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 FOR DEE FARMER, MARCELLAS HOFFMAN, CHRISSY SHORTER, AND DONALD SNOWDEN AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE AMICI CURIAE[1]

Amici — Dee Farmer, Marcellas Hoffman, Chrissy Shorter, and Donald Snowden — are individuals who have experienced serious violations of their constitutional rights by federal officers involved in domestic law enforcement. Ms. Farmer was the successful petitioner in *Farmer v. Brennan*, 511 U.S. 825 (1994), where this Court vacated the dismissal of her *Bivens* claim that prison officials were deliberately indifferent in violation of the Eighth Amendment in failing to protect her from sexual assault.

Mr. Hoffman, Ms. Shorter, and Mr. Snowden have more recently brought claims that fall within the traditional heartland of *Bivens*, but in each case district courts have dismissed those claims on a flawed understanding of this Court's recent *Bivens* jurisprudence. Some of these claims are currently on appeal. As victims of constitutional violations by federal officers, *amici* have a strong interest in the development of the *Bivens* doctrine.

This Court's recent *Bivens* cases have presented unique situations featuring pronounced separation-of-powers sensitivities. In the present case, the Court will have to decide how its *Bivens* framework applies to claims involving border agents charged with enforcing the country's laws near the United States Border.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), *amici* affirm that both parties consented to the filing of the brief.

But whichever side of the line the Court decides these claims should fall, it should take care not to decide claims that are not before it. With this brief, *amici* seek to bring to the Court's attention a discrete set of serious constitutional claims, involving constitutional violations by line-level federal officers in ordinary domestic law enforcement, which fall squarely within the historical core of the *Bivens* doctrine. These are valid *Bivens* claims under this Court's cases, as *amici* are presently arguing or have argued in their own cases. This Court was presented with a request to consider whether *Bivens* should be overruled, but did not grant certiorari on that question. Having rejected a request to reconsider *Bivens*, the Court should take care to decide the limited issues before it in a limited way, without inadvertently casting doubt on core *Bivens* claims that are not presently before it.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus Marcellas Hoffman was brutally assaulted in his prison cell after a federal prison guard offered to pay other inmates to attack him. *Amicus* Chrissy Shorter was raped and stabbed after prison officials determined that she was at high risk for sexual assault as a transgender woman who had been assaulted at a prior facility, yet refused to take steps to protect her. *Amicus* Donald Snowden was punched in the face by a federal drug agent who left him with a fractured eye-socket, despite Mr. Snowden doing nothing to resist arrest.

Mr. Hoffman, Ms. Shorter, and Mr. Snowden share a few things in common. Each of them suffered serious violations of their clearly established constitutional rights. Each of them was injured by wrongdoing in the "common and recurrent sphere of law enforcement" addressed by prior recognized *Bivens* claims, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) – not at the border and not in the context of any national security operation. Each of them sued the individual law enforcement officers that injured them – not seeking to change any agency's policy, but seeking compensation for actions that *violated* agency policies, in addition to the Constitution. Last but not least, each of them had their lawsuits thrown out by district courts irrespective of the truth of their allegations, but

on the view that this Court's recent *Bivens* cases required that *amici* be denied a remedy for the abuses they suffered.[2]

These are just a few cases that reflect a disturbing trend. This Court's recent decisions have reined in the incautious expansion of *Bivens* remedies, but they have studiously avoided overruling *Bivens* and its progeny, and have also declined to foreclose modest extensions that do not implicate separation-of-powers considerations warranting hesitation. Lower courts are nonetheless misapplying these cases to deny *Bivens* remedies in run-of-the-mill *Bivens* cases. *Amici* have brought textbook *Bivens* claims alleging that line-level federal officers violated their constitutional rights in the course of ordinary domestic law enforcement. These and other courts are misapplying the framework this Court laid out in *Abbasi*.

The *Abbasi* framework does not suggest that run-of-the-mill *Bivens* claims against line-level domestic law enforcement officers should be automatically dismissed. To the contrary, this Court in *Abbasi* emphasized that "it must be understood that this opinion is not intended to cast doubt on the continued force, or even necessity, of *Bivens* in the search-and-seizure context in which it arose." *Abbasi*, 137 S. Ct. at 1856. The claims in which the Court has declined to extend a *Bivens* remedy under the *Abbasi* framework were

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[2] The Third Circuit recently reversed the dismissal of Chrissy Shorter's case, correctly concluding that a *Bivens* remedy is available. *Shorter v. United States*, 12 F.4th 366 (3d Cir. 2021). Mr. Hoffman's and Mr. Snowden's cases are currently on appeal. *Hoffman v. Preston*, No. 20-15396 (9th Cir.); *Snowden v. Henning*, No. 21-1463 (7th Cir.).

based on extraordinary facts that bore "little resemblance" to the *Bivens* claims the Court has recognized in the past. *Abbasi*, 137 S. Ct. at 1860. The claims in *Abbasi* involved challenges to high-level policy decisions in the wake of a major terrorist attack, and the claims in *Hernandez* involved a cross-border shooting that had been the subject of disagreement between the United States and Mexico. *Hernandez v. Mesa*, 140 S. Ct. 735 (2020). These claims involved complex separation-of-powers concerns that were not present in prior cases like *Bivens* and *Carlson*, which involved challenges to individual instances of misconduct by rank-and-file law enforcement officers involved in domestic law enforcement. *Carlson v. Green*, 446 U.S. 14 (1980).

In presenting a clean break between *Bivens* and *Carlson* on the one hand and *Abbasi* and *Hernandez* on the other, Petitioner never once mentions an important case decided by this Court: *amicus* Dee Farmer's. Ms. Farmer, a transgender woman, brought an Eighth Amendment deliberate indifference claim for being raped in her cell after prison officials transferred her to the general population of a notoriously violent facility. As the Court noted, Ms. Farmer filed her claim pursuant to *Carlson*, which similarly involved prison officials' deliberate indifference to the wellbeing of inmates in a federal prison. *Farmer*, 511 U.S. at 830. Despite Petitioner's linear narrative that everything about this Court's *Bivens* jurisprudence changed "[a]fter 1980," Pet. Br. 15, the availability of such a claim in the domestic prison context did not even appear controversial in 1994, and the Court vacated a grant of summary judgment and allowed Ms. Farmer to press her claims.

In the case now before the Court, the Ninth Circuit concluded that the facts presented fall outside the historical core of *Bivens* claims recognized by this Court, but involved permissible extensions of *Bivens*. Pet. App. 36a, 42a. Specifically, Respondent's claims are brought against a border patrol agent by a hotelier located on the U.S./Canada border, raising the possibility that this case involves a border-specific immigration context where this Court has recognized separation-of-powers issues different from claims against other types of federal officers. *Hernandez*, 140 S. Ct. at 747. Since *amici* suffered constitutional violations at the hands of federal law enforcement and prison officers not involved in the border-area enforcement of immigration law, *amici* take no position on whether the present matter does involve immigration enforcement, and if it does, whether the Ninth Circuit was correct to recognize a *Bivens* remedy against border officers.

Rather, *amici* submit this brief to highlight the importance of the Court deciding the case before it in a manner that does not inadvertently pre-judge questions about the continuing validity of core *Bivens* claims. This Court declined to grant certiorari on the question of whether to reconsider the continuing validity of *Bivens*, which as *Abbasi* indicated is "settled." *Abbasi*, 137 S. Ct. at 1857; *see Egbert v. Boule*, 142 S. Ct. 457 (2021) (No. 21-147) (Mem.). *Amici*'s experience in the district courts suggest that some have misunderstood this Court's instructions in *Abbasi* and *Hernandez*. And Petitioner now asks this Court to compound the problem, going well beyond what is necessary to decide this case in order to hold — in contradiction of what this Court said in *Abbasi* — that even

modest extensions of *Bivens* are categorically barred. Pet. Br. 14-24.

The Court should reject Petitioner's sweeping and unfounded request. It should also take heed of the collateral damage its recent decisions have entailed for garden-variety *Bivens* claims in lower courts that have misunderstood the Court's rulings. The Court should take care to decide the limited case before it in a limited way. It should also remind lower courts that *Abbasi*'s holding did not disturb pre-existing remedies under *Bivens*.

There are sound reasons supporting this Court's decision in *Abbasi* not to disturb the historical core of *Bivens*, and its decision in this case not to grant certiorari to reconsider the validity of such claims. Core *Bivens* claims against domestic law enforcement officers for unlawful searches and seizures and prison mistreatment are an essential part of a federal law framework for holding federal officers responsible for violations of individuals' civil rights. Indeed, Congress has legislated on the assumption and expectation that this regime exists. In the Prison Litigation Reform Act, Congress specifically addressed the framework for federal prisoners to bring suits regarding their confinement conditions, and Congress chose not to disrupt what it recognized as the settled law of *Bivens* in that context. Likewise, in amending the Federal Tort Claims Act, Congress provided immunity for federal officers from state-law tort claims, but expressly exempted from this rule constitutional claims against individual officers, again taking it for granted that this avenue of relief existed and would be preserved. *Bivens* claims against rank-and-file law enforcement

officers are an essential component of the system governing law enforcement officers, and it would raise significant separation-of-powers concerns to upset this congressionally-approved regime, including legislation that has always been premised on the vitality of a historical core of *Bivens* claims.

ARGUMENT

I. The Court's recent cases have rejected extensions of *Bivens* on extraordinary facts, but district courts have misapplied those decisions to cut back the core of *Bivens*.

A. Traditional *Bivens* claims serve critical constitutional purposes in the domestic law enforcement context. Such claims deter unlawful conduct. *See Correctional Services Corp. v. Malesko*, 534 U.S. 61, 70 (2001) ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.") They also "provide[] instruction and guidance to federal law enforcement." *Abbasi*, 137 S. Ct. at 1856-1857. And for victims of official abuse, like *amici*, these claims offer direct redress for purely retrospective injuries. *See*, *Bivens*, 403 U.S. at 410 ("For people in Bivens' shoes, it is damages or nothing.") (Harlan, J., concurring). This promise of redress for constitutional wrongs have been particularly essential for individuals who have suffered unlawful searches and seizures, *Bivens*, 403 U.S. at 389, and mistreatment, abuse, and neglect by prison officers, *Carlson*, 446 U.S. at 16 n.1; *Farmer* 511 U.S. at 829-830. There "are powerful reasons to retain" this core of the *Bivens* doctrine. *Abbasi*, 137 S. Ct. at 1857.

This Court's decisions in *Abbasi* and *Hernandez* presented claims that were markedly different from the claims against rank-and-file domestic law enforcement officers for individual instances of misconduct involved in *Bivens*, *Carlson*, and *Farmer*. In *Abbasi*, the Court considered claims challenging confinement conditions imposed "pursuant to the formal policy adopted by [] Executive Officials in the wake of the September 11 attacks." *Id.* at 1858. These claims challenged "more than standard law enforcement operations"; they challenged "major elements of the Government's whole response to the September 11 attacks," including large-scale policy decisions. *Id.* at 1861 (internal quotation marks omitted).

Similarly, the claims in *Hernandez* involved a cross-border shooting, which "quickly became an international incident, with the United States and Mexico disagreeing about how the matter should be handled." *Hernandez*, 140 S. Ct. at 740. The Court found a "world of difference" between those claims and the Fourth Amendment claim based on an "arrest and search carried out in New York City" at issue in *Bivens*, and the Fifth Amendment claim based on sex discrimination "on Capitol Hill" in *Davis*. *Id.* at 744. The claims in both cases were thus markedly different from the prior *Bivens* claims this Court had recognized, which included a Fourth Amendment claim against FBI agents for an unreasonable search and seizure and an Eighth Amendment claim against federal prison officers for deliberate indifference toward a prisoner's medical needs.

The extraordinary facts of *Abbasi* and *Hernandez* raised complex separation-of-powers issues that were

not presented in the core *Bivens* claims that the Court had previously endorsed. *See Abbasi*, 137 S. Ct. at 1857; *Hernandez*, 140 S. Ct. at 749. The Court explained that adjudicating the claim about the post-September 11 detention policy in *Abbasi* would require "an inquiry into sensitive issues of national security," even though national-security policy "is the prerogative of the Congress and President." *Abbasi*, 137 S. Ct. at 1861. Moreover, Congress had specifically requested a report on the confinement conditions challenged and did not create or extend any remedies in response. *Id.* at 1862. The Court emphasized the need to recognize latitude for "high officials to make the lawful decisions necessary to protect the Nation in times of great peril." *Id.* at 1863.

Likewise, in *Hernandez*, the Court emphasized that "[u]nlike any previously recognized *Bivens* claim, a cross-border shooting claim has foreign relations and national security implications." *Hernandez*, 140 S. Ct. at 739. In that case, a jury determination could have risked "embarrassment of our government abroad through multifarious pronouncements by various departments on one question." *Id.* at 744 (citation and quotation omitted). There, the Department of Justice had conducted an investigation and decided not to bring charges or take other action against the border patrol agent. Moreover, the United States had denied a request by Mexico to extradite the agent to face criminal charges in a Mexican court. *Id.* Further, the Court emphasized that the Executive Branch "has the lead role in foreign policy." *Id.* (citation and quotation omitted). In short, both *Abbasi* and *Hernandez* involved sensitive, high-level policy issues that involved core Executive and Legislative functions.

These separation-of-powers concerns are not present in traditional *Bivens* claims against rank-and-file officers involved in domestic law enforcement, like the Fourth Amendment claim recognized in *Bivens* and the Eighth Amendment claims recognized in *Carlson* and *Farmer*. Indeed, this Court has made plain that the *Abbasi* framework left intact the historical core of *Bivens* claims that already existed. Although the *Abbasi* framework directs courts to exercise caution in *extending* a *Bivens* remedy to new contexts, the Court has reiterated that "the settled law of *Bivens*" remains important in the "common and recurrent sphere of law enforcement" by allowing some redress for injuries and providing needed guidance to federal law enforcement officers. *Abbasi*, 137 S. Ct. at 1856-7.

B. Nonetheless, some district courts have misapplied this Court's decisions in *Abbasi* and *Hernandez* to restrict *Bivens* claims in the "common and recurrent sphere of law enforcement" — precisely the sphere of claims where this Court has instructed that *Bivens* claims remain available.

For example, in *Hoffman v. Preston*, No. 1:16-cv-01617, 2020 WL 58039 (E.D. Cal. Jan. 6, 2020), a district court dismissed *amicus* Marcellas Hoffman's Eighth Amendment deliberate indifference claim against a rank-and-file federal prison officer. Mr. Hoffman alleged that an individual prison officer intentionally provoked violence against Mr. Hoffman by offering to pay other prisoners to physically attack him and by labeling him a "snitch" in front of other inmates in a manner calculated to induce harm. Mr. Hoffman was then brutally beaten in his cell by an-

other prisoner as a result of the officer's actions. *Hoffman v. Preston*, No. 1:16-cv-01617, 2019 WL 5188927, at *3 (E.D. Cal. Oct. 15, 2019), *adopted by* 2020 WL 58039 (E.D. Cal. Jan. 6, 2020). Mr. Hoffman's claim did not present any special separation-of-powers concerns. Rather, his claims were no different from those presented in *Carlson*, where this Court recognized an Eighth Amendment *Bivens* claim based on allegations that federal prison officials acted with deliberate indifference to a prisoner's medical needs. 446 U.S. at 17-23. Mr. Hoffman's claim was also remarkably similar to the claim presented by *amicus* Dee Farmer in *Farmer v. Brennan*, 511 U.S. 825 (1994), where this Court allowed a deliberate indifference claim to proceed against federal prison officials who failed to protect a prisoner from a substantial risk of prisoner violence.

Similarly, in *Shorter v. United States*, No. CV-19-16627, 2020 WL 4188455, (D.N.J. Jul. 21, 2020), *rev'd* 12 F.4th 366 (3rd Cir. 2021), a district court held that no *Bivens* remedy was available where a transgender woman, *amicus* Chrissy Shorter, alleged she was stabbed and raped by other prisoners because of the deliberate indifference of prison officials. The facts in *Shorter* even more closely paralleled those in *Farmer* — a case this Court has never overruled. Chrissy Shorter, like Dee Farmer, was visibly female at the time of her imprisonment among men. *Shorter*, 12 F.4th at 369. Prison officials, over Shorter's protests that she was likely to be assaulted, placed her first in an unlocked cell with 11 men, *id.*, and later in an unlocked cell isolated from any guard station, *id.* at 370. Although officials recognized that Shorter was at "significantly higher risk" for sexual assault than other

prisoners and "should be transferred," they took no action for months. *Id*. at 369-370. Then, almost a month and a half after a BOP committee determined Shorter should be relocated and after Shorter submitted a transfer request to her Warden, another prisoner entered Shorter's unlocked cell, raped her, and cut her body seven times. *Id*. at 370. The district court concluded that Shorter's suit, although it was almost indistinguishable from *Farmer*, *see id*. at 373 (comparing *Farmer* and *Shorter*), constituted a new *Bivens* context and determined that special factors counseled hesitation.

Recognizing the district court's error, the Third Circuit reversed, holding that Shorter's case was controlled by this Court's decision in *Farmer*. *Shorter v. United States*, 12 F.4th 366 (3rd Cir. 2021). But the district court's erroneous conclusion in Chrissy Shorter's case hammers home the point. When Dee Farmer brought a nearly identical claim before this Court in 1994, the Court treated it as uncontroversial that her claim could proceed under *Bivens*. *Abbasi* did not challenge this. And yet, the district court in *Shorter* misconstrued *Abbasi* as if it had overruled *Farmer* sub silentio and cast a straightforward *Bivens* claim into doubt.

District courts have likewise concluded that outright abuse by line-level officers is beyond the scope of *Bivens*. In *Harris v. United States*, the Eastern District of California found that *Abbasi* barred a remedy for disturbing prisoner abuse. There, a pro se federal prisoner alleged that a group of officers beat him, restrained him, then lowered his pants and sprayed his genitals and anus with pepper spray. *Harris v. United*

States, No. 1:17-cv-01683, 2018 WL 3203122, *1-2 (E.D. Cal. Jun. 28, 2018), *vacated on other grounds by* 2018 WL 3472523 (E.D. Cal. Jul. 17, 2018). The officers called Mr. Harris homophobic slurs and left him injured in a recreation cage following the attack. *Id.* The court concluded that only medical indifference claims were cognizable under the Eighth Amendment and that all other claims were precluded by special factors counseling hesitation. *Id.* at *3.

Similar examples, where lower courts have found that discrete instances of violence against inmates by line-level officers or other inmates were actually new contexts involving special factors, are numerous:

- *Millbrook v. Spitz*, No. 1:18-cv-01962, 2019 WL 4594275 (D. Colo. Sep. 23, 2019) (Officers "slammed" handcuffed "Plaintiff's head" and "tried to break his arms" causing "permanent nerve damage in his wrists and fingers and injuries to his head, neck, back, and arms.")
- *Anderson v. United States*, No. 4:18-cv-0871, 2021 WL 4990798 (N.D. Tex Oct. 26, 2021) (Officer slammed door of medical transport, trapping prisoner's foot between door and frame; officer refused to release door before transport, causing fracture to foot, breaking all of prisoner's toes and resulting in permanent disability).
- *Freeman v. Provost*, No. 3:19-cv-421, 2021 WL 710376 (S.D. Miss. Jan. 27, 2021) (Prisoner suffering from sickle-cell disease restrained, seated and then "continuously sprayed with OC

gas" until "soaked"; officers refused to take prisoner to a decontamination station although prisoner warned them he could not tolerate pepper spray because of his sickle cell, resulting in weeks of vomiting, hair and weight loss, and pain due to severe sickle cell episode.), *adopted by* 2021 WL 709704 (S.D. Miss. Feb. 23, 2021).

- *Harrison v. Nash*, No. 3:20-cv-374, 2021 WL 2005489 (S.D. Miss. Apr. 26, 2021) (Officers took handcuffed prisoner to the ground and "beat" his head "on the ground four or five times."), *adopted by* 2021 WL 2006293 (S.D. Miss. May 19, 2021).
- *Winstead v. Matevousian*, No. 1:17–cv–00951, 2018 WL 2021040 (E.D. Cal. May 1, 2018) (Officer paid inmate to assault another inmate) *adopted by* 2018 WL 3357437 (E.D. Cal. Jul. 9, 2018).
- *Longworth v. Mansukhani,* No. 5:19-ct-3199, 2021 WL 4472902 (E.D.N.C. Sep. 29, 2021) (Prison facilities secretary repeatedly sexually abused mentally-ill inmate and knowledgeable prison staff failed to intervene).

Courts have also rejected claims arising under the Fourth Amendment with facts similar to *Bivens* itself. In *Snowden v. Henning*, for example, a district court found no cognizable *Bivens* claim where a DEA agent walked up to *amicus* Donald Snowden in a hotel lobby to effectuate an arrest and beat him in the head multiple times without provocation, causing him two black eyes and an eye socket fracture. *Snowden v. Henning*, No. 19-cv-01322, 2021 WL 806724 (S.D. Ill.

Mar. 3, 2021). The court determined that a new context was at issue, despite the parallels with *Bivens* itself: both claims arising under the Fourth Amendment, against federal drug agents, and using excessive force. *Bivens*, 403 U.S. at 389 (stating that the complaint asserted a claim "that unreasonable force was employed in making the arrest"). The factors the district court cited as establishing a meaningful difference from this settled context were remarkably trivial. For instance, the court pointed out that whereas Mr. Bivens had been manacled by six drug-enforcement officers, Mr. Snowden was only attacked by one. *Snowden*, 2021 WL 806724 at *3. Or that Mr. Snowden was beaten in a hotel lobby, even though punching a non-resisting individual in the face is no less blatantly illegal in a hotel lobby than anywhere else. *Id.* Finding a new context, the court proceeded to reject Mr. Snowden's claims, *id.* at *4-*5, despite this Court's instruction that *Abbasi* "is not intended to cast doubt on 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.

In sum, although the *Abbasi* framework retains core *Bivens* claims against domestic law enforcement officers, district courts have misapplied that framework to restrict claims that fall well within the contexts where this Court has recognized that a *Bivens* remedy is necessary.

II. The Court should take care in this case not to inadvertently pre-judge questions about the continuing validity of core *Bivens* claims.

It is a "cardinal principle of judicial restraint" that "if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs. Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring). The Court has declined in this case a request to consider overruling *Bivens*. *Egbert v. Boule*, 142 S. Ct. 457 (2021). Accordingly, all that is before the Court is the Ninth Circuit's decision concluding that it was appropriate to extend the *Bivens* remedy to claims against a border agent for First Amendment retaliation and Fourth Amendment excessive force.

Notwithstanding the limited scope of the Court's grant of certiorari, Petitioner continues to make sweeping arguments, now inviting the Court to "make it official" that "the door to *Bivens* expansions is shut." Pet. Br. 24. Such a sweeping approach is unnecessary, incorrect, and imprudent.

In the present case, the incident's proximity to the border was central to the Ninth Circuit's reason for treating the Fourth Amendment claim in particular as a new context, and it is central to Petitioner's arguments before this Court. *See* Pet. Br. 3–8 (extensively describing border context). In concluding that no extension was warranted, the District Court noted that the Smuggler's Inn, where the action of this case took place, is "immediately adjacent to the U.S./Canada border" in "in an area known for cross-border smuggling." Pet. App. 49a.

In treating this case as involving an extension of *Bivens*, the Ninth Circuit followed this Court's recent *Bivens* jurisprudence in its treatment of the border. In *Hernandez*, the Court stated that "the conduct of agents positioned at the border has a clear and strong connection to national security." 140 S. Ct. at 746. The Court pointed to this connection to national security as "a reason to hesitate before extending *Bivens*" to a cross-border shooting claim. *Id.* at 747.

Amici take no position here on the questions of whether a *Bivens* remedy is available against a border agent for First Amendment retaliation and Fourth Amendment excessive force claims arising from border-area policing. *Amici* respectfully urge the Court, however, to decide only those questions. *Amici*'s stories reflect the continuing importance of the availability of some remedy to victims of constitutional violations by individual federal officers in domestic law enforcement — far away from the border. Such claims are not presented here, and the Court should take care not to prejudice them. To the contrary, in the face of lower courts' overzealous reaction to this Court's decisions in *Abbasi* and *Hernandez*, the Court should remind lower courts that it has not disturbed the historic core of the *Bivens* doctrine, and that these claims, in their proper sphere, continue to serve an important purpose.

Petitioner invites the opposite approach, arguing that "every *Bivens* extension" is barred by *Abbasi*. Pet. Br. 18. Petitioner's arguments fail to take this Court's recent precedents seriously. Twice in the last five years, this Court has carefully applied the special fac-

tors analysis in a case-specific manner. *See Hernandez*, 140 S. Ct. at 744–50; *Abbasi*, 137 S. Ct. at 1858–65. While that analysis may "often" conclude that Congress is better-suited than the judiciary to craft remedies, this Court has never treated the outcome of a special factors analysis as preordained. *Hernandez*, 140 S. Ct. at 750. Indeed, in *Abbasi*, this Court remanded certain claims for lower courts to conduct the very same analysis that Petitioner contends is fruitless. 137 S. Ct. at 1865.

The ink is barely dry on the test this Court articulated in *Abbasi* and applied in *Hernandez*. It would be imprudent to determine at this early stage that *Abbasi* was unworkable or held out "false hope" as Petitioner insists. Pet. Br. 24. The ordinary and prudent approach of this court is to "allow several courts to pass on a given . . . claim in order to gain the benefit of adjudication by different courts in different factual contexts." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Yet neither court below entertained the approach newly minted by Petitioner before this Court: bypassing the *Abbasi* standard altogether by concluding that every new *Bivens* context will be categorically barred by special factors counseling hesitation. And the record below — intensely focused on the role the border context plays in the *Abbasi* analysis — has little to offer this Court in passing on Petitioner's untested theory.

But there is also a more fundamental problem. As *amici*'s experiences illustrate, there are individuals who have suffered shocking and unconstitutional abuses by domestic, line-level federal law enforcement and prison officers. Many such claims properly fall

within an existing *Bivens* context, but the parameters of such contexts are being actively litigated. Meanwhile, Petitioner makes the callous suggestion that the Court "shut" the door, Pet. Br. 24., on claims that the Court does not have before it — without even hearing from the individuals in whose face Petitioner asks the door to be shut. This Court should decline Petitioner's improper and imprudent invitation.

III. Congressional action has consistently presupposed that core *Bivens* remedies exist.

This Court's recent decisions that have restricted the extension of *Bivens* remedies to new contexts have relied heavily on separation-of-powers concerns, with the aim "to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III." *Abbasi*, 137 S. Ct. at 1858. A central question in determining whether a *Bivens* action is appropriate is therefore whether "there are 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." *Id.* With respect to claims within the historical core of *Bivens*, Congress has consistently legislated on the premise that such claims would be available as "part of the system for enforcing the law and correcting a wrong" in the context of domestic law enforcement by line-level federal officers. *See id.* Significant separation-of-powers concerns would be raised not by preserving this core of *Bivens*, but by abrogating it.

In particular, Congress has specifically legislated on the subject of *Bivens* actions for federal prisoners

in the Federal Bureau of Prisons system, and has declined to upset this Court's recognition of a cause of action in that area. The Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e, was enacted in direct response to a *Bivens* decision issued by this Court, and declined to disturb a *Bivens* remedy that was widely understood to be available at the time the law was passed.

In the PLRA, Congress responded to this Court's ruling in *McCarthy v. Madigan*, 503 U.S. 140 (1992), which held that a federal prisoner did not need to exhaust BOP administrative grievance procedures before bringing a *Bivens* claim that alleged the prison employees' deliberate indifference violated his Eighth Amendment rights. In response to this ruling, Congress could have decided that there should be no cause of action for deliberate indifference claims against federal prison officers. In fact, if such claims had been of concern to Congress, it had every reason to say so, since just two years earlier this Court had allowed Ms. Farmer's deliberate indifference claim to go forward. Instead, Congress made the more modest decision to extend the exhaustion requirement to apply to any suit "under section 1983 of this title, *or any other Federal law*." *See* 42 U.S.C. § 1997e (1998) (emphasis added); *see also* 141 Cong. Rec. H14078, H14105 (daily ed. Dec. 6, 1995) (statement of Rep. Lobiondo) (citing *McCarthy v. Madigan*, 503 U.S. 140 (1992) as the reason the amendment to the exhaustion requirement was needed). The plain meaning of this statutory text — that exhaustion requirements apply to claims brought under "any other Federal law" — was a reference to *Bivens*, as *Bivens* stands alongside section

1983 as the cause of action for constitutional claims by prisoners. *See* 42 U.S.C. § 1997e(a).

The text of the PLRA thus reflects Congress's understanding that a *Bivens* remedy would be available for core *Bivens* claims asserting violations of constitutional rights by federal prisoners. When the PLRA was passed, this Court had already recognized claims in both *Bivens* and *Carlson*. And only two years before the 1996 Act, this Court allowed a claim for deliberate indifference to the risk of sexual assault to proceed in *Farmer v. Brennan*, 511 U.S. 825 (1994). This Court "assume[s] that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).[3]

This Court's precedent further confirms that the PLRA governs the procedures for bringing traditional *Bivens* claims and left those claims intact when the procedural requirements are met. In *Porter v. Nussle*,

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[3] Legislative history is not necessary to reach this conclusion, but it confirms that Congress was aware of existing *Bivens* claims and chose to regulate procedures for bringing the claims, rather than abolish the claims altogether. *See* 141 Cong. Rec. H14078, H14105 (daily ed. Dec. 6, 1995) (statement of Rep. Lobiondo) ("An exhaustion requirement [as imposed by the PLRA] would aid in deterring frivolous claims: by raising the cost, in time/money terms, of pursuing a Bivens action, only those claims with a greater probability/magnitude of success, would, presumably, proceed."); *id.* (observing that the "real problem" was the *McCarthy* decision "that an inmate need not exhaust the administrative remedies available prior to proceeding with a Bivens action for money damages only"); *see also* 142 Cong. Rec. S2298–99 (daily ed. Mar. 19, 1996) (statement of AAG Schmidt) (observing that "meaningful redress" must remain for Eighth Amendment violations based on unconstitutional prison conditions, such as "deliberate indifference to serious medical needs" and "preventable rape")

534 U.S. 516, 524 (2002), this Court interpreted the PLRA to require that "federal prisoners suing under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), must first exhaust inmate grievance procedures." In legislating on whether a prisoner must exhaust prison remedies before bringing a *Bivens* action, Congress cannot possibly have intended such remedies to displace a *Bivens* action. In short, Congress pre-supposed that *Bivens* actions would be available for core *Bivens* claims by federal prisoners when it enacted the PLRA.

Similarly, Congress pre-supposed that the historical core of *Bivens* would remain available when addressing the Federal Tort Claims Act ("FTCA"). An amendment to the FTCA known as the Westfall Act provides immunity to federal employees for certain tort claims that arise when federal employees act within the scope of their employment by making a claim against the United States the exclusive remedy for such a claim. 28 U.S.C. § 2679(b)(1) ("Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred."). The statute provides an exception, however, for constitutional claims against federal officers. The FTCA explicitly states it is not the exclusive remedy for civil actions against government employees "for a violation of the Constitution of the United States." *Id.* § 2679(b)(2). Again, it is clear what Congress was talking about — a cause of action against federal employees for a violation of the Constitution is a *Bivens* action. The statute thus reflects a decision that fed-

eral inmates would still be able to bring suit if individual prison officers violated their constitutional rights.[4]

In discussing the FTCA, Petitioner speculates about policy judgments Congress might have made, but ignores the statutory text that expressly recognizes that suits may proceed against federal employees for constitutional claims. *See* Pet. Br. 20–23. The text of the FTCA does not provide any basis to suggest that Congress sought to displace *Bivens* remedies through the FTCA. To the contrary, the text of the statute shows that Congress took the availability of *Bivens* remedies for granted and deliberately *declined* to make the FTCA the exclusive remedy in such cases.

In fact, the availability of *Bivens* actions was a core component of the system Congress created in the Westfall Act to regulate federal officer negligence and misconduct. At the time *Bivens* was decided, the constitutional claim that this Court recognized supplemented the possibility of a state law tort action against a federal law enforcement officer who had violated an individual's constitutional rights. *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392–95 (1971) (comparing scope of state tort law and Fourth Amendment

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[4] The legislative history is again unnecessary to reach this conclusion, but again confirms that Congress intended for the FTCA to be a "*counterpart* to the *Bivens* case and its progen[y]" as it waives sovereign immunity to make the federal government "independently liable" for the same type of conduct that *Bivens* "imposes liability upon the individual Government officials involved." *Carlson*, 446 U.S. at 20 (quoting S. Rep. No. 93-588 p. 3 (1973)).

in determining state tort law alone inadequate). Congress subsequently created immunity for federal officers from such state tort actions in the Westfall Act, relying on the *Bivens* actions this Court had already recognized for such circumstances. In other words, when Congress conferred immunity from state law claims that had long been available against rogue federal officers, it understood that a federal constitutional remedy would take the place of state law — not that victims of constitutional violations in domestic law enforcement would be left without recourse. It would be inconsistent with the separation-of-powers considerations central to the *Abbasi* inquiry to upset the balance struck by Congress in reliance on the existence of a cause of action at the historical core of *Bivens*.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the Court should take care to limit the scope of its ruling to the precise claims against federal immigration officers presented in this case. The Court declined to grant certiorari on the question of whether the historical core of *Bivens* claims should be reconsidered. The Court should avoid inadvertently casting doubt on the continued viability of *Bivens* claims against line-level law enforcement officers operating in a wholly domestic context. Instead, it should remind lower courts of what it said in *Abbasi*: in a limited but important set of cases, *Bivens* still has a role to play.

Respectfully submitted,

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