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EGBERT V. BOULE: SACRIFICING CUSTOM AND BORDER PATROL ACCOUNTABILITY IN THE NAME OF NATIONAL SECURITY

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In 2020, the United States experienced a public reckoning over law enforcement abuses against communities of color, sparking one of the largest protest movements in the nation's history and renewing calls for accountability and transparency.[1] Yet just two years later, the U.S. Supreme Court eliminated the use of a long-standing remedy for constitutional violations by federal agents against the largest law enforcement agency in the country,[2] Customs and Border Protection ("CBP").[3] In *Egbert v. Boule*, the Court refused to extend the *Bivens v. Six Unknown Named Agents*[4] remedy to the claim of a U.S. citizen alleging Fourth and First Amendment violations by a CBP agent.[5] By refusing to extend the cause of action to Fourth Amendment violations by CBP agents, the Court (1) misapplied existing *Bivens* precedent;[6] (2) continued to erode constitutional protections as applied to CBP agents and immigration officials;[7] and (3) failed to provide a judicially available accountability

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[1] Majlie de Puy Kamp, *The Year of Reckoning: How 2020 Revealed the Fault Lines in American Policing*, CNN Investigates (Dec. 18, 2020, 4:12 PM), https://www.cnn.com/2020/12/18/us/police-reform-year-of-reckoning-blm-invs/index.html.

[2] U.S. DEP'T OF JUST., FEDERAL LAW ENFORCEMENT OFFICERS, 2020 - STATISTICAL TABLES 3 (2022), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/fleo20st.pdf?utm_content=default&utm_medium=email&utm_source=govdelivery (demonstrating in 2020, Customs and Border Protection had 46,993 agents making it the largest federal law enforcement agency); NEW YORK POLICE DEPARTMENT, *About NYPD*, https://www1.nyc.gov/site/nypd/about/about-nypd/about-nypd-landing.page (last visited Sept. 4, 2023) ("The New York City Police Department (NYPD) is the largest and one of the oldest municipal police departments in the United States, with approximately 36,000 officers.").

[3] Egbert v. Boule, 142 S. Ct. 1793, 1800, 1805-06 (2022) ("[W]e ask here whether a court is competent to authorize a damages action not just against Agent Egbert but against Border Patrol agents generally. The answer, plainly, is no.").

[4] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[5] *Egbert*, 142 S. Ct. at 1805-06.

[6] *See infra* Section IV.A.

[7] *See infra* Section IV.B.

measure to an agency with limited oversight and a pattern of abuse and racism.[8]

I. THE CASE

Robert Boule ("Boule") is a United States citizen who "owns, operates and lives in a small bed and breakfast inn in Blaine, Washington."[9] The rear of the property adjoins the United States-Canadian border.[10] The bed and breakfast is named the "Smuggler's Inn," recognizing the reality of the area's association with illicit cross-border activity flowing in both directions across the border.[11] Boule served as an informant for CBP starting in 2003 and for Immigration and Customs Enforcement starting in 2008.[12]

On March 20, 2014, CBP agent Erik Egbert ("Egbert") twice stopped and questioned Boule regarding the guests at his inn while he was running errands in town.[13] Boule informed Egbert of a Turkish guest arriving from New York that day who had flown to the United States the prior day.[14] Egbert continued to patrol close to the Inn to see when the guest would arrive.[15]

Later that day, Egbert followed Boule's employee, who was driving Boule's vehicle, past a "no trespassing" sign into the driveway of Boule's property.[16] Egbert exited his patrol car and approached the vehicle.[17] Boule, from the porch of his property, asked Egbert to leave, but Egbert refused.[18] Boule continued off his porch and placed himself in between Egbert and the vehicle.[19] Boule again requested Egbert to leave and explained the guest had already been inspected and admitted at the New York airport.[20] Egbert grabbed Boule, lifted him off the ground, and shoved him against the vehicle.[21] He threw Boule to the

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[8] *See infra* Section IV.C.

[9] Boule v. Egbert, 980 F.3d 1309, 1312 (9th Cir. 2020), *amended by* Boule v. Egbert, 998 F.3d 370 (9th Cir. 2021), *rev'd*, Egbert v. Boule, 142 S. Ct. 1793, 1800 (2022).

[10] *Id.*

[11] Egbert v. Boule, 142 S. Ct. 1793, 1800, 1800 (2022).

[12] *Id.* at 1811 (Sotomayor, J., concurring in part and dissenting in part).

[13] *Id.*

[14] *Boule*, 980 F.3d at 1312.

[15] *Id.*

[16] *Egbert*, 142 S. Ct. at 1811 (Sotomayor, J., concurring in part and dissenting in part).

[17] *Boule*, 980 F.3d at 1312.

[18] *Egbert*, 142 S. Ct. at 1811 (Sotomayor, J., concurring in part and dissenting in part).

[19] *Id.* at 1811-12.

[20] *Id.*

[21] *Id.* at 1801.

ground where Boule landed on his hip and shoulder.[22] Boule later sought medical treatment for his injuries.[23]

Egbert then opened the door of the vehicle and checked the immigration status of the guest.[24] Boule called the police to request a supervisor.[25] Another agent and a supervisor arrived, but all the agents left after concluding the guest was lawfully present in the country.[26]

Boule filed a grievance with Egbert's supervisors regarding Egbert's use of excessive force.[27] Boule also filed a claim pursuant to the Federal Tort Claims Act ("FTCA").[28] After a year, Boule's FTCA claim was denied and CBP took no action regarding Boule's excessive force claims.[29] Egbert remained an active-duty CBP agent.[30]

In January 2017, Boule filed a claim against Egbert in federal district court seeking damages for violations of his constitutional rights by a federal officer under the *Bivens* precedent.[31] Boule alleged Fourth Amendment violations for excessive use of force and First Amendment violations for unlawful retaliation.[32] The district court granted summary judgement for Egbert, refusing to extend *Bivens* to Boule's claims.[33] The United States Court of Appeals for the Ninth Circuit reversed the district court decision, finding that the *Bivens* remedy was available for both Boule's Fourth and First Amendment claims.[34] A judge petitioned for a vote for a rehearing *en banc*, which failed to receive a majority of the votes.[35] The Supreme Court granted *certiorari* to address (1) whether the *Bivens* cause of action is available for First Amendment retaliation claims and (2) whether the *Bivens* cause of action is available for

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[22] *Id.* at 1812 (Sotomayor, J., concurring in part and dissenting in part).

[23] Boule v. Egbert, 980 F.3d 1309, 1312 (9th Cir. 2020), *amended by* Boule v. Egbert, 998 F.3d 370 (9th Cir. 2021), *rev'd*, Egbert v. Boule, 142 S. Ct. 1793, 1800 (2022). At the time, Boule was in his mid-sixties. *See* R. v. Boule, [2021] BCSC 2561, para. 13 (Can.) (demonstrating Boule was seventy-two years old on December 17, 2021).

[24] *Boule*, 980 F.3d at 1312.

[25] *Id.*

[26] *Id.*

[27] *Egbert,* 142 S. Ct. at 1801-02.

[28] *Id.* at 1802.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Boule v. Egbert, 980 F.3d 1309, 1312 (9th Cir. 2020), *amended by* Boule v. Egbert, 998 F.3d 370 (9th Cir. 2021), *rev'd*, Egbert v. Boule, 142 S. Ct. 1793, 1800 (2022).

[34] *Id.* at 1317.

[35] Boule v. Egbert, 998 F.3d 370 (9th Cir. 2021), *rev'd*, Egbert v. Boule, 142 S. Ct. 1793, 1800 (2022).

violations of the Fourth Amendment by federal officers performing immigration-related functions.[36]

II. LEGAL BACKGROUND

A. The History and Development of the Bivens *Cause of Action*

i. Creation of Cause of Action for Constitutional Violations by Federal Officers

In 1871, Congress created the principal remedy for violations of constitutional rights through its enactment of section 1 of the Civil Rights Act of 1871, now codified in 42 U.S.C. § 1983.[37] However, the statute only applies to persons acting under the color of law of "any state or territory or the District of Columbia,"[38] meaning the remedy is not applicable to federal officials.[39] In 1971, the Supreme Court addressed the lack of a remedy for violations by federal officials in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*.[40]

In *Bivens*, agents from the Federal Bureau of Narcotics entered Plaintiff Webster Bivens's apartment, handcuffed him in front of his wife and children, threatened to arrest his entire family, and searched his apartment.[41] Bivens's complaint alleged that the agents conducted the arrest and search without a warrant.[42] He sought damages for the resulting humiliation, embarrassment, and mental suffering.[43]

The Court rejected the assertion that Bivens's claim could only proceed as a state tort law claim.[44] The Court reasoned the Fourth Amendment goes beyond merely prohibiting conduct that, if done by a private citizen, would violate state law, and the interests protected by state trespass laws may be inconsistent with the interests protected by

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[36] *See* Egbert v. Boule, 142 S. Ct. 1793, 1804 (2022) ("[T]he Court of Appeals plainly erred when it created causes of action for Boule's Fourth Amendment excessive-force claim and First Amendment retaliation claim.").

[37] David Achtenberg, *A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of" Law*, 1999 UTAH L. REV. 1, 2 (1999).

[38] 42 U.S.C. § 1983.

[39] James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 125 (2009).

[40] *Id.*

[41] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

[42] *Id.*

[43] *Id.* at 389-90.

[44] *Id.* at 391-97.

the Fourth Amendment.[45] The Court stated that damages are the traditional remedy for the "invasion of personal interests in liberty" and federal courts have the power to provide any available remedies to correct a legal wrong.[46]

Additionally, the Court found "no special factors counsel[ed] hesitation" for granting the remedy given the lack of an explicit statement by Congress on the issue.[47] The question for the Court was not whether money damages were "necessary to enforce the Fourth Amendment," but whether the plaintiff was entitled to redress his legal injury by "a particular remedial mechanism normally available in the federal courts."[48] The Court found no reason to deny the petitioner a claim for damages against a federal officer, particularly where Congress had not explicitly precluded recovery or outlined a different remedy.[49]

Eight years later in *Davis v. Passman*,[50] the Supreme Court extended *Bivens* to violations of another constitutional amendment.[51] The Court recognized a cause of action for damages under the equal protection component of the Fifth Amendment's due process clause based on sex discrimination in an employment decision by a congressman.[52] The Court reinforced *Bivens*, finding the plaintiff adequately alleged a violation of her rights under the Constitution and there was no effective means of obtaining a remedy beyond the courts.[53] The lack of an "explicit congressional declaration" on the availability of damages in the situation reinforced the judiciary's general authority to provide remedies traditionally used by the courts.[54]

A year later, the Court again applied the *Bivens* cause of action in *Carlson v. Green*[55] by permitting damages for violations of the Eighth Amendment by federal officers.[56] However, the Court outlined two exceptions for *Bivens* claims:[57] first, when "special factors counsel[]

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[45] *Id.* at 392-94.

[46] *Id.* at 395-96.

[47] *Id.* at 396. Specifically, the court stressed the case did not implicate federal funds or congressional employees. *Id.* at 396-97.

[48] *Id.* at 397.

[49] *Id.*

[50] 442 U.S. 228 (1979).

[51] *Id.* at 230.

[52] *Id.*

[53] *Id.* at 243-44.

[54] *Id.* at 246-47 (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971)) (quotation marks omitted).

[55] 446 U.S. 14 (1980).

[56] *Id.* at 16-18.

[57] *Id.* at 18.

hesitation" in granting a right for damages under the Constitution and second, when Congress provides an "equally effective" remedy "explicitly declared to be a *substitute*" for constitutional damages claims.[58] Importantly, the Court held that the 1974 amendment to the FTCA, which allowed for causes of action against the United States for intentional torts by federal officers, did not preclude the *Bivens* remedy.[59] The Court outlined that the legislative history and the statutory construction of the FTCA demonstrated Congress's intent to make them parallel remedies.[60]

ii. Rolling Back Bivens *and the Development of the "Disfavored Activity" Doctrine*

Since *Carlson v. Green*, the Supreme Court has declined to extend *Bivens* eleven times to instances of constitutional violations by federal officers.[61] In 1983, the Court refused to sustain a claim for damages by a federal employee for First Amendment violations by supervisors.[62] The Court recognized Congress had not plainly prohibited claims for damages by federal employees against superiors or provided an equally effective substitute.[63] However, unlike in *Carlson* and *Davis*, the Court found that the *Bivens* cause of action was inappropriate given the development of civil service remedies for federal employees and their comprehensive nature.[64]

The question was no longer whether a constitutional violation would otherwise go without remedy but whether a comprehensive remedial structure enacted by Congress that considered policy concerns should be supplemented by the *Bivens* remedy.[65] The fact that the existing remedies did not provide full relief for the plaintiff could no longer alone justify the judicial creation of the remedy.[66] The Court reasoned *Bivens* should not be extended when Congress created a comprehensive remedial structure given Congress's ability to better evaluate the policy.[67]

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[58] *Id.* at 18-19 (emphasis in original).
[59] *Id.* at 19-20.
[60] *Id.* at 20 ("Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy.").
[61] Egbert v. Boule, 142 S. Ct. 1793, 1799 (2022).
[62] Bush v. Lucas, 462 U.S. 367, 368 (1983).
[63] *Id.* at 378.
[64] *Id.* at 388.
[65] *Id.*
[66] *Id.*
[67] *Id.* at 389.

Four years later in *United States v. Stanley*, Justice Scalia in his majority opinion outlined how the "special factors counselling hesitation" test barred *Bivens* claims stemming from activity incident to service in the military.[68] The plaintiff alleged that as part of a military program he volunteered for, he was secretly given LSD without his knowledge or consent.[69] The Court found the unique military disciplinary system and the Constitution's explicit delegation of power regarding regulation of the army were special factors that counseled hesitation before extending *Bivens* to military matters.[70] Additionally, the Court stated the determination of whether another adequate federal remedy existed was "irrelevant to a 'special factors' analysis."[71] The Court reframed the issues to separation of powers concerns of an overreaching judiciary.[72]

By 2001, the Supreme Court recognized that it had "consistently refused to extend *Bivens* liability to any new context or new category of defendants."[73] The Court continued this trend by refusing to extend *Bivens* claims under the Eighth Amendment against a corporation operating a halfway house for the Bureau of Prisons.[74] The Court stressed *Bivens*'s purpose was to deter individual federal officers and thus claims aimed at a corporate entity defeated that purpose.[75] The cases after *Carlson* demonstrate the evolution of the *Bivens* cause of action from its rapid expansion from 1971-1980 to a "disfavored judicial activity."[76]

iii. Bivens *in the Immigration Enforcement Context and the* Ziglar *Test*

The *Bivens* cause of action has arisen in immigration-related context through claims by noncitizens and claims against immigration enforcement officials.[77] In 2017, the Supreme Court laid out the modern

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[68] United States v. Stanley, 483 U.S. 669, 683-84 (1987).

[69] *Id.* at 671.

[70] *Id.* at 679.

[71] *Id.* at 683.

[72] *See id.* ("The 'special facto[r]' that 'counsel[s] hesitation' is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate.").

[73] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001).

[74] *Id.* at 63.

[75] *Id.* at 70-71.

[76] Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017).

[77] *See e.g.*, *id.* at 1853 (noncitizen petitioners "six men of Arab or South Asian descent . . . illegally in this country"); Hernandez v. Mesa, 140 S. Ct. 735, 739-741 (2020) (parents of deceased Mexican national brought suit against a Border Patrol agent after cross-border shooting).

test for all *Bivens* causes of action in *Ziglar v. Abbasi*.[78] The case involved claims by a group of Arab and Muslim noncitizens against high level federal officers for their detention policy in the wake of 9/11.[79] The plaintiffs alleged several constitutional violations, including harsh pretrial detention, discrimination based on race, religion, and national origin, abuse by guards in violation of the substantive due process and equal protection components of the Fifth Amendment, and unlawful searches in violation of the Fourth Amendment.[80]

The Court explained its refusal to extend *Bivens* in the years since *Carlson* was in large part because the *Bivens* Court relied heavily on precedent that implied causes of actions from statutes which, in the modern era, has largely been rejected.[81] The Court held that "separation-of-powers principles are or should be central to the analysis," and outlined the governing two prong test for *Bivens* claims going forward.[82] The first prong asks whether the case is "different in a meaningful way from previous *Bivens* cases."[83] If the answer is yes, meaning the case arises in a new context, the second prong of the analysis examines whether special factors exist indicating the judiciary is ill suited to consider whether the damages action should proceed.[84]

The Court applied the test and found the context differed from the original *Bivens* cases, particularly given the identity of the plaintiffs as "illegal aliens" and the identity of the defendants as high level executive officials, as well as the historical context of the 9/11 terrorist attack.[85] Given the new context, the Court identified several special factors cautioning the judiciary against granting damages.[86] In particular, the Court stressed the case's impact on national security policy, which made judicial interference inappropriate given the strong deference to the other branches in national security and military concerns.[87]

Three years later in *Hernandez v. Mesa*, the Court expanded on its concerns about the effect that *Bivens* causes of action would have on

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[78] 137 S. Ct. at 1859-60.

[79] *Id.* at 1853.

[80] *Id.* at 1853-54.

[81] *Id.* at 1855 ("To understand *Bivens* and the two other cases . . . it is necessary to understand the prevailing law when they were decided. In the mid-20th century, the Court followed a different approach to recognizing implied causes of action than it follows now.").

[82] *Id*. at 1857-60.

[83] *Id.* at 1864.

[84] *Id.* at 1857-58.

[85] *Id.* at 1860.

[86] *Id.* at 1859-62.

[87] *Id.* at 1861.

national security.[88] *Hernandez* involved CBP agent Jesus Mesa's cross border shooting and killing of fifteen-year-old Mexican national, Sergio Hernandez, on the Mexican side of the border near El Paso, Texas.[89] Hernandez's parents filed a *Bivens* claim asserting Agent Mesa violated Hernandez's Fourth and Fifth Amendment rights.[90]

The Court applied the two step test from *Ziglar*, finding the case arose in a new *Bivens* context and special factors made the judicial remedy inappropriate.[91] The Court reasoned that although the parents' claims involved the same constitutional amendments as previous *Bivens* cases, the cross-border setting raised a completely new context.[92] Turning to the special factors analysis, the Court outlined the foreign policy concerns regarding the killing of a foreign national by a U.S. government official and cautioned against the recognition of a *Bivens* remedy.[93] The Court stressed that cases involving the border, and in particular the conduct of agents at the border, plainly implicate the national security concerns outlined in *Ziglar*.[94]

B. The Supreme Court's Limitation of Constitutional Protections as Applied to CBP and Immigration Enforcement

Similar to the national security concerns raised by the Supreme Court in *Bivens* claims related to immigration enforcement, a line of Supreme Court jurisprudence grants expansive powers to CBP agents near the border and in other instances of immigration enforcement.[95] In *United States v. Brignoni-Ponce*, the Supreme Court recognized Fourth Amendment protections applied to CBP officers conducting roving patrols[96] in the border region.[97] Despite applying the Fourth Amendment

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[88] 140 S. Ct. 735, 745-47 (2020).

[89] *Id.* at 740.

[90] *Id.*

[91] *Id.* at 743-50.

[92] *Id.* at 743-44.

[93] *Id.* at 744-45.

[94] *Id.* at 747 ("[R]egulating 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.").

[95] *See infra* notes 100-50 and accompanying text.

[96] Roving patrols are a method of CBP surveillance where agents move along roads near the border in contrast with CBP's use of fixed checkpoints. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 268 (1973) (explaining the different methods of CBP surveillance).

[97] 422 U.S. 873, 882 (1975). The Court specifically applied prior precedents from *Terry v. Ohio* regarding limited stop and pat-down for weapons, which did not need to meet the probable cause standard, but were justified under the Fourth Amendment if the officer had reasonable grounds

to the actions of CBP agents at the border, the Court granted CBP an enormous amount of power by allowing CBP's interpretation of a "reasonable distance" from the border to include any area within 100 miles of the border.[98] Additionally, the Court sanctioned CBP's use of race and ethnicity in its justification for stopping a person as long as it was not the sole factor.[99] The Court stated agents could take into account a number of factors and acknowledged that "trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut."[100] By stating that "Mexican appearance [is] a relevant factor" the Court effectively granted CBP substantial latitude to racially profile.[101]

Just a year later, the Court again expanded CBP authority in *United States v. Martinez-Fuerte.*[102] The Court held that CBP's use of fixed checkpoints on major highways did not violate the Fourth Amendment and the government's interest in regulating illegal entry into the country outweighed the minimal intrusion of the fixed checkpoints.[103] The Court required neither a warrant for the location of a check point nor individualized suspicion to stop and question people passing through the check point.[104] Additionally, the Court granted CBP agents the license to require a person go through a secondary inspection "largely on the basis of apparent Mexican ancestry."[105]

Several civil rights organizations have raised concerns over the expansive power CBP wields in such a large area of the country.[106] "Roughly two-thirds of the U.S. population lives within . . . 100 miles of a U.S. land or coastal border."[107] Although the cases provide some minimal protection, reports indicate that in practice CBP "routinely ignore[s] or misunderstand[s]" the limits and does not fully comply with the minimal legal requirements set forth by the Supreme Court.[108] The expansive power and disregard of the limited safeguards begs the

for believing the suspects were armed and dangerous. *Id.* at 881. The Court applied the same reasonable grounds standard for roving patrols near the border given, in the Courts view, the limited nature of the investigative stops to inquire about immigration status. *Id.* 881-82.

[98] *Id.* at 877, 884.

[99] *Id.* at 886-87.

[100] *Id.* at 885.

[101] *Id.* at 885, 887.

[102] 428 U.S. 543, 545 (1976).

[103] *Id.* at 556-57.

[104] *Id.* at 562-64.

[105] *Id.* at 563.

[106] *See* ACLU, *The Constitution in the 100-Mile Border Zone* (Aug. 21, 2014), https://www.aclu.org/documents/constitution-100-mile-border-zone.

[107] *Id.*

[108] *Id.*

question of whether immigration enforcement has been given the power to circumvent fundamental constitutional protections.[109]

III. THE COURT'S REASONING

To expand on the jurisprudence regarding *Bivens* claims in the immigration enforcement context discussed in *Hernandez*, the Court granted certiorari to review the Ninth Circuit's decision in *Egbert v. Boule*.[110] Justice Thomas, writing for the majority, held Boule's *Bivens* cause of action presented a new context and the judiciary should refrain from extending *Bivens*.[111] Justice Thomas noted that in the past forty-two years, the Court declined eleven times to recognize a *Bivens* claim.[112] Justice Thomas reaffirmed the contemporary view that recognizing causes of action under *Bivens* is "a disfavored judicial activity."[113]

While recognizing that past precedent outlined a two-step test for applying *Bivens*, the majority stated the test is in fact really one question: "whether there is any reason to think that Congress might be better equipped to create a damages remedy."[114] To answer the question, the Court must perform the special factors analysis.[115] Additionally, the Court stated that if Congress or the Executive, through the delegation of authority from Congress, have created an "alternative remedial structure," a *Bivens* claim cannot be recognized.[116]

Turning to the Ninth Circuit's opinion, the Court held the Circuit erred in allowing the *Bivens* claim to proceed for two principle reasons: (1) "Congress is better positioned to create remedies in the border-security context," and (2) "the Government already has provided alternative remedies that protect plaintiffs like Boule."[117] Citing to *Hernandez*, the Court reiterated that regulating CBP agents' conduct implicated national security concerns which the judiciary is ill equipped to consider.[118] Finding the same national security concerns, the Court held that not only

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[109] *Id.*

[110] Egbert v. Boule, 142 S. Ct. 1793, 1800, 1805-06 (2022).

[111] *Id.* at 1805, 1807.

[112] *Id.* at 1800.

[113] *Id.* at 1803 (quoting Ziglar v. Abbasi, 137 S.Ct. 1843, 1857 (2017)).

[114] *Id.*

[115] *Id.* ("For example, we have explained that a new context arises when there are 'potential special factors that the previous *Bivens* cases did not consider.'") (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1860 (2017)).

[116] *Id.* at 1804 (citations and quotation marks omitted).

[117] *Id.*

[118] *Id.* at 1805.

could no cause of action under *Bivens* proceed against Agent Egbert, but that no claim could be made "against Border Patrol agents generally."[119]

The Court found that Congress already provided an alternative remedy for plaintiffs such as Boule, thereby precluding *Bivens* claims in this context.[120] The Court found the CBP's statutory mandate to supervise its agents and the regulations requiring CBP to receive and investigate grievances for violations of their standard of conduct provided an alternative remedial structure.[121] The Court held that alternative remedies did not have to provide complete or effective relief because the adequacy of a remedy is "a legislative determination that must be left to Congress, not the federal courts."[122] Lastly, the Court held that Boule's First Amendment retaliation claim could not proceed because the Court had never recognized a *Bivens* claim under the First Amendment and many factors indicated Congress "is better suited to authorize such a damages remedy."[123]

Justice Sotomayor, in dissent, first argued the majority misapplied the existing two-part test for *Bivens* claims applied in *Ziglar* and *Hernandez*.[124] Justice Sotomayor stated that Boule's case did not present a different circumstance from the original *Bivens* case, thus the court erroneously conducted the second prong special factor analysis.[125] Even if Boule's case presented a new context, she reasoned the majority distorted national security concerns by erroneously comparing the national security implications in *Hernandez* and *Ziglar* to Boule's case.[126] Lastly, Justice Sotomayor pointed out the flaws in the majority's finding of an existing remedial process, arguing the existing agency review procedures are inadequate as an effective remedy.[127]

IV. ANALYSIS

In *Egbert v. Boule*, the United States Supreme Court denied a U.S. citizen the *Bivens* remedy for constitutional violations by a CBP

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[119] *Id.* at 1806.
[120] *Id.*
[121] *Id.*
[122] *Id.* at 1806-07.
[123] *Id.* at 1807.
[124] *Id.* at 1818 (Sotomayor, J., concurring in part and dissenting in part) ("Today, however, the Court pays lip service to the [two-step] test set out in our precedents . . . .").
[125] *Id.* at 1815.
[126] *Id.* at 1815-17.
[127] *Id.* at 1821-22.

agent.[128] The Court's decision creates serious constitutional concerns for three principle reasons.[129] First, the Court misapplied existing *Bivens* precedent, implicitly eradicating the remedy while not explicitly overruling *Bivens*.[130] Second, the Court continued the erosion of constitutional protections as applied to CBP agents and in the border security context.[131] Lastly, the Court removed the use of an important deterrent for constitutional violations against an agency with a pattern of abuse, discrimination, and limited oversight.[132]

A. The Court Failed to Correctly Apply the Existing Bivens *Test, Severely Limiting the Remedy Without Explicitly Overruling* Bivens

In *Ziglar v. Abbasi*, the Supreme Court established the governing test for evaluating *Bivens* claims.[133] The test is a "two-step inquiry"[134] beginning with whether the claims arise in a new context, meaning it is "different in a meaningful way from previous *Bivens* cases."[135] If the case arises in a new context, the second step evaluates whether "special factors" exist that "counsel hesitation" about extending the remedy to such claims.[136] However, the Court in *Egbert v. Boule* reduced the test to one question: "whether there is any reason to think that Congress might be better equipped to create a damages remedy."[137]

The misapplication of the test allowed the Court to bypass, without significant consideration, the first step of evaluating whether the case was "different in a meaningful way from previous *Bivens* cases" and immediately conduct the special factors analysis.[138] Justice Thomas

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[128] *Id.* at 1800 (majority opinion).

[129] *See infra* Section IV.A-C.

[130] *See infra* Section IV.A.

[131] *See infra* Section IV.B.

[132] *See infra* Section IV.C.

[133] 137 S. Ct. 1843, 1859-60 (2017). *See also* Hernandez v. Mesa, 140 S. Ct. 735, 743 (2020) (citing to Ziglar v. Abbasi when elaborating the test to determine when to extend *Bivens*).

[134] *Hernandez*, 140 S. Ct. at 743.

[135] *Id.* (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1859 (2017)) (internal quotation marks omitted).

[136] *Id.* (quoting Carlson v. Green, 446 U.S. 14, 18 (1980)).

[137] 142 S. Ct. 1793, 1803 (2022). "Today, however, the Court pays lip service to the [two-step] test set out in our precedents, but effectively replaces it with a new single-step inquiry designed to constrict *Bivens*." *Id.* at 1818 (Sotomayor, J., concurring in part and dissenting in part).

[138] *Id.* at 1803-04 (majority opinion); *Id.* at 1813-14 (Sotomayor, J., concurring in the judgment part and dissenting in part). In the next sentence, after reducing the test to a single question, Justice Thomas immediately states, "we have explained that a new context arises when there are 'potential special factors that previous *Bivens* cases did not consider.'" *Id*. at 1803. Justice Thomas proceeds then to state that the previous identification of new contexts was

conflated concerns regarding separation of powers with the test's evaluation of a new context, and in the following sentence invoked the "counsel[ing] hesitation" language of the second step of the analysis.[139]

When applying this standard to Boule's claims, Justice Thomas emphasizes that the national security implications of the border context signify that Congress, and not the Judiciary, is "better positioned" to grant a damages remedy; therefore, Boule's *Bivens* claims cannot stand.[140] While emphasizing the border security concerns in the case, Justice Thomas diminishes the parallels with the original *Bivens* claims as "superficial similarities" that cannot "support the judicial creation of a cause of action."[141]

The similarities between Bivens's original claim and Boule's claims are significant.[142] Bivens claimed excessive use of force in violation of the Fourth Amendment after Federal agents entered his home without a warrant.[143] Boule also claimed excessive use of force in violation of the Fourth Amendment for the actions of Egbert on his property.[144] As the dissent notes, the only "salient difference in 'context'" is the fact that agents in *Bivens* were Federal Bureau of Narcotics agents while Agent Egbert was a CBP agent.[145] An additional difference in context is the fact that Boule's property straddles the border.[146]

However, the first step of the *Bivens* analysis to determine a meaningful difference from prior precedents does not take into account "trivial [differences] that . . . will not suffice to create a new *Bivens* context."[147] Egbert's membership in a different law enforcement agency and

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"largely because they represent situations in which a court is not undoubtedly better positioned than Congress to create a damages action." *Id.*

[139] *Id.*

> [W]e have identified several examples of new contexts . . . largely because they represent situations in which a court is not undoubtedly better positioned than Congress to create a damages action. We have never offered an "exhaustive" accounting of such scenarios, however, because no court could forecast every factor that might "counse[l] hesitation."

Id.

[140] *Id.* at 1804-05.

[141] *Id.* at 1805.

[142] *See id.* at 1814-15 (Sotomayor, J., concurring in part and dissenting in part) (finding "Boule's Fourth Amendment claim does not arise in a new context.").

[143] *See supra* notes 41-44 and accompanying text.

[144] *See supra* notes 31-32 and accompanying text.

[145] *Egbert*, 142 S. Ct. at 1814 (Sotomayor, J., concurring in part and dissenting in part).

[146] *Id.* at 1800 (majority opinion).

[147] Ziglar v. Abbasi, 137 S. Ct. 1843, 1865 (2017). "[T]his Court's precedent instructs that some differences are too 'trivial . . . to create a new Bivens context.'" *Egbert*, 142 S. Ct. at 1814-15 (Sotomayor, J., concurring in part and dissenting in part) (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1865 (2017)).

the location of the encounter on private property near the border do not create a meaningful difference in the context of Boule's claims.[148]

The Court's reinvention of the standard severely limits the application of *Bivens*.[149] The Court never explicitly overrules *Bivens* and claims that its holding is still in effect.[150] However, the Court completely eliminated the cause of action against an entire law enforcement agency, CBP.[151] Additionally, the standard the Court applies in precluding Boule's *Bivens* claim despite its many parallels to the original case severely reduces the remedy's application.[152]

B. The Court's Decision Continues the Line of Precedent Eroding Constitutional Protections as Applied to CBP Agents and Immigration Enforcement

The Supreme Court has long recognized the expansive power of Congress and the Executive to regulate immigration and the nation's borders.[153] This reasoning is often referred to as the plenary power doctrine.[154] Under this doctrine, Congress and the Executive branch have granted expansive powers to CBP agents and immigration enforcement officials.[155] These statutes allow warrantless searches of private property

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[148] *Egbert*, 142 S. Ct. at 1815 (Sotomayor, J., concurring in part and dissenting in part) ("That it was a CBP agent rather than a Federal Bureau of Narcotics agent who unlawfully entered Boule's property and used constitutionally excessive force against him plainly is not the sort of 'meaningful' distinction that our new-context inquiry is designed to weed out.").

[149] *Id.* at 1818 (reasoning the Court's standard will "foreclose remedies in yet more cases").

[150] *Id.* at 1803, 1809 (majority opinion) ("But, to decide the case before us, we need not reconsider *Bivens* itself.").

[151] *Id.* at 1806.

[152] *Id.* at 1819 (Sotomayor, J., concurring in part and dissenting in part).

[153] *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 605-06 (1889) (holding Congress had expansive power to regulate the entrance of foreigners to the country); Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) (extending the expansive power of Congress and the Executive to regulate entrance of foreigners to the power to expel foreigners within the country); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (holding long term resident non-citizens returning to the United States are not entitled to due process rights guaranteed in the constitution when detained "on the threshold of initial entry" at the border pending removal).

[154] David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 30 (2015).

[155] 8 U.S.C. § 1357(a) (authorizing CBP to stop and interrogate persons suspected of being unlawfully present and search vessels and other vehicles "within a reasonable distance from any external boundary of the United States"); 8 C.F.R. § 287.1(a)(2) (defining a reasonable distance as 100 miles from any border).

within twenty-five miles of a border as long as it is not a "dwelling,"[156] and authorize CBP to set up check points and stop and interrogate anyone regarding their immigration status.[157] The decision in *Egbert* follows the line of precedent that extend the plenary power doctrine and erode constitutional protections in the sphere of immigration enforcement in comparison to other law enforcement agencies.[158]

Supreme Court decisions regarding the regulation of CBP agent conduct often begin the analysis with discussions of the expansive problems of border security and the large number of illegal activities at the border.[159] These decisions point to the "large numbers"[160] of noncitizens that enter illegally and the near "impossible [task of] prevent[ing] illegal border crossings" given the size of the border.[161] These discussions mirror the language of the Supreme Court's early iteration of the plenary power doctrine that equated "vast hordes" of people "crowding in upon" U.S. society to a foreign invasion.[162] Claims of border insecurity justify a compelling government interest that outweighs the "minimal intrusion" of CBP agents stopping and questioning individuals without the higher burden of probable cause.[163]

The decision in *Egbert* parallels this reasoning.[164] Justice Thomas begins his description of the facts of the case by stating that the area around Boule's property "is a hotspot for cross-border smuggling of people, drugs, illicit money, and items of significance to criminal organizations."[165] He describes that "on numerous occasions" CBP agents have observed illegal crossings through Boule's property and seized

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[156] 8 U.S.C. § 1357(a)(3). The legal definition of "dwelling" is a structure that is used as a residence. *See* United States v. Romero-Bustamente, 337 F.3d 1104, 1109 (9th Cir. 2003) (defining "dwelling" in 8 U.S.C. § 1357(a)(3)).

[157] 8 U.S.C. § 1357(a)(1).

[158] *See infra* text accompanying notes 158-75.

[159] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 551-52 (1976) (recognizing "large numbers of aliens seek illegally to enter" and the "border with Mexico . . . is almost 2,000 miles long"); United States v. Brignoni-Ponce, 422 U.S. 873, 878-79 (1975) (finding the number of noncitizens unlawfully present significant and that they create "significant economic and social problems").

[160] *Martinez-Fuerte*, 428 U.S. at 551.

[161] *Brignoni-Ponce*, 422 U.S. at 879.

[162] Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

[163] *Brignoni-Ponce*, 422 U.S. at 881 (recognizing "the importance of the governmental interest at stake" and the "absence of practical alternatives for policing the border" justified the use of roving patrols that could inquire about immigration status based on reasonable suspicion of illegal entry).

[164] Egbert v. Boule, 142 S. Ct. 1793, 1804 (2022) (finding the threat of poor border security to national security justifies nonapplication of the *Bivens* standard).

[165] *Id.* at 1800.

drugs on his property.[166] Then, when applying his articulated *Bivens* standard, Justice Thomas underscores the "national security implications" of "undermining border security."[167] Instead of recognizing the similarities in the facts between *Bivens* and Boule's claims, he states the national security concerns of the border context recognized in *Hernandez* apply with "full force" to Boule's claims.[168] The merging of border security concerns in *Egbert* and *Hernandez* with the "national security implications" from *Abbassi*, which involved the U.S. response to a terrorist attack on U.S. soil,[169] is also analogous to the reasoning from foundational plenary power doctrine cases equating "hordes" of immigrants to foreign invaders.[170]

There is no question that the government has a strong interest and authority to regulate the nation's border and should have the power to exercise that authority.[171] However, the manner in which the Supreme Court has framed the issue has justified the limitation of constitutional protections in the immigration enforcement context.[172] The emphasis of the border as a vast and unregulated region of criminal activity[173] and the early interpretation of the plenary power doctrine[174] conflate regulating immigration and the border with militaristic security and safety concerns.[175] This allows the Court to justify granting expansive authority to CBP agents and immigration officials and limiting constitutional

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166 *Id.*

167 *Id.* at 1804 (internal quotations and citations omitted).

168 *Id.*

169 *Id.* at 1820 (Sotomayor, J., concurring in the judgment part and dissenting in part). *See* Hernandez v. Mesa, 140 S. Ct. 735, 747 (2020) (citing directly to *Abbassi* the court finds "[s]ince 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.").

170 Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

171 *See* United States v. Martinez-Fuerte, 428 U.S. 543, 551-52 (1976) (discussing the strong governmental interest in controlling the border); United States v. Brignoni-Ponce, 422 U.S. 873, 879 (1975) (discussing the strong governmental interest in controlling the border).

172 *See Brignoni-Ponce*, 422 U.S. at 881 (upholding CBP's authority to conduct roving patrols within 100 miles of the border to stop and inquire about a person's immigration status only with reasonable suspicion the person is unlawfully present, not probable cause); *Martinez-Fuerte*, 428 U.S. at 557, 563 (upholding the use of fixed traffic check points to inquire about person's immigration status within 100 miles of the border and CBP agents authority to refer people to secondary inspection largely based on a person's Mexican ancestry); 8 U.S.C. § 1357(a)(3) (authorizing the use of warrantless searches on private property within 25 miles of the US border).

173 *See Martinez-Fuerte*, 428 U.S. at 551-52; *Brignoni-Ponce*, 422 U.S. at 879.

174 *Chae Chan Ping*, 130 U.S. at 606.

175 *See* Hernandez v. Mesa, 140 S. Ct. 735, 746-47 (2020) (comparing the *Ziglar* national security concerns of claims regarding the responses to a terrorist attack on U.S. soil to the national security concerns from claims against a CBP officer cross border shooting of a minor).

protections in the face of a grave safety and security risk.[176] The Court in *Egbert* continued this pattern and completely eliminated a remedy for constitutional violations from use against the agency charged with protecting and regulating the U.S. border.[177]

C. The Court Eliminated a Judicially Available Accountability Measure From Use Against CBP Despite its Limited Oversight and a History and Current Pattern of Abuse and Racism

The dissent recognizes the elimination of the *Bivens* remedy against CBP agents raises concerns because of the existing expansive power of CBP.[178] The concerns, however, are particularly acute given CBP's racist history and persistent pattern of discrimination and abuse of power.[179] Additionally, the existing administrative remedies are wholly inadequate in providing effective oversight and deterrence.[180] The decision in *Egbert* thus frustrates the principle purpose of the *Bivens* cause of action to deter constitutional violations by federal agents.[181]

i. CBP's History and Persistent Pattern of Racism and Abuse

Congress created Border Patrol in 1924 through the passage of the Labor Appropriation Act of 1924.[182] As a response to nativist pushback to the influx of Mexican immigrants in the early 1900s, Congress also passed the Immigration Act of 1924, criminalizing unlawful entry into the United States.[183] The newly founded Border Patrol attracted many officers from groups "with a history of racial violence and brutality, including the Ku Klux Klan and the Texas Rangers."[184] The

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[176] *See supra* Section II.B.

[177] Egbert v. Boule, 142 S. Ct. 1793, 1821 (Sotomayor, J., concurring in the judgment part and dissenting in part) ("CBP agents are now absolutely immunized from liability in any *Bivens* action for damages, no matter how egregious the misconduct or resultant injury.").

[178] *Id.*

[179] *See infra* Section IV.C.i.

[180] *See infra* Section IV.C.ii.

[181] *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70 (2001) ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.").

[182] *Border Patrol History*, U.S. CUSTOMS AND BORDER PROTECTION, https://www.cbp.gov/border-security/along-us-borders/history (July 21, 2020).

[183] KATY MURDZA & WALTER EWING, AM. IMMIGR. COUNCIL, THE LEGACY OF RACISM WITHIN THE U.S. BORDER PATROL 7 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_legacy_of_racism_within_the_u.s._border_patrol.pdf.

[184] *Id.*

Texas Rangers in particular influenced the newly formed Border Patrol, bringing a tradition of racial violence to the law enforcement agency.[185]

The Agency at its outset was not only involved in acts of horrific discrimination but carried out several racialized immigration enforcement plans throughout the twentieth century.[186] This included Japanese internment where Agency agents transported Japanese Americans to internment camps and served as guards in eight camps.[187] Similarly, CBP carried out racially targeted deportation plans against Mexicans and Mexican Americans in the 1930s and later in the 1940s, which affected not only Mexican immigrants but also U.S. citizens of Mexican heritage who are estimated to make up half of the population of those deported.[188] In addition, these plans targeted people based on race but as late as the 1950s still used racist epithets in their names, such as "Operation Wetback."[189]

The Agency's racist origins and history continue to manifest today, including reports of the use of racist terms in training.[190] Additionally, several migrants surveyed indicated CBP agents frequently used racist terms in their encounters with them.[191] In 2019, a ProPublica report revealed a Facebook group made up of several current and former members of CBP that circulated racists memes and language towards migrants and Hispanic members of Congress.[192] In 2021, images circulated of CBP agents on horseback appearing to corral and whip primarily Haitian migrants near Del Rio, evoking comparisons to 19th century slave patrols.[193]

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[185] *Id.* The Texas Rangers had a history of revenge killings of those of Mexican descent after crimes that were alleged to be committed by Mexican perpetrators. *Id.*

[186] *See id.* at 7-9.

[187] *Id.* at 9.

[188] Code Switch, *Mass Deportation May Sound Unlikely, But It's Happened Before*, NPR (Sept. 8, 2015) https://www.npr.org/sections/codeswitch/2015/09/08/437579834/mass-deportation-may-sound-unlikely-but-its-happened-before.

[189] MURDZA & EWING, *supra* note 180, at 9.

[190] *Id.* at 4, 13.

[191] *Id.* at 13.

[192] A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes*, PROPUBLICA (July 1, 2019, 10:55 AM), https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes.

[193] Eileen Sullivan & Zolan Kanno-Youngs, *Images of Border Patrol's Treatment of Haitian Migrants Prompt Outrage*, NEW YORK TIMES (Sept. 21, 2021), https://www.nytimes.com/2021/09/21/us/politics/haitians-border-patrol-photos.html; SARAH DECKER ET AL., ROBERT F. KENNEDY HUM. RTS. & HAITIAN BRIDGE ALL., BEYOND THE BRIDGE: DOCUMENTED HUMAN RIGHTS ABUSES AND CIVIL RIGHTS VIOLATIONS AGAINST HAITIAN MIGRANTS IN THE DEL RIO, TEXAS ENCAMPMENT 6 (Mar. 29, 2022) https://rfkhr.imgix.net/asset/Del-Rio-Report.pdf.

Numerous reports indicate a pervasive pattern of racial profiling by the agency.[194] The Supreme Court condemned the use of race and ethnicity by CBP agents to justify stops inquiring about immigration status.[195] A recent ACLU report confirmed CBP's use of race to justify stops in the State of Michigan.[196] The report indicated that from 2012 through 2018, 83.8% of those apprehended in Michigan were from Latin America despite the fact that of those arrested while entering the United States without authorization, 50.2% were Canadian citizens and 20.5% were European nationals.[197] The apprehension logs also revealed that CBP in Michigan used "'complexion codes' to describe people apprehended" and "more than 96% of those apprehended are recorded as being 'Black,' 'Dark Brown,' 'Dark,' 'Light Brown,' 'Medium Brown,' 'Medium,' or 'Yellow.'"[198] The report indicated that CBP's use of racial profiling not only affects immigrants but also U.S. citizens, finding over a third of the stops involved U.S. citizens.[199]

The ACLU of Michigan's report is not the only statistical indication of racism in the immigration enforcement context.[200] One study shows that Black immigrants in particular face discrimination when interacting with several U.S. immigration enforcement apparatuses including CBP.[201] Black immigrants, while making up only 7% of noncitizens in the United States, make up 20% of the population facing deportation on criminal grounds.[202] From 2018 through 2020, Haitian immigrants were ordered to pay immigration bonds around $5,000 more than the average immigration bond amounts, leading to prolonged

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194 MURDZA & EWING, *supra* note 180, at 4, 14.

195 *See supra* Section II.B.

196 Joe Davidson, *Black officers say CBP forced them to profile. A study in one state backs them up*, Wash. Post (July 22, 2021, 6:00 AM), https://www.washingtonpost.com/politics/cbp-racial-profiling-aclu-study-michigan/2021/07/21/ee354918-e723-11eb-934f-7e6c1927f261_story.html; MONICA ANDRADE-FANNON ET AL., ACLU MICHIGAN, THE BORDER'S LONG SHADOW: HOW BORDER PATROL USES RACIAL PROFILING AND LOCAL AND STATE POLICE TO TARGET AND INSTILL FEAR IN MICHIGAN'S IMMIGRANT COMMUNITIES (Mar. 25, 2021), https://www.aclumich.org/sites/default/files/field_documents/100_mile_zone_report-updated.pdf.

197 MONICA ANDRADE-FANNON ET AL., ACLU MICHIGAN, *supra* note 194, at 23.

198 *Id.* at 4.

199 *Id.*

200 BLACK ALL. FOR JUST IMMIGR. (BAJI) ET. AL., UNITED STATES OF AMERICA SHADOW REPORT TO THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (CERD) (Aug. 30, 2022), https://humanrightsfirst.org/wp-content/uploads/2022/09/US-Coalition_anti-Black-Discrimination-in-Immigration__CERD-Report_072222.pdf.

201 *Id.* at 1-4.

202 THE REFUGEE AND IMMIGRANT CTR. FOR EDUC. AND LEGAL SERVS. (RAICES), *Black Immigrant Lives are Under Attack*, https://www.raicestexas.org/2020/07/22/black-immigrant-lives-are-under-attack/ (last visited Sept. 24, 2023).

detention.[203] The history and persistent pattern of racism within CBP makes the Court's decision in *Egbert* to eliminate the *Bivens* remedy for constitutional violations against all CBP agents particularly troubling.

ii. CBP's Current Administrative Remedies are Inadequate

The elimination of the *Bivens* remedy is also troubling given the current inadequacy of CBP's administrative remedies.[204] Justice Sotomayor questioned the majority's acceptance of the current administrative remedies as adequate in the *Bivens* context because the process denied the complainant the right to participation and the ability to seek review.[205] Not only do the administrative procedures lack those key elements, but one watchdog group argues that CBP is the least transparent and least accountable law enforcement agency.[206] In 2015, "one former senior FBI official said, 'if a small police department or a mid-sized or a large police department had as many questionable use of force cases as [CBP], DOJ would be all over that.'"[207] Yet the agency has a "tradition of evading even the meager oversight and accountability mechanisms that other law enforcement agencies are subject to," in particular Congressional oversight. [208]

The current CBP grievance filing process highlighted by the majority in *Egbert* is particularly complicated and leads to several unanswered complaints.[209] Complaints against CBP employees can be submitted to any of four different offices: DHS Office of Inspector General ("OIG"), Joint Intake Center ("JIC"), CBP's Office of Internal Affairs ("OIA"), or DHS Office for Civil Rights and Civil Liberties ("CRCL").[210] However, the OIG has "a right of first refusal for all

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[203] *Id.* at 11–12. ICE does not track the racial identities of people who were deported in its data, so all people from majority Black countries are often included in the definition of "Black immigrants." *Id.*

[204] Egbert v. Boule, 142 S. Ct. 1793, 1821-22 (2022) (Sotomayor, J., concurring in part and dissenting in part).

[205] *Id.* at 1822.

[206] SARAH TURBERVILLE & CHRIS RICKERD, AN OVERSIGHT AGENDA FOR CUSTOMS AND BORDER PROTECTION: AMERICA'S LARGEST, LEAST ACCOUNTABLE LAW ENFORCEMENT AGENCY 3 (Oct. 12, 2021), https://www.pogo.org/report/2021/10/an-oversight-agenda-for-customs-and-border-protection-americas-largest-least-accountable-law-enforcement-agency.

[207] *Id.*

[208] *Id.* at 8-9, 11 ("It's not just accountability to Congress that CBP struggles to provide.")

[209] *Id.*

[210] GUILLERMO CANTOR & WALTER EWING, AMERICAN IMMIGR COUNCIL, STILL NO ACTION TAKEN: COMPLAINTS AGAINST BORDER PATROL AGENTS CONTINUE TO GO UNANSWERED 5 (Aug. 2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/still_no_action_taken_complaints_against_border_patrol_agents_continue_to_go_unanswered.pdf.

complaints."[211] Thus, it screens complaints it receives directly but also those received by the other offices.[212] The constant flow between several different offices makes obtaining status updates particularly difficult and all the more confusing for both complainants and those processing the complaints.[213]

In 2019, after an audit conducted by the OIG, DHS committed to creating a comprehensive case tracking system to better identify, manage and monitor complaints of misconduct.[214] The same report found 47% of the 16,003 CBP agents surveyed did not agree that employees are held accountable.[215] Reports indicate that complaints go unanswered and, of those resolved, the majority are resolved with no disciplinary action.[216]

Additionally, filed complaints are often referred back from the overseeing agencies to the Border Patrol sector where they originated and are not independently investigated.[217] This pattern of questionable independent investigation of grievances is exemplified by the existence of CBP's Critical Incident Teams ("CITs").[218] The CITs were units housed within CBP whose stated mission was the "mitigation of civil liability."[219] CITs without "criminal investigator" designation by the Office of Personnel Management investigated serious incidents of abuse including the death of a U.S. citizen from a CBP vehicle pursuit.[220] The report contained inconsistencies and inaccuracies, calling into question the manner CBP holds agents accountable.[221] Although CITs were set to end in this fiscal year, the practice represents a pattern of inadequacy in CBP's administrative process.[222] The majority's decision in *Egbert*

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[211] *Id.*

[212] *Id.* ("If the OIG declines to investigate a complaint, it will either be returned to the originating office or, with respect to complaints submitted directly to OIG, sent to CRCL and/or to the JIC for referral to OIA.").

[213] *Id.*

[214] DEP'T OF HOMELAND SEC. OFF. OF INSPECTOR GEN., DHS NEEDS TO IMPROVE ITS OVERSIGHT OF MISCONDUCT AND DISCIPLINE 16 (June 17, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-48-Jun19.pdf.

[215] *Id.* at 10.

[216] CANTOR & EWING, *supra* note 208, at 6 (finding in 2015, three-fifths of cases closed warranted no disciplinary action).

[217] *Id.*

[218] Shaw Drake & Rebecca Sheff, *Border Patrol is Investigating Itself Following Deaths, Report Reveals*, ACLU (June 7, 2022), https://www.aclu.org/news/immigrants-rights/border-patrol-is-investigating-itself-following-deaths-report-reveals.

[219] *Id.* (internal quotation marks omitted).

[220] *Id.*

[221] *Id.*

[222] *Id.*

exacerbates the lack of effective oversight of CBP, leaving victims like Boule with no effective options to redress abuses by agents.[223]

V. CONCLUSION

In *Egbert v. Boule*, the Court refused to extend the *Bivens* remedy to the claim of a U.S. citizen alleging Fourth and First Amendment violations by a CBP agent.[224] The Court stressed the security of the border and downplayed the similarities between the original *Bivens* claim and Boule's claims.[225] By removing the *Bivens* claims against CBP agents, the Court (1) misapplied existing *Bivens* precedent, gutting the application of the remedy in the future;[226] (2) continued the erosion of constitutional protections as applied to CBP agents and immigration officials;[227] and (3) failed to provide a legally available accountability measure to an agency with limited oversight and a pattern of abuse and racism.[228]

[223] Egbert v. Boule, 142 S. Ct. 1793, 1821 (Sotomayor, J. concurring in part and dissenting in part) ("Absent intervention by Congress, CBP agents are now absolutely immunized from liability in any Bivens action for damages, no matter how egregious the misconduct or resultant injury.").

[224] *Id.* at 1805-07 (majority opinion).

[225] *See supra* notes 139-146 and accompanying text.

[226] *See supra* Section IV.A.

[227] *See supra* Section IV.B.

[228] *See supra* Section IV.C.