No. 21-147

In the Supreme Court of the United States

ERIK EGBERT,
PETITIONER,

v.

ROBERT BOULE,
RESPONDENT.

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

REPLY BRIEF FOR PETITIONER

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The Ninth Circuit broke new ground, authorizing *Bivens* actions for First Amendment retaliation claims and Fourth Amendment excessive-force claims arising out of a Border Patrol investigation of a foreign national's immigration status. Twelve Ninth Circuit judges dissented from rehearing en banc. Why? Because the panel decision defies this Court's restrictions on *Bivens*, parts ways with other circuits, and skews Border Patrol agents' on-the-job decisions. Three amici agree. IRLI Br. 18-21; IWLC Br. 9-13; NBPC Br. 1-6.

Respondent dismisses the decision below as "unusual" (four times), "factbound" (thrice), "unique" (thrice), "limited" (twice), "restricted," "case-specific," and "idiosyncratic." Respondent claims this case does not extend

Bivens or involve immigration, national security, or separation-of-powers, and confines other circuits' decisions to their facts. Respondent portrays this case as unique by condemning Agent Egbert's conduct, but every *Bivens* case involves alleged misconduct. The question is whether the judiciary should seize the reins by implying new remedies. After *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), and *Hernandez v. Mesa*, 140 S. Ct. 735 (2020), all other circuits have said no in every context. Only the Ninth Circuit answers yes.

Twelve Ninth Circuit judges do not dissent over nothing. The panel adopted rationales that other circuits reject, and ignored cross-cutting grounds for hesitation that other circuits consider dispositive. This Court repeatedly grants review in *Bivens* cases without mirror-image factual splits. *E.g.*, *Abbasi*, 137 S. Ct. at 1843; *Wilkie v. Robbins*, 551 U.S. 537 (2007). The Ninth Circuit's departure from this Court's *Bivens* restrictions alone warrants review. S. Ct. R. 10(c).

I. The Ninth Circuit Stands Alone

Six circuits have rejected extending *Bivens* to various First Amendment retaliation claims. Three have refused to extend *Bivens* to Fourth Amendment immigration-related claims. Pet. 10-20. The Ninth Circuit is the exception. Only this Court can restore uniformity.

A. First Amendment Retaliation

First Amendment retaliation claims are common and a huge category of potential liability. Yet, only the Ninth Circuit allows *Bivens* remedies in *any* First-Amendment-retaliation context. As Judge Bumatay's dissent observed, the decision below is "out of step with … sister circuits." Pet.App.21a. "[T]he clear majority of circuits to decide the issue since *Abbasi* have declined to extend *Bivens* to First Amendment retaliation claims. The single

outlier decision is … *Boule v. Egbert*." *Nally v. Graham*, 2021 WL 3206348, at *10 (D. Kan. July 29, 2021).

Respondent (at 14) limits the decision below to "the situation where a CBP officer willfully retaliates against a U.S. citizen for … report[ing] misconduct where the retaliatory activity was outside of the scope of the officer's official duties." But the panel's reasoning applies to *all* First Amendment retaliation claims, which presuppose that the retaliation was unfounded. The panel deemed such claims well-established and tacitly endorsed by this Court. Pet.App.41a-42a.

Respondent (at 14) notes the Ninth Circuit's rejection of other First Amendment *Bivens* claims. But those plaintiffs had adequate alternative remedies. BIO 14 & n.4. In any First Amendment case without an express, on-point comprehensive legislative scheme, the decision below invites further *Bivens* expansions.

Respondent (at 25-27) emphasizes factual differences in other circuits' decisions. But six circuits' rationales for rejecting *Bivens* extensions in other First Amendment retaliation cases would equally foreclose respondent's claim. Pet. 10-14. None endorse the Ninth Circuit's rationales for expansion; many expressly disavow those rationales, a point respondent ignores. Pet. 14-15.

- D.C. Circuit: Grounds for pause include "the Supreme Court's marked reluctance to extend *Bivens* to new contexts," difficulties balancing competing interests when fashioning damages remedies, and that First Amendment retaliation claims by definition "are easy to make, hard to disprove," and disruptive. *Loumiet v. United States*, 948 F.3d 376, 378, 385 (D.C. Cir. 2020).
- Second Circuit: Hesitation is warranted in First Amendment cases if "the right injured" places the

claim in a new *Bivens* context. *Turkmen v. Hasty*, 789 F.3d 218, 236 (2d Cir. 2015); *accord Hudson Valley Black Press v. IRS*, 409 F.3d 106, 111-13 (2d Cir. 2005) (no *Bivens* suits for retaliatory tax audits, since Congress weighed remedies for taxpayers). Respondent (at 28) cites a footnote in *Gonzales v. Hasty*, 802 F.3d 212, 222 n.10 (2d Cir. 2015), assuming that First Amendment *Bivens* claims could exist. Since then, the Second Circuit has left open whether *Abbasi* abrogates *all Bivens* extensions. *Gonzales v. Hasty*, 755 F. App'x 67, 69 (2d Cir. 2018).

- Third Circuit: Previous cases authorizing First Amendment *Bivens* suits are no longer good law; "[s]eparation-of-power concerns" counseled against recognizing a *Bivens* First Amendment retaliation claim in the prison-housing context. *Bistrian v. Levi*, 912 F.3d 79, 96 (3d Cir. 2018); *accord Vanderklok v. United States*, 868 F.3d 189, 207 (3d Cir. 2017) (this Court's "reluctance … to weigh in on issues of national security" rules out other First Amendment retaliation claims).

- Fourth Circuit: No First Amendment retaliation *Bivens* claims that "would work a significant intrusion into an area … that demands quick response and flexibility," i.e., "prison management." *Earle v. Shreves*, 990 F.3d 774, 781 (4th Cir. 2021). This Court's "unbroken line of judicial abstention" dictates caution; military matters just counsel extra hesitation. *Cioca v. Rumsfeld*, 720 F.3d 505, 510 (4th Cir. 2013).

- Fifth Circuit: In all *Bivens* cases, "the separation of powers is itself a special factor." *Oliva v. Nivar*, 973 F.3d 438, 444 (5th Cir. 2020). Thus, the Fifth Circuit bars *all Bivens* extensions. *Byrd v. Lamb*, 990 F.3d 879, 883 (5th Cir. 2021) (Willett, J., specially concurring). Further, after *Abbasi*, that court said: "[A]s

First Amendment retaliation claims are a 'new' *Bivens* context, it is unclear—and unlikely—that *Bivens*'s implied cause of action extends this far." *Butler v. S. Porter*, 999 F.3d 287, 293 (5th Cir. 2021). The court has since "confirmed" this "suspicion." *Id.*

- Sixth Circuit: The Supreme "Court has never recognized a *Bivens* action for any First Amendment right, and it rejected a First Amendment retaliation claim decades ago for federal employees. There's something to be said for leaving it at that." *Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 523 (6th Cir. 2020).

B. Fourth Amendment/Immigration Enforcement

In the Ninth Circuit, a Border Patrol agent's investigation of immigration status does not trigger national-security or immigration-enforcement concerns. Pet.App.38a-39a. These precise concerns foreclose immigration-related *Bivens* claims in three other circuits. Pet. 16-18.

1. Respondent (at 12-13, 29) denies that this case involves "core immigration functions." But, as the panel stated, "Agent Egbert was investigating the status of a foreign guest … arriving at [respondent's] inn," Pet.App.37a, and entered respondent's property to "ask[] the guest about his immigration status," Pet.App.33a. Agent Egbert allegedly "us[ed] excessive force while carrying out official duties." Pet.App.47a. Investigations of immigration status are "core immigration functions" just like removal or detention. BIO 29.

Respondent (at 12-14, 29) identifies illusory, fact-specific limiting principles. The panel never endorsed respondent's accusation (at 1, 13, 16, 23, 29) that Agent Egbert "knew" respondent's foreign guest "had entered the country lawfully." The panel noted that respondent told

Agent Egbert that the guest flew into New York—hardly objective proof of lawful entry. Pet.App.38a.

Respondent (at 13) says the panel considered respondent's U.S. citizenship dispositive, and did not "authorize[] claims … brought by noncitizens" in other immigration-related contexts. Actually, the panel cited approvingly a case purportedly authorizing *Bivens* claims "by [a] Mexican citizen against a border patrol agent for excessive force at a port of entry," Pet.App.39a (citing *Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006)). *Martinez-Aguero* did not authorize a *Bivens* remedy, Pet. 20, and would not be good law in the Fifth Circuit had it done so, *infra* p. 7.

Nor does *Quintero Perez v. United States*, 8 F.4th 1095 (9th Cir. 2021), suggest the Ninth Circuit might limit *Bivens* in other immigration-enforcement contexts, *contra* BIO 13. The facts of that cross-border shooting case "f[e]ll squarely under" *Hernandez*, *id.* at 1106, prompting the court's "regret" that *Hernandez* compelled dismissal, *id.* at 1099. That ambivalence augurs poorly for any marginally different *Bivens* claims.

2. Respondent (at 29-30) emphasizes factual differences in other circuits' immigration-related decisions. But no two *Bivens* cases are identical. The key is that other circuits recognize grounds for hesitation that would have foreclosed respondent's claims.

- Fourth Circuit: "[E]nforcement of the immigration laws implicates broad policy concerns distinct from the enforcement of criminal law." *Tun-Cos v. Perrotte*, 922 F.3d 514, 524 (4th Cir. 2019). Immigration enforcement inherently "affect[s] diplomacy, foreign policy, and the security of the nation." *Id.* at 526. And "immigration enforcement is 'a context in which Congress has designed its regulatory authority in a

guarded way.'" *Id.* (quoting *Abbasi*, 137 S. Ct. at 1858).

- Fifth Circuit: Separation-of-powers concerns always counsel hesitation. *Oliva*, 973 F.3d at 444. "[S]pecial factors unique to the immigration context far outweigh any benefits … from authorizing *Bivens* suits." *De La Paz v. Coy*, 786 F.3d 367, 378 (5th Cir. 2015). "Immigration policy and enforcement implicate serious separation of powers concerns." *Id.* "*Bivens* liability could deter agents from vigorous enforcement and investigation of illegal immigration." *Id.* at 379.
- Eleventh Circuit: "[T]he importance of demonstrating due respect for the Constitution's separation of powers" dictates hesitation, since "immigration cases" generally "may implicate" foreign policy and security. *Alvarez v. ICE*, 818 F.3d 1194, 1210 (11th Cir. 2016).

Thus, other circuits' rationales put immigration enforcement off-limits for *Bivens*. Meanwhile, the decision below has emboldened district courts to let novel *Bivens* claims proceed. *Marquez v. Rodriguez*, 2021 WL 2826075, at *6-7, *14 (S.D. Cal. July 6, 2021); *Kidd v. Mayorkas*, 2021 WL 1612087, at *11-12 (C.D. Cal. Apr. 26, 2021).

II. The Decision Below Is Incorrect

As eleven Ninth Circuit judges recognized, "the panel decision is significantly out of step with modern Supreme Court cases emphasizing that the *Bivens* remedy is not to be lightly extended." Pet.App.30a (Bress, J., dissenting); *accord* Pet.App.29a (Bumatay, J., dissenting). And the twelfth Ninth Circuit dissenter commented that "*Bivens* jurisprudence has not" improved with age, and "new legislation … is better than our current jurisprudential word jumble." Pet.App.29a (Owens, J., dissenting). "The Ninth Circuit's evasion of this Court's precedent cries out for review." IWLC Br. 3.

1. Respondent (at 17-19) denies any *Bivens* extension. But the panel acknowledged the contrary. Pet.App.36a,42a. Any *Bivens* claim in a "new context" or involving "a new class of defendants" is an extension. *Hernandez*, 140 S. Ct. at 743. Border Patrol agents are a "new class of defendants," and this Court has never recognized First Amendment retaliation *Bivens* claims. Pet.14, 18; *contra* BIO 18. There is also a "world of difference" between "[a]n allegedly unconstitutional arrest and search … in New York City" (the facts of *Bivens*) and an excessive-force claim arising while a Border Patrol agent discharged official duties near the border. *See Hernandez*, 140 S. Ct. at 744; Pet.App.47a.

2. Respondent (at 19-22) dismisses grounds for hesitation, treating *Hernandez* and *Abbasi* as outliers. But this Court looks for *any* conceivable "reason to pause before applying *Bivens* in a new context," not whether prior *Bivens* cases are factually distinct. *Hernandez*, 140 S. Ct. at 743.

Reasons abound, including this Court's refusal to extend *Bivens* on ten occasions. Pet. 21. "The caution toward extending *Bivens* remedies into any new context, a caution consistently and repeatedly recognized for … decades, forecloses such an extension here." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001). Similarly, other circuits' refusal to extend *Bivens* underscores a consensus that the Judiciary is ill-suited "to consider and weigh the costs and benefits of allowing a damages action to proceed." *Abbasi*, 137 S. Ct. at 1858; Pet. 21. Respondent (at 19) objects that these concerns weigh against all *Bivens* expansions. Exactly: extensions of *Bivens* are "now a 'disfavored' judicial activity." *Abbasi*, 137 S. Ct. at 1857. The United States has accordingly questioned "the extent" to which *Bivens* claims "remain[] viable after *Ziglar v. Abbasi*." U.S. Br. 2, *Thompson v. Clark*, No. 20-659.

Additionally, "this should have been an easy call" because a Border Patrol agent carrying out official duties clearly "implicates an 'element of national security.'" Pet.App.26a (Bumatay, J., dissenting); NBPC Br. 1. "[R]egulating the conduct of agents at the border unquestionably has national security implications." *Hernandez*, 140 S. Ct. at 747. These concerns obviously extend beyond "policing a border crossing," *contra* BIO 17, especially since the incident here occurred yards from the border.

Respondent (at 15-17, 29) reasons that pushing respondent "to the ground … was not securing the border or promoting national security." But "[t]he question is not whether national security requires such conduct … but whether the Judiciary should alter the framework established by the political branches for addressing cases in which it is alleged that [excessive] force was unlawfully employed by an agent at the border." *Hernandez*, 140 S. Ct. at 746.

The decision below hampers Border Patrol agents' decision-making, perversely incentivizing Border Patrol agents to stand down if someone interferes with an investigation of a foreign national's immigration status, lest the officer face a *Bivens* suit. Pet.App.28a (Bumatay, J., dissenting); NBPC Br. 15-16; IWLC Br. 11.

Other available remedies further counsel hesitation, including "the variety of state law claims at [respondent's] disposal." Pet.App.24a (Bumatay, J., dissenting). Respondent (at 21) questions available administrative remedies, but DHS offers "internal administrative options," Pet. 4, including expedited review of excessive force claims, 8 C.F.R. § 287.10. The FTCA provides another alternative remedy. *Oliva*, 973 F.3d at 444. Congress's comprehensive legislation on all immigration-related matters further counsels caution. Pet. 4. There is no waiver, *contra* BIO 20. The briefs and opinions below canvassed

alternative remedies. Pet.App.23a-24a, 44a-46a; CA9 Appellee Br. 25-26.

3. As for *Bivens*' continuing vitality, respondent does not even attempt to square *Bivens* with modern doctrine. Pet. 22-26; IRLI Br. 3-16; IWLC Br. 13-21. Respondent (at 31) calls *Bivens* "settled law" and notes that *Abbasi* disavowed "cast[ing] doubt on" *Bivens*. But *stare decisis* is no "inexorable command." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020). *Bivens*' "usurpation of the legislative power" weighs against retention. *Hernandez*, 140 S. Ct. at 750 (Thomas, J., concurring).

Respondent (at 31) defends *Bivens*' workability, saying the same "test … has been in place since 1980." But since 1980, the Court has jettisoned the presumption favoring implied rights of action, tightened criteria for expanding *Bivens*, and signaled that the first "three *Bivens* cases might have been different if they were decided today." *Abbasi*, 137 S. Ct. at 1856. Because *Bivens* demands policy-laden judgments ill-suited for courts, courts have struggled and this Court has frequently intervened. Pet. 23-24; IWLC Br. 2.

Respondent (at 31-32) portrays *Bivens* as necessary for plaintiffs who can get "damages or nothing." But a "freestanding damages remedy for a claimed constitutional violation … is not an automatic entitlement." *Wilkie*, 551 U.S. at 550. *Bivens* suits rarely succeed, Pet. 23, and respondent (at 32) overstates *Bivens*' value in guiding federal officials. Administrative investigations and agency regulations set parameters without creating separation-of-powers violations.

Nor did Congress "deliberately preserve" *Bivens* in its 1974 amendment to the FTCA and the 1988 Westfall Act, *contra* BIO 32-33. "[W]hether Congress, in rejecting

Justice Department proposals and providing a FTCA exemption [for constitutional claims], meant to ratify *Bivens* is open to doubt." *Meshal v. Higgenbotham*, 804 F.3d 417, 428 (D.C. Cir. 2015); IRLI Br. 13-16. Congress "simply left *Bivens* where it found it," neither endorsing nor abrogating the decision. *Hernandez*, 140 S. Ct. at 748 n.9.

III. No Vehicle Issues Exist in This Important Case

1. The twelve dissenting votes in this case underscore its obvious importance. All *Bivens* extensions implicate fundamental separation-of-powers questions, and respondent blinks reality by denying the immigration-enforcement and national-security concerns here. Pet.App.26a-28a (Bumatay, J., dissenting); Pet.App.30a (Bress, J., dissenting).

Regardless, the consequences in the Ninth Circuit alone warrant review. Border Patrol agents cannot gamble that the Ninth Circuit will someday limit *Egbert* to its facts. That circuit spans both borders, employs the most Border Patrol agents, and experiences significant smuggling, immigration violations, and terrorism risks. Pet. 26-27; Pet.App.28a (Bumatay, J., dissenting); NBPC Br. 12-16; IWLC Br. 11. Respondent's rejoinder (at 16) that officers can avoid risk by refraining from misconduct misapprehends the problem. *Bivens* suits invariably involve disputed allegations about misconduct. By opening a new frontier of liability, the decision below discourages Border Patrol agents from vigorously performing vital work fighting terrorism and cross-border crime.

2. Respondent (at 22) points to the case's "interlocutory posture." But this Court routinely grants review in these circumstances. *E.g.*, *Hernandez*, 140 S. Ct. at 740; *Abbasi*, 137 S. Ct. at 1854; *Minneci v. Pollard*, 565 U.S. 118, 122 (2012); *Wilkie*, 551 U.S. at 548. The availability

of *Bivens* remedies inherently arises at the motion-to-dismiss or summary-judgment stages.

Respondent (at 22-23) asserts factual disputes. But the questions presented are purely legal, such as whether any reasons exist to doubt Congress's desire to subject Border Patrol agents to liability for conduct arising from immigration investigations.

Respondent's claimed factual disputes involve allegations that no judge in any court below considered significant. Some (at 4 n.2) are outside the summary-judgment record. Agent Egbert's alleged misconduct and the United States' discretionary decision not to assume his representation are irrelevant to the *Bivens* calculus, *contra* BIO 24. In *Hernandez*, the agent was accused of unlawfully shooting a child; faced criminal charges and internal investigation; and was represented by private counsel. 140 S. Ct. at 739, 740. None of those facts informed the *Bivens* inquiry. *Id.* at 746.

Moreover, "the purpose of Agent Egbert's entry" of respondent's property, BIO 23, is inconsequential, especially given the panel's conclusion that Agent Egbert was "carrying out official duties" when the use-of-force incident arose. Pet.App.47a; *accord* Pet.App.68a-69a. The scope of Agent Egbert's investigation, his mental state, and respondent's informant work (BIO 29) are immaterial to whether respondent's *Bivens* claims are new or create grounds for pause.

Finally, respondent (at 22) asserts that "because key facts remain sealed, this case is a poor vehicle." But the panel decision offers a blueprint for *Bivens* expansion without mentioning sealed facts. Respondent's unusual choice to file a sealed brief featuring allegations that the district-court judge, panel, and twelve en banc dissenters

considered irrelevant reflects a tactical ploy, not a vehicle problem.

CONCLUSION

This Court should grant the petition.

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