). On April 14, 2022, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including May 25, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a U.S. citizen who resides in Michigan. Pet. App. 2a. Petitioner traveled to Canada on April 10, 2015, and sought to return to Detroit via the Ambassador Bridge around 1:45 a.m. the following day. *Id.* at 23a. When petitioner approached the port of entry, U.S. Customs and Border Protection (CBP) officers asked petitioner to exit his vehicle, performed a pat-down search, and handcuffed him. *Ibid.* CBP officers escorted petitioner to the Ambassador Bridge inspection building, where he was detained from approximately 2 a.m. to 6 a.m. *Id.* at 24a-25a. Before placing him in a detention cell, the officers performed another search and took petitioner's shoes, belt, watch, and jacket, leaving him wearing his shirt, undershirt, pants, socks, and undershorts. *Id.* at 24a. Respondent, an officer with CBP's Office of Field Operations, was petitioner's case officer while he was detained; he interviewed petitioner and wrote a post-interview report. *Id.* at 26a-27a.

In successive interviews during his four-hour detention, petitioner repeatedly complained that his cell was cold and asked CBP officers to return his jacket and shoes to him or provide him with a blanket. Pet. App. 28a-30a. Near the end of that period, petitioner "requested an ambulance," and officers moved him from the detention cell to a waiting room. *Id.* at 31a; see *id.* at 32a. The officers informed petitioner that he could leave, but he insisted on being taken to the hospital. *Id.* at 32a.

An ambulance arrived and transported petitioner to the hospital. Pet. App. 33a-34a. Ambulance records indicate that petitioner's "chief complaint" was back pain, although he also "complained of being cold." *Ibid.* At

the hospital at 6:49 a.m., petitioner's temperature was measured at 96.08°F, which was flagged by the hospital's computer system as "below" the reference range of 96.26° to 99.5°. *Id.* at 34a. Petitioner was treated for back pain and given a blanket. *Id.* at 35a-36a. He fell asleep and woke up "feeling 'way better.'" *Id.* at 36a. His temperature was measured at 96.98°, and he was "discharged in satisfactory condition" at 9:10 a.m. *Id.* at 35a. CBP officers brought him back to the Ambassador Bridge facility, returned his clothing and other belongings, and released him from CBP custody. *Id.* at 36a.

2. a. In September 2017, petitioner filed a complaint in the United States District Court for the Eastern District of Michigan; petitioner's sole claim was based on *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. 3a-4a; Compl. 6-9; Second Am. Compl. 10-14. Petitioner alleged that CBP officers assigned to the Ambassador Bridge facility the night of his detention, including respondent, violated his due process rights under the Fifth Amendment by imposing cruel and unusual conditions of civil confinement. *Ibid.*

The officers moved to dismiss the complaint on a number of grounds, including that no cause of action existed under *Bivens*. Pet. App. 4a. The district court denied the motion to dismiss, finding that the case presents a new *Bivens* context but that special factors do not counsel against extending *Bivens* to that new context. *Ibid.*; D. Ct. Doc. 41, at 14-20 (Mar. 1, 2019).

b. Following discovery, the district court denied respondent's motion for summary judgment but granted summary judgment to the other defendants. Pet. App. 21a-71a. The court found that petitioner had "pre-

sented enough evidence that a reasonable jury could find" that his conditions of confinement violated the Fifth Amendment and that respondent was "deliberate[ly] indifferen[t] to [petitioner's] health and safety." *Id.* at 50a, 56a; see *id.* at 48a-62a. The court also found that the right was clearly established in 2015 and respondent was therefore not entitled to qualified immunity. *Id.* at 71a; see *id.* at 67a-71a. The court granted summary judgment in favor of the remaining defendants because there was not "sufficient evidence" of their "personal involvement" in the alleged Fifth Amendment violation. *Id.* at 61a; see *id.* at 63a-65a.

3. Responded appealed, arguing that the district court erred in denying qualified immunity. Pet. App. 4a. The court of appeals requested supplemental briefing on "the district court's decision to extend *Bivens*," *ibid.*, in response to which respondent contended that the court of appeals could choose to consider the issue, and if it did, it should reverse on that ground, Resp. Supp. C.A. Br. 2-10. The court of appeals reversed, finding that there is no cause of action under *Bivens* to support petitioner's Fifth Amendment claim. Pet. App. 1a-20a.

a. The court of appeals found that it could and should review the availability of a *Bivens* cause of action. Pet. App. 7a-10a. The court first rejected petitioner's argument that it "lack[ed] jurisdiction" to consider that issue, finding that "appellate courts have jurisdiction over the *Bivens* issue on interlocutory appeal because the question is 'directly implicated by the defense of qualified immunity.'" *Id.* at 7a (quoting *Wilkie* v. *Robbins*, 551 U.S. 537, 549 n.4 (2007)). The court also rejected petitioner's argument that respondent had forfeited the *Bivens* issue by failing to challenge that as-

pect of the district court's holding in its initial briefs on appeal. The court of appeals noted that a "cause of action's availability under *Bivens* is an 'antecedent' question that [a court of appeals] can address even if it was not raised below." *Id.* at 8a (quoting *Hernández* v. *Mesa*, 137 S. Ct. 2003, 2006 (2017) (per curiam) (*Hernández I*)). And the court found that addressing the *Bivens* question first was consistent with this Court's approach in *Hernández I*; was "[p]ruden[t]" because litigation should not proceed without a cause of action; and was supported by Article III's bar on advisory opinions because "[a]ny qualified-immunity conclusion here is hypothetical if [petitioner] can't sue." *Id.* at 9a; see *id.* at 8a-10a.

Turning to the merits of the *Bivens* question, the court of appeals held that it could not extend *Bivens* to petitioner's Fifth Amendment conditions-of-confinement claim. Pet. App. 10a-14a. The court explained that "the Supreme Court" has "devised a two-part inquiry to determine" whether *Bivens* provides a cause of action in a particular case: "First, [the court] ask[s] whether the claim arises in a new *Bivens* context," and, if the context is new, the court asks "whether any special factors counsel against extending a cause of action." *Id.* at 6a.

At the first step of the inquiry, the court of appeals found that petitioner's "claim[] occurred in * * * a 'markedly new' *Bivens* context: the border." Pet. App. 12a (quoting *Hernández* v. *Mesa*, 140 S. Ct. 735, 739 (2020) (*Hernández II*)). The court explained that, under this Court's decision in *Hernández II*—which held that a Fourth Amendment claim involving a cross-border shooting of a Mexican national by a rank-and-file law-enforcement officer presented a new context, 140 S. Ct. at 743-744—the border "context is new re-

gardless of what constitutional claim is at issue." Pet. App. 12a.

Turning to the second step of the *Bivens* inquiry, the court of appeals found that *Hernández II* "made clear that national security will always be a special factor counseling against extending *Bivens* to the border context." Pet. App. 12a. The court explained that factual differences between *Hernández II* and this case—including petitioner's U.S. citizenship—are irrelevant when it comes to the special-factors inquiry. *Id.* at 13a. That is so, the court reasoned, because "[i]n th[e] context" of "cases involv[ing] claims against border-patrol officers serving in their capacity as agents protecting the border," this Court "has spoken: *Bivens* is unavailable." *Ibid.* The court of appeals noted that, with the exception of the Ninth Circuit in *Boule* v. *Egbert*, 998 F.3d 370 (2021), rev'd, 142 S. Ct. 1793 (2022), "[e]very other circuit * * * faced with an invitation to expand *Bivens* to the border/immigration context" has declined to do so. Pet. App. 13a; see *id.* at 13a-14a.

b. Judge Rogers dissented. Pet. App. 15a-20a. Judge Rogers viewed the *Bivens* issue as forfeited and would have declined to reach it. *Id.* at 15a-19a. He therefore would have addressed the qualified-immunity issue and affirmed the denial of qualified immunity. *Id.* at 19a-20a.

4. The court of appeals denied rehearing en banc with no judge requesting a vote. Pet. App. 72a.

ARGUMENT

The court of appeals correctly held that, on an interlocutory appeal of an order denying qualified immunity, a court of appeals has jurisdiction to consider the availability of a cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*,

403 U.S. 388 (1971). And, in declining to extend *Bivens* to petitioner's claim, the court correctly anticipated this Court's decision in *Egbert* v. *Boule*, 142 S. Ct. 1793 (2022). The court of appeals' decision does not conflict with any decision of this Court or another court of appeals, and the questions presented do not otherwise warrant this Court's review. The petition for a writ of certiorari should be denied.

1. Petitioner contends that the court of appeals "[l]acked [j]urisdiction * * * to ignore the qualified-immunity question that was the subject of respondent's appeal and to decide, instead, that no *Bivens* remedy was available to petitioner." Pet. 23 (emphasis omitted). That contention is meritless. In *Wilkie* v. *Robbins*, 551 U.S. 537 (2007), this Court held that when a court of appeals has jurisdiction over an interlocutory appeal from an order denying qualified immunity, it also has jurisdiction to decide whether *Bivens* provides a cause of action in the first place. The courts of appeals that have reached the issue have uniformly taken this Court at its word and—without engaging in any sort of case-specific inquiry—found jurisdiction over *Bivens*-cause-of-action questions in interlocutory appeals involving qualified immunity. See *Vanderklok* v. *United States*, 868 F.3d 189, 197 (3d Cir. 2017); *Tun-Cos* v. *Perrotte*, 922 F.3d 514, 520 (4th Cir. 2019), cert. denied, 140 S. Ct. 2565 (2020); *Byrd* v. *Lamb*, 990 F.3d 879, 881 (5th Cir. 2021) (per curiam), cert. denied, 142 S. Ct. 2850 (2022); *Vance* v. *Rumsfeld*, 701 F.3d 193, 197-198 (7th Cir. 2012) (en banc), cert. denied, 569 U.S. 1038 (2013); *Farah* v. *Weyker*, 926 F.3d 492, 497 (8th Cir. 2019); *Solida* v. *McKelvey*, 820 F.3d 1090, 1093 (9th Cir. 2016); *Big Cats of Serenity Springs, Inc.* v. *Rhodes*, 843 F.3d 853, 856 (10th Cir. 2016); *Liff* v. *Office of Inspector Gen.*, 881 F.3d 912,

918 (D.C. Cir. 2018); cf. *Doe* v. *Hagenbeck*, 870 F.3d 36, 50 (2d Cir. 2017). And the first question presented does not otherwise merit this Court's review.

a. As petitioner recognizes (Pet. 28), this Court has held that interlocutory orders denying qualified immunity are immediately appealable to the extent that they turn on an issue of law. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 671-672 (2009). That "well established" rule is premised on the fact that an interlocutory order denying qualified immunity "'conclusively determines' that the defendant must bear the burdens of discovery" or trial; "is 'conceptually distinct from the merits of the plaintiff's claim'; and would prove 'effectively unreviewable on appeal from a final judgment.'" *Id.* at 672 (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 527-528 (1985)) (brackets, citation, and internal quotation marks omitted). This Court has also recognized that when a government official appeals an interlocutory order denying qualified immunity, the court of appeals has jurisdiction over a number of related issues separate from "the ultimate issue" of "whether the legal wrong asserted was a violation of clearly established law." *Id.* at 673 (brackets, citation, and internal quotation marks omitted).

For example, in *Hartman* v. *Moore*, 547 U.S. 250 (2006), "the Court reviewed an interlocutory decision denying qualified immunity" but decided a different question: "the elements a plaintiff 'must plead and prove in order to win'" a particular constitutional claim. *Iqbal*, 556 U.S. at 673 (quoting *Hartman*, 547 U.S. at 257 n.5). The Court in *Hartman* explicitly rejected the plaintiff's argument that the Court was "exceed[ing]" its jurisdiction under the collateral-order doctrine, finding that elements of the claim were "directly implicated by the defense of qualified immunity and properly be-

fore [the Court] on interlocutory appeal." 547 U.S. at 257 n.5. In *Wilkie*, the Court relied on *Hartman* and found that "the recognition of the entire cause of action" under *Bivens* "was 'directly implicated by the defense of qualified immunity'"—and that the court of appeals therefore had jurisdiction over the *Bivens* question. 551 U.S. at 549 n.4 (quoting *Hartman*, 547 U.S. at 257 n.5). The Court then found that *Bivens* did not provide a cause of action and declined to "enquire further into * * * the asserted defense of qualified immunity." *Id.* at 567. And in *Iqbal* the Court held that, on appeal from an order denying a motion to dismiss based on qualified immunity, a court of appeals has jurisdiction over the question of whether the complaint stated a claim. 556 U.S. at 672-675. En route to that holding, the Court relied on *Wilkie* when rejecting the argument that "the collateral-order doctrine restricts appellate jurisdiction to the ultimate issue" of "whether the legal wrong asserted was a violation of clearly established law." *Id.* at 673 (brackets, citation, and internal quotation marks omitted).

b. In holding that it had jurisdiction to decide whether *Bivens* provides petitioner with a cause of action, the court of appeals correctly applied *Wilkie*—as well as *Hartman* and *Iqbal*. Those cases provide a straightforward rule that certain categories of issues—including whether a *Bivens* cause of action exists to support a claim—may properly be considered by a court of appeals when exercising collateral-order jurisdiction over an order denying qualified immunity. It is therefore unsurprising that the court disposed of petitioner's jurisdictional argument in a single sentence with a reference to *Wilkie*. Pet. App. 7a.

c. Petitioner primarily asserts (Pet. 16) that, in order to exercise jurisdiction over the *Bivens* issue, the court of appeals needed to find that "the *Bivens* question is inextricable from the qualified-immunity collateral order or otherwise properly before the court of appeals." But neither *Wilkie* (which adopted the applicable rule) nor *Iqbal* (which confirmed its continuing vitality) engaged in or suggested a case-specific inquiry into whether the *Bivens* and qualified-immunity issues are inextricably intertwined. See *Wilkie*, 551 U.S. at 549 n.4; *Iqbal*, 556 U.S. at 673. Rather, those cases indicate that the *Bivens* cause-of-action issue is *always* "directly implicated by the defense of qualified immunity." *Wilkie*, 551 U.S. at 549 n.4 (citation omitted). That reading is consistent with this Court's broader recognition that "*Bivens* question[s] [are] 'antecedent' to" qualified immunity questions. *Hernández I*, 137 S. Ct. 2003, 2006 (2017) (per curiam) (citation omitted); see also *Wood* v. *Moss*, 572 U.S. 744, 757 (2014). It is also consistent with courts' "'responsibility' to evaluate any grounds that counsel against *Bivens* relief." *Egbert*, 142 S. Ct. at 1806 n.3 (citation omitted). Indeed, this Court in *Egbert* favorably cited the court of appeals' decision *in this case* to support that point. See *ibid.*

Transforming *Wilkie*'s rule into a case-specific approach would be inconsistent with this Court's normal approach to the collateral-order doctrine. The Court "do[es] not engage in an 'individualized jurisdictional inquiry'" but instead "focus[es] * * * on 'the entire category to which a claim belongs'" when determining the bounds of the collateral-order doctrine. *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 107 (2009) (citations omitted). In light of *Wilkie* and *Iqbal*, *Mohawk* confirms that, whenever an interlocutory order denying

qualified immunity is properly before a court of appeals, the court has jurisdiction over the antecedent question whether a *Bivens* cause of action exists.[1]

Petitioner's case-by-case rule thus has no support in this Court's precedents. Petitioner fails to identify any court of appeals decision engaging in a fact-specific inquiry into whether the existence of a *Bivens* cause of action may be considered as part of an interlocutory qualified immunity appeal.

d. Petitioner's remaining arguments also lack merit. Contrary to petitioner's suggestion (Pet. 21-22), the unanimous recognition in the courts of appeals that *Wilkie* provides a clear rule is not in tension with decisions finding that a statute-of-limitations question may not be considered as part of an interlocutory appeal about qualified immunity. See, *e.g.*, *DeCrane* v. *Eckart*, 12 F.4th 586, 601-602 (6th Cir. 2021). A statute-of-limitations argument is "a defense to liability." *Id.* at

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[1] Petitioner's attempt to distinguish *Wilkie* (Pet. 32) based on its procedural history is misplaced. In *Wilkie*, the district court initially found that there was no cause of action under *Bivens* and dismissed the case; the court of appeals reversed. 551 U.S. at 548. On remand, the district court declined to dismiss based on qualified immunity, and later denied a motion for summary judgment based on qualified immunity. *Ibid.* On interlocutory appeal from the denial of summary judgment, the court of appeals affirmed the denial of qualified immunity; it did not revisit its earlier *Bivens* ruling. *Id.* at 548-549. This Court granted certiorari from that interlocutory appeal; held that it had jurisdiction over the *Bivens* question; and found that there was no *Bivens* cause of action. *Id.* at 549-562 & n.4. Contrary to petitioner's assertion (Pet. 32), the fact that the court of appeals decided the *Bivens* question on appeal from a final judgment (the district court's dismissal of the case) five years earlier in the litigation does not change the fact that the order this Court reviewed in *Wilkie* was interlocutory. Nor does it suggest that *Wilkie* should be limited to its facts.

601. But this Court has recognized that the absence of a *Bivens* cause of action is more than a mere defense. It is an argument that no cause of action exits in the first place *and* that argument is both "'antecedent' to," *Hernández I*, 137 S. Ct. at 2006 (citation omitted), and "directly implicated by" qualified-immunity questions, *Wilkie*, 551 U.S. at 549 n.4 (citation omitted). Moreover, judicial recognition of "a *Bivens* cause of action" always puts "great stress on the separation of powers," *Egbert*, 142 S. Ct. at 1806 n.3 (citation omitted)—something that is not always true when a court improperly denies a statute-of-limitations defense.

At various points, petitioner's jurisdictional argument appears to rely (Pet. 15, 19, 24-27, 37) on criticisms of the court of appeals' separate determination that it was appropriate to consider the *Bivens* question despite the fact that respondent was not the first to raise the *Bivens* issue in that court. In doing so, petitioner conflates the separate analyses that the court engaged in. Compare Pet. App. 7a (finding jurisdiction), with *id.* at 8a-10a (finding that the *Bivens* issue should be addressed despite respondent's failure to raise it before supplemental briefing). And petitioner has not sought review of the court's factbound determination that it could consider the *Bivens* question even though respondent did not initially brief it. *Id.* at 8a-10a. In any event, this Court recently instructed that appellate courts have a "'responsibility' to evaluate any grounds that counsel against *Bivens* relief," *Egbert*, 142 S. Ct. at 1806 n.3 (citation omitted), even if particular grounds were forfeited in a lower court.

2. The court of appeals also correctly held that *Bivens* does not provide a cause of action for petitioner's Fifth Amendment claim challenging the condi-

tions of his confinement. As confirmed by this Court's recent decision in *Egbert*, the court of appeals' resolution of that issue does not conflict with any decision of this Court. And petitioner does not suggest that the decision below conflicts with any decision of another court of appeals. Further review of the second question presented is unwarranted.

a. In its 1971 decision in *Bivens*, this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Iqbal*, 556 U.S. at 675 (citation omitted). The Court subsequently approved a *Bivens* damages remedy for a Fifth Amendment due process claim involving gender discrimination by a Congressman in *Davis* v. *Passman*, 442 U.S. 228 (1979), and an Eighth Amendment claim for failure to provide adequate medical treatment in a prison in *Carlson* v. *Green*, 446 U.S. 14 (1980). But since its 1980 decision in *Carlson*, this Court has "consistently rebuffed requests to add to the claims allowed under *Bivens*." *Hernández II*, 140 S. Ct. 735, 743 (2020) (listing cases). The Court shifted its approach as it began to "'appreciate more fully the tension between' judicially created causes of action and 'the Constitution's separation of legislative and judicial power.'" *Egbert*, 142 S. Ct. at 1802 (quoting *Hernández II*, 140 S. Ct. at 741).

This Court has generally "framed the [*Bivens*] inquiry as proceeding in two steps." *Egbert*, 142 S. Ct. at 1803. The Court first asks "whether the request involves a claim that arises in a new context or involves a new category of defendants." *Hernández II*, 140 S. Ct. at 743 (citation and internal quotation marks omitted). If the claim arises in a new context, the Court proceeds "to the second step," asking "whether there are any

'special factors that counsel hesitation' about granting the extension." *Ibid.* (brackets, citations, and internal quotation marks omitted). But as the Court recently explained, "those steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy." *Egbert*, 142 S. Ct. at 1803; see *id.* at 1805 ("A court faces only one question: whether there is any rational reason (even one) to think that Congress is better suited to 'weigh the costs and benefits of allowing a damages action to proceed.'") (citation and emphases omitted). And the answer to that question "in most every case" is that "no *Bivens* action may lie." *Id.* at 1800.

Applying that framework in *Egbert*, the Court held that *Bivens* did not permit a Fourth Amendment excessive-force claim to proceed against an agent of the U.S. Border Patrol (a component of CBP). 142 S. Ct. at 1800. The plaintiff in *Egbert* was a U.S. citizen who owned an inn along the U.S.–Canada border that was frequently used for cross-border smuggling. *Ibid.* The plaintiff informed the defendant, a U.S. Border Patrol agent, that a Turkish national would be arriving at the inn; when he arrived, the agent followed his vehicle into the driveway to check on his immigration status. *Id.* at 1801. A physical altercation between the plaintiff and the agent ensued on the plaintiff's property. *Ibid.* The plaintiff later brought a Fourth Amendment excessive-force claim for damages under *Bivens*. *Id.* at 1801-1802.

This Court held that the claim could not proceed under *Bivens* "for two independent reasons." *Egbert*, 142 S. Ct. at 1804. First, *Bivens* was unavailable because "Congress is better positioned to create remedies in the border-security context." *Ibid.* The Court rejected the argument that *Bivens* should be available because the

case involved "a more 'conventional' excessive-force claim" than the cross-border shooting claim in *Hernández II*; because the plaintiff was "'a United States citizen, complaining of harm suffered on his own property in the United States'"; and because the Turkish national "already had cleared customs." *Id.* at 1805 (citation omitted). The Court explained that "a court should not inquire * * * whether *Bivens* relief is appropriate in light of the balance of circumstances in the 'particular case,'" but instead "must ask 'more broadly' if there is any reason to think that 'judicial intrusion' into a given field might be 'harmful' or 'inappropriate.'" *Ibid.* (brackets and citations omitted). The Court therefore "ask[ed] * * * whether a court is competent to authorize a damages action not just against [the defendant] but against Border Patrol agents generally" and found that "[t]he answer, plainly, is no." *Id.* at 1806. And the Court found that a second "independent reason" barred the extension of *Bivens*: "the Government already has provided alternative remedies that protect plaintiffs"—including a U.S. Border Patrol grievance process. *Id.* at 1804; see *id.* at 1806-1807.

b. The court of appeals correctly declined to recognize a *Bivens* cause of action to support petitioner's Fifth Amendment claim. Petitioner characterizes respondent's actions as involving "traditional law-enforcement duties," Pet. i, but respondent is a CBP officer, and petitioner's claim arises out of a detention that was performed by respondent and other CBP officers when petitioner was attempting to enter the United States at a port of entry. See pp. 2-3, *supra*. In light of the Court's decision in *Egbert*, those facts are dispositive. The assertion of "a more 'conventional' excessive-force claim * * * does not bear on the relevant point," be-

cause "Congress is better positioned to create remedies in the border-security context," and courts are not "competent to authorize a damages action * * * against Border Patrol agents generally." *Egbert*, 142 S. Ct. at 1804-1806.[2] And, as in *Egbert*, there is a second, independent reason not to extend *Bivens* to this context. The same grievance process that the Court identified in *Egbert* is available to correct any improper action taken by respondent. See *id.* at 1804, 1806-1807; 8 C.F.R. 287.10(a)-(b).

Petitioner suggests (Pet. 36) that a *Bivens* cause of action is available here because his claim involves "mistreatment of a U.S. citizen on U.S. soil." But *Egbert* found those distinctions immaterial and declined to recognize a *Bivens* cause of action to support a claim brought by a U.S. citizen based on events that occurred on his own property in the United States. 142 S. Ct. at 1805-1806; see *United States* v. *Stanley*, 483 U.S. 669, 678-686 (1987) (declining to extend a *Bivens* remedy to a claim brought by a member of the U.S. Army who was secretly administered LSD in the United States). Petitioner also asserts (Pet. 36) that the court of appeals erred by engaging in a "categorical analysis" focused on the border context. But such a categorical analysis is precisely what the Court's intervening opinion in *Egbert* requires. See 142 S. Ct. at 1805 ("[A] court should not

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[2] That the defendant in *Egbert* was a U.S. Border Patrol agent and respondent is a CBP officer with the Office of Field Operations does not change the analysis. The U.S. Border Patrol and the Office of Field Operations are both components of CBP. And U.S. Border Patrol agents and CBP officers share the mission of safeguarding the border. In any event, when detaining petitioner while he was attempting to cross the border, respondent was performing actions that fall squarely within "the border-security context." *Egbert*, 142 U.S. at 1804.

inquire * * * whether *Bivens* relief is appropriate in light of the balance of circumstances in the 'particular case.'") (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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