No. 21-147

IN THE

Supreme Court of the United States

ERIK EGBERT,

Petitioner,

v.

ROBERT BOULE,

Respondent.

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

BRIEF OF *AMICUS CURIAE* NATIONAL POLICE ACCOUNTABILITY PROJECT IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild to protect the rights of individuals in their encounters with law enforcement and detention facility personnel. NPAP provides training for its attorney members, offers public resources, and engages in legislative advocacy on issues of law enforcement misconduct and accountability. It has hundreds of attorney members throughout the United States who represent clients injured by law enforcement use of force. NPAP's central mission is to promote the accountability of law enforcement officers and their employers for violations of the Constitution and the laws of the United States. The approach Petitioner advocates directly undermines the interest of NPAP, its members, and their clients.

INTRODUCTION AND SUMMARY OF ARGUMENT

Border Patrol agent Erik Egbert petitioned this Court to review whether a *Bivens* action exists for Fourth Amendment violations committed by federal officers performing "immigration-related functions."[2]

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

[2] Mr. Boule's case presents *Bivens* claims for violations of both the First and Fourth Amendments. This brief focuses on the Fourth Amendment *Bivens* claim.

Pet. (I). In his brief, he argues against the availability of *Bivens* actions in "the border context." *E.g.*, Pet'r Br. 36. Petitioner's nebulous language cannot veil the enormous sweep of his request. Petitioner asks this Court to eliminate *Bivens* actions in any constitutional tort case involving an immigration officer or arising near a border—that is, any case where the defendant works for the Government's largest law enforcement agency, and any case that takes place in a geographic territory that covers two-thirds of the U.S. population. This Court should deny that radical request.

Petitioner and his *amici* contend that blanket elimination of *Bivens* remedies is appropriate because cases arising in "the border context" necessarily raise grave concerns of national and border security. That is not true as a logical or factual matter. *Infra* § I. On the contrary, in many circumstances little distinguishes "immigration-related" law enforcement from purely domestic law enforcement, or constitutional violations committed by "immigration-related" officers from those committed by other federal officers. Denying a *Bivens* remedy in any case remotely related to immigration or the border would lead to inequitable and anomalous results.

Nor would allowing some *Bivens* actions to proceed lead to under-enforcement of national and border security. *Infra* § II. Though the Government has posited that the threat of personal financial liability from *Bivens* actions chills officer conduct, extensive empirical research shows that officers in fact face negligible risks of personal financial liability. Because officers are almost always indemnified, there is little personal

financial risk, thus eliminating the first domino in the Government's theory leading to a chilling effect.

Without a *Bivens* remedy, the constitutional rights of the millions of people who interact with law enforcement in "the border context" are purely theoretical. *Infra* § III. No adequate alternative remedies exist, not least because administrative avenues for relief are broken down. The Court should affirm the judgment below.

ARGUMENT

I. Law Enforcement In "The Border Context" Does Not Inherently Raise National Or Border Security Concerns.

Petitioner raises the specter of national and border security concerns in "the border context" well over a dozen times in his opening brief. Pet'r Br. 36; *see, e.g.*, *id.* at 3, 9, 10, 12, 13, 29-32, 35, 37-38. According to his *amici*, any *Bivens* action related to immigration officers or the border "necessarily" and "[i]nherent[ly]" threatens the security of the nation. Former Attorneys General Br. at 13; Independent Women's Law Center Br. at 13; *see also* Immigration Reform Law Institute Br. at 9-11; National Border Patrol Council Br. at 12. But not every suit involving the border jeopardizes those significant interests. Garden-variety law enforcement conduct and misconduct routinely take place near the nation's borders and in situations involving its immigration officials. The concerns are often no different than with law enforcement closer to the interior. Petitioner's bright-line rule flouts this Court's admonition that "national-

security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'" *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017). It must be rejected.

A. Law enforcement in the border context often resembles, and includes, routine domestic law enforcement.

Petitioner and his *amici* combine all law enforcement in the "border context" in cursory fashion, Pet'r Br. 36, but the range of law enforcement activity conducted by immigration officers and near the border is immense. To be sure, law enforcement near the border can be difficult work that bears on border security. But that is far from uniformly the case.

Dozens of thousands of federal agents work "at the border" and in "immigration context[s]," Pet'r Br. 29 (quotation marks omitted). *See* Bureau of Just. Stats., U.S. Dep't of Just., *Federal Law Enforcement Officers, 2016 – Statistical Tables* [hereafter *Federal Law Enforcement Officers*] at 1, 3-4 (2019), https://tinyurl.com/2zsx4px7. Indeed, more full-time federal law enforcement officers work for the Department of Homeland Security, which houses Customs and Border Patrol (CBP) and Immigration and Customs Enforcement (ICE), than for any other federal department or agency. *Id.* CBP officers alone make up approximately one-third of the entire federal law enforcement force; there are more agents working for CBP than across all of Germany's federal officer corps. *Compare id.* at 3, *with* Bundespolizei, Annual Report 2019 at 78, https://tinyurl.com/yd3yva59.

According to the Department of Justice, the "primary function" of many of those officers is providing "police protection," which is also the primary function of most federal law enforcement officers across federal agencies. *Compare Federal Law Enforcement Officers* at 1, 6, *with* Pet'r Br. 29 (contending the "core function[]" of "agents at the border" is unique to the border context). Like other domestic law enforcement officers, immigration officers carry firearms, 8 C.F.R. § 287.5(f); conduct interrogations, 8 U.S.C. § 1357(a)(1), 8 C.F.R. § 287.8(b); engage in vehicular pursuits of suspects, 8 C.F.R. § 287.8(e)(2); and make arrests, 8 U.S.C. § 1357(a)(5), 8 C.F.R. §§ 287.5(c), 287.8(c). Immigration officers also oversee individuals taken into and held in government custody. 8 U.S.C. § 1226(a)(1); 8 C.F.R. § 287.5(c)(6).

Immigration officers often exercise these powers against United States citizens, as this case illustrates. Petitioner himself points out that agents "may not know in advance" whether they are policing a U.S. citizen. Pet'r Br. 38. A recent study of Border Patrol activity in Michigan found that fully one-third of individuals stopped are U.S. citizens. ACLU Michigan, *The Border's Long Shadow* 4, 25 (2021), https://tinyurl.com/4s6xe5fm. Even in circumstances where agents understand their activity targets a citizen, they may "make arrests" for "any felony cognizable under the laws of the United States" and "for any offense against the United States, if the offense is committed in the officer's or employee's presence." 8 U.S.C. § 1357(a)(5).

The geographic jurisdiction of immigration officers is vast, too. "Border Patrol agents often work miles

from the border." *Hernandez v. Mesa*, 140 S. Ct. 735, 746 (2020). CBP officers' power extends in some circumstances up to 100 miles inland from border lines, *see* 8 U.S.C. § 1357(a), 8 C.F.R. § 287.1(a)(2), a territory in which "[r]oughly two-thirds of the United States' population lives." ACLU, *The Constitution in the 100-Mile Border Zone* (hereinafter *Border Zone*), https://tinyurl.com/yc5vvvp9. Nine out of 10 of the largest metro areas in the country fall within their dominion. *Id*.

That means that on the ground, DHS officers and other federal police officers are often in the same place, at the same time, performing coinciding functions. *See, e.g.*, *Muehler v. Mena*, 544 U.S. 93, 95-96 (2005) (immigration officer aiding SWAT team executing "broad search" for deadly weapons and evidence of gang membership); *United States v. Correa-Santos*, 785 F.3d 307, 309 (8th Cir. 2015) (ICE agents working with DEA on drug crime).

The work of DHS officers bleeds into the work of other federal law enforcement agencies by design. ICE boasts "partnerships" with the Federal Bureau of Investigations (FBI), Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco, and Firearms (ATF), the U.S. Marshals Service, and the United States Postal Inspection Service. *See* ICE, *Partnerships Work*, https://tinyurl.com/2p96rmuy. *Bivens* actions are routinely brought against officers in these agencies. *See* Pet. App. 38a (collecting cases); Resp. Br. 30 (same). CBP officers likewise regularly work with agencies like DEA. *See, e.g.*, U.S. Customs & Border Prot., *CBP, HIS, DEA, USCG, NYSP & NYPD Approximately 3,200 Pounds of Cocaine Seized*

(Mar. 11, 2019), https://tinyurl.com/2exahuvk (describing "ongoing partnership" between CBP, DEA, and state and local police departments, among others, in counter-narcotics operations).

The practical and legal "authorities" for domestic and border law enforcement agencies in many cases are, in the words of DHS and DOJ, "overlapping." DOJ/DHS OIG Joint Report, *A Joint Review of Law Enforcement Cooperation on the Southwest Border between the Federal Bureau of Investigations and Homeland Security Investigations* at 3 (2019), https://tinyurl.com/2p8xzf3p. For instance, "[t]he FBI and [Immigration and Customs Enforcement's Homeland Security Investigations] share many of the same statutory authorities," *id.* at i, and investigative domains, ranging from commercial fraud to human trafficking to intellectual property theft, *id.* at 3. Officers under the umbrella of DOJ and of DHS regularly work together in multiagency taskforces, such as the Safe Streets Task Forces. *Id.*

There are also circumstances in which immigration officers perform purely domestic law enforcement functions. Border Patrol personnel have been called to join the U.S. Marshals to "manage hostile crowds during the Civil Rights movement in the 1960s" and aid police efforts "following the Los Angeles police beating of Rodney King in 1999," and they have been deployed in the aftermath of Hurricane Katrina. Tanvi Misra, *Immigration Agencies to Assist Law Enforcement Amid Unrest*, Roll Call (June 1, 2020), https://tinyurl.com/mterpp27.

More recently, in the summer of 2020, immigration agencies contributed to policing of Black Lives Matter demonstrations. The Department of Homeland Security deployed helicopters, airplanes, and drones typically used for border patrol to surveil demonstrators. Zolan Kanno-Youngs, *U.S. Watched George Floyd Protests in 15 Cities Using Aerial Surveillance*, N.Y. Times (June 19, 2020), https://tinyurl.com/5p2dm5t2. ICE personnel set aside their immigration-related work to act as additional "boots on the ground nationwide." Misra, *supra*; *see also* Priscilla Alvarez, *ICE Deploying Personnel and Teams Nationwide in Response to Protest Unrest*, CNN (June 1, 2020), https://tinyurl.com/2p9ysacn ("An agency spokesperson underscored … that ICE will not be conducting immigration enforcement."). In the words of the Secretary of DHS, CBP and ICE agents "st[oo]d shoulder to shoulder" with other federal law enforcement officers. Acting Secretary Chad Wolf (@DHS_Wolf), Twitter (June 2, 2020, 4:58 PM), https://tinyurl.com/2p8jppbu. From the public's perspective, the difference between DHS and other federal police officers is minimal at most.

B. Garden-variety law enforcement misconduct occurs in the border context.

Just as domestic and "immigration-related" law enforcement share much in common, so does similar misconduct occur in both spheres. Individuals like Mr. Boule who have suffered constitutional injuries at the hands of immigration officers or near a border have sought to redress those harms through *Bivens* actions. According to Petitioner and his *amici*, every single *Bivens* claim in "the border context," Pet'r Br.

at 36, must be barred because it compromises "national security and foreign policy," "regardless of whether the facts in a particular case implicate that subject." Former AGs Br. at 15.[3] That bright-line rule rests on the logical fallacy that national and border security are at risk simply because an action involves an immigration officer and/or falls within 100 miles of the border. That is like arguing that every time a baseball player swings a bat or is on a diamond, he is necessarily playing baseball. But the player might instead be coaching little league, playing softball, or swinging at someone, just as an officer in the border context's actions may not bear on national security or border threats.

Rather than adopt Petitioner's bright-line rule, this Court should consider whether an individual action does in fact implicate national or border security concerns. Recent *Bivens* actions against immigration officers—including Mr. Boule's—demonstrate that the challenged conduct may touch no more on national and border security issues than did the claims in *Bivens* itself.

Take, for example, *Byrd v. Lamb*, 990 F.3d 879 (5th Cir. 2021): The plaintiff, Kevin Byrd, went to visit his ex-girlfriend at the hospital after she called to tell him she had been in a car accident. *Id.* at 880. He learned that her then-boyfriend, Eric Lamb, was

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[3] Petitioner's *amici* cite *United States v. Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004), which concerned the question whether a human smuggling statute applied extraterritorially. It offers no support for their position that national security concerns preclude *Bivens* actions in any border context.

also in the car at the time of the accident, and that the two of them had been kicked out of a bar shortly beforehand. *Id.* When Byrd went to the bar in hopes of learning more, he encountered DHS Agent Ray Lamb, Eric's father. *Id.* Agent Lamb physically and verbally threatened to shoot Byrd and attempted to smash the windows of his car. *Id.* After Byrd called for police assistance, Agent Lamb notified the arriving local officers that he was a DHS agent, leading them to arrest and detain Byrd. *Id.* After the police reviewed security footage, they released Byrd and took Agent Lamb into custody. *Id.* at 880-81. Byrd then brought a *Bivens* action against DHS Agent Lamb, alleging excessive use of force to effectuate an unlawful seizure. *Id.* at 881. Invoking "national-security issues" and concluding that Byrd's case arose in a "new context," the Fifth Circuit held no *Bivens* action was available. *Id.* at 881-82.

A *Bivens* action in a case like *Byrd*, however, does not plausibly implicate any national- or border-security harms. Though *Byrd* involved action by an immigration officer in territory not far from the border, it had nothing to do with "the movement of people and goods across the border." *Hernandez*, 140 S. Ct. at 746. There would be no occasion to consider, let alone second-guess, "high-level executive policy" or the deliberative process that yielded it, *Abbasi*, 137 S. Ct. at 1860; nor would there be occasion to question officers' time-sensitive "attempt[s] to prevent [] illegal entry," *Hernandez*, 140 S. Ct. at 746. Adjudication of such claims also would not require the judiciary to "alter" "national security policy" "established by the political branches." *Id.* at 746 (quoting *Abbasi*, 137 S. Ct. at 1861). Rather, "individual instances of … law

enforcement overreach" would be before the court, *Abbasi*, 137 S. Ct. at 1862; to the extent those individual instances bear on "large-scale policy," *id.*, it is only in the individual officer's breach of such policy. The same is true in a plethora of cases in the border context, including the case at bar. *See* Resp. Br. 22-24, 33-35.

The alarming behavior of the DHS officer in *Byrd* is not unique. "Border Patrol agents engage in criminal activities outside their official duties at five times the rate of other law enforcement agencies' officials." Andrea Flores & Shaw Drake, *Border Patrol Violently Assaults Civil Rights and Liberties*, ACLU, https://tinyurl.com/5n6fmumb; *see also* SBCC, *Fatal Encounters with CBP since 2010*, https://tinyurl.com/mwyey28u (counting 12 off-duty homicides by CBP officers since 2010). CBP reports that 223 of its employees were arrested in FY2019 alone—eight of whom were arrested twice in that same year. U.S. Customs & Border Prot., *Discipline Overview: Fiscal Year 2019* 8, https://tinyurl.com/mrec93pn.

Nor does the mere location of activity near or "on the border" raise "national security and immigration-related concerns." *Contra* Pet'r Br. 31. Such suits, too, may challenge "individual instances of … law enforcement overreach." *Abbasi*, 137 S. Ct. at 1862. In *Linlor v. Polson*, for instance, the court allowed a U.S. citizen plaintiff to bring a *Bivens* action against a TSA agent who allegedly committed aggravated sexual battery in the course of a pat down. 263 F. Supp. 3d 613, 617-18 (E.D. Va. 2017). Pat downs are common to all kind of policing, and the kind of misconduct alleged has no

relationship to policing the border; the court accordingly found "little to tie specific national security concerns to the context under consideration," despite airport security's similarities to "international borders." *Id.* at 623. *See also, e.g.*, *Martinez v. United States*, No. 19-6135 (W.D. Mo.), Dkt. 1 (*Bivens* claim against ICE officers brought by immigration attorney challenging use of force when attorney brought three-year-old child to ICE facility to reunite with his mother to be deported together); *Castellanos v. United States*, 438 F. Supp. 3d 1120, 1130 (S.D. Cal. 2020) ("There are numerous cases where Border Patrol officers have been sued for Fourth Amendment violations and the court sees no reason why this case, simply because it occurred at the border, implicates national security issues.").

Major cities fall within the border zone. *Border Zone*, *supra*. On the logic of Petitioner and his *amici*, any *Bivens* claim arising out of conduct in a city such as San Diego, which lies a mere 17 miles from the Mexico border, would be barred.[4] But courts have reasonably recognized *Bivens* actions should be able to proceed in such jurisdictions. *See, e.g.*, *Lee v. Gregory*, 363 F.3d 931 (9th Cir. 2004) (recognizing *Bivens* action against FBI agent for false arrest at agent's behest conducted by San Diego Sheriff's Office). Reversal here threatens to eliminate a *Bivens* action for two-thirds of the people in the United States, leaving their constitutional rights merely theoretical. *See Border Zone*, *supra*; *Byrd*, 990 F.3d at 883-84 (Willett, J., specially concurring) (lack of *Bivens* remedy

[4] *See* San Diego, *Welcome to Baja California*, https://tinyurl.com/vuu8w7xm.

"allow[s] federal officials to operate in something resembling a Constitution-free zone").

While some actions near the border or involving an immigration officer may bear on national security, this Court's existing precedents protect against a *Bivens* action in those circumstances. *See Abbasi*, 137 S. Ct. at 1860-62*; see also* Resp. Br. 20-21. But Petitioner's rule would eliminate *Bivens* altogether in much of the country, and it would create anomalous results: DHS officers would be immune from suit for the same constitutional misconduct that FBI and state officers would be liable for. The Court should not immunize tens of thousands of federal officers who routinely engage in ordinary domestic law enforcement functions under the "talisman" of national security. *Abbasi*, 137 S. Ct. at 1862.

II. Recognizing A *Bivens* Remedy In This Case Would Not Lead To Under-Enforcement Of National Or Border Security.

As discussed above, DHS officers perform a wide range of garden-variety police work with little or no direct connection to national security or immigration enforcement. But even to the extent that those officers' work *does* involve immigration and national security, concerns that *Bivens* liability will lead to under-enforcement are misplaced.

Although this Court has previously assumed that damages remedies may affect federal officers' willingness and ability to perform enforcement duties, *see, e.g.*, *Abbasi*, 137 S. Ct. at 1863, the realities of

indemnification arrangements mean that officers virtually never pay damages themselves.

The Court's mistaken assumption is understandable, as attorneys for the Government have long told the Court that, for example, "[i]mposing damages liability on individual agents executing … essential national-security functions at the border could chill the performance of their duties." U.S. Br. at 29. But the Government's rhetoric has little basis in reality and is even contradicted by the Government's own practices when defending *Bivens* claims, as explained below. Indeed, as one recent empirical study found, "Government attorneys persist in describing *Bivens* as potentially ruinous even though individual defendants almost never pay judgments or settlements in successful *Bivens* cases." James E. Pfander et al., *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 Stan. L. Rev. 561, 606 (2020).[5]

Nor is this empirical study alone in concluding that individual *Bivens* defendants face little risk of personal financial liability. Earlier scholarship confirms that, "virtually without exception, the

[5] The study also found that these realities are not exactly unknown to the Government: "[G]overnment attorneys play an active role in deliberately repackaging *Bivens* cases for settlement under the FTCA and Judgment Fund. Such repackaging belies any assertion that the Department harbors misconceptions about the ways its practices shift the ultimate incidence of *Bivens* liability to the U.S. Treasury." *Id.* In sum, as the study authors noted, "the payment practice we document here conflicts with the rhetorical position the government has long taken in representations made to the federal judiciary and to the legal profession in the course of defending *Bivens* claims." *Id.* at 605.

government represents or pays for representation of federal officials accused of constitutional violations and pays the costs of judgments or settlements." Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 Geo. L.J. 65, 67 (1999).

Indeed, that earlier research found that "[t]he federal government provides representation in about 98% of the cases for which representation is requested," *id.* at 76 n.51, and "[i]n cases in which the United States has provided representation to the individual defendant, it has not once failed to reimburse a federal employee for the costs of a *Bivens* settlement or judgement," *id.* at 78 n.61.

In fact, even one scholar who emphasizes that indemnification is typically not guaranteed as a legal right to federal employees acknowledges that, "[i]n practice, federal officials have a tiny chance of ultimately paying a judgment out of pocket." Andrew Kent, *Are Damages Different?:* Bivens *and National Security*, 87 S. Cal. L. Rev. 1123, 1154 n.130 (2014).

The recent empirical study discussed above analyzed *Bivens* claims brought against officers of the Federal Bureau of Prisons (BOP) and concluded that "individual government officials almost never contribute any personal funds to resolve claims arising from allegations that they violated the constitutional rights of incarcerated people." *The Myth of Personal Liability*, 72 Stan. L. Rev. at 566.

Specifically, that study found that out of 171 successful *Bivens* claims—itself a small subset of all such

claims that are brought—only eight resulted in a federal officer or an insurer being required to make "a compensating payment to the claimant." *Id.* And when looking at individual officer payments as a proportion of total payments as opposed to total claims for this dataset, "federal employees or their insurers" paid only "0.32% of the total" payments made to plaintiffs in the 171 successful cases. *Id.* When excluding amount paid by insurers, that figure is even lower. *See id.* at 581.

In all, the study authors found, "the federal government effectively held its officers harmless in over 95% of the successful cases brought against them, and paid well over 99% of the compensation received by plaintiffs in these cases." *Id.* at 566. "Extrapolating from the study data, and assuming that all employees engage in wrongdoing at the same rate, less than 0.1% of BOP employees will contribute to a settlement or judgment during a twenty-year career." *Id.* at 599.

Nor in many cases is the cost borne by the particular agency at issue. "[W]e found no case in which the BOP itself appears to have contributed agency funds to plaintiffs' settlements in successful *Bivens* claims. Instead, government attorneys arranged to have these matters resolved with payments from the Judgment Fund, which is funded by the Treasury of the United States." *Id.* at 579. "As a result, both individual officers and the BOP are spared the financial consequences of almost all successful claims." *Id.* at 596.

Finally, any gaps in indemnification can be, and are, addressed through government-subsidized "professional liability insurance for law-enforcement

officers and supervisory or management officials." *See Taking Fiction Seriously*, 88 Geo. L.J. at 78.

A damages remedy for constitutional violations provides an essential deterrent to official wrongdoing regardless of indemnification, *see* Alexander Reinert et al., *New Federalism & Civil Rights Enforcement*, 116 Nw. U. L. Rev. 737, 765 (2021), but there is simply no basis in fact for the assumption that *Bivens* liability is bankrupting or seriously financially burdening individual officers in any appreciable number of cases. If Government agencies are actually concerned that their officers will be chilled by the threat of personal *Bivens* liability, they could largely address any such concern by telling their employees the truth about indemnification. *Cf. Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013) (holding that "self-inflicted injuries are not fairly traceable to the" challenged conduct at issue and "subjective fear" of a possible event alone "does not give rise to standing").

III. Reversal Would Leave No Adequate Remedy In A Wide Category Of Cases Involving Abuses By Federal Law Enforcement Officers.

Petitioner and his *amici* argue that a *Bivens* remedy is unnecessary here because plaintiffs like Mr. Boule can seek relief through alternative avenues. That is wrong.

Petitioner relies heavily on the availability of administrative "[r]emedies," pointing to DHS's ability to investigate complaints. *See* Pet'r Br. 39.[6]

As Mr. Boule notes, those purported remedies offer "complainants" no "right to participate in the investigation process or to obtain judicial review," or individual "'redress.'" *See* Resp. Br. 39-40. But even beyond those express regulatory limitations, the ineffectiveness of CBP's internal administrative review process is well-documented. According to one recent analysis of data obtained through a Freedom of Information Act request, 96% of cases with a reported outcome resulted in "no action" against the CBP officer or agent accused of misconduct. Guillermo Cantor & Walter Ewing, *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered* 15, Am. Immigr. Council (Aug. 2, 2017), https://tinyurl.com/3c6f8jbk.

As that study found, "'[n]o action' was the outcome of many complaints against Border Patrol agents that alleged serious misconduct, such as running a person over with a vehicle, making physical threats, sexually assaulting a woman in a hospital, and denying medical attention to children." *Id.* at 1. Examples of complaints to which no responsive action was taken include a "Border Patrol agent allegedly plac[ing] [a] Taser in the mouth of a U.S. citizen, resulting in injury" in Tombstone, Arizona, and a "Border Patrol

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[6] Petitioner also asserts that "[t]he FTCA provides … redress." Pet'r Br. 40. But as Mr. Boule explains, see Resp. Br. 37-39, the FTCA is not an alternative remedy.

agent … threaten[ing]" a child "with rape" in Laredo, Texas. *Id.* at 8, 9.

Troublingly, "many complaints filed with the offices overseeing the Border Patrol … are kicked back to the Border Patrol sector from which they originated. They are not investigated independently." *Id.* at 6.

It is not just advocacy groups that have found that DHS's internal investigations are plagued by inefficacy, corruption, and lack of independence. Indeed, according to the Cato Institute, the three offices in DHS with purported internal investigative authority do not "necessarily cooperate with independent investigatory agencies such as the FBI." Alex Nowrasteh, *Border Patrol Termination Rates: Discipline and Performance Problems Signal Need for Reform*, Cato Inst. (Nov. 2, 2017), https://tinyurl.com/2p82rm8z.

In fact, the former assistant director of the FBI's criminal investigative division described DHS's Office of the Inspector General as "a troubled place" that saw "sharing information as misconduct," that "fought us at every turn" in "a deliberate attempt by senior people in DHS and in the inspector general's shop to avoid cooperating with the FBI." *Id.* If DHS's internal watchdogs will not even cooperate with the FBI, it is hard to imagine what heed they may pay the complaints of ordinary people without federal law enforcement authority.

The Government in this case suggests that "the existence of other statutes and regulations to deter and remedy excessive force by Border Patrol agents

counsels against recognizing" a *Bivens* remedy here, noting that violations of use-of-force standards "must" be investigated and "can" support disciplinary actions. U.S. Br. at 32. But in its capacity as a criminal prosecutor, the Government has had to contend with rampant corruption and misconduct within DHS's Office of the Inspector General (DHS-OIG). In 2014, the Government criminally prosecuted "[a] former Special Agent in Charge" of DHS-OIG "for a scheme to falsify records and obstruct an internal DHS-OIG inspection." *See* DOJ OPA, *Former Special Agent in Charge of the Department of Homeland Security's Office of Inspector General Sentenced to More Than Three Years in Prison* (Dec. 15, 2014), https://tinyurl.com/2p8p4e2y.

And while federal prosecutions remain a theoretical possibility for some of the most egregious and well-documented cases of abuse, DOJ does not purport to investigate most forms of misconduct. *See* U.S. Br. at 32 (noting that DOJ has statutory authority under 18 U.S.C. § 242 to prosecute "willful[]" deprivations of constitutional rights by Border Patrol agents). The universe of cases of abuse for which available evidence satisfies the higher criminal standard of proof is by definition only a small subset of cases, even before factoring in the exercise of prosecutorial discretion and resource constraints. DOJ has told the public that the practical limitations of proving a case under § 242 tie its hands in many cases. *See, e.g.*, DOJ OPA, *Justice Department Announces Closing of Investigation into 2014 Officer Involved Shooting in Cleveland, Ohio* (Dec. 29, 2020), https://tinyurl.com/yckn3nrc. This Court should listen.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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