No. 21-147

In the Supreme Court of the United States

ERIK EGBERT, PETITIONER

v.

ROBERT BOULE

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether the cause of action for damages for violations of the Constitution that was recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should be extended to a claim alleging that a law-enforcement officer retaliated against a citizen's speech, in violation of the First Amendment, by reporting the citizen to other state and federal agencies.

2. Whether *Bivens* should be extended to a claim against an agent of U.S. Customs and Border Protection for allegedly using excessive force, in violation of the Fourth Amendment, during the agent's investigation of a foreign national at a property known for smuggling activity near the international border.

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INTEREST OF THE UNITED STATES

This case concerns claims for damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against an agent of the U.S. Border Patrol, a component of U.S. Customs and Border Protection (CBP), arising from the agent's allegedly unconstitutional search and seizure during an investigation of a foreign national near the international border, and from the agent's subsequent alleged retaliation in response to a complaint to his supervisors. The United States has a substantial interest in this matter. *Bivens* suits are brought against federal officials and have the potential to affect how they perform their duties, including those involving national security and immigration. And defendants in *Bivens* cases are often represented by the Department of Justice. The federal

government has participated in many of this Court's *Bivens* cases as an amicus curiae or as counsel to a party, including *Hernández* v. *Mesa*, 140 S. Ct. 735, 743 (2020), *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1857 (2017), and *Bivens* itself.

STATEMENT

In *Bivens*, *supra*, this Court recognized a cause of action for damages against federal drug-enforcement officers who allegedly violated the Fourth Amendment by conducting a warrantless search and arrest of a U.S. citizen at his home in New York City. In this case, respondent seeks to invoke *Bivens* to recover damages from petitioner, a Border Patrol agent, for injuries allegedly arising from petitioner's investigation near the U.S.–Canada border of a foreign national who might have been there to engage in illegal cross-border activities. Respondent also seeks damages for petitioner's act of reporting him to certain federal and state authorities, which respondent alleges was retaliation for respondent's complaints about petitioner to Border Patrol superiors. Respondent contends that the judicially created *Bivens* remedy should be extended to those alleged violations of the First and Fourth Amendments.

1. Respondent owns, operates, and lives in a small hotel called Smuggler's Inn in Blaine, Washington. Pet. App. 32a, 49a. Blaine is a small town on the Nation's northern border where cross-border smuggling activity is common. See, *e.g.*, CBP, *Blaine Sector Washington* (Aug. 19, 2021), https://go.usa.gov/xeMX2. Smuggler's Inn itself is located right at the border: It abuts 0 Avenue—a two-lane road in Canada that marks the international boundary. See J.A. 100-101, 112 (photos). It is unlawful to cross the border at respondent's property, but the area is nevertheless "known for cross-

border smuggling of people, drugs, illicit money[,] and items of significance to criminal organizations." Pet. App. 49a; see Br. in Opp. 3. "Large shipments of cocaine, methamphetamine, ecstasy, and opiates have previously been intercepted" there. Pet. App. 9a (Bumatay, J., dissenting).

Owing to the prevalence of illegal activity at his property, respondent has had various interactions with law enforcement. At times he has been "a paid informant" for U.S. law enforcement—including at the time of the events in this case—and has provided information "about guests at his inn" that "resulted in numerous arrests." Pet. App. 32a-33a. But respondent himself has also been arrested by Canadian authorities and pleaded guilty to aiding persons in unlawfully crossing the border into Canada. See *id.* at 9a & n.3 (Bumatay, J., dissenting); see also Br. in Opp. 11 n.3.

Petitioner Erik Egbert is a U.S. Border Patrol agent who has "been to Smuggler's Inn many times" as part of his job duties and has "apprehended persons who had illegally crossed the border" there. Pet. App. 9a (Bumatay, J., dissenting). On March 20, 2014, respondent told Agent Egbert that a guest would be arriving at Smuggler's Inn who had flown into the United States from Turkey the previous night. *Id.* at 33a. Respondent reported that the Turkish guest had arrived in New York, had flown to Seattle, and was presently being driven another 125 miles to Smuggler's Inn. *Ibid.* Agent Egbert considered that activity suspicious: he could think of "no legitimate reason a person would travel from Turkey to stay at a rundown bed-and-breakfast on the border in Blaine," and he thought the Turkish guest might attempt to cross illegally into Canada or else meet persons coming from Canada for illegal purposes. J.A. 104;

see Pet. App. 27a (Bumatay, J, dissenting). To investigate further, Agent Egbert went to Smuggler's Inn and awaited the guest's arrival. *Id.* at 10a.

When the vehicle carrying the Turkish guest arrived, Agent Egbert followed it onto the property, intending to check the guest's immigration status. Pet. App. 50a-51a. Respondent, however, attempted to prevent that check by accusing Agent Egbert of trespassing, telling him to leave, and "mov[ing] between" him and the car with the guest. *Ibid.* Respondent alleges that Agent Egbert then shoved him against the car, grabbed him, and pushed him to the ground, causing injuries to his back for which he later sought medical treatment. *Id.* at 33a. Agent Egbert performed an immigration check, determined that the Turkish guest was lawfully present in the United States, and departed. *Ibid.*

Respondent complained about the incident to Agent Egbert's Border Patrol supervisors. Pet. App. 33a. Respondent alleges that Agent Egbert then retaliated against him by, among other things, making reports about him and his business to various state and federal agencies, including the Internal Revenue Service (IRS), which initiated an audit of his tax returns. *Id.* at 33a-34a. Respondent alleges that he paid an accountant over $5000 to respond to the audit. *Id.* at 34a.

2. CBP has informed this Office that, after the March 2014 episode, respondent filed an administrative claim with CBP for $7348 in damages—as required before bringing suit under the Federal Tort Claims Act (FTCA), see 28 U.S.C. 2675(a)—asserting that Agent Egbert had caused his back injury. See Pet. App. 28a (Bumatay, J., dissenting). The agency denied the claim in September 2014 after an investigation, "finding insufficient evidence of any wrongful or negligent act."

CBP informed respondent that he could file an FTCA action within six months, but respondent did not do so. Instead, he waited until 2016 and then filed another administrative claim, this one for $295,000, alleging excessive force as well as retaliation. CBP denied that claim as an untimely request for reconsideration.

Separately, in response to respondent's allegations of Agent Egbert's misconduct, CBP's Office of Internal Affairs conducted an investigation. See J.A. 166, 177-178. CBP thereafter charged Egbert in an internal disciplinary process with making unauthorized disclosures and a failure to be forthcoming with investigators. The unauthorized-disclosure charge was not sustained in the disciplinary process, but the failure-to-be-forthcoming charge was sustained, and Egbert was disciplined as a result. See J.A. 182-184.

3. Respondent then brought this suit seeking damages from Agent Egbert under *Bivens*. The operative complaint claims that Egbert violated the Fourth Amendment by entering respondent's property without permission and using excessive force against him while performing the immigration check at Smuggler's Inn, and that Egbert later violated the First Amendment by retaliating against him. See J.A. 84-85.

The district court granted summary judgment to Agent Egbert, Pet. App. 48a-70a, finding that respondent's claims would each require "an unwarranted extension of *Bivens*" into a "new context" where "Congress is in the best position to evaluate the costs and benefits of a new legal remedy." *Id.* at 53a, 69a. The court further found that special factors counseled hesitation about extending *Bivens* to either claim. The Fourth Amendment claim would "raise significant separation-of-powers concerns by implicating the other branches'

national-security policies." *Id.* at 68a. In particular, "the risk of personal liability" could "cause Border Patrol agents to hesitate and second guess their daily decisions about whether and how to investigate suspicious activities near the border." *Id.* at 68a-69a. The court additionally observed that this Court "has never implied a *Bivens* action under any clause of the First Amendment." *Id.* at 55a.

4. The court of appeals reversed and remanded. Pet. App. 31a-47a (amended opinion). The court acknowledged that respondent's First and Fourth Amendment claims would both require extending *Bivens* into new contexts, but it concluded that no special factors counseled hesitation about those extensions. *Id.* at 36a, 42a.

In the court of appeals' view, respondent's Fourth Amendment claim would require only a "modest extension" of *Bivens*, because it is "a conventional Fourth Amendment excessive force claim arising out of actions by a rank-and-file border patrol agent on [respondent's] own property in the United States." Pet. App. 36a-38a. The court also found that there is "no adequate alternative remedy that would preclude a *Bivens* claim." *Id.* at 44a-46a.

On the First Amendment claim, the court of appeals found "even less reason to hesitate" before extending *Bivens*. Pet. App. 43a. While acknowledging that this Court "has never actually *held* that a First Amendment retaliation claim may be brought under *Bivens*," the court of appeals reasoned that this Court "explicitly stated * * * that such a claim may be brought" in *Hartman* v. *Moore*, 547 U.S. 250, 256 (2006). Pet. App. 41a-42a. The court of appeals further stated that "retaliation is a well-established First Amendment claim," and

Agent Egbert was not performing "official duties" when he allegedly retaliated against respondent. *Id.* at 43a.

5. The court of appeals denied a petition for rehearing en banc over the dissent of 12 judges. Pet. App. 7a.

Judge Bumatay's dissent, Pet. App. 7a-29a, joined by six other judges, stated that the panel "clearly erred in extending *Bivens* to *two* new contexts." *Id.* at 16a. Judge Bumatay found multiple reasons to hesitate before recognizing respondent's First Amendment retaliation claim, including Congress's failure to create any damages remedy for federal-officer retaliation and the existence of various potential alternative remedies. See *id.* at 17a-25a. On the Fourth Amendment claim, Judge Bumatay stated that declining to extend *Bivens* "should have been an easy call," *id.* at 26a, because "the subject of this litigation is a Border Patrol agent's conduct during an on-duty investigation of a foreign national, at a property known for smuggling activity, adjacent to an international border," *id.* at 27a. He observed that this Court has "firmly concluded that judges should refrain from extending *Bivens* when doing so would interfere with border enforcement," "which implicates an 'element of national security.'" *Id.* at 26a (quoting *Hernández*, 140 S. Ct. at 746).

Judge Owens dissented on the ground that legislative remedies are superior to judicially created causes of action as a means of enabling citizens to vindicate their constitutional rights. Pet. App. 29a-30a.

Judge Bress also dissented, joined by three other judges, finding it "self-evident that there are many reasons counseling hesitation" against respondent's expansions of *Bivens* and stating that "the panel decision is significantly out of step with modern Supreme Court cases." Pet. App. 30a-31a.

SUMMARY OF ARGUMENT

The judicially created damages remedy that was recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for an unconstitutional search and seizure during a federal narcotics investigation at a home, should not be extended to the markedly different claims in this case.

A. When a plaintiff asserts a *Bivens* claim, a court must apply a two-step inquiry that asks whether the claim arises in a new context and considers whether special factors counsel hesitation about extending *Bivens* to the claim. See *Hernández* v. *Mesa*, 140 S. Ct. 735, 743 (2020). In applying that standard, this "Court has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity" in light of "the notable change in the Court's approach to recognizing implied causes of action." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1857 (2017) (citation omitted). For more than 40 years, the Court has "consistently refused to extend *Bivens* to any new context or new category of defendants." *Ibid.* (citation omitted). And the Court has admonished that, if there are "any 'special factors that counsel hesitation' about" extending *Bivens* to a new context, then courts must refrain from doing so out of respect for Congress's role in creating federal causes of action. *Hernández*, 140 S. Ct. at 743 (brackets and citation omitted); see *Abbassi*, 137 S. Ct. at 1858.

B. The court of appeals extended *Bivens* to two contexts that it acknowledged were novel. This Court's cases recognizing a *Bivens* remedy did not involve First Amendment claims. Contrary to the court of appeals' suggestion that this Court endorsed a retaliation claim like respondent's in *Hartman* v. *Moore*, 547 U.S. 250 (2006), the Court's holding there "d[id] not go beyond"

defining an element of a retaliatory prosecution claim, *id.* at 257 n.5. And respondent's Fourth Amendment claim is meaningfully different from the claim in *Bivens*. The altercation at issue here occurred when respondent deliberately interfered with a Border Patrol agent's investigation of a foreign national who the officer had reason to suspect had traveled to the border to engage in illegal cross-border activities. Moreover, that investigation was taking place just steps from the international border. This Court has recognized the direct connection between policing the border and national security, and Fourth Amendment claims arising from such policing "implicate[] an element of national security" that was not at issue in *Bivens*. *Hernández*, 140 S. Ct. at 746.

C. Several special factors counsel against extending the *Bivens* remedy to the new contexts presented here.

1. This Court should not extend *Bivens* to First Amendment claims for alleged retaliation by law-enforcement officers. As the Court has explained, retaliation claims might adversely affect federal personnel in the performance of their duties, and "Congress is in a far better position than a court" to evaluate the costs and benefits. *Bush* v. *Lucas*, 462 U.S. 367, 389 (1983).

This Court has further observed that retaliation claims, which depend on an officer's motive for acting, are "easy to allege and hard to disprove." *Crawford-El* v. *Britton*, 523 U.S. 574, 584-585 (1998) (citation omitted). The vast range of governmental actions that could give rise to retaliation claims, and the difficulties the Court has noted in calibrating such claims to avoid disrupting law-enforcement functions in particular, indicate that "Congress might doubt the efficacy or necessity of a damages remedy" in this setting. *Hernán-*

dez, 140 S. Ct. at 743 (citation omitted). Congress's creation of various alternative remedial mechanisms for protecting against retaliatory conduct is another "convincing reason" why the Judiciary should not create its own damages remedy to address that misconduct. *Abbasi*, 137 S. Ct. at 1858 (citation omitted).

2. Nor should this Court extend *Bivens* to a Fourth Amendment claim arising from a Border Patrol agent's investigation near the border of a foreign national for potential immigration violations or smuggling activity. This Court explained in *Hernández* that "the conduct of agents positioned at the border has a clear and strong connection to national security," and "the risk of undermining border security provides reason to hesitate before extending *Bivens* into this field." 140 S. Ct. at 746-747. Decisions about national security are "'delicate, complex, and involve large elements of prophecy' for which 'the Judiciary has neither aptitude, facilities, nor responsibility.'" *Id.* at 749 (brackets and citation omitted). The court of appeals erred in suggesting that respondent has a conventional Fourth Amendment claim because he is a U.S. citizen and the incident occurred on his property. At an appropriate level of generality, the facts alleged in the complaint concerning a Border Patrol agent's investigation at the border plainly implicate border security.

The Executive Branch uses various means to help ensure that Border Patrol agents fulfill their mission without unwarranted force, including CBP's detailed use-of-force policy, disciplinary investigations, and other administrative tools. Any further remedies that would hold Border Patrol agents personally liable in damages for malfeasances in performing their important work must be crafted by Congress.

ARGUMENT

THE *BIVENS* REMEDY SHOULD NOT BE EXTENDED TO THESE NOVEL CONTEXTS

The court of appeals erred in expanding the cause of action from *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to the two new contexts presented by respondent's claims. To be clear, the United States does not condone the conduct that respondent alleges here: If the government determined that Agent Egbert used excessive force or retaliated against a citizen for protected speech, then he could and should have been subject to discipline. But the court of appeals' extensions of *Bivens* to respondent's claims would have a substantial and detrimental impact on the government and its employees, including increased risks to national security. The decision below is inconsistent with this Court's precedent, especially *Hernández* v. *Mesa*, 140 S. Ct. 735 (2020), and *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017).

A. For 40 Years, This Court Has Consistently Declined To Extend *Bivens* To New Contexts Where Congress Is The More Appropriate Body To Craft Any Damages Remedy

1. As this Court has recently recounted, its 1971 decision in *Bivens* "broke new ground by holding that a person claiming to be the victim of an unlawful arrest and search" at his home "could bring a Fourth Amendment claim for damages against the responsible [federal] agents even though no federal statute authorized such a claim." *Hernández*, 140 S. Ct. at 741. "[I]n the 100 years leading up to *Bivens*, Congress did not provide a specific damages remedy for plaintiffs whose constitutional rights were violated by agents of the Federal Government." *Abbasi*, 137 S. Ct. at 1854. Congress in

1871 allowed injured persons to sue officials acting under color of *state* law for deprivations of rights under the Constitution and federal law, see 42 U.S.C. 1983, but "Congress did not create an analogous statute for federal officials." *Abbasi*, 137 S. Ct. at 1854. Instead, "the traditional way in which civil litigation addressed abusive conduct by federal officers was by subjecting them to liability for common-law torts." *Hernández*, 140 S. Ct. at 748.

Bivens followed a different approach. The Court reasoned that, although "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation," federal courts could infer that "particular remedial mechanism," as they had done for claims alleging violations of various federal statutes. *Bivens*, 403 U.S. at 396-397. In creating that cause of action, however, the Court emphasized that the case presented "no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396.

Since deciding *Bivens* in 1971, this Court has extended its holding only twice. See *Hernández*, 140 S. Ct. at 741. In *Davis* v. *Passman*, 442 U.S. 228 (1979), the Court allowed a congressional employee to sue for sex discrimination in violation of the Fifth Amendment. *Id.* at 248-249. And in *Carlson* v. *Green*, 446 U.S. 14 (1980), the Court allowed a suit against federal prison officials for Eighth Amendment violations arising from a failure to provide medical treatment that led to an inmate's death. *Id.* at 16, 19-23 & n.1. In each case, the Court reiterated that it found "no special factors counselling hesitation." *Id.* at 19; see *Davis*, 442 U.S. at 245.

"After those decisions, however, the Court changed course." *Hernández*, 140 S. Ct. at 741. In the more than

40 years since *Carlson*, this Court has "consistently refused to extend *Bivens* to any new context or new category of defendants." *Abbasi*, 137 S. Ct. at 1857 (citation omitted). Ten decisions of this Court have squarely rejected efforts to extend *Bivens*. See *Hernández*, *supra*; *Abbasi*, *supra*; *Minneci* v. *Pollard*, 565 U.S. 118 (2012); *Wilkie* v. *Robbins*, 551 U.S. 537 (2007); *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61 (2001); *FDIC* v. *Meyer*, 510 U.S. 471 (1994); *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988); *United States* v. *Stanley*, 483 U.S. 669 (1987); *Bush* v. *Lucas*, 462 U.S. 367 (1983); *Chappell* v. *Wallace*, 462 U.S. 296 (1983).

This Court's refusal to extend *Bivens* in those cases reflects its changed understanding of the scope of judicial authority to create private rights of action. See *Hernández*, 140 S. Ct. at 741; *Abbasi*, 137 S. Ct. at 1855-1856. The reasoning of *Bivens* "rel[ied] largely on earlier decisions implying private damages actions into federal statutes." *Malesko*, 534 U.S. at 67; see *Bivens*, 403 U.S. at 397 (citing *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964)); *Bivens*, 403 U.S. at 402-403 & n.4 (Harlan, J., concurring in the judgment) (same). "*Bivens*, *Davis*, and *Carlson* were [thus] the products of" another "era"—an "'*ancien regime*'" under which "'the Court assumed it to be a proper judicial function "to provide such remedies as are necessary to make effective" a statute's purpose'" and was therefore willing to infer "'causes of action not explicit in the statutory text itself.'" *Hernández*, 140 S. Ct. at 741 (quoting *Abbasi*, 137 S. Ct. at 1855).

The Court has since come "to appreciate more fully the tension between this practice and the Constitution's separation of legislative and judicial power." *Hernández*, 140 S. Ct. at 741. "[W]hen a court recognizes an

implied claim for damages on the ground that doing so furthers the 'purpose' of the law, the court risks arrogating legislative power," because "a lawmaking body that enacts a provision that creates a right or prohibits specified conduct may not wish to pursue the provision's purpose to the extent of authorizing private suits for damages." *Id.* at 741-742. A novel damages action implicates "a number of economic and governmental concerns," including by "often creat[ing] substantial costs" for "defense and indemnification," as well as "the time and administrative costs attendant upon intrusions resulting from the discovery and trial process." *Abbasi*, 137 S. Ct. at 1856. An issue that requires such "a host of considerations that must be weighed and appraised * * * should be committed to those who write the laws rather than those who interpret them." *Id.* at 1857 (citation and internal quotation marks omitted). This Court accordingly has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one," *Malesko*, 534 U.S. at 67 n.3, and has stated that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity," *Abbasi*, 137 S. Ct. at 1857 (citation omitted).

2. Against that backdrop, this Court has explained that when a plaintiff asserts a *Bivens* claim, a court must apply a "two-step inquiry" to determine whether the claim can proceed. *Hernández*, 140 S. Ct. at 743. The court first asks whether the claim "arises in a 'new context' or involves a 'new category of defendants'" different from those in *Bivens*, *Davis,* and *Carlson*. *Ibid.* (quoting *Malesko*, 534 U.S. at 68). The court then considers "whether there are any 'special factors that counsel hesitation' about granting the extension." *Ibid.* (quoting *Abbasi*, 137 S. Ct. at 1880) (brackets omitted).

If there are—if there is "reason to pause"—then the claim is not allowed. *Ibid.*; cf. *Nestlé USA, Inc.* v. *Doe*, 141 S. Ct. 1931, 1938-1939 (2021) (plurality opinion) ("A court 'must' not create a private right of action if it can identify even one 'sound reaso[n] to think Congress might doubt the efficacy or necessity of [the new] remedy.'") (citation omitted). In asking whether special factors counsel hesitation, the court gives important weight to "'separation-of-powers principles'" and "consider[s] the risk of interfering with the authority of the other branches." *Hernández*, 140 S. Ct. at 743 (quoting *Abbasi*, 137 S. Ct. at 1857).

Under that standard, the court of appeals erred in extending *Bivens* to two new contexts.

B. Respondent Seeks To Extend The *Bivens* Remedy To Two New Contexts

Although the court of appeals ultimately erred in allowing respondent's claims to proceed, the court correctly observed (Pet. App. 36a, 42a) that those claims would require extending *Bivens* to new contexts. This Court's "understanding of a 'new context' is broad": a case is "new" if it differs in "'a meaningful way'" from the cases in which this Court has recognized *Bivens* remedies. *Hernández*, 140 S. Ct. at 743 (quoting *Abbasi*, 137 S. Ct. at 1859).

1. Respondent's First Amendment retaliation claim would extend Bivens *to a new context*

The claims in *Bivens*, *Davis*, and *Carlson* did not involve the First Amendment. "A claim may arise in a new context" for purposes of the *Bivens* analysis "even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized." *Hernández*, 140 S. Ct. at 743; see

Abbasi, 137 S. Ct. at 1859. But a claim that puts a new "constitutional right at issue"—like respondent's First Amendment retaliation claim—is necessarily materially different from those that have previously been accepted. *Abbasi*, 137 S. Ct. at 1859-1860.

Respondent has contended (Br. in Opp. 18-19) that this Court already "suggested" in *Hartman* v. *Moore*, 547 U.S. 250 (2006), that a First Amendment retaliation claim like his "is cognizable under *Bivens*." Cf. Pet. App. 41a-42a (court of appeals reasoning that *Hartman* "explicitly stated" that a First Amendment retaliation claim "may be brought"). In *Hartman*, this Court recognized that "as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions * * * for speaking out," and then stated that "[w]hen the vengeful officer is federal, he is subject to an action for damages on the authority of *Bivens*." 547 U.S. at 256.

Respondent misreads *Hartman*. The Court was clear that the only "issue before [it]" concerned what elements must be pleaded and proved by "a plaintiff in a retaliatory-prosecution action"—whether against federal officials under *Bivens* or state officials under 42 U.S.C. 1983. *Hartman*, 547 U.S. at 256-257; see *id.* at 255-256 (describing the circuit conflict that prompted the writ of certiorari); *id.* at 259 (referring interchangeably to "a *Bivens* (or § 1983) plaintiff"). Thus, the Court's "holding d[id] not go beyond a definition of an element of the tort." *Id.* at 257 n.5. Any doubt about *Hartman*'s meaning has since been obviated. In *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), the Court explained that "[t]he legal issue decided in *Hartman* concerned the elements a plaintiff 'must plead and prove in order to win' a First Amendment retaliation claim." *Id.* at 673

(quoting 547 U.S. at 257 n.5). And in *Reichle* v. *Howards*, 566 U.S. 658 (2012), the Court observed that it has "never held that *Bivens* extends to First Amendment claims." *Id* at 663 n.4.

2. Respondent's Fourth Amendment claim challenging actions during a Border Patrol agent's investigation near the border presents a new context

Respondent has asserted (Br. in Opp. 17-18) that his Fourth Amendment claim is "within the original bounds of *Bivens*" by characterizing the claim as "a common Fourth Amendment claim against a line law enforcement officer based on the officer's assault on a U.S. citizen." Cf. Pet. App. 36a (court of appeals reasoning that respondent's claim would require only a "modest extension" of *Bivens*). That blinkered view of the context here disregards *Abbasi*'s non-exhaustive list of "examples" of the several kinds of "differences" that may make a context "new" at the first step of the *Bivens* inquiry, including the "generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; [or] the statutory or other legal mandate under which the officer was operating." 137 S. Ct. at 1859-1860. *Abbasi* also mentioned "the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider." *Id.* at 1860. And the Court observed that "even a modest extension is still an extension." *Id.* at 1864.

Judged in that light, respondent's claim is meaningfully different from the claim recognized in *Bivens* in multiple respects. For one thing, Agent Egbert was not performing ordinary domestic law-enforcement functions like the investigation of narcotics violations in

Bivens. Cf. Br. in Opp. 18 (citing cases involving the U.S. Marshals Service, U.S. Park Police, and U.S. Forest Service). He was a Border Patrol agent investigating a foreign national who might have been involved in cross-border smuggling or immigration violations. See pp. 2-4, *supra*. Respondent contends (Br. in Opp. 18) that Agent Egbert's specific mission "does not matter," but *Abbasi* recognized that a *Bivens* claim may be meaningfully different because the officer "was operating" under a different "statutory or other legal mandate." 137 S. Ct. at 1860. In addition, the allegedly unconstitutional actions here occurred during Agent Egbert's attempt to conduct an immigration check, which further increases the "risk of disruptive intrusion by the Judiciary into the functioning of other branches." *Ibid.* This Court has long observed that the enforcement of the immigration laws is committed to the Executive Branch and that the government's treatment of foreigners affects our Nation's foreign relations. See, *e.g.*, *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations.").

This case is also meaningfully different from *Bivens* because the altercation occurred when respondent attempted to frustrate Agent Egbert's investigation just steps away from the international border, and specifically in an area known for illegal smuggling of persons, drugs, and money. See pp. 2-4, *supra*. Respondent's claim thus "implicates an element of national security" that was not present in prior *Bivens* cases, as "[o]ne of the ways in which the Executive protects this country is by attempting to control the movement of people and goods across the border." *Hernández*, 140 S. Ct. at 746;

see *ibid.* (describing CBP's responsibility to detect "'drug smugglers and traffickers, human smugglers and traffickers, and other persons who may undermine the security of the United States'") (citation omitted).

C. Congress Is The Appropriate Body To Decide Whether To Provide A Damages Remedy In The New Contexts At Issue Here

The court of appeals erred (Pet. App. 36a, 42a) in concluding that no special factors counseled hesitation before accepting respondent's extensions of *Bivens*. This Court's special-factors analysis is guided by respect for the Constitution's separation of powers: The Court "ask[s] 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, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.'" *Hernández*, 140 S. Ct. at 743 (quoting *Abbasi*, 137 S. Ct. at 1858). The Court also considers the presence of any "alternative remedial structure," which by itself "may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Abbasi*, 137 S. Ct. at 1858. If any special factors are present, then "the courts must refrain from creating" the new *Bivens* remedy "in order to respect the role of Congress." *Ibid.* Several special factors counsel hesitation before inferring a private damages remedy to address the kinds of claims that respondent presents here.

1. Multiple special factors counsel against extending the Bivens *remedy to First Amendment retaliation claims*

a. This Court's own previous "reluctance" to extend *Bivens* to First Amendment claims, *Iqbal*, 556 U.S. at

675, is itself a sign that special factors counsel hesitation. See Pet. App. 19a (Bumatay, J., dissenting). Three times, the Court has either suggested that *Bivens* may not apply to First Amendment claims or paused to note that the Court has never recognized such a claim, instead merely assuming arguendo that such claims were cognizable while deciding other issues. See *Wood* v. *Moss*, 572 U.S. 744, 757 (2014); *Reichle*, 566 U.S. at 663 n.4; *Iqbal*, 556 U.S. at 675. Those are strong indications that extending *Bivens* to the First Amendment would be no small matter.

Retaliation claims present particular reasons for concern. In *Bush*, the Court expressly declined to recognize a First Amendment claim against federal employers for retaliation against employees' protected speech, observing that the decision whether to recognize such a remedy would require balancing sensitive considerations. See 462 U.S. at 368-370, 388-390. The prospect of individual suits for damages would make it "quite probable" that some federal personnel "would be deterred" from energetically performing their duties. *Id.* at 389. But "Congress is in a far better position than a court to evaluate the impact of a new species of litigation" against federal officials. *Ibid.*; see *Abbasi*, 137 S. Ct. at 1858 ("[T]he decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide," "includ[ing] the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself."). The same principles apply to respondent's claim here: Determining whether the possibility of retaliation suits against federal officers would be more likely to advance the public interest, or instead to deter officers' vigorous performance of important

duties, is a judgment that should be made by Congress. See *Abbasi*, 137 S. Ct. at 1856.

b. Other courts of appeals have also repeatedly expressed misgivings about extending *Bivens* to retaliation claims, especially since *Abbasi*. See*, e.g.*, *Loumiet* v. *United States*, 948 F.3d 376, 385 (D.C. Cir.) (refusing *Bivens* remedy based on allegedly retaliatory administrative enforcement action), cert. denied, 141 S. Ct. 180 (2020); *Mack* v. *Yost*, 968 F.3d 311, 325 (3d Cir. 2020) (refusing prisoner's claim concerning allegedly retaliatory work assignment); *Buenrostro* v. *Fajardo*, 770 Fed. Appx. 807, 808 (9th Cir. 2019) (refusing prisoner's retaliation claim); *Petzold* v. *Rostollan*, 946 F.3d 242, 252 & n.46 (5th Cir. 2019) (finding it "unlikely" that *Bivens* extends to prisoner's claim of retaliatory placement in special housing unit); *Bistrian* v. *Levi*, 912 F.3d 79, 95 (3d Cir. 2018) (same); see also Pet. App. 21a-22a & nn.6-7 (Bumatay, J., dissenting) (citing other cases). In the "context of airport security screeners," for example, the Third Circuit concluded that special factors, including national-security concerns, prevented it from recognizing "a *Bivens* cause of action for First Amendment retaliation." *Vanderklok* v. *United States*, 868 F.3d 189, 207, 209 (2017). The agreement of so many courts before the decision below is further evidence that ample grounds counsel hesitation before extending *Bivens* to retaliation claims.

c. Retaliation claims against law-enforcement officers present special difficulty for courts trying to "weigh the costs and benefits of allowing a damages action," *Hernández*, 140 S. Ct. at 743 (citation omitted), in part because of the "difficulty of devising a workable cause of action" for retaliation in that setting, *Wilkie*, 551 U.S.

at 562. That, too, counsels strongly against extending *Bivens* to respondent's First Amendment claim.

i. Any number of routine law-enforcement activities can be challenged as retaliatory, and because the constitutional violation always turns on the officer's motive, such claims are notoriously "easy to allege and hard to disprove." *Crawford-El* v. *Britton*, 523 U.S. 574, 584-585 (1998) (citation omitted). This Court has already responded to that difficulty by limiting the scope of certain retaliation actions (sometimes by drawing on the common law) so that "policing certain events like an unruly protest" does not "pose overwhelming litigation risks," and officers are not forced into burdensome discovery "based solely on allegations about" their "mental state." *Nieves* v. *Bartlett*, 139 S. Ct. 1715, 1725 (2019) (retaliatory arrest claim); see *Hartman*, 547 U.S. at 256 (retaliatory prosecution claim). The vast range of governmental actions that can give rise to a retaliation claim, and the recognized difficulties of calibrating such claims to avoid impinging on law-enforcement functions, make it more than reasonable to think that "Congress might doubt the efficacy or necessity of a damages remedy" in this setting. *Hernández*, 140 S. Ct. at 743 (quoting *Abbasi*, 137 S. Ct. at 1858).

The need for legislative judgments about how to weigh the costs and benefits of a First Amendment *Bivens* claim would be particularly acute in a case like this one, where respondent alleges that Agent Egbert retaliated against him by communicating about him with other agencies. See Pet. App. 33a-34a. Full and prompt information sharing is often indispensable to protecting national security and preventing and solving crime. As a result, the risk that federal officers might balk at sharing information about suspected law break-

ers with other agencies, lest that action prompt a personal damages suit for retaliation, would be a serious cost of the new remedy that respondent seeks. Cf. *Abbasi*, 137 S. Ct. at 1861; *Bush*, 462 U.S. at 388-390.

ii. The court of appeals found (Pet. App. 43a) no reason to hesitate about respondent's retaliation claim because he alleges that Agent Egbert "was not carrying out official duties in asking for investigations of" him. But a similar assertion could be made in many *Bivens* cases. Contrary to respondent's suggestion (Br. in Opp. 14) that this Court can simply recognize a *Bivens* remedy that is "narrowly tailored" to law-enforcement officers who act "outside of the scope of [their] official duties," plaintiffs would surely seize on that remedy to sue many federal officers for *allegedly* exceeding the scope of their duties with retaliatory motives. Cf. *Wood*, 572 U.S. at 747 (claim of "unconstitutional viewpoint-based discrimination" at a protest); *Reichle*, 566 U.S. at 660 (claim of retaliatory arrest by Secret Service agents). The necessity and complexity of assessing the outer boundaries of federal officers' duties in each case is another reason to hesitate over respondent's retaliation claim.

Moreover, the court of appeals' decision to limit its new retaliation remedy to conduct that is allegedly outside the scope of a federal officer's duties demonstrates that the court was engaged in policy balancing. If Congress were to create a cause of action for retaliation, it might reject an "official duties" standard and instead permit damages for infringements of the freedom of speech "under color of law," as it did in the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb-2(1); see *Tanzin* v. *Tanvir*, 141 S. Ct. 486, 489 (2020)—as well as in the express cause of action for constitutional vio-

lations by state officials under 42 U.S.C. 1983. Which line to draw is a decision that should be made by the body to which the Constitution assigns the legislative power. See *Hernández*, 140 S. Ct. at 741-742.

d. Various "alternative remedial structure[s]" also exist that can deter and address the kinds of misconduct that respondent alleges. *Abbasi*, 137 S. Ct. at 1858. This Court has held that the existence of "any alternative, existing process for protecting the injured party's interest" can counsel hesitation, *ibid.* (brackets and citation omitted), even when the alternatives may not enable the particular plaintiff to obtain similarly effective relief. See, *e.g.*, *Bush*, 462 U.S. at 372 (declining to create a *Bivens* remedy even though alternative processes "were not as effective as an individual damages remedy and did not fully compensate [the plaintiff] for the harm he suffered") (footnote omitted); *Schweiker*, 487 U.S. at 427-428 (holding that Social Security appeal procedures precluded a *Bivens* remedy even though those procedures could not redress past due-process violations). Here, a variety of procedures exist for protecting against retaliatory conduct.

First, insofar as respondent alleges that Agent Egbert improperly reported him to the IRS, federal tax law contains provisions for preventing and addressing wrongdoing by IRS employees in tax administration, and the comprehensive character of the Internal Revenue Code weighs strongly against any new judicially created remedy. This Court has explained that, "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," courts should "not create[] additional *Bivens* remedies." *Schweiker*, 487

U.S. at 423; see *Bush*, 462 U.S. at 388-389 (the comprehensive federal civil service laws supported rejecting a new *Bivens* remedy for a First Amendment violation). The tax code is just such a "complex and comprehensive administrative scheme that provides various avenues of relief for aggrieved taxpayers," including provisions specifically designed to prevent and remedy improper audits. *Hudson Valley Black Press* v. *IRS*, 409 F.3d 106, 113 (2d Cir. 2005); see *id.* at 111-114. Courts should not supplement that detailed framework by inferring a damages remedy against non-IRS employees for inducing an audit with a retaliatory motive. If the tax code would not enable respondent to obtain relief here because IRS employees determined that Agent Egbert's tip warranted an audit, then that only reinforces that a judicially inferred retaliation claim should not go forward. Cf. *Hartman*, 547 U.S. at 261-263.

Second, insofar as respondent alleges that Agent Egbert improperly disclosed private information about him, the Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896, regulates the "collection, maintenance, use, and dissemination of information" about individuals by federal agencies. *Doe* v. *Chao*, 540 U.S. 614, 618 (2004) (quoting Privacy Act § 2(a)(5), 88 Stat. 1896); see 5 U.S.C. 552a(a)(4) and (5) (describing the information protected by the Privacy Act); see also Pet. App. 23a (Bumatay, J., dissenting). The Act authorizes civil suits by persons whose rights under the Act are infringed, and it permits criminal penalties against federal officials who willfully disclose a record in violation of the Act. See 5 U.S.C. 552a(i)(1). The Privacy Act demonstrates that Congress has both considered the problem of unlawful disclosures of personal information by federal officials and provided the remedies that it deems appropriate.

Third, respondent might seek relief against Agent Egbert through various causes of action under Washington state law. See *Minneci*, 565 U.S. at 125 (declining to recognize *Bivens* claim because "state tort law provides an 'alternative, existing process' capable of protecting the constitutional interests at stake") (quoting *Wilkie*, 551 U.S. at 550). Judge Bumatay's dissent identified some state-law causes of action that might have been available to respondent, see Pet. App. 24a, and petitioner has identified still more, see Pet. Br. 33. In the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563, Congress precluded most state-law claims against federal officials acting "within the scope of [their] office or employment" by making the FTCA's remedy "exclusive." 28 U.S.C. 2679(b)(1); see *Hernández*, 140 S. Ct. at 748. But respondent contends (and the court of appeals stated) that Agent Egbert was *not* "carrying out official duties" when he allegedly retaliated against respondent. Pet. App. 43a; see Br. in Opp. 14. Courts have allowed state-law claims against federal employees to go forward in cases of "egregious[]" misconduct outside the scope of their employment. *Vanderklok*, 868 F.3d at 204.

Fourth, other statutory and executive authorities can also help deter and remedy unconstitutional retaliation by Border Patrol agents or other federal officers. See *Schweiker*, 487 U.S. at 424 (considering the availability of administrative systems). Respondent invoked CBP's administrative-claim process to seek damages for Agent Egbert's alleged retaliation, though his second claim (the one asserting retaliation) was denied for procedural reasons. See pp. 4-5, *supra*. Border Patrol agents, like other federal employees, can also be

subject to internal review and discipline for retaliatory conduct. See, *e.g.*, 5 U.S.C. 7503 and 7513; 5 C.F.R. 2635.101(b)(1), (5), and (8). And CBP takes reports of misconduct seriously, as shown by the CBP Office of Internal Affairs' thorough investigation of respondent's allegations against Agent Egbert. See p. 5, *supra*.

Respondent has protested (Br. in Opp. 20-22) that none of those alternative remedial structures will be able to compensate his injury. Even if that proves to be true, it would not justify the extension of *Bivens* to his claim. This Court has explained that while the *presence* of an alternative remedy may preclude an extension of *Bivens*, 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*, 487 U.S. at 421-422. Instead, Congress's decisions to provide certain remedies, but not others, that protect against retaliation is a "convincing reason for the Judicial Branch to refrain from providing a new and free-standing remedy in damages" for respondent's First Amendment claim. *Abbasi*, 137 S. Ct. at 1858 (quoting *Wilkie*, 551 U.S. at 550).

2. Multiple special factors counsel against extending* Bivens *to investigating immigration violations and smuggling at the border

Several special factors also counsel against extending the *Bivens* remedy to respondent's Fourth Amendment claim.

a. This Court has previously concluded that courts should not extend *Bivens* to a claim that "implicates an element of national security." *Heráandez*, 140 S. Ct. at 746; see *Abbasi*, 137 S. Ct. at 1861-1862. That conclusion follows directly from this Court's respect for the

Constitution's separation of powers, *Abbasi*, 137 S. Ct. at 1857, because "[n]ational-security policy is the prerogative of the Congress and [the] President," *id.* at 1861. Decisions about national security are "'delicate, complex, and involve large elements of prophecy' for which 'the Judiciary has neither aptitude, facilities, nor responsibility.'" *Hernández*, 140 S. Ct. at 749 (brackets and citation omitted).

A decision recognizing a *Bivens* remedy to challenge the work of agents investigating immigration violations and smuggling at the border would have significant national-security implications. See *United States* v. *Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004) ("[T]his country's border-control policies are of crucial importance to the national security and foreign policy of the United States."), cert. denied, 544 U.S. 950 (2005). Congress has charged the Department of Homeland Security (DHS) and its components, including CBP, with "securing the homeland." 6 U.S.C. 111(b)(1)(A) and (E). One of CBP's statutory duties is to "detect, respond to, and interdict terrorists, drug smugglers and traffickers, human smugglers and traffickers, and other persons who may undermine the security of the United States, in cases in which such persons are entering, *or have recently entered*, the United States." 6 U.S.C. 211(c)(5) (emphasis added). CBP also enforces immigration laws, including "the detection [and] interdiction * * * of persons unlawfully entering, or who have recently unlawfully entered, the United States." 6 U.S.C. 211(c)(8)(B).

Within CBP, the U.S. Border Patrol is given "primary responsibility" for "interdicting persons attempting to illegally enter or exit the United States" and "deter[ring] and prevent[ing] the illegal entry of terrorists,

terrorist weapons, persons, and contraband." 6 U.S.C. 211(e)(1), (3)(A) and (B). DHS officers, including Border Patrol agents, are specifically authorized, "without warrant," to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States"; to "make arrests" for certain offenses; and to "have access," "within a distance of twenty-five miles from any" international border, "to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States." 8 U.S.C. 1357(a)(1)-(5); see 8 C.F.R. 287.5(a)-(d); *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537 (1985) ("Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country.").

Imposing damages liability on individual agents executing those essential national-security functions at the border could chill the performance of their duties in circumstances where the stakes are often high. See *Hernández*, 140 S. Ct. at 745, 747; see also *Abbasi*, 137 S. Ct. at 1861 ("The risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy."); *Chappell*, 462 U.S. at 304 (refusing a *Bivens* remedy in light of "the need for unhesitating and decisive action"). In short, as this Court explained in *Hernández*, "the conduct of agents positioned at the border has a clear and strong connection to national security," and "the risk of undermining border security provides reason to hesitate before extending *Bivens* into this field." 140 S. Ct. at 746-747. Multiple courts of appeals

have therefore refused to extend *Bivens* to officers' actions investigating immigration, or other violations that occur at the border. See, *e.g.*, *Elhady* v. *Unidentified CBP Agents*, No. 20-1339, 2021 WL 5410758, at *6 (6th Cir. Nov. 19, 2021); *Tun-Cos* v. *Perrotte*, 922 F.3d 514, 528 (4th Cir. 2019), cert. denied, 140 S. Ct. 2565 (2020); *Maria S.* v. *Garza*, 912 F.3d 778, 784 (5th Cir.), cert. denied, 140 S. Ct. 81 (2019).

b. The decision below failed to recognize the important national-security interests at stake when it countenanced private damages liability against Border Patrol agents for their conduct in border-security investigations.

The court of appeals purported to distinguish *Hernández* on the ground that the Border Patrol agent at issue there "was literally 'at the border,'" whereas Agent Egbert had been told by respondent that the Turkish guest had already entered the United States through an airport in New York. Pet. App. 38a (citation omitted); see Br. in Opp. 16 (asserting that Agent Egbert knew the Turkish guest "had entered the country via a lawful port of entry"). But as the court of appeals itself recognized, Agent Egbert's investigation took place "at the United States-Canada border." Pet. App. 37a; see p. 2, *supra*. And Agent Egbert had reason to question whether the Turkish guest had traveled to Smuggler's Inn to engage in illegal cross-border activities. See pp. 2-4, *supra*.

Nor does it matter that the plaintiffs in *Hernández* "were foreign nationals, complaining of a harm suffered in Mexico," whereas respondent is a U.S. citizen "complaining of a harm suffered on his own property in the United States." Pet. App. 38a; see Br. in Opp. 16. That description omits the full context and the facts that bear

most directly on the separation of powers: Agent Egbert had an objectively reasonable basis for protecting national security by investigating potential immigration-law violations and suspected smuggling when he entered respondent's property at the border, and he then allegedly pushed respondent aside when respondent attempted to thwart the investigation.

This case therefore does not present a "conventional Fourth Amendment excessive force claim." Contra Pet. App. 38a. Considered at the appropriate level of generality, the facts alleged in the complaint directly implicate border security, which Congress and this Court have linked to national security. If the prospect of personal suits for damages prompted Border Patrol agents to hesitate in their duties, including by allowing citizens to disrupt their investigations, then the Border Patrol's national-security mission could be compromised. *Hernández*, 140 S. Ct. at 746-747. And a failure by the United States to do its part to prevent illegal cross-border activity could also have "potential effect[s]" on our government's "foreign relations" with Canada. *Id.* at 744.

Respondent asserts (Br. in Opp. 15) that "Agent Egbert was not securing the border or promoting national security" when he allegedly "pushed [respondent] to the ground." But again, that second-by-second parsing elides the features of the case that make it different from *Bivens*: at the time of the altercation, respondent was interfering with Agent Egbert's investigation of a foreign national who might have committed immigration violations or been involved in illegal cross-border activities. See Pet. App. 27a (Bumatay, J., dissenting), 50a-51a (district court opinion). As in *Hernández*, respondent's argument "misses the point": "The question is not whether national security requires" unwarranted

force by a Border Patrol agent—"of course, it does not"—"but whether the Judiciary should alter the framework established by the political branches for addressing cases in which it is alleged that * * * an agent at the border" unlawfully used excessive force. 140 S. Ct. at 746. And as in *Hernández*, the Court should not do so.

c. Finally, as with respondent's First Amendment claim, the existence of other statutes and regulations to deter and remedy excessive force by Border Patrol agents counsels against recognizing a new private damages remedy.

CBP's officers and agents are trained to follow a detailed use-of-force policy, under which "[t]he use of excessive force * * * is strictly prohibited." CBP, *CBP Use of Force - Administrative Guidelines and Procedures Handbook* i (Jan. 2021), https://go.usa.gov/xeM2H (*Use of Force Handbook*). Agents may use non-deadly force only with "reasonable grounds to believe that such force is necessary," and they "shall always use the minimum non-deadly force necessary to accomplish [their] mission." 8 C.F.R. 287.8(a)(1)(ii) and (iii). Alleged violations of the use-of-force standards must be "investigated expeditiously," 8 C.F.R. 287.10(a), and substantiated violations can "constitute grounds for disciplinary action," *Use of Force Handbook* i. In this case, as discussed above, respondent's complaints about Agent Egbert's use of force prompted an internal investigation. See pp. 4-5, *supra*. In addition, Border Patrol agents who willfully deprive any person of a constitutional right can be criminally prosecuted by the Department of Justice under 18 U.S.C. 242, and a successful prosecution can result in an order of restitution for the victim, 18 U.S.C. 3663(a)(1)(A). The Executive Branch uses all

of those tools to help ensure that Border Patrol agents fulfill their mission without unwarranted force, and those standards should not be supplemented by judicially crafted remedies.

Moreover, state tort law, as well as the FTCA and related administrative claims, may provide a basis to award damages to plaintiffs who are injured by federal law-enforcement officers in certain circumstances, including an assault and battery that would be actionable under state law. See 28 U.S.C. 1346(b)(1), 2680(h). As discussed above, respondent invoked CBP's administrative-claim process to seek damages. See pp. 4-5, *supra*. Those remedial structures offer yet more assurance that an implied damages remedy is not necessary to prevent Border Patrol agents from persistent uses of unnecessary force in the performance of their border-protection duties.

Respondent observes (Br. in Opp. 21) that this Court in *Carlson* stated that Congress has treated the FTCA and *Bivens* "as parallel, complementary causes of action." 446 U.S. at 19-20. But that establishes only that Congress did not *displace* a damages remedy in the contexts where one was recognized in *Bivens*, *Davis*, and *Carlson*. Congress's willingness to accept particular judicially created remedies does not suggest that the potential availability of an FTCA action should not cause this Court to pause before devising a new damages remedy for a different context. If the public interest supports holding Border Patrol agents personally liable for their work, then the decisions whether to recognize that remedy and on what terms must be made by Congress.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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