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 *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, CATO INSTITUTE, RODERICK & SOLANGE MACARTHUR JUSTICE CENTER, NATIONAL IMMIGRATION LITIGATION ALLIANCE, AND NORTHWEST IMMIGRANT RIGHTS PROJECT IN SUPPORT OF RESPONDENT

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STATEMENTS OF INTEREST

Amici curiae respectfully submit this brief in support of Respondent.[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and the Nation's civil rights laws. For more than 100 years, the ACLU has appeared in myriad cases before this Court, both as counsel representing parties and as *amicus curiae*. The ACLU has litigated numerous *Bivens* cases in this Court and lower courts.

The American Civil Liberties Union of Washington is an ACLU-affiliated statewide, nonprofit, nonpartisan organization of more than 80,000 members.

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, limited government, the proper role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

The Roderick & Solange MacArthur Justice Center ("MJC") is a nonprofit, public-interest law firm

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[1] The parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no one has made a monetary contribution to the preparation or submission of this brief other than *amici* and their counsel.

founded to advocate for human rights and social justice through litigation. MJC attorneys have been involved in civil rights battles in areas that include police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated people. MJC litigates appeals throughout the federal circuits.

The National Immigration Litigation Alliance ("NILA") is a non-profit organization that seeks to realize systemic change in the immigrant rights arena through litigation—by engaging in impact litigation and by building the capacity of social justice attorneys to litigate in federal court through its strategic assistance and co-counseling programs. NILA and its members have an acute interest in ensuring that noncitizens are not unduly prevented from pursuing remedial suits in response to unconstitutional action by federal officers.

The Northwest Immigrant Rights Project ("NWIRP") is a non-profit legal services organization dedicated to the defense and advancement of the legal rights of noncitizens in the United States with respect to their immigrant status. NWIRP provides direct representation to low-income immigrants placed in removal proceedings.

SUMMARY OF ARGUMENT

This case involves a garden-variety excessive force and warrantless entry claim under the Fourth Amendment and a classic First Amendment retaliation claim. Respondent alleges that Petitioner entered his property without a warrant, pushed him to the ground, and then, in retaliation for Respondent's complaints about Petitioner's use of force, instigated various federal, state, and local investigations of Respondent, including an Internal Revenue Service tax audit. Nothing about these claims presents any special factors counseling hesitation in recognizing a claim for damages under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Petitioner is accordingly left to urge the Court to adopt broad, categorical exclusions that have no support in the law or the facts of this case.

Petitioner's sweeping contention that *Bivens* claims should be foreclosed in all new contexts, even where no special factors are present, would overrule the case-by-case approach consistently followed by this Court for 50 years, and recently reaffirmed in both *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), and *Hernandez v. Mesa*, 140 S. Ct. 735 (2020). There is no justification for overruling this longstanding approach, and doing so would contravene both *stare decisis* and Congress's approval of the Court's *Bivens* jurisprudence in the 1974 amendments to the Federal Tort Claims Act ("FTCA") and in the Westfall Act of 1988.

Petitioner's alternative proposal for a new, categorical exemption from *Bivens* exposure for all Customs and Border Protection ("CBP") agents or all

officers engaged in immigration enforcement is similarly unpersuasive. These officers engage in a broad range of activities (often far from any border or port of entry), many of which present no special factors counseling against applying *Bivens*. There is no sound basis for affording them a blanket exemption from the constitutional limitations applicable to all other federal law enforcement officers.

Applying this Court's well-established two-step inquiry to the facts presented here supports recognition of Respondent's *Bivens* claims. His Fourth Amendment claim is not materially different from the claim in *Bivens* itself, and Petitioner has cited no special factors that justify denying relief here. The claim presents no conceivable national security or foreign relations concerns, and Congress has not provided any alternative form of redress.

Respondent's First Amendment claim is also cognizable under *Bivens*. He asserts that Petitioner retaliated against him for the exercise of his constitutionally protected rights to speech and to petition the government for redress. There are no special factors counseling hesitation with respect to such claims; to the contrary, there are strong reasons to recognize them under *Bivens*, as this Court itself recognized in *Hartman v. Moore*, 547 U.S. 250, 256 (2006). Such claims are judicially manageable and will not open the floodgates to frivolous litigation. And, as with Respondent's Fourth Amendment claim, Petitioner's retaliatory conduct does not raise any sensitive national security or foreign relations concerns, and no adequate alternative remedies exist.

ARGUMENT

I. THIS COURT SHOULD NOT OVERRULE 50 YEARS OF PRECEDENT BY CATEGORICALLY SHUTTING THE DOOR ON NEW *BIVENS* CLAIMS

Petitioner asked this Court to reconsider *Bivens* in his petition for certiorari, and the Court declined. Now, Petitioner asks the Court to declare that "the door to *Bivens* expansions is shut." Pet. Br. 24. Petitioner's argument contravenes both *stare decisis* and the will of Congress.

A. *Stare decisis* counsels against overruling this Court's case-by-case approach to *Bivens*

In *Hernandez* and *Abbasi*, this Court reaffirmed its "two-step inquiry" for *Bivens* cases, asking (1) whether the claim "arises in a 'new context' or involves a 'new category of defendants'"; and (2) if so, "whether there are any 'special factors that counsel hesitation' about granting the extension." *Hernandez*, 140 S. Ct. at 743 (brackets omitted) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001), and *Abbasi*, 137 S. Ct. at 1857). The special factors inquiry draws from decades of precedent, dating back to *Bivens* itself. *See Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); *F.D.I.C. v. Meyer*, 510 U.S. 471, 486 (1994); *Bush v. Lucas*, 462 U.S. 367, 378 (1983); *Chappell v. Wallace*, 462 U.S. 296, 298 (1983); *Carlson v. Green*, 446 U.S. 14, 18-19 (1980); *Davis v. Passman*, 442 U.S. 228, 245 (1979); *Bivens*, 403 U.S. at 396.

The requirement that defendants identify special factors means that, absent such factors, a *Bivens*

remedy is appropriate. *See Hernandez*, 140 S. Ct. at 743-49 (not allowing *Bivens* claim only after identifying "multiple, related factors" counseling hesitation); *Abbasi*, 137 S. Ct. at 1863-65 (holding plaintiffs' claim arose in a "new context," and remanding to lower court to "perform the special factors analysis"). These factors must be tailored to the case and the claims presented. Special factors have included whether the claims "necess[arily] requir[e] an inquiry into sensitive issues of national security," *Abbasi*, 137 S. Ct. at 1861, whether "alternative methods of relief are available," *id.* at 1863, whether "legislative action suggest[s] that Congress does not want a damages remedy," *id.* at 1865, and "the potential effect on foreign relations," *Hernandez*, 140 S. Ct. at 744.

In arguing that "***every*** *Bivens* extension raises sound reasons for hesitation" as a matter of law, Pet. Br. 11 (emphasis added), Petitioner effectively seeks to eliminate the special factors step of the analysis. That would require overruling *Hernandez*, *Abbasi*, and numerous prior decisions holding that the fact that a *Bivens* claim presents a new context is not, in and of itself, a reason to deny a remedy. There is no justification for such a departure from precedents.

First, "*stare decisis* carries enhanced force" here, because those objecting to the special factors approach "can take their objections across the street, and Congress can correct any mistake it sees." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). Unlike most constitutional issues, this is not a situation where the Court's "interpretation can be altered only by constitutional amendment or by overruling . . . prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235

(1997). Rather, as this Court has long held, Congress may preempt *Bivens* expansions by statute if it so chooses. *See Bush*, 462 U.S. at 377-78 ("[A] *Bivens* action could be defeated" where there has been a "congressional determination foreclosing the damages claim"); *Hui v. Castaneda*, 559 U.S. 799, 812 (2010) (interpreting statute to bar particular *Bivens* remedy). Congress has not done so.

Thus, although the case-by-case approach to the special factors test does not hinge on statutory interpretation, this Court's *Bivens* precedents command respect under *stare decisis* principles as much as its statutory interpretation cases do; in both areas, Congress has the power to override through legislation. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2422-23 (2019) (adhering to *stare decisis*, even though issue did not concern statutory interpretation, because "'Congress remains free to alter what we have done' . . . [a]nd so far, at least, Congress has chosen acceptance") (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)); *Halliburton Co. v. Erica P. John Fund, Inc.*, 572 U.S. 258, 274 (2014) (reaffirming a "judicially created doctrine designed to implement a judicially created cause of action" under *stare decisis* because "Congress may overturn or modify" the doctrine).

Second, the special factors standard has been reaffirmed twice in the past five terms. *See Hernandez*, 140 S. Ct. at 743; *Abbasi*, 137 S. Ct. at 1857. Petitioner cannot point to any "[d]evelopments" since *Hernandez* or *Abbasi*, either "factual [or] legal," that have "'eroded' the decision's 'underpinnings.'" *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2482-83 (2018) (quoting *United States v.*

Gaudin, 515 U.S. 506, 521 (1995)). Reffirming the framework employed in these cases will therefore "contribute[] to the actual and perceived integrity of the judicial process." *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (quoting *Payne v. Tenn.*, 501 U.S. 808, 827 (1991)).

Third, "the strength of the case for adhering to [precedent] grows in proportion to [its] 'antiquity.'" *Id.* (quoting *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009)). For 50 years, this Court has reaffirmed the case-specific nature of the inquiry in every *Bivens* case that has come before it.

Fourth, and of particular relevance to the potential impact on "foreign relations," *Hernandez*, 140 S. Ct. at 744, the U.S. government itself has relied upon extending *Bivens* relief to an arguably new context in its conduct of foreign policy. In 2006, a U.N. Committee inquired "how [the United States will] ensure that its legislative, judicial, administrative, and other measures fully meet the obligations of the [Convention Against Torture]." *See* U.S. Dep't of State, United States Written Response to Questions Asked by the U.N. Committee Against Torture ¶ 5 (Apr. 28, 2006), https://2009-2017.state.gov/j/drl/rls/68554.htm (accessed Jan. 9, 2022). The State Department responded that "U.S. law provides various avenues for seeking redress," including "[s]uing federal officials directly for damages under provisions of the U.S. Constitution for 'constitutional torts,' *see Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and *Davis v. Passman*, 442 U.S. 228 (1979)." *Id.* (bullet 5). A ruling that *Bivens* cannot apply in new contexts would

contradict this representation to the international community.

B. Congress ratified this Court's *Bivens* framework

Petitioner suggests that Congress displaced *Bivens* expansions by enacting the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-80. *See* Pet. Br. 18-19, 22-24. To the contrary, Congress's amendments to the FTCA ***ratified*** *Bivens* and make clear that Congress intends these two causes of action to co-exist. Congress was aware that *Bivens* could be expanded beyond the facts of *Carlson*, *Davis*, and *Bivens* itself, but instead of limiting those potential expansions, Congress enacted statutory language that allows the judiciary to continue assessing the availability of *Bivens* remedies on a case-by-case basis.

Congress evinced its approval of *Bivens* when it enacted the 1974 amendment to the FTCA, which permits suits against the United States for numerous torts by law enforcement officers. *See* Pub. L. No. 93-253, 88 Stat. 50 (1974) (amending 28 U.S.C. § 2680(h)). The accompanying Senate Committee report demonstrates Congress was aware of *Bivens*, which had been decided only two years previously, and intended *Bivens* "and its progen[y]" to remain in effect. S. Rep. 93-588, *reprinted in* 1974 U.S.C.C.A.N. 2789, 2791 (1973) ("[A]fter the date of enactment of this measure, innocent individuals . . . will have a cause of action against the individual Federal agents and the Federal Government. Furthermore, this provision should be viewed as a counterpart to the Bivens case and its progen[y] . . . .").

As this Court recognized in *Carlson*, these "congressional comments accompanying" the 1974 amendment to the FTCA "made it crystal clear that Congress views the FTCA and *Bivens* as parallel, complementary causes of action," a conclusion "buttressed by the significant fact that Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy." 446 U.S. at 19-20. *Carlson* thus rejected the argument that "Congress relegated [individuals suffering constitutional violations] exclusively to the FTCA remedy." *Id.* at 23.

Moreover, in drafting the 1974 amendments, Congress rejected proposed legislation that would have abrogated *Bivens* by designating the United States the exclusive defendant in constitutional tort actions. *See* Jack Boger, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C. L. REV. 497, 512, 514 (1976) (discussing this history). Congress repeatedly rejected similar bills introduced over the following decade. *See, e.g.*, S. 2117, 95th Cong., 1st Sess. (1977); H.R. 24, 97th Cong., 1st Sess. (1981); H.R. 595, 98th Cong., 1st Sess. (1983); S. 829, 98th Cong., 1st Sess. (1983). Congress's decision not to "tak[e] action" on these bills supports the conclusion that Congress intends *Bivens* and the FTCA to be complementary remedies. *Carlson*, 446 U.S. at 20.

Petitioner nevertheless asserts that the Court should now jettison its prior construction of the FTCA as preserving *Bivens*. *See* Pet. Br. 24. But *stare decisis* applies with special force where the Court has interpreted a statute, as the Court did in *Carlson*. *See Neal v. United States,* 516 U.S. 284, 295 (1996); *Rasul*

v. Bush, 542 U.S. 466, 493 (2004) (Scalia, J., dissenting) (noting the "almost categorical rule of *stare decisis* in statutory cases"). *Stare decisis* is not diminished merely because the Court might interpret the statute differently if the issue were first presented today:

> All our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects.

Kimble, 576 U.S. at 456; *see also Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1510 (2020) (adhering to statutory interpretation due to *stare decisis* despite the earlier decisions' use of an approach "incongruous with the 'modern era' of statutory interpretation").

Congress again recognized the availability of *Bivens* remedies when it enacted the Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988). This Act preempts claims against employees of the federal government in most cases and creates a default rule that FTCA remedies against the United States are an exclusive remedy. *See* 28 U.S.C. § 2679(b)(1); *Minneci v. Pollard*, 565 U.S. 118, 126 (2012). But the Act's exclusivity provision "does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2). This language is an "explicit exception for *Bivens* claims." *Castaneda*, 559 U.S. at 807; *see also Hernandez*, 140 S.

Ct. at 748 n.9 (section 2679(b)(2) "made clear that [Congress] was not attempting to abrogate *Bivens*" and "left *Bivens* where it found it").

The text of § 2679(b)(2) shows that Congress did not cabin *Bivens* by limiting it to the factual circumstances the Court had previously recognized as supporting a claim; instead, it endorsed the Court's case-by-case approach to evaluating whether *Bivens* should apply in new contexts.[2] The provision refers broadly to all "action[s] . . . brought for a violation of the Constitution." If Congress intended this term to refer to only some contexts, it could have said so, similar to language it has used elsewhere under the FTCA. *See* 28 U.S.C § 2680 (enumerating specific circumstances in which the United States is immune from suit); *id. at* § 2680(h) (allowing various intentional tort claims against the United States only when they arise from the "acts or omissions of investigative or law enforcement officers"); *see also Simmons v. Himmelreich*, 578 U.S. 621, 627 (2016) ("Absent persuasive indications to the contrary, we presume Congress says what it means and means what it says."). By using unqualified statutory language, Congress showed that it did not want to foreclose future *Bivens* expansions. Petitioner's position ascribes an "artificially narrow meaning" to the provision that is without "basis in [the] text." *See*

[2] In *Hernandez*, the Court rejected the argument that § 2679(b)(2), in and of itself, implies a "license to create a new *Bivens* remedy in a [new] context" or reflects Congress's intent that *Bivens* remedies be "robust." 140 S. Ct. at 748 n.9. Our argument is different; namely, that § 2679(b)(2) confirmed the case-by-case analysis of new *Bivens* claims that was already part of this Court's jurisprudence by 1988.

Thompson v. North American Stainless, LP, 562 U.S. 170, 177 (2011).

Furthermore, the legal backdrop against which Congress acted shows that Congress approved this Court's jurisprudence under *Bivens*—its *method* of determining when a damages remedy would be available. *See Parker Drilling Mgmt. Servs. v. Newton*, 139 S. Ct. 1881, 1890 (2019) ("It is a commonplace of statutory interpretation that 'Congress legislates against the backdrop of existing law.'") (quoting *McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013)); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 160 (2003) (interpreting statute in light of Supreme Court precedent of which "Congress was presumably aware"). By 1988, this Court had not only made clear that *Bivens* extended beyond the search-and-seizure context, *see Davis*, 442 U.S. at 230-31 (sex discrimination by member of Congress); *Carlson*, 446 U.S. at 16 n.1 (deliberate indifference toward prisoner), but had also reaffirmed the case-specific nature of the special factors inquiry, even when it held *Bivens* inapplicable. *See Bush*, 462 U.S. at 378 (in determining whether to allow a *Bivens* claim, "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation"). Moreover, Congress was aware that it could preempt *Bivens* extensions by statute, *see id.* at 377-78; *Carlson*, 446 U.S. at 18-19, but declined to do so.

For 50 years, therefore, this Court and Congress have both consistently approved a case-by-case approach to the special factors analysis. Petitioner's proposal to jettison that approach should be rejected.

II. PETITIONER OFFERS NO SOUND BASIS FOR A BORDER OR IMMIGRATION CARVE-OUT FROM THIS COURT'S CASE-BY-CASE APPROACH

Petitioner suggests in the alternative that this Court should categorically exempt all CBP agents or, even more sweepingly, any "officers enforcing immigration laws" or "claims at the border." Pet. Br. 36. But as established in Point I, *supra,* Petitioner's categorical exclusions are contrary to this Court's longstanding *Bivens* jurisprudence requiring a case-by-case determination of whether a particular claim for relief presents a new context and special factors counseling hesitation.

Just two terms ago in *Hernandez*, the Court declined to adopt a categorical rule that all cases against Border Patrol agents, or involving "border enforcement" or "immigration enforcement" present a new *Bivens* context, and instead engaged in a careful evaluation of the particular facts involved in that cross-border shooting case to conclude that *Bivens* relief was inappropriate. Petitioner has pointed to no good reason to depart from the Court's approach.

The lower federal courts have long applied this Court's case-by-case analysis of both the new-context and special factors questions in *Bivens* cases involving border and immigration officers without creating the parade of horribles Petitioner invokes. Courts have permitted citizens to pursue *Bivens* remedies for Fourth Amendment violations by border and immigration agents where those cases do not present

a new context and special factors. These have included *Bivens* actions for wrongful detention, [3] ethnic profiling,[4] and civil forfeiture.[5]

Courts have also permitted non-citizens to proceed with *Bivens* claims against ICE and CBP where no special factors counsel hesitation. *See, e.g.*, *Lanuza v. Love*, 899 F.3d 1019, 1034 (9th Cir. 2018) (allowing *Bivens* claim based on ICE attorney's submission of forged document, which "defrauded the courts" and wrongfully denied immigration relief to plaintiff); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625-627 (5th Cir. 2006) (denying qualified immunity to Border Patrol agent who assaulted woman at port of entry); *Franco-de Jerez v. Burgos*, 876 F.2d 1038, 1044 (1st Cir. 1989) (permitting Rule 56(f) discovery on non-citizen's claim that immigration agents held her incommunicado for nine days); *Prado v. Perez*, 451 F. Supp. 3d 306, 310-311, 314-316 (S.D.N.Y. 2020) (denying motion to dismiss claim that ICE agents unlawfully entered plaintiff's home in New York City, arrested him despite having proof of his lawful residence in U.S., and threw away his HIV medications); *Mendia v. Garcia*, 165 F. Supp. 3d 861, 880-885, 898 (N.D. Cal. 2016) (permitting plaintiff to amend complaint to plead First, Fourth, and Fifth Amendment equal protection claims, but denying

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[3] *See, e.g.*, *Morales v. Chadbourne*, 793 F.3d 208, 222 (1st Cir. 2015); *Garcia v. United States*, 550 F. App'x 506, 507 (9th Cir. 2013); *Mendoza v. Osterberg*, No. 8:13CV65, 2014 WL 3784141, *7-*8 (D. Neb. July 31, 2014); *Lyttle v. United States*, 867 F. Supp. 2d 1256, 1301-1302 (M.D. Ga. 2012).

[4] *Chavez v. United States*, 683 F.3d 1102, 1112 (9th Cir. 2012).

[5] *Ysasi v. Rivkind*, 856 F.2d 1520, 1526-1528 (Fed. Cir. 1988).

Bivens remedy for other claims); *Escobar v. Gaines*, No. 3-11-0994, 2014 WL 4384389, *4 (M.D. Tenn. Sept. 4, 2014) (holding that Immigration and Nationality Act does not provide alternative remedy to plaintiffs alleging arrest without justification and race discrimination during ICE and local police joint operation at apartment complex); *Diaz-Bernal v. Myers*, 758 F. Supp. 2d 106, 127-129 (D. Conn. 2010) (same, as to ICE raids on private homes).

In other cases, the courts of appeals have declined to permit *Bivens* claims against border and immigration officers, but they have done so on a case-by-case basis, looking to the specific factors presented, rather than on a categorical basis.[6] The Second Circuit, for example, noted that the new-context question must be framed correctly, neither at too granular nor too general a level, *see Arar v. Ashcroft*, 585 F.3d 559, 572 (2d Cir. 2009), and dismissed a Canadian citizen's claim that he was unlawfully detained and subjected to extraordinary rendition to Syria by INS officers, because his case presented both a new *Bivens* context and special factors relating to delicate questions of national security and foreign relations. The Second Circuit reached this result

[6]In three cases, circuit courts have used broadly sweeping language to dismiss *Bivens* claims against immigration or border officers. *Tun-Cos v. Perrotte*, 922 F.3d 514, 523-25 (4th Cir. 2019); *Elhady v. Unidentified CBP Agents*, 18 F.4th 880, 885 (6th Cir. 2021); *De La Paz v. Coy*, 786 F.2d 367, 371 (5th Cir. 2015). Respondent explains why these cases are distinguishable, Resp. Br. 32 n.8, and in any event these decisions are contrary to this Court's continued emphasis on a case-by-case analysis—including, most recently and most relevantly, in *Hernandez*.

while avoiding categorical rules about *Bivens* liability, as this Court has instructed. *See id.* at 563, 574.

Similarly, the Ninth Circuit declined to afford a *Bivens* remedy to plaintiffs who sued FBI and immigration agents for allegedly submitting false information in order to deny them bond pending removal proceedings. *See Mirmehdi v. United States*, 689 F.3d 975, 979-982 (9th Cir. 2012). The Ninth Circuit, like the Second Circuit, was careful to undertake the two-step inquiry and to assess the availability of alternative remedies to challenge the plaintiffs' detention, and not to rule that any claim involving immigration enforcement was barred. *See id.* at 981-82; *see also Quintero Perez v. United States*, 8 F.4th 1095, 1105-1107 (9th Cir. 2021) (applying special factors inquiry to shooting at the border and finding case sufficiently similar to *Hernandez* to require same result).

And the Eleventh Circuit declined to recognize a *Bivens* remedy for prolonged immigration detention, grounding its reasoning not on a categorical immunity for immigration officers, but rather on the conclusion that the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.*, provided meaningful remedies for that particular claim. *See Alvarez v. U.S. Immigr. & Customs Enf't*, 818 F.3d 1194, 1207-08 (11th Cir. 2016) (quoting *Mirmehdi*, 689 F.3d at 982).

In short, applying this Court's case-by-case approach to suits against CBP and ICE officers has not presented any problems of administrability. Cases against CBP and U.S Immigration and Customs Enforcement ("ICE") officers are not categorically different from suits against other federal agencies'

officers; some cases, like the cross-border shooting in *Hernandez*, present a new context and special factors warranting dismissal, but others do not. Whether relief is appropriate turns not on the badge the officer wears, but on whether the particular claims or circumstances present a new context and special factors counseling hesitation. Where they do not, *Bivens* relief is appropriate.

As this case demonstrates, Border Patrol agents' actions do not necessarily implicate foreign relations or injuries in a foreign country, as in *Hernandez*. Border Patrol agents sometimes carry out ordinary police activities, like traffic stops, far from any border. *See supra* at 15-16 (noting law enforcement operations in New York City, Northern California, Connecticut, and Tennessee). And as Petitioner himself acknowledges, Pet. Br. 6, CBP agents often enforce drug laws. *Bivens* itself was a suit against Federal Bureau of Narcotics officers. Like FBI, DEA, or other federal police officers, some but by no means all of what the CBP does directly implicates national security in a way that would warrant precluding *Bivens* relief. As this Court noted in *Abbasi*, "national-security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'" 137 S. Ct. at 1862 (citation omitted).

CBP is the largest of all federal law enforcement agencies. *See* U.S. Customs and Border Protection, CBP Enforcement Statistics Fiscal Year 2022 (noting CBP is "nation's largest federal law enforcement agency"), https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics (accessed Jan. 21, 2022). In Fiscal Year 2021, there were 25,914 CBP officers and

19,536 Border Patrol agents, U.S. Customs & Border Protection, On a Typical Day in Fiscal Year 2021, CBP…, https://www.cbp.gov/newsroom/stats/typical-day-fy2021 (accessed Jan. 21, 2022), with a total annual budget of $17.7 billion, *see* American Immigration Council, Fact Sheet: The Cost of Immigration Enforcement and Border Security (Jan. 20, 2021), Fig. 2, https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security (accessed Jan. 21, 2022).

CBP officers have broad statutory powers to conduct unwarranted searches and arrests, *see* 8 U.S.C. § 1357(a), which CBP has interpreted to apply within 100 air miles of all external boundaries of the United States, 8 C.F.R. § 287.1(a)(2)—not only the U.S.-Canada and U.S.-Mexico borders, but also along the entire Atlantic, Pacific, Gulf of Mexico, and Great Lakes coastlines. CBP asserts its warrantless search powers in areas where 65.3 percent of the U.S. populations lives, thus affecting approximately 216 million U.S. residents.[7] Most of our nation's ten largest cities, including New York, Los Angeles, and Chicago, fall within this zone. Thus, CBP agents

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[7] *See* Tanvi Misra, *Inside the Massive U.S 'Border Zone'*, Bloomberg CityLab (May 14, 2018), https://www.bloomberg.com/news/articles/2018-05-14/mapping-who-lives-in-border-patrol-s-100-mile-zone (reporting CBP's regulatory 100-mile zone "is home to 65.3 percent of the entire U.S. population, and around 75 percent of the U.S. Hispanic population"), s*ee also* Brynn Epstein & Daphne Lofquist, *U.S. Census Bureau Today Delivers State Population Totals for Congressional Apportionment*, U.S. Census Bureau (Apr. 26, 2021), https://www.census.gov/library/stories/2021/04/2020-census-data-release.html (reporting first 2020 Census data showing U.S. population of 331,449,281).

conduct operations not only at or near international borders, but also in urban, suburban, and rural areas throughout the United States. In the course of their law enforcement duties across the country, over 27,000 agents employed by CBP and Border Patrol unfortunately may violate the Constitution and injure people. Petitioner has given no good reason to preclude *Bivens* liability categorically in all such cases.

There is even less reason to accept Petitioner's suggestion that *any* federal officer "engaged in immigration-related functions" should automatically be exempt from *Bivens* liability. Pet. Br. (I). ICE agents have the same statutory authorities in 8 U.S.C. § 1357, and they operate in all 50 states. As demonstrated by the cases above, *supra* at 15-16, ICE and CBP law enforcement can affect people throughout our country, regardless of citizenship. Giving these law enforcement agencies a blanket pass from *Bivens* liability would contravene this Court's prior approach to *Bivens* claims. Where special factors counsel hesitation, *Bivens* claims should not be recognized. But where special factors are absent, ICE and CBP officers should be treated like any other federal officer.

III. RESPONDENT'S FOURTH AMENDMENT CLAIM IS REDRESSABLE UNDER *BIVENS*

Respondent's Fourth Amendment claim is appropriate for *Bivens* relief. It does not present a new context or any special factors counseling hesitation. Respondent contends that Petitioner, a federal officer, entered his property without a warrant and shoved him to the ground, without justification, while conducting an investigation. This is a garden-variety

Fourth Amendment claim. The record discloses no national security concerns like those the Court found dispositive in *Hernandez*, only ordinary questions about a law enforcement officer's use of force. Respondent's Fourth Amendment claim is not different from that recognized in *Bivens* itself. *See Bivens*, 403 U.S. at 389 (alleging that federal agent entered plaintiff's home without a warrant and used excessive force in executing an arrest).

Since *Bivens*, this Court has permitted other Fourth Amendment claims to proceed against federal officers in similar situations. *See Groh v. Ramirez*, 540 U.S. 551, 563 (2004) (holding ATF agents' search unreasonable in *Bivens* case); *Hanlon v. Berger*, 526 U.S. 808, 810 (1999) (same as to Fish and Wildlife Service agents); *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (same as to U.S. marshals). As the Sixth Circuit noted in a case against U.S. Marshals Service defendants, these are "run-of-the-mill challenges 'to standard law enforcement operations' that fall well within *Bivens* itself," and "garden-variety *Bivens* claims [are still] viable post-*Ziglar*." *Jacobs v. Alam*, 915 F.3d 1028, 1038-39 (6th Cir. 2019); *see also Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 864 (10th Cir. 2016) ("garden-variety" Fourth Amendment claim against U.S. Department of Agriculture inspectors is "hardly a new context"). This case is on this familiar ground, not a "new context."

Even if this case were deemed to present a new context, no special factors counsel hesitation in recognizing a damages remedy. First, Respondent does not have an adequate alternative remedy. As set forth in Point I(B) above, Congress has excluded constitutional claims from the FTCA's exclusivity

provision. The possibility of an internal Department of Homeland Security investigation, *see* Pet. Br. 39, no more justifies denying a remedy here than in any other case, as such internal investigations are always possible. Nor are there any special factors present here, as Respondent has demonstrated. *See* Resp. Br. 33-40. Petitioner is a rank-and-file Border Patrol agent, not a policymaker. He shoved Respondent to the ground on Respondent's private property. Pet. App. 33a, 65a. Whether Petitioner used excessive force is a question well within the competence of the federal courts, and that inquiry will not entail any "disruptive intrusion" into an Executive Branch function. *See Abbasi*, 137 S. Ct. at 1860.

This case presents none of the special circumstances of *Hernandez*, which involved a cross-border shooting. 140 S. Ct. at 744 ("A cross-border shooting is by definition an international incident; it involves an event that occurs simultaneously in two countries and affects both countries' interests."). Respondent's claim implicates no conflict between the United States and any foreign sovereign, and there are no novel issues of extraterritorial application of U.S. law. The mere fact that the officer wore a CBP badge rather than an FBI or DEA badge does not warrant any different result here than in *Bivens* itself.

Bivens has "continued force . . . in the search-and-seizure context in which it arose" and remains "settled law . . . in this common and recurrent sphere of law enforcement." *Abbasi*, 137 S. Ct. at 1856-57. To preclude Respondent's claim here would be contrary to that settled law.

IV. RESPONDENT'S FIRST AMENDMENT CLAIM IS REDRESSABLE UNDER *BIVENS*

A. Courts have long recognized the need for First Amendment *Bivens* claims

Individuals whose First Amendment rights are violated by a government employee should have a cause of action against the offending employee. Recognizing such a cause of action under *Bivens* would not, as Petitioner speculates, "open a vast new frontier of *Bivens* liability." Pet. Br. 25. As recently as 2006, this Court indicated that First Amendment retaliation claims are viable under *Bivens*. *See Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("When the vengeful officer is federal, he is subject to an action for damages on the authority of *Bivens.*"). Contrary to Petitioner's argument that courts are "ill-equipped" to analyze First Amendment claims, Pet. Br. 28, the courts of appeals have developed a body of case law doing just that, over several decades. *See, e.g., Tobey v. Jones*, 706 F.3d 379, 386-91 (4th Cir. 2013) (allowing First Amendment *Bivens* claim to proceed based on alleged violation of right to engage in political expression); *Trulock v. Freeh*, 275 F.3d 391, 404-406 (4th Cir. 2001) (vacating dismissal of First Amendment *Bivens* claim brought by former counterintelligence official alleging retaliation over article criticizing Government's intelligence preparedness); *Nat'l Commodity & Barter Ass'n v. Archer,* 886 F.2d 1240, 1248 (10th Cir. 1989) (allowing First Amendment *Bivens* claim based on activities of IRS officials); *Gibson v. United States.*, 781 F.2d 1334, 1341-42 (9th Cir. 1986) (allowing First Amendment *Bivens* claim alleging wiretapping and other tactics to "discourage [plaintiff's] political activities").

Courts have also relied on *Bivens* to ensure individuals have a remedy when their First Amendment rights are violated in the Nation's capital. In *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977), the plaintiffs, including a sitting congressman, participated in an anti-war assembly from the Mall to the Capitol Grounds, "obeying traffic signals and the directions of police officers along the way." *Id.* at 173. As another member of Congress addressed the crowd, "the police cordoned off the bottom of the steps, preventing anyone from leaving, and began arresting members of the assemblage." *Id.* at 174. In holding plaintiff's *Bivens* claim cognizable, the court recognized that "what is at stake here is a loss of opportunity to express to Congress one's dissatisfaction with the laws and policies of the United States." *Id.* at 195; *see also Patterson v. United States*, 999 F. Supp. 2d 300, 303-04, 307-11 (D.D.C. 2013) (allowing First Amendment *Bivens* claim against U.S. Park Police officers who arrested plaintiff for use of profanity); *Hartley v. Wilfert*, 918 F. Supp. 2d 45, 48 (D.D.C. 2013) (allowing First Amendment *Bivens* claim against Secret Service agents who required plaintiff to provide her name, date of birth, and social security number as a condition of allowing her to demonstrate on the sidewalk in front of the White House).

These cases exemplify the importance of a *Bivens* remedy for some First Amendment violations and demonstrate that the courts' application of the two-step *Bivens* test has not opened the floodgates to frivolous First Amendment claims.

B. The need for a *Bivens* remedy is acute here

When, as here, a federal officer retaliates against a person for filing a grievance about the officer's unconstitutional conduct, *Bivens* is essential. Such official conduct strikes directly at the right to petition for redress of grievances, and the retaliation itself chills alternative remedies.

Here, Respondent filed an administrative claim with Petitioner's supervisors after being shoved to the ground. But Respondent's use of that grievance process and filing of an FTCA complaint, both protected by the First Amendment, resulted in retaliation. Respondent was punished for exercising the "cognate rights" of speech and petition this Court has recognized as "integral to the democratic process . . . ." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011). Speech concerning "alleged governmental misconduct" "'l[ies] at the core of the First Amendment.'" *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035 (1991) (quoting *Butterworth v. Smith*, 494 U.S. 624, 632 (1990)); *see also Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1954-55 (2018) (petitioner maintaining retaliatory arrest claim based on his "criticisms of public officials," which "is high in the hierarchy of First Amendment values," not required to prove no probable cause for arrest). Such speech "is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409, 3426 (1982)). Likewise, "[t]he right to petition is in some sense the source of other fundamental rights, for petitions have provided a vital means for citizens to request recognition of new rights and to assert existing rights

against the sovereign." *Duryea*, 564 U.S. at 397; *see also Lozman*, 138 S. Ct. at 1954.

In First Amendment cases, concerns about interbranch friction and legislative deference are at their lowest ebb. The need for judicial protection of political speech and the judiciary's independence make it "well suited . . . to consider and weigh the costs and benefits of allowing a damages action to proceed." *Abbasi*, 137 S. Ct. at 1858; *see Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."); *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints . . . .").

If agents like Petitioner can engage in retaliation without *Bivens* accountability, it will chill individuals from asserting claims for constitutional violations—which is their core right under the First Amendment. "Fear of retaliation may chill an individual's speech, and, therefore, permit the government to 'produce a result which [it] could not command directly.'" *Trulock*, 275 F.3d at 404 (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). A *Bivens* remedy protects against that chilling effect by deterring agents from retaliating at the outset. *See Abbasi*, 137 S. Ct. at 1860 (2017) ("The purpose of *Bivens* is to deter the officer") (emphasis omitted) (quoting *Meyer*, 510 U.S. at 485).

C. There are no special factors counseling hesitation

1. The floodgates of litigation will not open

Petitioner posits that because First Amendment retaliation claims may hinge on the defendant's "state of mind," they will be "hard to defeat on summary judgment," produce "obvious social costs," and "open the floodgates to litigation." Pet. Br. 28. These arguments are not persuasive.

Experience in both the § 1983 and *Bivens* contexts shows that the volume of retaliation claims in the law enforcement context is modest. *See Hartman*, 547 U.S. at 258-59 (noting only "two dozen damages actions for retaliatory prosecution under *Bivens* or § 1983" before the federal courts of appeals over 25 years); Colin P. Watson, Note, *Limiting a Constitutional Tort Without Probable Cause: First Amendment Retaliatory Arrest After Hartman*, 107 MICH. L. REV. 111, 129 & n.99 (2008) (finding only 29 actions for retaliatory arrest before the federal courts of appeals from 1982 to 2007). Furthermore, *Bivens* claims have been shown to comprise only a small fraction of the federal court's docket, by one estimate comprising less than 0.17% of civil cases filed in federal court. *See* Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 837 (2010) (tracking filings within five federal court districts from 2001 to 2003 and finding that 243 of the 143,092 filings were *Bivens* filings).

Petitioner's claim that "[r]outine, lawful conduct . . . can become unlawful if allegedly done for

the purpose of retaliating against protected speech," Pet. Br. 27-28, is out of step with current law. Decisions like *Nieves v. Bartlett*, 139 S. Ct. 1715, 1720 (2019), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), now protect officers from retaliation lawsuits for routine conduct. In *Nieves*, the Court held that "a plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest," further insulating officers from liability in all but the most compelling retaliatory arrest lawsuits. 139 S. Ct. at 1724. And in *Iqbal*, addressing a *Bivens* claim, the Court dismissed claims that plaintiffs were subjected to harsh conditions of confinement based on religion, race, and national origin. *Iqbal* applied the rule—applicable in all civil actions—that pleadings must "state a claim to relief that is plausible on its face," meaning that it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

2. Petitioner's retaliation claim does not implicate national security

Contrary to Petitioner's assertion, Respondent's First Amendment retaliation claim does not implicate national security. As noted above, Petitioner's status as a CBP officer does not make this a national security case, or otherwise create any special factor counseling hesitation. *Abbasi* "challenge[d] major elements of the Government's response to the September 11 attacks," 137 S. Ct. at 1861, and *Hernandez* involved "[a] cross-border shooting" that quickly became "an

international incident," *Hernandez*, 140 S. Ct. at 744. National security, international diplomacy, and border security have no bearing whatsoever on a retaliatory tax investigation of the owner of a bed and breakfast, the impertinence of his vehicle's license plate, or the assessed value of his real property.

3. There are no adequate alternative remedies

Petitioner raises a laundry list of purported alternative remedies under federal and state law, but as Respondent has shown, they would not be adequate. *See* Resp. Br. 44-49 (discussing inadequacy of proposed alternative remedies).

The fact that Respondent could have filed an "administrative claim" with CBP is not a ground to deny a *Bivens* remedy. The administrative claim mechanism to which Petitioner refers is merely a first step to bringing a lawsuit under the FTCA. *See* 28 U.S.C. § 2675(a) (requiring denial of administrative claim before FTCA lawsuit may be filed); Pet. Br. 8 (conceding Respondent's administrative claims were brought "pursuant to the Federal Tort Claims Act"). Since Congress intended the FTCA and *Bivens* to co-exist, *see* Point I(B), *supra*, administrative claims pursuant to the FTCA do not preclude a *Bivens* remedy.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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