

No. 21-147

In The
Supreme Court of the United States

—◆—
ERIK EGBERT,

Petitioner,

v.

ROBERT BOULE,

Respondent.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

—◆—
**BRIEF OF THE NATIONAL BORDER
PATROL COUNCIL AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

—◆—
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TABLE OF CONTENTS

| | Page |
|--|------|
| TABLE OF CONTENTS | i |
| TABLE OF AUTHORITIES | iii |
| BRIEF OF THE NATIONAL BORDER PATROL COUNCIL AS <i>AMICUS CURIAE</i> IN SUP- PORT OF PETITIONER INTEREST OF <i>AMI- CUS CURIAE</i> | 1 |
| SUMMARY OF THE ARGUMENT | 1 |
| INTRODUCTION | 3 |
| ARGUMENT | 6 |
| I. The Ninth Circuit Overlooked the Distinct Role of the Border Patrol By Grouping Border Patrol and F.B.I. Agents Together as Simply “Federal Law Enforcement Offi- cials.” | 6 |
| A. The Ninth Circuit’s Analysis Would Subject Tens of Thousands of Other Federal Law Enforcement Officials to <i>Bivens</i> Actions | 6 |
| B. Congress Has Determined that Border Patrol Agents Have a Distinct Respon- sibility to the United States that Dif- fers from that Assigned to F.B.I. Agents | 9 |
| C. A Border Patrol Agent’s Work Envi- ronment is Fundamentally Different than that of Other Federal Law En- forcement Officials and this Differ- ence is a Special Factor Counseling Hesitation | 15 |

TABLE OF CONTENTS—Continued

| | Page |
|--|------|
| D. Substantial Differences Between the Northern and Southern Border Constitute a Special Factor that Counsels Hesitation | 18 |
| CONCLUSION..... | 20 |

APPENDIX

| | |
|--|--------|
| Excerpted Trial Testimony of Peter Hermansen, <i>U.S. v. Swartz</i> | App. 1 |
|--|--------|

TABLE OF AUTHORITIES

| | Page |
|---|-----------------|
| CASES | |
| <i>Arar v. Ashcroft</i> , 585 F.3d 559 (2d Cir. 2009)..... | 4 |
| <i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009) | 7 |
| <i>Bistrrian v. Levi</i> , 912 F.3d 79 (3d Cir. 2018)..... | 8 |
| <i>Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics</i> , 403 U.S. 388 (1971)..... | <i>passim</i> |
| <i>Boule v. Egbert</i> , 998 F.3d 370 (9th Cir. 2021)..... | <i>passim</i> |
| <i>Canada v. United States</i> , 950 F.3d 299 (5th Cir. 2020) | 4 |
| <i>Carlson v. Green</i> , 446 U.S. 14 (1980) | 3 |
| <i>Davis v. Passman</i> , 442 U.S. 228 (1979) | 3 |
| <i>Haig v. Agee</i> , 453 U.S. 280 (1981) | 5 |
| <i>Hernandez v. Mesa</i> , 140 S. Ct. 735 (2020)..... | <i>passim</i> |
| <i>Jesner v. Arab Bank, PLC</i> , 138 S. Ct. 1386 (2018) .. | 5, 14 |
| <i>Nestle USA, Inc. v. Doe</i> , 141 S. Ct. 1931 (2021)..... | 21 |
| <i>Schweiker v. Chilicky</i> , 487 U.S. 412 (1988) | 4 |
| <i>United States INS, United States Border Patrol v. Federal Labor Relations Auth.</i> , 12 F.3d 882 (9th Cir. 1993) | 15 |
| <i>Wilkie v. Robbins</i> , 551 U.S. 537 (2007) | 4 |
| <i>Ziglar v. Abbasi</i> , 137 S. Ct. 1843 (2017).... | 4, 7, 8, 14, 21 |

TABLE OF AUTHORITIES—Continued

| | Page |
|---|------------|
| CONSTITUTIONAL PROVISIONS | |
| U.S. Const. amend. V | 3 |
| U.S. Const. amend. VIII | 3 |
| STATUTES AND RULES | |
| 6 U.S.C. § 111(B)(1)(A) | 9 |
| 6 U.S.C. § 111(B)(1)(B) | 9 |
| 6 U.S.C. § 211(c)(5) | 13 |
| 6 U.S.C. § 211(e)(3) | 10 |
| Homeland Security Act of 2002 (P.L. 107-296) | 9 |
| Supreme Court Rule 37.6 | 1 |
| OTHER AUTHORITIES | |
| Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, <i>Federal Law Enforcement Officers, 2016—Statistical Table</i> , https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/fedlawenforceoff2016.pdf | 7 |
| Chad C. Haddal, Cong. Rsch. Serv., RL32562, <i>Border Security: The Role of the U.S. Border Patrol</i> (2010) | 10, 18, 19 |
| https://bjs.ojp.gov/data-collection/census-federal-law-enforcement-officers-fleo#publications-0 | 7 |
| https://www.cbp.gov/border-security/along-us-borders/history | 9 |

TABLE OF AUTHORITIES—Continued

| | Page |
|--|--------|
| https://www.cbp.gov/careers/frontline-careers/bpa/duty-locations | 11 |
| https://www.cbp.gov/careers/usbp-what-we-do | 15 |
| https://www.dea.gov/sites/default/files/2018-05/Early%20Years%20p%2012-29.pdf | 9 |
| https://www.fbi.gov/about/mission | 10 |
| https://www.fbi.gov/contact-us | 11 |
| Julian Resendiz, <i>Border Patrol: Cartels telling migrants to fight their way past agents</i> , Border Report, June 23, 2021, https://www.borderreport.com/hot-topics/immigration/border-patrol-cartels-telling-migrants-to-fight-their-way-past-agents/ | 17 |
| Map of Border Patrol Duty Locations, https://www.cbp.gov/careers/frontline-careers/bpa/duty-locations | 11, 15 |
| Office of Inspector General, Department of Homeland Security, <i>Conditions at CBP's Forward Operating Bases along the Southwest Border (2016) (Redacted)</i> , https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-37-Feb16.pdf | 15 |
| Petition No. P-2030-20, https://hilliardshadowenlaw.com/wp-content/uploads/2020/10/IACHR-Complaint-copy.pdf | 12 |
| Transcript of Record (Day 15), <i>United States v. Swartz</i> , CR-15-1723 (D. Ariz. 2018) | 17, 18 |

TABLE OF AUTHORITIES—Continued

| | Page |
|--|------|
| U.S. Border Patrol Mission Statement, https:// www.cbp.gov/border-security/along-us-borders | 10 |
| U.S. Customs and Border Protection, CBP Enforcement Statistics Fiscal Year 2021, https:// www.cbp.gov/newsroom/stats/cbp-enforcement- statistics | 16 |
| U.S. Customs and Border Protection, SNAP-SHOT: A summary of CBP Facts and Figures, https://www.cbp.gov/sites/default/files/assets/ documents/2021-Apr/cbp-snapshot-mar-2021. pdf | 16 |

**BRIEF OF THE NATIONAL BORDER
PATROL COUNCIL AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER
INTEREST OF *AMICUS CURIAE*¹**

The National Border Patrol Council (NBPC) is a labor union established in 1967 to represent non-supervisory agents and support staff of the United States Border Patrol. NBPC works to preserve the oath of office sworn by all Border Patrol agents by promoting policies that contribute to the security of the United States and opposing policies that restrict or impede the sworn duties of Border Patrol agents.

The decision of the court of appeals in *Boule v. Egbert*, 998 F.3d 370 (9th Cir. 2021) should be reversed because an expansion of the judicial remedy created in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), will interfere with border enforcement and undermine border security.



SUMMARY OF THE ARGUMENT

The Ninth Circuit failed to consider special factors previously recognized by this Court when it extended

¹ The parties have consented to the filing of this brief. Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

Bivens into new contexts. These factors and others caution against such a move because doing so will adversely affect the unique mission of the U.S. Border Patrol.

The Ninth Circuit found Border Patrol agents indistinguishable from F.B.I. agents as “federal law enforcement officials.” This decision and its determination that no special factors existed puts more than 19,000 Border Patrol agents and 132,000 federal law enforcement officials in 80 other federal organizations at risk for personal liability under *Bivens*.

The Ninth Circuit ignored Congress’ designation of the Border Patrol as a unique law enforcement organization whose agents discharge duties that implicate foreign policy, diplomacy and national security. It failed to explore special factors arising from Border Patrol agents’ unique working environment, focus on physically protecting the border and need to feel self-confident while operating alone in remote parts of the country while being severely outnumbered. The Ninth Circuit also failed to explore the enforcement, foreign policy and national security differences between the northern and southern borders in its decision to permit Respondent’s lawsuit to proceed.

This Court should reverse the judgment of the court of appeals for two primary reasons. First, expanding the *Bivens* remedy to two new contexts will adversely impact Border Patrol agents’ ability to effectively discharge their essential, day-to-day functions, including physically guarding our nation’s borders

against multiple threats. Second, allowing Border Patrol agents to be hamstrung with *Bivens* claims with have both foreseeable and unforeseen ramifications on this country's foreign policy, diplomacy and security.



INTRODUCTION

This Court has expanded *Bivens* twice in the 50 years since its inception with the last expansion being in 1980.² Hindsight has permitted an understanding of *Bivens*' impact on the three narrow areas countenanced by this Court.³ A *Bivens*' extension would be treacherous since its potential impact is subject to only forward-looking speculations. Hence, this Court's prior and now complete hesitancy to expand its application.

Here, the Ninth Circuit admitted expanding *Bivens* to provide Boules with a remedy for Border Patrol Agent Egbert's as-yet unproven constitutional violations. *Boule*, 998 F.3d at 387. Characterized as

² *Davis v. Passman*, 442 U.S. 228 (1979) (holding that an administrative assistant, who sued Congress for gender discrimination, could pursue money damages for violating the equal protection principles embodied in the Due Process Clause of the Fifth Amendment); and *Carlson v. Green*, 446 U.S. 14 (1980) (permitting a *Bivens* remedy to proceed against prison officials based on a violation of the Eighth Amendment).

³ See *Boule*, 998 F.3d at 377 (“[S]ince the 1980s, the Court has come to ‘appreciate more fully the tension between this practice [of creating causes of action] and the Constitution’s separation of legislative and judicial power.’”) (Bumatay, J., dissenting) (internal citation omitted).

“modest” extensions *id.*, the discussion below demonstrates that the Ninth Circuit’s extension of *Bivens* will have far-reaching and adverse consequences.

In deciding whether any “special factors” bar the extension of *Bivens*, the inquiry focuses on “who should decide whether to provide for a damages remedy, Congress or the Courts?” *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017). This analysis considers “the risk of interfering with the authority of the other branches,” “whether there are sound reasons to think Congress *might doubt* the efficacy or necessity of a damages remedy,” and “whether the Judiciary is well suited . . . to consider and weigh the costs and benefits of allowing a damages action to proceed.” *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020) (emphasis added).⁴

If special factors exist, “then courts *must refrain* from creating an implied cause of action in that case.” *Canada v. United States*, 950 F.3d 299, 309 (5th Cir. 2020) (emphasis added). The threshold for what constitutes a “special factor” counseling hesitation is “remarkably low.” *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009). In other words, “if [the court has] reason to pause before applying *Bivens* in a new context or to a new class of defendants—[the court must] reject the

⁴ Moreover, the “absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation.” *Schweiker v. Chilicky*, 487 U.S. 412, 421-422 (1988). On the contrary, the special-factors analysis applies “even in the absence of an alternative.” *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

request.” *Hernandez*, 140 S. Ct. at 743. The lesson from this Court is a strong presumption against expanding *Bivens*.

But the Ninth Circuit diverged from this Court’s admonition to avoid exercising a quasi-legislative function. And it contradicted the Court’s recent, clear, and correct conclusion that *Bivens* should not be extended in the border enforcement context. *Id.* at 746; *see also Haig v. Agee*, 453 U.S. 280, 292 (1981) (“Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) (“The political branches, not the judiciary, have the responsibility and the institutional capacity to weigh foreign-policy concerns.”).

Consequently, the precise constitutional violation alleged should not be the gravamen of the Court’s concern. *See Hernandez*, 140 S. Ct. at 743 (“A claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized.”). It is, rather, factors this Court already recognizes, namely national security implications and the risk of undermining border security, and, perhaps, some additional factors that counsel against extending *Bivens* into these new contexts.



ARGUMENT**I. The Ninth Circuit Overlooked the Distinct Role of the Border Patrol By Grouping Border Patrol and F.B.I. Agents Together as Simply “Federal Law Enforcement Officials.”****A. The Ninth Circuit’s Analysis Would Subject Tens of Thousands of Other Federal Law Enforcement Officials to *Bivens* Actions.**

The Ninth Circuit justified its “modest” extension of *Bivens* by finding two distinct law enforcement agencies fungible simply because “border patrol and F.B.I. agents are both federal law enforcement officials. . . .” *Boule*, 998 F.3d at 387. But this election to merge Border Patrol and F.B.I. agents into one amorphous body has created a class of potential defendants defined as all “federal law enforcement officials.” This new class of defendants, according to the Ninth Circuit, are not worthy of any further special factor consideration analysis since *Bivens* already applied to F.B.I. agents.⁵ *Id.*

The Ninth Circuit’s analytical sleight of hand has now opened the door to tens of thousands of other federal law enforcement officials being subjected to personal liability for damages under *Bivens*. The Ninth Circuit’s decision, if upheld, would eviscerate one part of the two-part inquiry to determine when courts

⁵ In fact, this Court has never extended *Bivens* to F.B.I. agents. *See* Footnote 8, *infra*.

should engage in the “disfavored judicial activity” of recognizing a new *Bivens* action by implying the remedy to all federal law enforcement officers, without regard to whether doing so presents a new context.⁶

In 2016, there were more than 132,000 federal law enforcement officers spread among 39 federal agencies and 41 offices of inspector general. *See* Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, *Federal Law Enforcement Officers, 2016—Statistical Table* at 3, <https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/fedlawenforceoff2016.pdf>.⁷ They were employed by the executive, judicial and legislative branches of government. Two-thirds of the full-time federal law enforcement officers were employed by Customs and Border Protection (33%), the Federal Bureau of Prisons (14%), the F.B.I. (10%) or Immigration and Customs Enforcement (9%). *Id.* at 1. Among the remainder were officers employed by the Bureau of Reclamation, Food and Drug Administration, Secret Service, Drug Enforcement Administration, Bureau of Diplomatic Security, Amtrak, U.S. Capitol Police, National Nuclear Security Administration, Bureau of Indian Affairs and the U.S. Mint Police, to name but a few. *Id.* at 3.

⁶ This Court has repeatedly characterized expanding *Bivens* as a “disfavored” judicial activity. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017); *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009).

⁷ This October 2019 data is the latest available. *See* <https://bjs.ojp.gov/data-collection/census-federal-law-enforcement-officers-fleo#publications-0>.

The vast spectrum of “federal law enforcement officials” with their varying interests, working conditions and political sensitivities suggests that lumping them all together is too simplistic an approach. Further, this Court in *Abassi* made abundantly clear that lower courts “must pause when implying a damages remedy implicates economic and governmental concerns” such as “the substantial monetary cost of defending and indemnifying claims against federal officials, as well as the time and administrative costs incident to the litigation.” *Abassi*, 137 S. Ct. at 1856. The Ninth Circuit’s decision exponentially magnified this potential financial burden to the government by including all federal law enforcement officials within *Bivens*’ reach. See *Bistrrian v. Levi*, 912 F.3d 79, 89 (3d Cir. 2018) (“Assuming the existence of a *Bivens* cause of action—without deciding the issue—can risk needless expenditure of the parties’ and the courts’ time and resources.”). Rather, this Court should find that a more nuanced examination of a particular federal law enforcement officer’s duties, responsibilities and working conditions is required before determining that no special factors exist for that group of federal officers.

The Ninth Circuit’s decision also failed to consider important distinctions between the work of Border Patrol agents and agents of the F.B.I. (as well as other federal law enforcement agencies) that should inform the question of whether special factors “‘counsel hesitation’ such that a *Bivens* action in this new context is foreclosed.” *Boule*, 998 F.3d at 387.

B. Congress Has Determined that Border Patrol Agents Have a Distinct Responsibility to the United States that Differs from that Assigned to F.B.I. Agents.

The Border Patrol once resided alongside the F.B.I. within the Department of Justice.⁸ See <https://www.cbp.gov/border-security/along-us-borders/history>. But in response to the terrorist attacks on Sept. 11, 2001, Congress enacted the Homeland Security Act of 2002 (P.L. 107-296). This Act created, on March 1, 2003, the Department of Homeland Security (DHS) and it moved the Border Patrol from the Department of Justice to the new Department of Homeland Security as one component of the U.S. Customs and Border Protection. See *id.*, Subtitle D, sec. 441.

Congress directed that DHS and the Border Patrol focus primarily on preventing and mitigating the risk of terrorist attacks. See 6 U.S.C. § 111(B)(1)(A) and (B) [“. . . preventing terrorist attacks” and reducing the country’s vulnerability to terrorism]. Congress’ new anti-terrorism mandate for the Border Patrol was reflected in its revised mission statement: “Since the terrorist attacks of September 11, 2001, the focus of the Border Patrol has changed to detection, apprehension

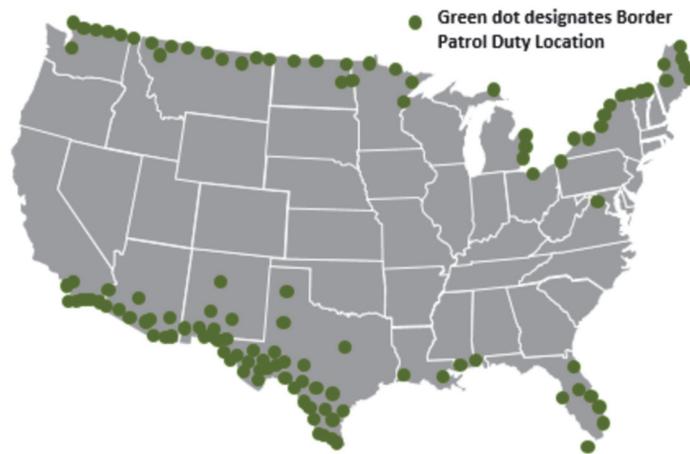
⁸ NBPC contrasts Border Patrol and F.B.I. agents because the Ninth Circuit compared Border Patrol agents with F.B.I. agents. See *Boule v. Egbert*, 998 F.3d 370, 387 (9th Cir. 2021). However, *Bivens* involved six federal law enforcement agents from the Bureau of Narcotics, the predecessor of the Drug Enforcement Agency, and the case did not involve F.B.I. agents. See <https://www.dea.gov/sites/default/files/2018-05/Early%20Years%20p%2012-29.pdf>.

and/or deterrence of terrorists and terrorist weapons.” See U.S. Border Patrol Mission Statement, <https://www.cbp.gov/border-security/along-us-borders>. Border Patrol agents also focus on preventing the entry of weapons of mass destruction into the United States. See Chad C. Haddal, Cong. Rsch. Serv., RL32562, *Border Security: The Role of the U.S. Border Patrol* (2010) at 3 [hereinafter “Haddal at . . . ”]. These new responsibilities are in addition to the Border Patrol’s historic obligation to prevent the illegal trafficking of people and contraband across our nation’s borders. See 6 U.S.C. § 211(e)(3). In contrast, the F.B.I.’s portfolio of interests span from anti-terrorism to combating cyber-crime, from detecting and stopping foreign espionage to protecting civil rights, and from combating transnational criminal syndicates to stopping significant white-collar and violent crimes. See <https://www.fbi.gov/about/mission>. Even where the interests of the two agencies intersect, the way agents perform their duties is materially different. See *below*.

The disparate missions of the Border Patrol and F.B.I. are reflected in the geographic breadth of their respective offices. Figure 1, below, shows the exclusive province of the Border Patrol within the United States primarily along its northern and southern borders, while Figure 2, below, shows the worldwide reach of the F.B.I.

Figure 1:

Map of Border Patrol Duty Locations



<https://www.cbp.gov/careers/frontline-careers/bpa/duty-locations>

Figure 2:

CONTACT US

Field Offices | FBI Headquarters | Overseas Offices



The FBI has offices around the world and can be contacted around the clock, every day of the year.

<https://www.fbi.gov/contact-us>

The location of Border Patrol's stations suggest that the daily work of its agents has a natural tendency to affect diplomacy, foreign policy, and national security in a very narrow band along the U.S. border, all factors counseling hesitation. *Hernandez*, 140 S. Ct. at 745, 749. In *Hernandez*, this Court found that a Border Patrol agent's cross-border killing of a Mexican national created a diplomatic incident between the United States and Mexico that was "addressed through diplomatic channels." *Id.* at 746. These types of incidents, the Court noted, resulted in a foreign policy decision by the two countries to create a joint Border Violence Prevention Council. *Id.*⁹ But this response, which was only one factor considered by the *Hernandez* Court, nevertheless highlights the fact that Border Patrol's law enforcement activities along the border can give rise to new and unplanned national security and diplomatic predicaments.

It is the very nature of the Border Patrol's mission, hard up against the international borders of our country, that create the situations giving rise to international incidents, the need for diplomacy and foreign policy, and the day-to-day security of this nation. Border Patrol's mission, geographic location and mandate for interdicting cross-border lawbreakers makes it unique. No other federal law enforcement agency—

⁹ Tragic as it may have been, the cross-border shooting in *Hernandez* was not a one-time event. That incident, and others like it, resulted in a claim against the United States in the Inter-American Commission on Human Rights. See Petition No. P-2030-20, <https://hilliardshadowenlaw.com/wp-content/uploads/2020/10/IACHR-Complaint-copy.pdf>.

on a daily basis—operates in such an environment. And no other federal law enforcement agency is charged with the responsibility to protect the physical boundaries of our nation. For example, if an agency’s intelligence unit revealed an anticipated breach of the border by human or drug traffickers or other nefarious actors, that agency would notify the appropriate Border Patrol Sector so it could fashion an appropriate response. It is highly unlikely another law enforcement agency would develop or execute an interdiction because no other agency has the boots-on-ground knowledge and experience of patrolling the border. Otherwise, a response would be unorganized, chaotic, and result in inconsistent enforcement policies.

This Court already recognized the exclusive functions of Border Patrol agents in *Hernandez*. Describing the “daunting task” of preventing the illegal entry of dangerous people and goods, this Court acknowledged that what federal agents do at the border “has a clear and strong connection to national security,” *Hernandez*, 140 S. Ct. at 746, because Border Patrol officers are statutorily required to respond to “terrorists, drug smugglers and traffickers, human smugglers and traffickers, and other persons who may undermine the security of the United States.” *Id.* (quoting 6 U.S.C. § 211(c)(5)).

This Court also noted that in contemplating questions of national security, such decisions are typically the province of Congress and the President. *Id.* Foreign-policy and national-security decisions are

“‘delicate, complex, and involve large elements of prophecy’ for which ‘the Judiciary has neither aptitude, facilities[,] nor responsibility.’” *Id.* at 749 (quoting *Jesner*, 138 S. Ct. at 1414). In *Abbasi*, this Court instructed that to determine whether a new context presents any “special factor counselling hesitation,” a court “must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.” 137 S. Ct. at 1857-1858. If a court has any “sound reasons to think Congress *might doubt* the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the court[] *must refrain* from creating the remedy in order to respect the role of Congress.” *Id.* at 1858 (emphasis added).

This Court should find that the nature of a Border Patrol agent’s job so implicates the executive branch’s interests in foreign policy, diplomacy and the security of the nation that hesitation is warranted in this case and that the Ninth Circuit erred in determining otherwise.

C. A Border Patrol Agent’s Work Environment is Fundamentally Different than that of Other Federal Law Enforcement Officials and this Difference is a Special Factor Counseling Hesitation

The U.S. Border Patrol is a uniformed, mobile, paramilitary force. *United States INS, United States Border Patrol v. Federal Labor Relations Auth.*, 12 F.3d 882, 883 (9th Cir. 1993). Agents are “focused 24/7 on securing our international land borders and coastal waters between ports of entry” and “safeguarding the American people from terrorists and their weapons, drug smugglers, and illegal entry of undocumented noncitizens.” <https://www.cbp.gov/careers/usbp-what-we-do>.

Border Patrol agents are responsible for 6,000 miles of Mexican and Canadian land borders and more than 2,000 miles of coastal borders. *Id.* They work in field units, horse patrols, bike patrols, K-9 units, boat patrols, off-road vehicle units, tactical units, search and rescue units and rapid response teams. *Id.* Border Patrol agents actively search for, detect and track transnational criminals trafficking in narcotics and human beings. *Id.* They work in some of the most remote locations in the country; sometimes from forward operating bases. See Map of Border Patrol Duty Locations, *supra*; see also Office of Inspector General, Department of Homeland Security, *Conditions at CBP’s Forward Operating Bases along the Southwest Border (2016) (Redacted)* at 2, <https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-37-Feb16.pdf>.

In fiscal year (FY) 2020, there were 19,740 Border Patrol agents. *See* U.S. Customs and Border Protection, SNAPSHOT: A summary of CBP Facts and Figures, <https://www.cbp.gov/sites/default/files/assets/documents/2021-Apr/cbp-snapshot-mar-2021.pdf>. In FY2020 these agents encountered 405,036 people who were arrested, held for further processing or—in most cases—returned to Mexico. *See* U.S. Customs and Border Protection, CBP Enforcement Statistics Fiscal Year 2021, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics>. In FY2021 through September 30, 2021, the number of apprehensions more than quadrupled as Border Patrol agents encountered 1,662,167 people. *Id.* These astonishing figures represent the vast majority of enforcement actions by agents throughout all of Customs and Border Patrol. *Id.* Rescue efforts also substantially increased in the past few years. In FY2020, Border Patrol agents engaged in 5,071 efforts to rescue people along the Southwestern border, which was slightly higher than the 4,920 efforts in FY2019. *See U.S. Customs and Border Protection*, CBP Enforcement Statistics Fiscal Year 2021, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics>. In FY2021 through September, agents engaged in 12,883 rescue efforts on the Southwest border alone. *Id.*

Border Patrol agents logically face a greater risk of suit compared to other federal law enforcement officials because their work mandates far greater interactions with large numbers of people who are not legally welcome in the country. This is particularly so when the people they are interacting with are so

highly motivated to avoid contact with Border Patrol agents that they will engage in assaults to avoid apprehension. See Julian Resendiz, *Border Patrol: Cartels telling migrants to fight their way past agents*, Border Report, June 23, 2021, <https://www.borderreport.com/hot-topics/immigration/border-patrol-cartels-telling-migrants-to-fight-their-way-past-agents/>.

The unique reality of a Border Patrol agent's daily work was described in 2018 testimony by Pete Hermansen, a former Border Patrol agent who, during his 21-year career, held numerous leadership and tactical unit positions within the Agency, including U.S. Customs and Border Protection's Director of Use of Force. See Transcript of Record (Day 15) at 7, *United States v. Swartz*, CR-15-1723 (D. Ariz. 2018). During the *Swartz* criminal trial, Hermansen testified the great majority of Border Patrol agents operate alone, in remote areas with "backup a long way away." *Id.* at 11. Solo agents have arrested 50-200 people at a time and there have been instances where a shift of 15-20 agents have arrested a couple of thousand people. *Id.* During traffic stops, Border Patrol agents typically sprint to the suspect vehicle to try and contain or capture the suspected traffickers and unauthorized immigrants inside the vehicle before they may try to abscond as soon as the vehicle stops. *Id.* This differs from other law enforcement officers who usually approach such vehicles slowly and cautiously with their safety and the safety of the occupants in mind. *Id.* Border Patrol agents have been attacked by rock throwers thousands of times. *Id.* at 10. It is a daily occurrence. *Id.*

Unlike other types of agents, Border Patrol agents have no obligation to retreat in the face of assaults and they are not trained to take cover as a first option when attacked. *Id.* at 12.

Along the international border, Border Patrol agents face off against an array of criminal actors and organizations. *Id.* at 19. They can be “minimally structured, fly-by-night, quick opportunists, all the way up to highly structured, highly organized elements that have scouts, response elements, scaling fence elements, . . . lookouts [and] . . . communication elements.” *Id.*

The nature of Border Patrol agents’ regular engagements in the execution of their duties make them particularly vulnerable to personal lawsuits for money damages. This factor is incompatible with the reality that agents must make quick decisions under stressful, dynamic circumstances where a reluctance to make such decisions can lead to harm, both to the agent and to those with whom they interact.

D. Substantial Differences Between the Northern and Southern Border Constitute a Special Factor that Counsels Hesitation.

The United States’ northern border is more than 4,000 miles and spans 12 states. *See* Haddal at 3. This border features vast mountain ranges such as the Rockies, the Great Lakes, numerous river systems and extreme snow and cold in the winter. *Id.* The United

States' southern border with Mexico is 1,952 miles and spans four states. *See* Haddal at 13. It features expansive and harsh desert landscapes with temperatures frequently above 100 degrees, mountain ranges and the Rio Grande River along the Texas border with Mexico. *Id.* at 3.

Since FY2000, 98.7% of all unauthorized migrant apprehensions have taken place along the southern border where the Border Patrol deploys about 85% of its agents. *Id.* The Border Patrol's southern strategy has focused on illegal border crossers and smugglers while remaining wary of terrorists using the same trafficking infrastructure to enter the country. *Id.* The Border Patrol's northern strategy focuses on preventing the entry of terrorists and reducing cross-border crime and smuggling. *Id.* at 21.

Egbert is part of the less than 15% of Border Patrol agents deployed along the northern border and his focus and actions will differ from those of the majority of agents stationed on the southern border. Yet the expansion of *Bivens* green-lighted by the Ninth Circuit would apply to all agents. This Court should find that this constitutes a special factor counseling hesitation against expanding *Bivens* to 100% of Border Patrol agents when Egbert only represents the 15% of agents on the northern border.



CONCLUSION

This Court should reverse the Ninth Circuit's decision and find that the *Bivens* remedy should not apply in the border enforcement context, which implicates foreign policy, diplomacy and national security. These domains are the prerogative of the other branches of government.

The prudence of judicial deference is exemplified by the decision below. By permitting Boule's lawsuit to proceed, the court of appeals exposed thousands of federal law enforcement agents, not only Border Patrol agents, to liability for personal damages. The court failed to consider the potentially massive financial impact of the decision, which was mischaracterized as representing only a "modest" extension of *Bivens*.

With respect to Border Patrol agents specifically, there are special factors that should cause the Court to hesitate and decline to extend the *Bivens* remedy. Border Patrol agents focus on physically protecting the northern and southern border, between ports of entry, from incursion by criminal drug and human traffickers, illegal border crossers and potential terrorists, as well as thwarting the entry of contraband including weapons of mass destruction. Agents work in uniquely demanding, dynamic environments. Border Patrol agents need to retain confidence in their ability to act decisively while operating alone, often in remote parts of the country and while, at times, being grossly outnumbered. The Ninth Circuit's decision will undermine the Agency's mission by causing agents to

hesitate and second guess their daily decisions about whether and how to investigate suspicious activities near the border, paralyzing their mandate to keep the border secure.

For the foregoing reasons, there are several sound reasons against expanding the judicially created cause of action to the new context presented here. *Abbasi*, 137 S. Ct. at 1858; *see also Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931, 1937 (2021). Indeed, there is nothing about the facts presented below that would justify an exception to this Court’s recent observation that Congress should “most often” decide whether to provide a damages remedy. *Hernandez*, 140 S. Ct. at 750.

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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