No. 21-147

In the Supreme Court of the United States

ERIK EGBERT, Petitioner,

v.

ROBERT BOULE, *Respondent*.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court recognized a cause of action under the Constitution for damages against Federal Bureau of Narcotics officers for alleged violations of the Fourth Amendment. The questions presented are:

1. Whether a cause of action exists under *Bivens* for First Amendment retaliation claims.

2. Whether a cause of action exists under *Bivens* for claims against federal officers engaged in immigration-related functions for allegedly violating a plaintiff's Fourth Amendment rights.

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INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute[1] ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated both to litigating immigration-related cases in the interests of United States citizens and to assisting courts in understanding federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of immigration-related cases. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization.

STATEMENT OF THE CASE

IRLI adopts the facts as stated by the petitioner, Erik Egbert, a Border Patrol agent with U.S. Customs & Border Protection. *See* Pet.'s Br. 3-9. In summary, Agent Egbert was investigating potential criminal conduct outside the Smuggler's Inn, just inside the U.S.-Canadian border. The Inn's proprietor, respondent Robert Boule, asked Agent Egbert to leave the premises and stepped between Agent Egbert and a foreign national who was the investigation's focus. Agent Egbert allegedly pushed Mr. Boule aside to continue the lawful investigation. As a result of this encounter, Mr. Boule allegedly sustained a back injury.

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[1] *Amicus* files this brief with all parties' written consent. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus* and its counsel—contributed monetarily to preparing or submitting the brief.

Mr. Boule complained to Agent Egbert's superiors and further alleges that Agent Egbert retaliated by reporting Mr. Boule to the Internal Revenue Service ("IRS") and other government agencies. These reports allegedly occasioned the IRS to audit Mr. Boule and the other agencies to investigate him.

Mr. Boule filed an unsuccessful administrative claim under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 ("FTCA"), but did not timely seek review in court. Instead, he filed a two-count complaint under *Bivens v. Six Unknown Named Agents of the Fed'l Bureau of Narcotics*, 403 U.S. 388 (1971), for the alleged push and retaliatory reports. The district court granted Agent Egbert summary judgment, but the Ninth Circuit reversed.

SUMMARY OF ARGUMENT

To reject Agent Egbert's third question—"[w]hether the Court should reconsider *Bivens*," Pet. at I—and thus determining "to dispose of this case as if *Bivens* were rightly decided" is "to start with an 'unreality.'" *Carlson v. Green*, 446 U.S. 14, 32 (1980) (Rehnquist, J., dissenting) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (Frankfurter, J., concurring). To avoid extending that unreality any further, this Court should recognize that even the *Bivens* majority likely would not extend *Bivens* today (Section I.A), that Congress has not ratified *Bivens* (Section I.B), and that an FTCA remedy should preclude a *Bivens* remedy where the FTCA overlaps with *Bivens* (Section I.C). Also weighing against extending *Bivens* here is the immigration context that involves foreign affairs (Section I.D) and the fact that Mr. Boule came into contact with Agent Egbert only when Boule tried

physically to impede a lawful exercise of authority (Section I.E). Finally, though the general separation-of-powers issue common to all *Bivens* actions counsels against any further extension, (Section I.F), if this Court extends *Bivens* to citizens such as Mr. Boule, that extension should not apply to criminals and illegal aliens who are not lawfully present in the United States (Section I.G).

ARGUMENT

I. THIS COURT SHOULD NOT EXTEND *BIVENS* TO FOURTH AMENDMENT CLAIMS IN IMMIGRATION CASES.

Although *Bivens* and this case are similar in that both invoke the Fourth Amendment, a number of differences warrant a different result here. First, there are significant differences between this Court's precedents, and the FTCA, circa 1971 and today. Second, there are significant differences between the improper law-enforcement actions in *Bivens* and Agent Egbert's justified immigration-related actions here.

A. *Bivens* is self-limiting and counsels against extending *Bivens* here.

Two facets of *Bivens* are important: (1) when this Court decided *Bivens*, the FTCA lacked an action for Mr. Bivens' injuries, and (2) *Bivens* itself included the special-factor analysis that has doomed all proposed extensions of *Bivens* for the past forty-plus years. Given the amendment of the FTCA to cover Mr. Bivens' injuries, it is not even clear whether the *Bivens* majority would find a *Bivens* action here in the first place.

Indeed, by including the special-factors analysis, *Bivens* contained the seeds of its own undoing:

> The present case involves no *special factors* counselling hesitation *in the absence of affirmative action by Congress*. … For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.

Bivens, 403 U.S. at 396-97 (emphasis added). While this Court's subsequent rejection of implied private rights of action perhaps motivated the Court's special-factor analysis since 1980, it is important to note that even the *Bivens* court weighed the presence or absence of congressional action in a special-factor calculus on the need for an implied right of action.

B. Congress did not ratify *Bivens*.

Although Congress has been aware of *Bivens* from the start and has *legislated around* it twice—in 1974 and 1988—Congress has never affirmatively *ratified* it. After all, exercising the judicial power under *Bivens* in lieu of an act of Congress is a *judicial act*. If this Court were to retreat from *Bivens*, the Court would not be thwarting congressional intent. The only way for Congress to ensure a cause of action for these kinds of torts would be to enact an affirmative cause of action.

This Court assumes congressional awareness of important decisions, *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.,* 470 U.S. 116, 128

(1985), so it should be no surprise that Congress was indeed aware of *Bivens* when amending the FTCA in 1974 and 1988. In both instances, however, Congress did not enact *Bivens* into law. Instead, Congress noted *Bivens*' existence and attempted to get out of the way.

In 1974, Congress amended the FTCA exclusion for intentional torts that had prevented Mr. Bivens' assertion of an FTCA action. PUB. L. NO. 93-253, § 2, 88 Stat. 50 (1974); *compare* 28 U.S.C. § 2680(h) (1970) *with* 28 U.S.C. § 2680(h). In the process, the Senate was aware of the potential effect on *Bivens* and stated how the 1974 amendment "should be viewed":

> [T]his provision should be viewed as a counterpart to the *Bivens* case and its [progeny], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved).

S. REP. NO. 93-588, at 3 (1973). In waiving the United States' sovereign immunity for its agents' intentional torts, Congress did not want to go on record as barring judicial action to fashion remedies directly against the individual agents under *Bivens*.

In 1988, when Congress made the FTCA exclusive *vis-à-vis* state torts, Congress again avoided *Bivens*—this time statutorily—by excepting *Bivens*-style actions from the FTCA's new exclusivity clause. *See* PUB. L. NO. 100-694, § 5, 102 Stat. 4563, 4564 (1988); 28 U.S.C. § 2679(b)(2)(A) (FTCA exclusivity "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"). The House report made clear that the amended statute "would not affect" *Bivens*:

> The second major feature of section 5 is that the exclusive remedy expressly does not extend to so-called constitutional torts. *See Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S., 388 (1971). Courts have drawn a sharp distinction between common law torts and constitutional or *Bivens* torts. Common law torts are the routine acts or omissions which occur daily in the course of business and which have been redressed in an evolving manner by courts for, at least, the last 800 years. … A constitutional tort action, on the other hand, is a vehicle by which an individual may redress an alleged violation of one or more fundamental rights embraced in the Constitution. Since the Supreme Court's decision in *Bivens*, supra, the courts have identified this type of tort as a more serious intrusion of the rights of an individual that merits special attention. *Consequently, H.R. 4612 would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights*.

H. REP. NO. 100-700, at 6 (1988) (emphasis added); *see also* 134 CONG. REC. 15,597, 15,600 (Oct. 12, 1988) ("I

would like to emphasize that this bill *does not have any effect* on the so-called *Bivens* cases or Constitutional tort claims.") (emphasis added) (Sen. Grassley). As in 1974, the 1988 FTCA amendment did not foreclose judicial action to fashion a damages remedy directly against individuals under *Bivens*, but Congress also did not *affirmatively* enact a remedy for constitutional torts or require this Court to continue *Bivens*.

Although this Court has "found it 'crystal clear' that Congress intended the FTCA and *Bivens* to serve as 'parallel' and 'complementary' sources of liability," *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61. 68 (2001), that in no way ratifies or freezes in place *Bivens* circa 1971 as a legislative mandate to follow *Bivens* in any given case or context. Indeed, Congress lacks constitutional authority to "requir[e] the federal courts to exercise 'the judicial Power of the United States' in a manner repugnant to the text, structure, and traditions of Article III." *Plaut v. Spendthrift Farm*, 514 U.S. 211, 217-18 (1995).[2] But the 1974 and 1988 FTCA actions and inactions did no such thing. Instead, Congress merely left a judicial issue to the judiciary, without any legislative imprimatur or mandate. *Bivens* itself included the "special-factors" narrowing, 403 U.S. at 396, so the congressional action and inaction here leave this Court free to conclude—based on the separation-of-powers issue

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[2] Unlike in *Plaut*, no one is seeking to re-open the *judgment* on remand under which Mr. Bivens presumably recovered. The question is whether the *Bivens* holding can apply prospectively, even if subsequent decisions undermine the holding's validity.

alone, *see* Section I.F, *infra*—that *Bivens* actions are simply not extendable.

C. Mr. Boule's FTCA remedy displaces any Fourth Amendment *Bivens* remedy.

Although the *absence* of an alternate remedy is no "special factor" for extending *Bivens*, *see United States v. Stanley*, 483 U.S. 669, 683 (1987) ("it is irrelevant to a 'special factors' analysis whether the laws currently on the books afford Stanley … an 'adequate' federal remedy for his injuries"), the presence of an alternate remedy can preclude resort to *Bivens*:

> In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.

Wilkie v. Robbins, 551 U.S. 537, 550 (2007). An adequate remedy outside *Bivens* is enough for this Court to withhold *Bivens* relief: "if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1858 (2017). Certainly, a *Bivens* action "is not an automatic entitlement no matter what other means there may be to vindicate a protected interest," *Wilkie*, 551 U.S. at 550, and Mr. Boule could have sued under the FTCA. *Compare* 28 U.S.C. § 2680(h) (1970) (FTCA barred assault suits when Mr. Bivens sued) *with* 28 U.S.C. § 2680(h) (FTCA no longer bars assault

suits); PUB. L. NO. 93-253, § 2, 88 Stat. at 50.[3] Mr. Boule elected to proceed under *Bivens*, avoiding the FTCA's limitations. That is reason enough to decline to extend *Bivens* in the Fourth Amendment context.

D. The immigration context is a special circumstance.

Agent Egbert was investigating a foreign national just inside the U.S. border who was coordinating with others on foreign soil to commit crimes in the U.S. That context warrants judicial deference *vis-à-vis* Congress:

> Since regulating the conduct of agents at the border unquestionably has national security implications, the risk of undermining border security provides reason to hesitate before extending *Bivens* into this field.

Hernandez v. Mesa, 140 S.Ct. 735, 747 (2020) ("*Hernandez II*"). Also, "[f]oreign policy and national security decisions are delicate, complex, and involve large elements of prophecy for which the Judiciary has neither aptitude, facilities, nor responsibility." *Id.* at 749 (interior quotation marks and alterations

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[3] Ironically, because the FTCA now includes a damages claim for the type of Fourth Amendment claims at issue in *Bivens*, this Court should not even extend *Bivens* circa 1971 to *Bivens* today. To be sure, this Court rejected the idea that the 1974 amendment displaced a *Bivens* claims on the *Bivens* facts: ""We … found it 'crystal clear' that Congress intended the FTCA and *Bivens* to serve as 'parallel' and 'complementary' sources of liability." *Malesko*, 534 U.S. at 68 (quoting *Carlson*, 446 U.S. at 19-20). But the history on which *Carlson* relied was inconclusive. *See* Section I.B, *supra*.

omitted); *see also Arizona v. United States*, 567 U.S. 387, 409 (2012) (immigration-related decisions and enforcement "touch on foreign relations"). Especially where the FTCA applies, courts should not entangle themselves—without express congressional authorization—in immigration matters close to the nation's international borders.

E. Mr. Boule's interference with law enforcement is a special circumstance.

In the three instances where this Court has found a *Bivens* remedy, the plaintiff had a sympathetic case (*e.g.*, the victim of an unwarranted home-invasion-style investigation, sexual harassment, or cruel and unusual punishment of a prisoner). In his claim under the Fourth Amendment, Mr. Boule came into contact with Agent Egbert only because Mr. Boule attempted to intercede between Agent Egbert and a lawful goal of his investigation.

To the extent that *Bivens* relies in part on equity, *see Bivens*, 403 U.S. at 399-407 (Harlan, J., concurring), Mr. Boule has "unclean hands" that deny him an entitlement to such equitable relief: "'a court will not redress a wrong when he who invokes its aid has unclean hands.'" *United States v. Payner*, 447 U.S. 727, 745 (1980) (quoting *Olmstead v. United States*, 277 U.S. 438, 483 (1928)). In any event, this Court should consider Mr. Boule's interference—which caused the alleged injury—a special circumstance that bars extending *Bivens*.

F. Separation of Powers is a special factor against extension.

Although it applies in *every* decision on whether to extend *Bivens*, Separation of Powers doctrine is

another special factor that counsels against extension: "When evaluating whether to extend *Bivens*, the most important question is 'who should decide' whether to provide for a damages remedy, Congress or the courts?" *Hernandez II*, 140 S.Ct. at 750 (interior quotation marks omitted). The fact that the "correct answer most often will be Congress," *id.* (interior quotation marks omitted), does not make the factor any less special.

Extending *Bivens* undermines our governmental system, which requires the political branches to resolve political issues. *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 311-12 (2014). The failure to extend *Bivens* further after 1980 reflects a concern about the separation of powers: "when 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." *Hernandez II*, 140 S.Ct. at 741. There is no reason for the Court to continue the practice without Congress taking the hint and enacting legislation allowing or barring such actions: "Having sworn off the habit of venturing beyond Congress's intent," the Court should no longer "accept respondents' invitation to have one last drink." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). Recognizing the separation-of-powers conflict inherent in *Bivens* as a special factor would justify a decision either overruling *Bivens* entirely or refusing to extend it further.

In addition to the core decision of whether to allow a private right of action at all, the question of how to address constitutional torts presents many subsidiary

questions—such as limits on attorneys' fees—that only Congress can answer:

- The Equal Access to Justice Act includes many limits on attorney-fee awards, including an hourly cap of $125—inflation adjusted from 1996—for actions against the United States, whereas civil-rights litigation against state and local government pays market rates, which can exceed $1,000 hourly. *Compare* 28 U.S.C. § 2412(d)(1) *with* 42 U.S.C. § 1988(b); *Murphy v. Smith*, 138 S.Ct. 784, 789 (2018) ("strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate—represents a 'reasonable' fee") (interior quotation marks omitted).
- The FTCA caps attorney-fee awards at 25% for litigation and 20% for settled cases, but there is no limit—apart from ethical standards in the relevant jurisdiction—for *Bivens* actions. *See* 28 U.S.C. § 2678.

When it comes to such issues, to ask the question "who should decide," *Hernandez II*, 140 S.Ct. at 750, is to answer it: Congress.

G. Even if the Court finds a *Bivens* claim for citizens like Mr. Boule, the Court should limit its holding to citizens.

Under the facts of this case, Agent Egbert had a good reason to be suspicious of the Turkish national arriving at the Smuggler's Inn from Seattle: the Turkish man crossed illegally into Canada that night. Pet.'s Br. at 8. But both the Turkish man and Mr. Boule were lawfully present in the United States. If this Court finds a *Bivens* action under these

circumstances, the Court should confine the action to plaintiffs lawfully present in the United States.

While border-protection actions sometimes involve citizens and others lawfully present, they typically involve foreign-based criminals and illegal aliens who are not lawfully present in the United States, and have not, in the legal sense, entered the United States. These criminals and illegal aliens could not have a *Bivens* action, even if citizens such as Mr. Boule had one.

"The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Generally, "[e]ntry" is a term of art that requires "physical presence in the United States" and "freedom from official restraint." *United States v. Argueta-Rosales*, 819 F.3d 1149, 1158 (9th Cir. 2016); *accord United States v. Kavazanjian*, 623 F.2d 730, 736 (1st Cir. 1980). By the nature of the case, aliens who allege tortious contact with border enforcement agents were not "free of official restraint" at the time of that alleged contact.

Aliens who have "effected entry" into the United States enjoy "additional rights and privileges not extended to those . . . who are merely 'on the threshold of initial entry.'" *Length v. Barber*, 357 U.S. 185, 187 (1958) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)). Accordingly, "[t]he Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores." *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring), *quoted with approval in Kwong Hai Chew*

v. Colding, 344 U.S. 590, 596 n.5 (1953). Excluding an alien seeking admission is an act of sovereignty, and "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Accordingly, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Mezei*, 345 U.S. at 212 (interior quotation marks omitted). Instead, "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003).[4] Aliens who have not entered the United States thus lack the constitutional rights whose alleged violation forms the basis of *Bivens* actions.

CONCLUSION

The judgement of the court below should be reversed.

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[4] Although *Demore* discusses precedents dating back more than a century on detention during deportation, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, PUB. L. NO. 104-208, Div. C, 110 Stat. 3009, 3009-546 to 3009-724 ("IIRIRA"), changed the nomenclature: "What was formerly known as 'deportation' is now called 'removal' in IIRIRA." *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 33 n.1 (2006). What *Demore* discusses about detention during deportation is applicable to detention during removal here.

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Respectfully submitted,

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