No. 23-384

IN THE

Supreme Court of the United States

MICHAEL BORESKY,
Petitioner,

v.

JEREMY GRABER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION (FLEOA) AND THE NATIONAL BORDER PATROL COUNCIL (NBPC) AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DEBRA L. ROTH
Counsel of Record
CHRISTOPHER J. KEEVEN
JAMES P. GARAY HEELAN
SHAW, BRANSFORD & ROTH P.C.
1101 Connecticut Avenue, NW
Ste 1000
Washington, D.C. 20036
(202) 463-8400
droth@shawbransford.com

Counsel for Amici Curiae

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INTEREST OF THE *AMICI CURIAE*[1]

The *amici* herein are the Federal Law Enforcement Officers Association (FLEOA) and the National Border Patrol Council (NBPC).

Formed in 1977, FLEOA is the largest nonpartisan and nonprofit professional member association exclusively representing federal law enforcement officers. *About Us*, Federal Law Enforcement Officers Association, https://www.fleoa.org/about-us. FLEOA represents the interests of its members in legislative, executive, and judicial forums in addition to providing legal services for members. *Id.* FLEOA advocates for its members on matters ranging from pay and benefits to the policies necessary for federal law enforcement officers to effectively combat crime, terrorism, and other threats to the public. *Id.*

FLEOA currently represents over 32,000 federal law enforcement officers—including Petitioner Michael Boresky—across 65 federal agencies, like the U.S. Supreme Court Police; U.S. Marshals Service; U.S. Secret Service; Transportation Security Administration's Federal Air Marshals; U.S. Forest Service; Bureau of Alcohol, Tobacco, Firearms and Explosives; Bureau of Engraving and Printing Police; and Defense Criminal Investigative Service. *Id.* With membership across U.S. Department of Homeland Security (DHS) agencies, law enforcement components within the Department of Justice (DOJ), non-law enforcement agencies, and

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of this brief in accordance with Rule 37.2.

various Department of Defense law enforcement components, FLEOA members regularly engage in high risk and high stakes domestic and foreign security operations. *Id.* FLEOA's advocacy efforts focus on ensuring members are secure and supported in these operations to avoid unnecessary distractions that undermine their homeland security and law enforcement mission. *Id*.

NBPC is a labor union established in 1967 to represent non-supervisory Border Patrol agents and support staff of the United States Border Patrol. https://bpunion.org/about-nbpc/. The NBPC preserves the oath of office sworn by all Border Patrol agents by promoting policies that contribute to the security of the United States and opposing policies that restrict or impede the sworn duties of Border Patrol agents.

NBPC members "safeguard the American people from terrorists and their weapons and detect and prevent drug smugglers and the illegal entry of undocumented noncitizens." *What We Do*, U.S. Customs and Border Protection, https://www.cbp.gov/careers/usbp/what-we-do. NBPC members are also responsible for maintaining the security of 6,000 miles of Mexican and Canadian land borders and more than 2,000 miles of coastal borders. *Id*; *see also As Ports of Entry*, U.S. Customs and Border Protection, https://www.cbp.gov/border-security/ports-entry. On any single day in 2022, 19,357 Border Patrol agents had 6,068 enforcement encounters nationwide between ports of entry (including apprehensions and expulsions). *Snapshot: A Summary of CBP Facts and Figures*, U.S. Customs and Border Protection, https://www.cbp.gov/sites/default/files/assets/documents/2023-May/cbp-snapshot-fy2022-stats.pdf. Border Patrol agents and their Customs and Border Protection colleagues on any typical day in 2022 also

seized 2,895 pounds of drugs; $217,700 of illicit currency items; and $8 million worth of products with Intellectual Property Rights violations. *Id*. Given the breadth of Border Patrol agents' geographic and enforcement authority, the work of these agents regularly implicates foreign policy, diplomacy, and national security matters.

The NBPC rarely submits amicus briefs–historically submitting only two briefs before this Court–and only does so when a case directly impacts its members' ability to fulfill their critical national security mission. *See* Brief for Petitioner at 1, *Egbert v. Boule*, 142 S. Ct. 1793 (2022) (No. 21-147) (arguing "an expansion of the judicial remedy created in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), will interfere with border enforcement and undermine border security"); *see also* Brief for Petitioner at 2, *Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04-278) (arguing alongside a coalition of law enforcement organizations that the lower court's decision would "create great confusion for public employees in the performance of their duties"). NBPC submits this brief because the district courts' continued allowance of new implied causes of action beyond the three recognized *Bivens* contexts[2] subjects Border Patrol agents to litigation that distracts from their core duties and undermines their national security mission. *See Egbert*, 596 U.S. 432, 491 (2022); *see also Ziglar v. Abbasi*, 582 U.S. 120, 134-35 (2017); *see generally Hicks v. Ferreyra*, 64 F.4th 156 (4th Cir. 2023) (finding that traffic stops do not constitute a new *Bivens* context); *Snowden v. Henning*, 72 F.4th 237 (7th Cir. 2023) (finding Fourth Amendment claims that arise outside

[2] *See Bivens*, 403 U.S. 338 (1971); *Davis v. Passman*, 442 U.S. 228 (1979); and *Carlson v. Green*, 446 U.S. 14 (1980).

a home are not a new *Bivens* context). NBPC feels this impact directly. Border Patrol Agent Erik Egbert, the petitioner in *Egbert v. Boule* and a NBPC member, experienced the distress of five years of litigation until relieved of the burden of an unauthorized lawsuit by this Court. *Egbert,* 596 U.S. at 490.

With Boresky a FLEOA member, this case is of particular importance to FLEOA. But Boresky is not the only affected FLEOA member. Federal law enforcement personnel who work closely with the public, like FLEOA members, are the most common subjects of a *Bivens* action. FLEOA is concerned about the inability to immediately appeal a district court decision allowing a new cause of action under *Bivens* because protracted litigation inhibits the important work of federal law enforcement across the Executive Branch. When federal law enforcement is subjected to discovery and trial in a *Bivens* action, they are distracted from their homeland security and national law enforcement operations. This Court properly limits *Bivens* suits to not intrude on the Executive Branch's national security decision making authority. *Abbasi*, 582 U.S. at 142 ("The risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy. . .For these and other reasons. . .'courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs' unless 'Congress specifically has provided otherwise.'") (internal citations omitted).

The *amici* submit this brief together because of the common impact, repeatedly identified by their members and this Court, of *Bivens* litigation on important government functions. Federal law enforcement officers differ in many ways across many federal agencies. But

the importance of their national and homeland security missions remains the same. The burden imposed by unauthorized *Bivens* suits against FLEOA and NBPC members is often the same. We therefore move this Court to grant writ of certiorari and ultimately allow federal *Bivens* defendants to immediately appeal a finding of an implied *Bivens* cause of action by district courts. This would prevent federal law enforcement officers and other defendants from being unnecessarily burdened by discovery and trial before an appellate court determines the implied cause of action is unauthorized.

SUMMARY OF THE ARGUMENT

In *Bivens*, this Court broke new ground and recognized an implied right of action against Federal Bureau of Narcotics officers who subjected the plaintiff to an invasive warrantless search of his home and his person in violation of the Fourth Amendment. Since then, after a brief period when this Court extended the rationale of *Bivens* to recognize two other implied claims for monetary damages—in *Davis v. Passman*, 442 U.S. 228 (1979) (Fifth Amendment Equal Protection Clause claim against Member of Congress for sex-based discrimination), and *Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment Cruel and Unusual Punishment Claim against Bureau of Prisons medical personnel for medical neglect)—this Court cautioned against recognizing new claims to stem the tide of new *Bivens* actions filed principally against federal law enforcement officers.

"In the years since it first expressed caution at the prospect of expanding *Bivens*, the Court has performed its own version of Bonaparte's retreat from Moscow and progressively chipped away at the decision—to the

point that very little of its original force remains." *Silva v. U.S.*, 45 F.4th 1134, 1138-39 (10th Cir. 2022) (internal citation omitted). Most recently in 2022, this Court in *Egbert v. Boule*, fashioned a rule so stringent that no new *Bivens* action should pass it. *See Egbert*, 596 U.S. 596 U.S. 482, 504 (2022) (Gorsuch, J. concurring) (". . .this Court leaves a door ajar and holds out the possibility that someone, someday might walk through it even as it devises a rule that ensures no one ever will."). Yet, district courts continue recognizing new *Bivens* contexts.

After the district court wrongly recognized a new *Bivens* context against Petitioner Boresky, the Third Circuit in *Graber v. Doe II*, 59 F.4th 603, 608 (3d Cir. 2023) denied immediate appellate review of the *Bivens* ruling. So too has the Sixth Circuit in *Himmelreich v. Fed. Bureau of Prisons*, 5 F.4th 653 (6th Cir. 2021). When allowed to proceed toward trial, erroneous *Bivens* rulings jeopardize two "particular value[s] of a high order": the initiative of federal officials and the efficiency of government. *See Will v. Hallock*, 546 U.S. 345, 353 (2006). Erroneously recognizing new *Bivens* actions causes real-world consequences to FLEOA and NBPC members and *all* federal officials protecting our nation, and to important missions of federal agencies. The first-hand experiences of NBPC and FLEOA members, described herein, plainly illustrate how *Bivens* litigation distracts and discourages federal employees from effectively performing their law enforcement duties, wastes federal government resources, and interferes with congressionally enacted administrative processes.

This Court must act to protect the "substantial public interests" of preserving the initiative of federal officials and the efficiency of government. *Id.* at 352-53. This Court should therefore grant certiorari and

reverse *Graber* and *Himmelreich*, so that circuit courts may mitigate waste caused by erroneous *Bivens* rulings.

ARGUMENT

Bivens actions allowed to proceed toward trial create "protracted litigation destined to yield nothing." *See Egbert v. Boule*, 596 U.S. 482, 504 (2022) (Gorsuch, J., concurring). The harm from such litigation is needless. Allowing immediate appellate review is the antidote.

The collateral order doctrine applies to "a small class of rulings, not concluding the litigation, but conclusively resolving claims of right separable from, and collateral to, rights asserted in the action." *See Will v. Hallock*, 546 U.S. 345, 349 (2006). The doctrine is available to orders that: (1) "conclusively determine the disputed question;" (2) "resolve an important issue completely separate from the merits of the action;" and (3) are "effectively unreviewable on appeal from a final judgment." *Id*. (quoting *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 239, 144 (1993)) (citations omitted). The third condition is applied when there is a "particular value of a high order" in either "preserving the initiative of [federal] officials" or "the efficiency of government." *Id*. at 353. Both elements are satisfied here.

In *Egbert* and *Abbasi*, this Court held that shielding individual federal officers from litigation is a special factor counseling hesitation against allowing new *Bivens* actions. *See Egbert v. Boule*, 596 U.S. 482, 499 (2022) ("Recognizing any new *Bivens* action 'entail[s] substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their

duties.'") (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)); *Ziglar v. Abbasi*, 582 U.S. 120, 141 (2017) ("[T]he burden and demand of litigation might well prevent [Executive Officials]—or, to be more precise, future officials like them—from devoting the time and effort required for the proper discharge of their duties.") (citing *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 356, 382 (2004)). These holdings mirror this Court's long-standing rationale for applying the collateral order doctrine to qualified immunity rulings. *See Will*, 546 U.S. at 354 ("The nub of qualified immunity is the need to induce officials to show reasonable initiative . . . a quick resolution of a qualified immunity claim is essential.") (internal citations omitted). It is also implicit, if not explicit, in *Egbert* and *Abbasi* that allowing new *Bivens* claims to proceed through discovery and litigation jeopardizes "the initiative of [federal] officials" and "the efficiency of government." *See Will*, 546 U.S. at 353. Yet, the Third Circuit held in *Graber v. Doe II*, that the collateral order doctrine is unavailable for *Bivens* rulings. Relying on dicta from *Will*,[3] the appeals court concluded "a *Bivens* ruling can be effectively reviewed after a final judgment because . . . a *Bivens* ruling is not meant to protect a defendant from facing trial." *See Graber v. Doe II*, 59 F.4th 603, 608 (3d Cir. 2023); *contra Egbert*, 596 U.S. at 499 and *Abbasi*, 582 U.S. at 141. The *amici* respectfully disagree.

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[3] *Will* mused, "if simply abbreviating litigation troublesome to Government employees were important enough for [collateral order] treatment, [then] collateral order appeal would be a matter of right whenever. . .a federal office lost [a motion to dismiss] on a *Bivens* action." *Will*, 546 U.S. at 353-54. *Graber* overstates the *Will* dicta. *See Graber*, 59 F.4th at 609 n.10. Moreover *Graber* does not reconcile *Will* with the subsequent *Egbert* and *Abbasi* holdings that the burdens of litigation are a "special factor" precluding new *Bivens* claims. *Id.*

Immediate appellate review must be available to *Bivens* rulings. District courts flouting the clear message of *Egbert* are adversely impacting "the initiative of [federal] officials" and "the efficiency of government." *Will*, 546 U.S. at 353. These impacts expose the error of *Graber* and *Himmelreich v. Fed. Bureau of Prisons*, 5 F.4th 653 (6th Cir. 2021), and should persuade this Court to grant certiorari in this case.

I. *Graber* jeopardizes "the initiative of [federal] officials."

The "burden of trial is unjustified in the face of" a *Bivens* lawsuit destined to fail on appeal. *Cf. Will*, 546 U.S. at 353. Trial burdens include "embarrassment, expense and ordeal. . .compelling [a defendant] to live in a continuing state of anxiety." *Id*. at 352 (quoting *Abney v. United States*, 431 U.S. 651, 661-662). That burden "might well prevent" federal employees or their successors "from devoting the time and effort required for the proper discharge of their duties." *Abbasi*, 582 U.S. at 141 (citing *Cheney*, 542 U.S. at 382); *accord Egbert*, 596 U.S. at 499 (acknowledging "risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties").

The first-hand experience of FLEOA and NBPC members crystalizes how *Bivens* litigation "imperil[s] a substantial public interest" in "preserving the initiative of [federal] officials" in the performance of their duties.[4] *See Will*, 546 U.S. at 352-53.

[4] To prepare this brief, FLEOA conducted a voluntary electronic membership survey, to gather information from current and former *Bivens* defendants to include in this brief.

A. Border Patrol Agent Erik Egbert

After more than five years of litigation, this Court granted Border Patrol Agent (BPA) Erik Egbert's petition in *Egbert v. Boule*, 596 U.S. 482 (2022). That result was a long time coming. Filed in January 2017, five months prior to *Abbasi*, the *Bivens* suit against BPA Egbert proceeded to discovery. The district court ultimately granted summary judgment in BPA Egbert's favor in August 2018. But the litigation continued for another four years. Defending against the suit for half of a decade caused "effectively unreviewable" harm to BPA Egbert and disruption to his federal agency employer. *See Will*, 546 U.S. at 349 (quoting *Puerto Rico Aqueduct and Sewer Auth.*, 506 U.S. at 144).

BPA Egbert is a member of the NBPC bargaining unit. NBPC knows how BPA Egbert was deeply embarrassed by the local media reports and negative local community sentiment caused by the plaintiff's public allegations against him.[5] Worse still, the

[5] BPA Egbert and Robert Boule, the plaintiff in *Egbert*, have both lived for years in Blaine, Washington, a town of approximately 6,000 residents. *QuickFacts: Blaine City, Washington*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/blainecitywashington/PST045222. Over the course of plaintiff's pending *Bivens* litigation against BPA Egbert, the local Blaine newspaper published four separate articles about it. *See Boule civil case goes to U.S. Supreme Court, could expand First Amendment rights*, The Northern Light, https://www.thenorthernlight.com/stories/boule-civil-case-goes-to-us-supreme-court-could-expand-first-amendment-rights,18322; U.S. Supreme Court hears Bob Boule case, The Northern Light https://www.thenorthernlight.com/stories/us-supreme-court-hears-bob-boule-case,19286; *U.S. Supreme Court rejects Bob Boule's suit against U.S. Border Patrol agent*, The Northern Light, https://www.thenorthernlight.com/stories/us-supreme-court-rejects-bob-boules-suit-against-us-border-patrol-agent,20217; U.S. Border

plaintiff, a convicted human trafficker, *see Egbert*, 596 U.S. at 488 n.1, through discovery obtained BPA Egbert's personal financial and employment information,[6] *see* Stipulated Protective Order Between Parties, U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement, *Boule v. Egbert*, No. 2:17-cv-00106, at 2 (W.D. Wash. Mar. 6, 2018).

The same and related allegations the plaintiff raised in his *Bivens* action were the subject of a year-long agency investigation into BPA Egbert's conduct. That investigation produced a report that the plaintiff obtained in discovery. *Id.* at 2. NBPC understands from BPA Egbert that his personal financial and employment information eventually made its way into the local Blaine community. As a federal employee, BPA Egbert could not publicly respond to the work-related allegations without his employer's approval. He was silenced, left alone and embarrassed.

The NBPC also knows how the financial worries about the cost of litigation and risk of a large monetary judgment consumed BPA Egbert and adversely

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Patrol agents off the hook after court ruling, The Northern Light, https://www.thenorthernlight.com/stories/us-border-patrol-agents-off-the-hook-after-court-ruling,20282. Each article identified BPA Egbert by name and repeated the plaintiff's allegations against him.

[6] In response to the survey FLEOA conducted for this brief, numerous officers reported significant stress caused by disclosing during discovery their intimate personal information to *Bivens* plaintiffs. Officers explained: "When working complex investigations on criminal groups you don't want to have your personal info out there," and "[P]laintiff was the suspect in a prior attempt on an officer's life … I worried for years that even if I emerged unscathed, I might get [killed] anyway."

impacted his personal relationships.[7] DOJ regulations allowing agencies to indemnify *Bivens* defendants for damages are little solace, when indemnification is discretionary and generally unavailable until *after* a judgment or settlement. *See* 28 C.F.R. § 50.15(c)(3); *Indemnification of Employees Acting in Official Capacity*, https://www.dhs.gov/sites/default/files/publications/mgmt/litigation-and-judicial-activities/mgmt-dir_md-0415-indemnification-employees-acting-official-capacity.pdf, U.S. Department of Homeland Security. NBPC knows that BPA Egbert constantly feared losing everything he worked for, and consequently he lost empathy for his friends and family. Given his plight, he could not help but view their own personal struggles as lesser than his own. According to NBPC, living on the precipice of financial ruin caused BPA Egbert's personal relationships to deteriorate over the course of the *Bivens* suit.[8]

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[7] Likewise, FLEOA survey respondents reported financial anxieties arising from *Bivens* actions against them: "[H]ad to report civil case against me on mortgage application," "Difficulty refinancing house," "It prevented me from applying for loans or other financial activities due to the questions about ongoing litigation, regardless of the litigation's merit," "I wasn't sure if my entire life savings was about to be taken away from me," "I was always worried about losing my house and saving[s]," "[M]y family could still face massive financial losses," and "It has caused a personal rift at times with my spouse worrying about personal liability and our personal budget."

[8] FLEOA survey respondents reported emotional turmoil arising from their experience as *Bivens* defendants. For example, "[t]he stress was immeasurable," "I felt that my credibility was in question," "It always hangs over your head," and "By doing my job it's caused und[ue] stress and created an environment of distrust."

The litigation also placed sensitive law enforcement information in jeopardy. Both BPA Egbert's supervisor and co-worker were deposed as part of the litigation. *See* Government's Response to Agent Egbert's Motion to Seal, *Boule v. Egbert*, No. 21-cv-00106, at 2 (W.D. Wash. July 11, 2018). During those depositions, they were required to testify to law enforcement privileged information. *Id*. The *Bivens* litigation even caused conflict between BPA Egbert as an individual capacity defendant in a civil action and two separate DHS component agencies, Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE). The two agencies had a protracted discovery dispute over information that BPA Egbert sought to defend himself against the *Bivens* action. The district court resolved the dispute and ordered CBP and ICE to produce the evidence. *See* Order Granting Motion to Compel and for Extension of Discovery Deadlines, *Boule v. Egbert*, No. 2:17-cv-00106, at 2 (W.D. Wash. May 14, 2018). The district court separately ordered CBP and ICE to pay $10,507.05 to BPA Egbert for the attorney's fees and costs he incurred to bring his successful motion to compel. *See* Order Granting in Part Defendant Egbert's Supplemental Motion for Fees and Costs, *Boule v. Egbert*, No. 2:17-cv-00106, at 2 (W.D. Wash. June 27, 2018).

The NPBC knows such litigation distracts BPAs from effectively performing their duties.[9] *See Briscoe*, 460 U.S. 325, 343 (1983) ("Subjecting … police officers,

[9] FLEOA survey respondents straightforwardly reported distraction from work as consequence of having to defend against *Bivens* litigation: "[The *Bivens* litigation] took away from time spent doing my actual job," and "Tied up time and resources and distraction from actual work duties and case work."

to damages liability … might undermine … the effective performance of their other public duties."). NBPC knows BPA Egbert's morale suffered when his employer detailed him to patrol approximately 30 miles from his usual territory, to temporarily separate him from the plaintiff. This adversely impacted other BPAs too. The NBPC knows the agency changed the schedules and patrol locations of other BPAs to cover BPA Egbert's usual patrol area. When the detail ended, BPA Egbert returned to patrolling the plaintiff's property while the *Bivens* litigation dragged on for years.

Despite ultimately prevailing in June 2022, the adverse impacts of the *Bivens* litigation linger today. The NBPC confirms that BPA Egbert still works for U.S. Border Patrol and even patrols the plaintiff's property. And, while many of his co-workers from 2017 have moved on, new hires receive "*Egbert*" training. They know of BPA Egbert and the allegations against him before ever meeting him, which NBPC knows causes BPA Egbert continuing embarrassment.

B. FLEOA Member

A FLEOA Member employed by a DOJ component in 2021, was subject to a *Bivens* suit alleging that members of an antinarcotics task force (including the Member) fabricated evidence and lied to prosecutors and a grand jury to maliciously prosecute the plaintiff, who had multiple prior drug-related convictions spanning decades. The district court in May 2022, one month before this Court issued *Egbert*, denied the Member's motion to dismiss and allowed three *Bivens* claims—including two claims the district court held presented a new context—to proceed to discovery. Those claims were Fourth Amendment claims for "false

arrest" and "malicious prosecution," and a Fifth Amendment "fair trial" claim.

The Member was simultaneously subjected to a lengthy internal agency investigation of the plaintiff's allegations. That investigation resulted in the Member's employer proposing to remove him from the federal service. That proposal apparently was the basis for DOJ's decision to decline to provide the Member representation against the *Bivens* action. 28 C.F.R. § 50.15(a). To save his job and his good name, the Member was required to carefully navigate the congressionally enacted, internal agency process for the proposed removal. *See* 5 U.S.C. § 7513. Throughout that administrative process, the Member knew any statements he made to defend against the proposed removal would be discoverable in the *Bivens* litigation. The Member's employing agency fully exonerated him of all allegations of misconduct at the conclusion of the disciplinary process. Despite that full exoneration, DOJ declined the Member's request to reconsider providing his *Bivens* legal defense. The relationship between the Member and his employer was irreversibly damaged.

The *Bivens* litigation also caused "effectively unreviewable" impacts to the Member's personal life. Like BPA Egbert, the Member spent years worrying about the ruinous financial impact the *Bivens* action could potentially have on his family. Though the Member learned of *Egbert*, there was no guarantee the district court would follow this Court's instructions and change its initial *Bivens* ruling. Further, the DOJ decision to not provide for the Member's legal defense—even after the Member's employer cleared him of all allegations of misconduct—cast doubt on whether the federal government would indemnify the Member after a judgment.

The Member's case ultimately resolved through settlement in district court. But the wounds of the litigation remain. Because of his experience as a *Bivens* defendant, the Member left his agency for another federal agency position requiring less public interaction. To obtain his new law enforcement position, the Member was required to disclose in Section 28 of the Questionnaire for National Security Positions,[10] Standard Form (SF) 86, that he was party to a *Bivens* action. He must continue to do so on any other SF-86 that he completes for another 10 years. It could jeopardize his employment security.[11] These litigation consequences are "effectively unreviewable" by any appellate court. *See Will*, 546 U.S. at 349 (quoting *Puerto Rico Aqueduct and Sewer Auth.*, 506 U.S. at 144). Granting certiorari and reversing *Graber* and *Himmelreich*, will mitigate the "effectively unreviewable" harms, *id.*, that *Bivens* litigation causes to "the initiative of [federal] officials," *id.* at 352.

II. *Graber* jeopardizes "the efficiency of government."

Allowing new *Bivens* claims to proceed toward trial can likewise imperil "the efficiency of government." *Will*, 546 U.S. at 353. Whether it is wasted government resources or interference with administrative processes created by Congress and the Executive, the damage is

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[10] *See Questionnaire for National Security Positions*, U.S. Office of Personnel Management, https://www.opm.gov/forms/pdf_fill/sf86.pdf.

[11] FLEOA survey respondents reported lingering career consequences of the *Bivens* litigation against them. For example, "[I] will have to report case for rest of career even though I was dropped off suit," "Delayed promotion," "[T]here were definitely promotions I put in for which I did not get," and "I have to disclose it to every [prosecutor] prior to court testimony."

"effectively unreviewable on appeal from a final judgment." *Id*. at 349.

A. *Bivens* litigation wastes government resources.

The "sensible policy" purpose of the 28 U.S.C. § 1291 "final decision" rule is "avoiding the obstruction of just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise." *Will*, 546 U.S. at 350 (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)) (internal quotations omitted). But claims "destined to yield nothing," *see Egbert*, 596 U.S. at 504 (Gorsuch, J. concurring), are not just.

Since this Court began to chip away at *Bivens*, Congress has not sought to fill the void and create a claim for monetary damages against federal officials. Congress's silence "is telling." *See Abbasi*, 582 U.S. 120, 143-44 (2017); *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.") And now with *Egbert*, "[t]he Supreme Court's message could not be clearer—lower courts expand *Bivens* claims at their own peril." *Silva*, 45 F. 4th at 1136. Against this backdrop, district courts waste federal government resources by recognizing new *Bivens* claims. *See Mangold v. Analytic Serv., Inc.*, 77 F.3d 1442, 1448 (4th Cir. 1996) (holding waste is contrary to efficient government) (citing *Barr v. Matteo*, 360 U.S. 564 (1959), *Westfall v. Ervin*, 484 U.S. 292 (1988)).

DOJ resources[12] too are wasted when asserting otherwise unnecessary qualified immunity defenses to create an interlocutory appeal right, and/or becoming embroiled in potentially "protracted litigation" before eventually appealing a final judgment that will surely be overturned. *See Egbert*, 596 U.S. at 505. Appealing a district court's erroneous *Bivens* ruling at first opportunity is not harassment, but a "prompt resolution" of the otherwise "unjustified" burdens of trial. *Cf. Will*, 546 U.S. at 354 (internal citations omitted). Immediate appeal of *Bivens* rulings will therefore promote the "substantial public interest" of minimizing government waste and promoting judicial economy. *See Will*, 546 U.S. at 352-53.

B. Withholding collateral review of *Bivens* rulings incentivizes government attorneys to assert unnecessary qualified immunity arguments.

Not every *Bivens* case will present a meritorious qualified immunity defense prior to discovery. In contrast, nearly every *Bivens* lawsuit presents a new context in which no cause of action exists. *See Egbert*, 596 U.S. at 504 (Gorsuch, J. concurring) ("[T]his Court leaves a door ajar and holds out the possibility that someone, someday might walk through it even as it devises a rule that ensures no one ever will.").

Only allowing immediate review of *Bivens* rulings if and when tethered to a qualified immunity ruling challenge, *Graber* and *Himmelreich* incentivize government waste. To zealously represent their clients, defense attorneys are compelled to raise otherwise unnecessary

[12] DOJ provides either direct or indirect representation to most *Bivens* defendants. *See* 28 C.F.R. §§ 50.15, 50.16.

qualified immunity arguments for the purpose of having a right to interlocutory appeal. *Wilkie v. Robbins*, 551 U.S. 537, 549 n.4 (2007). Most of the attorneys are DOJ attorneys providing direct, personal representation to *Bivens* defendants. *See* 28 C.F.R. § 50.15(a)(3) ("Justice Department attorneys. . . undertake a full and traditional attorney-client relationship with the [*Bivens* defendant] with respect to the attorney-client privilege."). If the government attorney raises qualified immunity solely as a bootstrapping vehicle to allow for the immediate appeal of a wrong *Bivens* ruling, DOJ and district court resources are wasted addressing that additional defense. But because DOJ regulations prohibit the assertion of "any legal position or defense. . .deemed not to be in the interest of the United States," *see* 28 C.F.R. § 50.15(a)(8)(ii), some defendants may be denied this "qualified immunity vehicle" bootstrap strategy.[13]

These tensions—between efficient final resolution of novel *Bivens* claims, waste of government resources created by qualified immunity vehicles, and DOJ regulations—need not exist. This Court can eliminate them by making immediate appeal available to *Bivens* rulings. The "particular value of a high order" in "preserving the efficiency of government" demands it. *See Will*, 546 U.S. at 353.

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[13] Petitioner Michael Boresky was represented by DOJ attorneys at the district court and before the Third Circuit. Those attorneys did not raise qualified immunity as an argument to the appellate court. *See Graber*, 59 F.4th at 605.

C. *Bivens* litigation interferes with other administrative processes.

Bivens actions often interfere with administrative remedial schemes created by Congress and the Executive. *Egbert* held administrative schemes—including an agency's authority to investigate allegations of employee misconduct and to subject employees to disciplinary action—are adequate deterrence that foreclose recognizing a new *Bivens* context. *Egbert*, 596 U.S. at 497. "So long as Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a *Bivens* remedy." *Id* at 498. Authority to receive complaints, investigate employees, and take disciplinary actions against career federal employees is the bedrock of the federal personnel system.

Congressional action creating the modern civil service system confirms that Executive Branch transparency and accountability are substantial public interests. *See Will*, 546 U.S. at 353. The pillar of the civil service system is merit.[14] *See* 5 U.S.C. § 2301. To further these substantial public interests and ensure the integrity of the merit-based system, Congress enacted the Inspector General Act of 1978, codified at 5a U.S.C. §§1-11. The Act tasks inspectors general with rooting out waste, fraud, and abuse in large federal agencies. Inspectors General publish reports for public consumption,[15] and report their findings to the heads of

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[14] Congress established the modern civil service system seven years after *Bivens*, principally via the Civil Service Reform Act of 1978. *See* Pub. L. 95-454, 92 Stat. 1111.

[15] *See, e.g.*, *All DOD OIG Reports*, Department of Defense Office of Inspector General, https://www.dodig.mil/reports.html; *All Reports*, Department of Veterans Affairs Office of Inspector General,

federal agencies and to Congress. *See* 5a U.S. Code §§ 5, 8G. When wrongdoing is found, whether by an Inspector General investigation or an agency's own internal inquiry, Executive Branch agencies are authorized, and expected, by Congress to hold misbehaving civil servants accountable. At the same time, Congress provided avenues for many Executive Branch employees to contest disciplinary actions (including terminations) to independent authorities whose final decisions are publicly available. *See*, *e.g.*, 5 U.S.C. §§ 7513(d), 7543(e); 38 U.S.C. §§ 713(b)(5), 714(d).

Ongoing *Bivens* litigation jeopardizes the integrity of these congressionally enacted civil service processes. A *Bivens* defendant (like the FLEOA member described above) becomes inherently conflicted. They must weigh their own personal financial interests at issue in the lawsuit, against their obligation as a federal employee to cooperate with an inspector general or federal agency investigation. Though a federal employee may have a professional interest to confess their misconduct and plead *mea culpa* in attempt to save their job, they can be disincentivized against doing so given how their statements could be used against them in the *Bivens* action. *Cf. Briscoe v. LaHue*, 460 U.S. at 343 ("Subjecting government officials, such as police officers, to damages liability. . .for their testimony might undermine. . .their contribution to the judicial process."). As a result, the accuracy of

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https://www.vaoig.gov/reports/all; *Reports*, Department of Justice Office of the Inspector General, https://oig.justice.gov/reports; *Audits, Inspections, and Evaluations*, Office of the Inspector General Department of Homeland Security, https://www.oig.dhs.gov/reports/audits-inspections-and-evaluations; *Audits/Evaluations/Announcements*, Office of Inspector General Pension Benefit Guaranty Corporation, https://oig.pbgc.gov/evaluations.html.

information the American public ultimately receives about employee misconduct can be jeopardized, in contravention of the comprehensive remedial scheme created by Congress.

D. Courts continue to recognize new *Bivens* contexts.

The harms to "efficiency of government" caused by erroneous *Bivens* decisions are not hypothetical. Despite *Egbert*, district courts across the country continue wasting federal government resources by recognizing new *Bivens* contexts allowed to proceed toward trial. Many cases that are plainly different from the only three recognized contexts—*Bivens*, *Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson v. Green*, 446 U.S. 14 (1980)—survived defendants' motions to dismiss.[16]

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[16] *See, e.g.*, *Bistrian v. Levi*, No. CV 08-3010, 2023 WL 6927327 at *1 (E.D. Pa. Oct. 19, 2023) (failure to protect inmate from other prisoners); *Orellana v. United States*, No. TDC-20-0845, 2023 WL 6217447 at *8 (D. Md. Sept. 25, 2023) (U.S. Marshal canine bite); *Duncan v. U.S.*, No. 1:20-cv-1685, 2023 WL 2370479 at *5 (N.D. Ga. Feb. 27, 2023) (refusal to provide medically prescribed diet by prison officials); *Tso v. United States*, No. 1:22-cv-00511, 2023 WL 4850182 at *4 (E.D. Va. July 28, 2023) (injury due to fall and delay of medical care by prison officials); *Cauthen v. Blackmon*, No. 5:20-cv-371, 2023 WL 2771316 at *2 (M.D. Fla. Apr. 4, 2023) (excessive force claim against corrections officer); *Aaron v. City of Lowell*, No. 20-cv-11604, 2023 WL 2743337 at *16 (D. Mass. Mar. 31, 2023) (excessive force by DEA agent); *Garraway v. Ciufo*, No. 1:17-cv-00533, 2023 WL 1446823 at *3 (E.D. Cal. Feb. 1, 2023) (failure to protect an inmate from other prisoners); *Kidd v. Mayorkas*, 645 F. Supp. 3d 961, 969 (C.D. Cal. 2022), *appeal dismissed sub nom. Kidd v. O. M.*, No. 23-55170, 2023 WL 5453664 (9th Cir. May 11, 2023) (use of misrepresentation by ICE agents to enter home); *Kennedy v. Massachusetts*, 643 F. Supp. 3d 253, 258 (D. Mass. 2022) (home search based on arrest warrant for non-resident family member); *Fleming v. United States*, No.

Even though *Egbert* effectively prohibits *Bivens* claims against the U.S. Border Patrol Agents class of defendants, plaintiffs may continue to file suit and some courts may allow these claims to proceed through trial. This Court should grant certiorari in this case and ultimately reverse *Graber* and *Himmelreich*, to stop the waste.

CONCLUSION

For these reasons, this Court should grant the petition and reverse the decision below.

Respectfully submitted,

DEBRA L. ROTH
Counsel of Record
CHRISTOPHER J. KEEVEN
JAMES P. GARAY HEELAN
SHAW, BRANSFORD & ROTH P.C.
1101 Connecticut Avenue, NW
Ste 1000
Washington, D.C. 20036
(202) 463-8400
droth@shawbransford.com

Counsel for Amici Curiae

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4:20cv545, 2022 WL 17091878 at *1 (N.D. Fla. Nov. 21, 2022) (exposure to asbestos in prison).