

No. 21-147

In The
Supreme Court of the United States

—◆—
ERIK EGBERT,

Petitioner,

v.

ROBERT BOULE,

Respondent.

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

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

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

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

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



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

SUMMARY OF THE ARGUMENTS

The Ninth Circuit's extension of *Bivens* into new contexts failed to consider special factors previously recognized by this Court, as well as other factors, that caution against such a move because doing so would adversely affect the unique work of Border Patrol agents.

The Ninth Circuit's election to find Border Patrol agents indistinguishable from F.B.I. agents as "federal law enforcement officials" and to find that no special factors existed puts more than 132,000 federal law enforcement officials in 80 other federal organizations at risk for personal liability under *Bivens*.

The Ninth Circuit's decision ignored Congress' designation of the Border Patrol as a unique law enforcement organization whose agents discharge duties that implicate foreign policy, diplomacy and national security. It also failed to explore the special factors created by Border Patrol agents' focus on physically protecting the border, their unique working environment and the need for agents to retain confidence in their ability to act while operating alone and being severely outnumbered in remote parts of the country. The Ninth Circuit also failed to explore the enforcement, foreign policy and national security differences between the northern and southern borders.

This Court may want to explore whether the Ninth Circuit erred by relying on the flawed summary judgment process as a factual foundation for exercising what is arguably the judiciary's most controversial

power – the quasi-legislative expansion of the judicially-created *Bivens* remedy.

This Court should grant the petition for writ of certiorari and reverse the judgment of the court of appeals because its decision will adversely impact the ability of Border Patrol agents to engage in the critical national security activity of physically guarding our borders against multiple threats.



INTRODUCTION

In the 50 years since this Court decided *Bivens*, it has expanded its application twice. The last such expansion was in 1980.² Since then, the benefit of hindsight has permitted a valuable view of the impact *Bivens* has had on the three narrow areas where the Court countenanced its application.³ But any extension of *Bivens* is treacherous since its potential impact in a new area is subject to only forward-looking

² *Davis v. Passman*, 422 U.S. 228 (1979) (holding that an administrative assistant, who sued Congress for gender discrimination, could pursue money damages for violating the equal protection principles embodied in the Due Process Clause of the Fifth Amendment); *Carlson v. Green*, 446 U.S. 14 (1980) (permitting a *Bivens* remedy to proceed against prison officials based on a violation of the Eighth Amendment).

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

speculations. Hence, this Court's prior and growing hesitancy to expand its application.

In this case, the Ninth Circuit acknowledged it was expanding *Bivens* to provide Boules with a remedy for Border Patrol Agent Egbert's as yet unproven constitutional violations. *Boule*, 998 F.3d at 387. While the Court characterized this expansion as "modest," *id.*, the discussion below demonstrates that applying *Bivens* in the contexts presented may have far-reaching, adverse consequences.

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

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

to pause before applying *Bivens* in a new context or to a new class of defendants – [the court must] reject the request.” *Hernandez*, 140 S.Ct. at 743. The lesson from the Court is, thus, a strong presumption *against* expanding *Bivens*.

The decision of the court of appeals diverges from this Court’s admonition to avoid exercising a quasi-legislative function⁴ and directly contradicts the Court’s recent, clear, and correct conclusion that *Bivens* should not be extended in the border enforcement context. *Id.* at 746; *see also Haig v. Agee*, 453 U.S. 280, 292 (1981) (“Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”); *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1403 (2018) (“The political branches, not the judiciary, have the responsibility and the institutional capacity to weigh foreign-policy concerns.”).

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

⁴ This Court has characterized expanding *Bivens* as a “dis-favored” judicial activity. *See Ziglar v. Abbasi*, 137 S.Ct. 1843, 1857 (2017); *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009).

that apply to a federal law enforcement agency not previously examined by this Court.

◆

ARGUMENTS

I. The Ninth Circuit Overlooked the Distinct Role of the Border Patrol By Wrongly Grouping Border Patrol and F.B.I. Agents Together as Simply “Federal Law Enforcement Officials.”

A. The Ninth Circuit’s Analysis Threatens to Subject Tens of Thousands of Federal Law Enforcement Officials to *Bivens* Actions.

One of the two elements cited by the Ninth Circuit to justify its “modest” extension of *Bivens* was the Court’s belief that “border patrol and F.B.I. agents are both federal law enforcement officials. . . .” *Boule*, 998 F.3d at 387. But this election to group Border Patrol and F.B.I. agents together as one amorphous body created an enormous class of potential defendants – federal law enforcement officials – that, according to the Court’s examination, did not warrant further consideration of special factors because *Bivens* had already been extended to cover F.B.I. agents. *Id.* That analytical sleight of hand has now opened the door to not only Border Patrol agents, but tens of thousands of other federal law enforcement officials all being subject to personal liability for damages.

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

The fact of so many federal law enforcement officials existing within the federal government representing such a diverse range of interests and responsibilities suggests that lumping them all together as “federal law enforcement officials” was too simplistic an approach. Further, this Court in *Abbasi* made abundantly clear that lower courts “must pause when implying a damages remedy implicates economic and governmental concerns” such as “the substantial monetary cost of defending and indemnifying claims against federal officials, as well as the time and

administrative costs incident to the litigation.” *Abbasi*, 137 S.Ct. at 1856. The Ninth Circuit’s decision exponentially magnified this potential financial burden to the government by including all federal law enforcement agents within *Bivens*’ reach. Rather, this Court may find that a more nuanced review of a particular federal law enforcement officer’s duties, responsibilities and working conditions is required before determining that no special factors exist for that particular group of federal officers.

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

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

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

of the U.S. Customs and Border Protection. *See id.*, Subtitle D, sec. 441.

Congress directed that DHS and the Border Patrol focus primarily on preventing and mitigating the risk of terrorist attacks. *See* 6 U.S.C. §111(B)(1)(A) and (B) [“. . . preventing terrorist attacks” and reducing the country’s vulnerability to terrorism]. Congress’ new anti-terrorism mandate for the Border Patrol was reflected in its mission statement: “Since the terrorist attacks of September 11, 2001, the focus of the Border Patrol has changed to detection, apprehension and/or deterrence of terrorists and terrorist weapons.” *See* U.S. Border Patrol Mission Statement, <https://www.cbp.gov/border-security/along-us-borders>. Border Patrol agents also focus on preventing the entry of weapons of mass destruction. *See* Chad C. Haddal, Cong. Rsch. Serv., RL32562, *Border Security: The Role of the U.S. Border Patrol* (2010) at 3 [hereinafter “Haddal at . . .”]. The Border Patrol also retains its historic obligation to prevent the illegal trafficking of people and contraband across our nation’s borders. *See* 6 U.S.C. §211(e)(3). In contrast, the F.B.I.’s obligations span from anti-terrorism to combating cybercrime, from detecting and stopping foreign espionage to protecting civil rights, and from combating transnational criminal syndicates to stopping significant white-collar and violent crimes. *See* <https://www.fbi.gov/about/mission>. Even where the interests of the two agencies intersect, the manner in which agents perform their duties is materially different. *See below*.

The disparate missions of the Border Patrol and F.B.I. are reflected in the geographic breadth of their respective offices. Figure 1, below, shows the exclusive

province of the Border Patrol within the United States, while Figure 2, below, shows the worldwide reach of the F.B.I.

Figure 1:



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

Figure 2:



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

The location of Border Patrol's stations suggest that the daily work of its agents has a natural tendency to affect diplomacy, foreign policy, and national security, all factors counseling hesitation. *Hernandez*, 140 S.Ct. at 745, 749.

This Court need only look back at its recent decision in *Hernandez* where it found that a Border Patrol agent's cross-border killing of a Mexican national created a diplomatic incident between the United States and Mexico that was "addressed through diplomatic channels." *Id.* at 746. These types of incidents, the Court noted, resulted in a foreign policy decision by the United States and Mexico to create a joint Border Violence Prevention Council. *Id.* Tragic as it may have been, the cross-border shooting in *Hernandez* was not a one-time event. See *Swartz v. Rodriguez*, No. 18-309. Although the *Swartz* case was ultimately dismissed following this Court's *Hernandez* decision, the impact of this one law enforcement action by one Border Patrol agent has now resulted in a claim, Petition No. P-2030-20, against the United States in the Inter-American Commission on Human Rights. See <https://hilliardshadowenlaw.com/wp-content/uploads/2020/10/IACHR-Complaint-copy.pdf>.⁵

It is the very nature of the Border Patrol's mission, hard up against the international borders of our country, that create the situations giving rise to international incidents, the need for diplomacy and

⁵ Counsel was unable to locate a direct commission reference for the case.

foreign policy and the day-to-day security of this nation. Border Patrol's mission, geographic location and mandate for interdicting cross-border law breakers makes it unique. No other federal law enforcement agency, including the F.B.I., on a daily basis, operates in such an environment. And, no other federal law enforcement agency is charged with the responsibility to protect the physical boundaries of our nation.⁶ As this Court recognized, "the conduct of agents positioned at the border has a clear and strong connection to national security. . . ." *Hernandez*, 140 S.Ct. 746.

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

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

The U.S. Border Patrol is a uniformed, mobile, paramilitary force. *United States INS, United States*

⁶ For example, if an agency's intelligence revealed an expected breach of the border by human or drug traffickers or other nefarious actors, that agency would notify the appropriate Border Patrol sector of the information in order to fashion an appropriate response. No other law enforcement agency would themselves develop or execute the interdiction.

Border Patrol v. Federal Labor Relations Auth., 12 F.3d 882, 883 (9th Cir. 1993). They are “focused 24/7 on securing our international land borders and coastal waters between ports of entry” and “safeguarding the American people from terrorists and their weapons, drug smugglers, and illegal entry of undocumented noncitizens.” <https://www.cbp.gov/careers/usbp-what-we-do>. They are responsible for 6,000 miles of Mexican and Canadian land borders and more than 2,000 miles of coastal borders. *Id.* Border Patrol agents work in field units, horse patrols, bike patrols, K-9 units, boat patrols, off-road vehicle units, tactical units, search and rescue units and rapid response teams. *Id.* Border Patrol agents actively search for, detect and track transnational criminals trafficking in narcotics and human beings. *Id.* They work in some of the most remote locations in the country; sometimes from forward operating bases. *See* Map of Border Patrol Duty Locations, *supra*; *see also* Office of Inspector General, Department of Homeland Security, *Conditions at CBP’s Forward Operating Bases along the Southwest Border (2016) (Redacted)* at 2, <https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-37-Feb16.pdf>.

In fiscal year (FY) 2020, there were 19,740 Border Patrol agents. *See* U.S. Customs and Border Protection, *SNAPSHOT: A summary of CBP Facts and Figures*, <https://www.cbp.gov/sites/default/files/assets/documents/2021-Apr/cbp-snapshot-mar-2021.pdf>. In FY2020, these agents encountered 405,036 people who were arrested, held for further processing or – in most cases – returned to Mexico. *See* U.S. Customs and Border Protection,

CBP Enforcement Statistics Fiscal Year 2021, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics>. In FY2021 through July, this number nearly tripled as Border Patrol agents encountered 1,278,376 people. *Id.* In FY2020, Border Patrol agents engaged in 5,071 efforts to rescue people along the southwestern border, which was slightly higher than the 4,920 efforts in FY2019. *See U.S. Customs and Border Protection*, CBP Enforcement Statistics Fiscal Year 2021, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics>. In FY2021 through July, agents engaged in 10,275 rescue efforts. *Id.*

The unique reality of a Border Patrol agent's daily work was described in 2018 testimony by Pete Hermansen, a former Border Patrol agent who, during his 21-year career, held numerous leadership and tactical unit positions including U.S. Customs and Border Protection's Director of Use of Force. *See* Transcript of Record (Day 15) at 7, *United States v. Swartz*, CR-15-1723 (D. Ariz. 2018). During testimony in the *Swartz* criminal trial, Hermansen testified that the vast majority of Border Patrol agents operate alone, in remote areas with "backup a long way away." *Id.* at 11. Solo agents have arrested 50-200 people at a time and there have been instances where a shift of 15-20 agents have arrested a couple of thousand people. *Id.* During traffic stops, Border Patrol agents typically sprint to the suspect vehicle to try and contain or capture the suspected traffickers and unauthorized immigrants inside the vehicle who frequently try to abscond as soon as the vehicle stops. *Id.* This differs

from other law enforcement officers who usually approach such vehicles slowly and cautiously with their safety and the safety of the occupants in mind. *Id.* Border Patrol agents have been attacked by rock throwers thousands of times. *Id.* at 10. It is a daily occurrence. *Id.* Unlike other types of agents, Border Patrol agents have no obligation to retreat in the face of assaults and they are not trained to take cover as a first option when attacked. *Id.* at 12.

Along the international border, Border Patrol agents face off against an array of criminal actors and organizations. *Id.* at 19. They can be “minimally structured, fly-by-night, quick opportunists, all the way up to highly structured, highly organized elements that have scouts, response elements, scaling fence elements, . . . lookouts [and] . . . communication elements.” *Id.*⁷

This information indicates that the nature of Border Patrol agents’ regular engagements in the execution of their duties makes them particularly vulnerable to personal lawsuits for money damages. This factor is incompatible with the reality that agents often must make quick decisions under stressful, dynamic circumstances and reluctance to make such

⁷ The physically demanding, rugged and dynamic nature of Border Patrol agents’ work may explain why the Border Patrol, as a component of Customs and Border Protection, has the second lowest morale among all DHS agencies. See Government Accountability Office, *DHS Employee Morale: Some Improvements Made, but Additional Actions Needed to Strengthen Employee Engagement* (2021) at 9, <https://www.gao.gov/assets/gao-21-204.pdf>. The only DHS agency to rank lower is the Countering Weapons of Mass Destruction Office. *Id.*

decisions can lead to harm, both to the agent and to those with whom they interact.

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

The United States' northern border is more than 4,000 miles and spans 12 states. *See* Haddell at 3. This border features vast mountain ranges such as the Rockies, the Great Lakes, numerous river systems and extreme snow and cold in the winter. *Id.* The United States' southern border with Mexico is 1,952 miles and spans four states. *See* Haddell at 13. It features expansive and harsh desert landscapes where temperatures average about 100 degrees for much of the year, mountain ranges and the Rio Grande River along the Texas border with Mexico. *Id.* at 3.

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

Egbert is part of the less than 15 percent contingency of Border Patrol agents deployed along the northern border and his focus and actions will differ from those of the majority of agents stationed on the southern border. The expansion of *Bivens* greenlighted by the court of appeals, however, would apply equally to all agents. This Court may believe this constitutes a special factor counseling hesitation against expanding *Bivens* to all 100 percent of Border Patrol agents when Egbert only represents the 15 percent of agents on the northern border.

II. The Insufficiently Developed and Perhaps Erroneous Record in this Case Should Not be the Foundation Upon Which the Judiciary Engages in a Rare but Significant Expansion of a Judicially Created Remedy and Should Result in Deference to Congress.

The record upon which this litigation arises rests on opposing motions for summary judgment, which mandated that the Ninth Circuit “draw all reasonable factual inferences in favor of Plaintiff, Robert Boule.” *Boule, supra* at 385. But relying on summary judgments to decide whether to extend an extremely rare, quasi-legislative⁸ *Bivens* remedy is a dangerous step since the presumed facts may be inaccurate.

⁸ Expanding *Bivens* is “disfavored” precisely because it requires a court to invoke its quasi-legislative authority to expand a remedy that it, as opposed to Congress, created. *See Abbasi*, 137 S.Ct. at 1843 (“it is a significant step under separation-of-powers

The *Swartz* case provides an apt example. The Ninth Circuit set forth the dilemma in its opinion:

We take the facts as they are pleaded in the First Amended Complaint. These facts have not been proven, and they may not be true. But we must assume that they are true for the sake of determining whether the case may proceed. [footnote omitted.]

Rodriguez v. Swartz, 899 F.3d 719, 727 (2018), *vacated and remanded by Swartz v. Rodriguez*, 140 S.Ct. 1258 (2020). Critical to the Ninth Circuit’s decision permitting the *Bivens* action to proceed were Rodriguez’s claims that J.A. had been “peacefully walking,” “not committing a crime” and had not thrown rocks or engaged “in any violence or threatening behavior against anyone or anything.” *Id.* at 727, 731. But, unbeknownst to the court, some four months *before its decision*, on March 29, 2018, all of these essential facts were proven to be false.

While the *Bivens* case was pending in the Ninth Circuit, Agent Swartz was tried for murder in the District of Arizona. *United States v. Swartz*, CR-15-1723 (D. Ariz. 2018). On day seven of the criminal trial, government expert witness James Tavernetti testified regarding a video of the shooting event, which he acknowledged was an “eyewitness” account of the incident. *Id.*, Transcript of Record (Day 7), March 29,

principles for a court to determine that it has the authority . . . to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation.”).

2018, at 161. He testified that the video showed J.A. throwing rocks in the direction of the Border Patrol agents at the scene. *Id.* at 168-69. Tavernetti also testified that he would be the only government witness who would address the video of the incident. *Id.* at 160-61.

The problem is clear. If it were not for this Court's decision in the *Hernandez* case,⁹ the Court probably would have resolved the same *Bivens* question in the *Swartz* case, based on facts that were not true. And if this Court had not reversed the Ninth Circuit in *Swartz*, the Ninth Circuit and the judiciary generally would have been criticized for having expanded its extraordinary, quasi-legislative power on erroneous facts. The same problem potentially exists in this case because the facts may yet prove untrue.

There is also the question of whether judges can give fidelity to the summary judgment mandate that all factual inferences be viewed in the light most favorable to the nonmoving party or whether they "massage" the facts. See Suja A. Thomas, *Reforming the Summary Judgment Problem: The Consensus Requirement*, Fordham Law Review, Vol. 86 (2018) at 2251 [Discussing the judicial problem of massaging facts in summary judgment cases].

Massaging facts can occur in a number of ways. It can occur when a court ignores

⁹ This Court vacated and remanded in light of its decision in *Hernandez v. Mesa*. The *Swartz* case was subsequently dismissed in the district court.

relevant facts. It also can happen when courts do not consider different ways to view the facts. In other words, they do not take into account the reasonable inferences favoring the party not moving for summary judgment. . . . [A]lthough judges should emphasize to one another when facts are ignored or otherwise massaged, this practice has gone on for some time and no promise of change is apparent.

Id. at 2252, 2257.

Despite these problems, courts routinely resolve cases on summary judgment motions. But this Court may decide the identified problems counsel hesitation when it is being asked to exercise its quasi-legislative power in an area where there are national security implications and a risk of undermining border security, and when Congress is better suited to engage in the requisite fact-finding and to define the scope of a remedy.

◆

CONCLUSION

This Court should grant certiorari to expressly hold that the *Bivens* remedy should not apply in the border enforcement context, which implicates foreign policy, diplomacy and national security. These domains are the prerogative of other branches of government.

The prudence of judicial deference is exemplified by the decision below. By permitting Boule's lawsuit to

proceed, the court of appeals exposed thousands of federal law enforcement agents, not only Border Patrol agents, to liability for personal damages. The court failed to consider the potentially massive financial impact of the decision, which was mischaracterized as representing only a “modest” extension of *Bivens*.

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

Finally, the court below acted in a disfavored, quasi-legislative manner based on an untested, incomplete factual record.

For the foregoing reasons, the petition should be granted and this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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