

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

ERIK EGBERT,)
)
 Petitioner,)
)
 v.) No. 21-147
)
ROBERT BOULE,)
)
 Respondent.)

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 21-147, Egbert versus Boule.

Ms. Harris.

ORAL ARGUMENT OF SARAH M. HARRIS

ON BEHALF OF THE PETITIONER

MS. HARRIS: Mr. Chief Justice, and may it please the Court:

This Court should not expand Bivens for the first time in 40 years.

First, Bivens extensions clash with modern precedent. Bivens interpreted federal courts' jurisdiction over federal questions as authorizing courts to fashion new damages actions. Decades of intervening cases reject that premise and remove any doctrinal basis for Bivens extensions.

Second, this Court has held that any reason to think Congress might doubt the efficacy or the necessity of a damages remedy bars new Bivens actions. Abbasi and Hernandez make respect for the separation of powers the key consideration. But the Constitution vests

1 Congress alone with the power to create damages
2 actions. Abbasi and Hernandez say courts must
3 pause if the judiciary isn't well suited to
4 assess the systemic costs and benefits of a new
5 damages action. But courts are never equipped
6 for such predictive empirical judgments.

7 Abbasi and Hernandez also rule out
8 Bivens extensions if Congress has extensively
9 legislated in an area. But Congress has
10 extensively legislated about federal officer
11 liability without allowing individual damages
12 actions.

13 Third, at the very least, this Court
14 should not expand Bivens to First Amendment
15 retaliation claims or to Fourth Amendment claims
16 involving border security. Those claims raise
17 yet further grounds for pause and would explode
18 the universe of Bivens claims.

19 For First Amendment retaliation
20 claims, plaintiffs could portray virtually any
21 governmental action as unconstitutional if taken
22 for retaliatory reasons, creating especially
23 amorphous Bivens liability.

24 Further, allowing First and Fourth
25 Amendment claims against agents involved in

1 border security also implicates national
2 security, as Hernandez recognized.

3 And, finally, there are many
4 alternative means to protect these
5 constitutional interests.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Well, Ms. Harris, the
8 -- when you have -- the Fourth Amendment claim
9 in Bivens is similar to the Fourth Amendment
10 claim here, so why doesn't that foreclose your
11 argument that that's excluded?

12 MS. HARRIS: We respectfully disagree.
13 The Fourth Amendment claim in Bivens is quite
14 different from the claim here for a number of
15 reasons.

16 First of all, the class of defendants
17 and the statutory mission of the officers is
18 exceedingly different. The Federal Bureau of
19 Narcotics' mission is not the same in any
20 respect as the statutory mandate under which
21 Border Patrol officers are operating, and that
22 is an important factor under Abbasi for a new
23 context.

24 And, on top of that, we know, because
25 Congress and the Court have said so, that the

1 Fourth Amendment applies differently in a border
2 context. And that, I think, also goes to the
3 Border Patrol functions. Border Patrol agents
4 are in dangerous circumstances every day trying
5 to interdict terrorists, smugglers, illegal
6 entry and exit of foreign nationals crossing the
7 border.

8 JUSTICE THOMAS: But couldn't you say
9 something similar to that about police officers
10 and the Fourth Amendment? I mean, it seems to
11 be pretty much the same thing.

12 Beyond that, though, the -- if the
13 Court adopted your approach, what survives as
14 far as Bivens claims go?

15 MS. HARRIS: What survives is what we
16 think the Court recognized in Abbasi would
17 survive. So the Court said in Abbasi that it is
18 not questioning the necessity or the stare
19 decisis value of Bivens in the
20 search-and-seizure context in which it arose.

21 And I think the next paragraph of
22 Abbasi illustrates the Court was distinguishing
23 between claims that would not be a new context
24 for Bivens and claims that would be. So, again,
25 I think, if you look at the facts of Bivens and

1 the things that perhaps the DEA is doing today,
2 that would absolutely survive.

3 I don't think you have to resolve
4 exactly what is -- is or is not a new context
5 because this case, I think, is really about what
6 happens when there is a Bivens extension on the
7 table when there is something that is absolutely
8 a new context and what factors should courts be
9 considering in order to resolve that question.

10 CHIEF JUSTICE ROBERTS: Well, what is
11 so different? This was a search of somebody on
12 private prop -- an unlawful search on private
13 property. I mean, it was near the Canadian
14 border. Okay. The guy was a border agent.
15 Well, that doesn't seem to be particularly
16 relevant to -- to whether the other fellow was
17 subject to an illegal search on his private
18 property.

19 MS. HARRIS: Well, I think there are
20 two really important things that are missing
21 from that sort of picture of it, one of which is
22 that I think everyone agrees that Agent Egbert
23 was involved in an immigration investigation and
24 that was the whole reason for being on Mr.
25 Boule's property, which, again, was a notorious

1 site of smuggling and illegal entry and exit.

2 So the fact that the Border Patrol
3 agent was indeed exercising --

4 CHIEF JUSTICE ROBERTS: So they have
5 -- they have more flexibility under the Fourth
6 Amendment than a regular police officer, you
7 know, in -- in Des Moines?

8 MS. HARRIS: Yes, and I think, under
9 both the Court's precedents and what Congress
10 has said, that is absolutely the case. So the
11 Court's Montoya decision recognizes the Fourth
12 Amendment does apply differently at the border,
13 and Section 8 U.S.C. 1357 is Congress's
14 recognition that in the border context, there
15 are a lot of different warrantless searches,
16 arrests, et cetera, et cetera, that can happen
17 at the border that you would not have in Des
18 Moines.

19 And I think all of that's important
20 because this goes to what the Court said in
21 Hernandez with respect to the conduct of agents
22 stationed at the border inherently implicates
23 national security. That was absolutely true of
24 Agent Mesa in Hernandez and, I think, applies
25 equally here because the Court in Hernandez was

1 talking about the kinds of functions Border
2 Patrol agents are performing at the border,
3 which again involve the --

4 CHIEF JUSTICE ROBERTS: Well, that's
5 really your point. It has nothing to do with
6 geography. It's what he was doing, right?

7 MS. HARRIS: It's --

8 CHIEF JUSTICE ROBERTS: He was -- he
9 was a Border Patrol agent, but it's not -- we
10 don't have this sort of Fourth Amendment free
11 zone around the border.

12 MS. HARRIS: That's correct. I think
13 you have to tie it, obviously, to the officer's
14 functions. So, if we were talking about, you
15 know, an IRS agent who happens to be stationed
16 at the border, there might be different issues
17 with a Bivens claim in that context, but we
18 wouldn't be saying just because the IRS agent is
19 at the border means they can -- you know, they
20 are entitled to flexibility --

21 JUSTICE SOTOMAYOR: I thought that --

22 MS. HARRIS: -- with respect to the
23 border.

24 JUSTICE SOTOMAYOR: -- the issue here
25 was excessive force, and I thought that the

1 person making the claim was a U.S. citizen.
2 And, in Bivens, it was an excessive force claim
3 in an -- in a private home. Here, it's an
4 excessive force claim on the property of an inn
5 owned by a U.S. citizen.

6 I understand that Customs regulations
7 require agents to secure warrants absent exigent
8 circumstances, and we can debate whether this
9 was exigent circumstances justifying his entry
10 into this home and his decision to do what he
11 did. I'm not going to get into those details.

12 But I go back to Justice -- the
13 Chief's question, which is in what ways does the
14 Fourth Amendment -- not -- the Fourth
15 Amendment's excessive force claim differ between
16 law enforcement agents like narcotics agents,
17 alcohol -- alcohol and tobacco and firearm
18 agents, or Border Patrol?

19 I thought that none of them
20 constitutionally can use excessive force.

21 MS. HARRIS: Justice Sotomayor, I
22 think there are a couple reasons why --

23 JUSTICE SOTOMAYOR: Just answer that
24 question. Can any of them use excessive force?
25 Being defined as force greater than that

1 necessary.

2 MS. HARRIS: No, of course, excessive
3 force is something the Fourth Amendment
4 prohibits, but I think that is not quite the
5 inquiry when you're thinking about what is a new
6 context or what are special factors because we
7 also --

8 JUSTICE SOTOMAYOR: Well, what's the
9 special factor here? That it's the border,
10 you're saying, it's Customs agents, but I don't
11 understand how they don't have the same
12 constitutional protections that officers have,
13 qualified immunity, so there's nothing that
14 we've already said in Wilson versus Sellers that
15 in a Bivens claim qualified immunity exists.

16 So they have the right to use their
17 reasonable judgment and not engage in
18 constitutional conduct. I -- I don't understand
19 why this is a new context.

20 MS. HARRIS: So two points there.

21 First of all, with respect to why this
22 is a new context, I -- I think the Abbasi
23 factors are very clear that a statutory mandate
24 and a different level of judicial guidance makes
25 the claim meaningfully different.

1 And with respect to excessive force
2 claims at the border, both Congress and the
3 Court have recognized that the need for lethal
4 force in certain circumstances and the rules of
5 engagement are fundamentally different.

6 JUSTICE BREYER: That's not --

7 MS. HARRIS: That has to do --

8 JUSTICE BREYER: -- this case, is it?

9 MS. HARRIS: Well, I think it is
10 relevant to this case just for the same --

11 JUSTICE BREYER: I mean, I'm not
12 saying it isn't relevant. I just said this
13 isn't a case where they're having special rules.
14 This isn't a case where they're right at the
15 border. This is a case of, you know, what the
16 Chief Justice said, okay.

17 There are 83, I gather, with -- Bureau
18 of Justice statistics says there are 83
19 different agencies where the officers are
20 federal, they are authorized to make arrests,
21 they carry firearms, they provide police
22 protection as their primary function.

23 And I take it you think that Bivens
24 still applies in Shasta County, California,
25 doesn't it?

1 MS. HARRIS: I think it would depend
2 on --

3 JUSTICE BREYER: No, no, no, it
4 depends on whether it applies. Exactly the same
5 as the Bivens case, it's Shasta County,
6 California. It's not New York. Apply?

7 MS. HARRIS: Yes.

8 JUSTICE BREYER: Of course.

9 MS. HARRIS: But I think the --

10 JUSTICE BREYER: And you think it
11 applies in April and May of this year, even
12 though Bivens didn't take place in April and
13 May?

14 MS. HARRIS: Yes, those are --

15 JUSTICE BREYER: Okay.

16 MS. HARRIS: -- trivial differences.

17 JUSTICE BREYER: Fine. And now which
18 of these 83 agencies does it not apply to? I
19 mean --

20 MS. HARRIS: So I think the question
21 under Abbasi is --

22 JUSTICE BREYER: What?

23 MS. HARRIS: -- what is the statutory
24 -- in one of the questions, frankly, the context
25 is --

1 JUSTICE BREYER: And one of the --

2 MS. HARRIS: -- what are the statutory
3 missions.

4 JUSTICE BREYER: -- missions with
5 these people is they often fly in air -- in
6 helicopters to help keep the peace with others
7 who are just ordinary policemen or FBI men.

8 What -- I mean, I was going to ask
9 you, what do you think about the Federal Bureau
10 of Prisons, the police there? Does it apply
11 there?

12 MS. HARRIS: The Federal Bureau of
13 Prisons, I think probably not because their
14 statutory --

15 JUSTICE BREYER: No Bivens in the
16 Federal Bureau of Prisons?

17 MS. HARRIS: So --

18 JUSTICE BREYER: Okay. Even there.
19 No Bureau -- what about the Federal Bureau of
20 Investigation? Does it apply there?

21 MS. HARRIS: I think it likely is a
22 new context, and the reason is the Abbasi --

23 JUSTICE BREYER: Not the Federal
24 Bureau of Investigation? Bivens doesn't apply
25 to FBI agents? Is that what you're saying?

1 MS. HARRIS: I am saying it's a new
2 context, you'd have to run special factors, and
3 the reason for that is I think it's a faithful
4 application of Abbasi --

5 JUSTICE BREYER: I see.

6 MS. HARRIS: -- because the statutory
7 --

8 JUSTICE BREYER: Okay.

9 MS. HARRIS: -- mission is --

10 JUSTICE BREYER: All right. I'm just
11 getting your point of view.

12 MS. HARRIS: Okay.

13 JUSTICE BREYER: And the -- the --
14 the -- what about the Drug Enforcement
15 Administration?

16 MS. HARRIS: So the question for the
17 DEA is that is the successor agency to the
18 Federal Bureau of Narcotics, and, again, I think
19 you have to run through the Abbasi factors.

20 JUSTICE BREYER: Okay. I get it.
21 I'll give you two more. Bureau of Alcohol,
22 Tobacco, Firearms, and Explosives, in your
23 opinion, is it obvious that it does apply there,
24 not obvious, or we go through some mechanism?

25 MS. HARRIS: I think you apply Abbasi,

1 not obvious, because, again --

2 JUSTICE BREYER: Okay.

3 MS. HARRIS: -- the question has to
4 do --

5 JUSTICE BREYER: Last one, U.S. Mint
6 Police. I actually don't know what the U.S.
7 Mint Police does, but I suspect it's important
8 so people don't take all the gold out of Fort
9 Knox or something, but -- but do the same thing?
10 Does it apply, obviously, not apply?

11 MS. HARRIS: Again --

12 JUSTICE BREYER: And, by the way, if I
13 wanted to, which I don't because my colleagues
14 would lynch me, the -- I -- I could go through
15 78 more.

16 MS. HARRIS: Yes.

17 JUSTICE BREYER: And what they have in
18 common, they carry firearms, they provide police
19 protection, they're authorized to make arrests.
20 But you're saying that isn't enough?

21 MS. HARRIS: I'm saying --

22 JUSTICE BREYER: We're going to --

23 MS. HARRIS: -- that's not enough
24 because grouping all 83 federal agencies
25 together when they're -- when they range from

1 the Secret Service, which has obviously a
2 primary mission, to other law enforcement
3 agencies is not only new but raises really hard
4 questions for courts that I don't think courts
5 are equipped to consider --

6 JUSTICE BARRETT: Ms. --

7 MS. HARRIS: -- under Abbasi.

8 JUSTICE BARRETT: -- Ms. Harris, can I
9 follow up on Justice Breyer's questions? Is --
10 is your inquiry driven by the mission of the
11 agency or the mission of the federal officer in
12 the particular situation?

13 So, for example, would your position
14 change if, here, Egbert had gone in because he
15 was -- he just suspected that there had been a
16 domestic dispute and he was helping out local
17 law enforcement and he went in?

18 Is what matters the fact that he is a
19 Border Patrol agent, or is what matters that
20 when he went in, he was investigating the
21 potential smuggling?

22 MS. HARRIS: So I honestly think it's
23 both because Abbasi seems to be looking at both
24 the class of defendants, the implications for
25 the agency, and also the statutory mandate under

1 which the officer is operating.

2 And I say that because, in a lot of
3 circumstances, it's going to be difficult to
4 sort of separate out in one particular instance
5 which exactly are -- you know, is there an
6 overlapping sort of statutory mandate an officer
7 is executing.

8 And I think that also goes to the
9 special factors analysis in the sense that the
10 ultimate -- one of the ultimate questions is,
11 are courts well-equipped to figure out the costs
12 and benefits government-wide --

13 JUSTICE BARRETT: Well, so, in my --
14 in my hypothetical, where the border agent --
15 where Egbert goes in and he's not investigating
16 a border issue, but he's investigating a
17 domestic dispute or, you know, an assault or
18 something like that, kind of following up on
19 Justice Breyer's hypotheticals or questions to
20 you, would Bivens apply in that circumstance?

21 MS. HARRIS: I don't think so. I
22 think you could certainly argue the national
23 security implications might be different in that
24 case, but I would still be arguing that Bivens
25 does not apply in that circumstance for all of

1 the other special factors I've mentioned, and I
2 would like to also flag alternative remedies are
3 really important in this context.

4 Again, the Court's test is, is there
5 any single reason to doubt the need -- to think
6 Congress would doubt the need for a Bivens
7 remedy. And, in your particular context, the
8 Border Patrol agent is still going to be someone
9 where there's the possibility of Federal Tort
10 Claims Act liability and a whole raft of
11 administrative remedies and other potential
12 outlets for someone to vindicate their interest
13 in making sure their constitutional rights
14 aren't violated.

15 JUSTICE KAGAN: Sorry. So, other than
16 the alternative remedies, your answer to Justice
17 Barrett's question is sort of across the board
18 Bivens doesn't apply to Border Patrol agents,
19 and if I could just hear again why that is?
20 What you think the special factors are that make
21 all Border Patrol agents in every context doing
22 any -- any function different?

23 MS. HARRIS: Sure. I think it's a mix
24 of things. Now, again, I think it's easiest at
25 the border where the national security

1 implications, I think, Hernandez has already
2 recognized --

3 JUSTICE KAGAN: But you would extend
4 it even if the Border Patrol agent was not at
5 the border?

6 MS. HARRIS: Yes. And that is
7 correct, and that is because I think the
8 cross-cutting reasons against Bivens extensions
9 make it a very difficult sell. I think that one
10 of the questions --

11 JUSTICE KAGAN: So, again, what are
12 those -- what are those reasons?

13 MS. HARRIS: Sure. Happy to go
14 through them, first of which is just the
15 doctrinal foundation, so is there reason to
16 doubt -- to think Congress wouldn't want a
17 remedy in which there is a separation-of-powers
18 violation that --

19 JUSTICE KAGAN: Well, but that just
20 begs the question, I mean, why would Congress --
21 I mean, the question is, like, what's different
22 about this very large class now that you're
23 demarcating?

24 MS. HARRIS: Sure. And I think the
25 second question is whether the judiciary is

1 well-suited to weigh the costs and benefits for
2 the -- and the cross-cutting effects on the
3 Border Patrol in recognizing such claims,
4 including whether it -- whether Border Patrol
5 agents are sort of implementing overlapping
6 functions.

7 Sort of at one moment, perhaps they
8 think a search is initially perhaps something
9 more akin to a routine law enforcement search.
10 It becomes an immigration enforcement action. I
11 think there are pretty hard questions about how
12 it's going to affect --

13 JUSTICE KAGAN: I mean, but don't all
14 -- all law enforcement officers -- you know,
15 they do what's needed, and sometimes they're
16 going to do something that's not strictly in the
17 wheelhouse and sometimes they're going to -- I
18 mean, that -- that would apply to everybody,
19 wouldn't it, that, you know, they -- you know,
20 there's a -- just a cop on the beat and he might
21 be doing border patrol someday too.

22 MS. HARRIS: I think it's a
23 particularly acute with respect to the border
24 patrol, but I do think that this illustrates,
25 again, the level of generality that Abbasi and

1 Hernandez have now pick -- pitched the inquiry,
2 which is really separation-of-powers concerns
3 have to be at the absolute forefront and is the
4 answer to the question are courts ever
5 well-suited to figure out the systemic costs on
6 an agency, including morale, deterrent effect,
7 administrative costs, and --

8 JUSTICE KAGAN: Well, with respect, it
9 does seem like, you know -- you know, what --
10 when Justice Breyer was a little bit making fun
11 of this, like, you know, on Tuesday and Thursday
12 but not Wednesday and Friday, I mean, it seems
13 that that's what you're saying, that we sort of
14 focus Bivens at this unbelievably minute level
15 of detail and find out exactly what Bivens was
16 about and say, oh, sorry, it doesn't apply
17 because it's Tuesday rather than Monday or it's
18 April rather than May.

19 MS. HARRIS: Well, I respectfully
20 disagree with that. I do think we're trying to
21 faithfully apply exactly what Abbasi says. So I
22 think the question is how do you distinguish
23 between trivial differences and differences that
24 are meaningful from Bivens and which, again,
25 we're not challenging the stare decisis and

1 settled law value of Bivens. And so I think
2 that question really is answered by the Abbasi
3 new context inquiry, which the Court has said is
4 broad and easily satisfied.

5 And so I think that has to be the
6 answer in order to be faithful to what the Court
7 has already said in this context.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas?

11 JUSTICE THOMAS: No questions.

12 CHIEF JUSTICE ROBERTS: Justice
13 Breyer, anything further?

14 Justice Alito? No?

15 Justice Gorsuch, anything further?

16 Justice Barrett? No?

17 Thank you, counsel.

18 Mr. Huston.

19 ORAL ARGUMENT OF MICHAEL R. HUSTON
20 FOR THE UNITED STATES, AS AMICUS CURIAE,
21 SUPPORTING THE PETITIONER

22 MR. HUSTON: Mr. Chief Justice, and
23 may it please the Court:

24 A straightforward application of this
25 Court's recent Bivens precedents demonstrates

1 that the judgment of the court of appeals should
2 be reversed. At step 1 of Abbasi's framework,
3 both of Respondent's claims would require
4 extending Bivens to new contexts for the first
5 time in 40 years, and at step 2, multiple
6 special factors counsel hesitation against the
7 Court taking that momentous step.

8 On the First Amendment, this Court has
9 explained that retaliation claims are easy to
10 allege and hard to disprove and that they have
11 the potential to chill federal officers'
12 performance of important functions. That is
13 especially true here, where Respondent seeks to
14 impose liability for Agent Egbert's giving of a
15 tip to another agency suggesting further
16 investigation.

17 And on the Fourth Amendment,
18 Respondent's claim is meaningfully different
19 from the ones in Bivens in ways that bear
20 directly on the separation of powers. This
21 Court has recognized that agents' effective
22 policing of the border has a clear and strong
23 connection to national security, and Congress
24 has also determined that law enforcement at the
25 border is different from other kinds of law

1 enforcement.

2 All of those features give ample
3 reason to doubt that Congress would have wanted
4 an individual damages remedy in the
5 circumstances here.

6 I'd like to begin --

7 JUSTICE THOMAS: Following up on the
8 questions that Ms. Harris was confronted with,
9 do you think that there is a meaningful
10 difference between Border Patrol agents and
11 narcotics agents?

12 MR. HUSTON: I think that Border
13 Patrol agents do present a new context, Your
14 Honor, at step 1 of Abbasi, but I think whether
15 special factors counsel hesitation and, thus,
16 whether a Bivens claim can go forward depends on
17 what the Border Patrol agents are doing.

18 So I think this goes directly to the
19 question that -- that Justice Barrett posed
20 about what about a situation where a federal
21 officer performs some duties that do implicate
22 national security and others that don't.

23 We do think that that makes a very
24 important difference, and we think that the --
25 the facts here present a very clear and strong

1 connection to national security, similar to what
2 was at issue in Hernandez. That's why a Bivens
3 claim cannot go forward here.

4 We think the case would be different
5 if you had a Border Patrol agent who's just
6 investigating -- you know, assisting with local
7 law enforcement to perform routine law
8 enforcement functions.

9 JUSTICE BREYER: Well, after 9/11,
10 there were quite a few local policemen, I
11 believe, as well as FBI agents and federal
12 police, in New York City looking for terrorists,
13 which is certainly a national law enforcement
14 function.

15 So is it the position of the Solicitor
16 General and the government that if any of those
17 normal agents that fall under Bivens, FBI, I
18 take it, ordinary police, et cetera, federal
19 police officials, if they had beaten somebody
20 over the head unreasonably and acted contrary to
21 the Constitution, there would be no Bivens
22 action?

23 MR. HUSTON: Yes, there would be no
24 Bivens action in --

25 JUSTICE BREYER: So any time -- so

1 Bivens is not simply -- I'd never heard of that
2 one. But you're saying that just -- who are the
3 most ordinary people that Bivens applies to? I
4 thought FBI agents.

5 MR. HUSTON: I think it is FBI.

6 JUSTICE BREYER: I thought DEA agents
7 too. I was wrong about that?

8 MR. HUSTON: There are many claims
9 brought against -- there are some claims brought
10 --

11 JUSTICE BREYER: Yeah, DEA. Okay. I
12 thought --

13 MR. HUSTON: -- against DEA agents,
14 but the most common one --

15 JUSTICE BREYER: And I thought --

16 MR. HUSTON: -- is the FBI marshals.

17 JUSTICE BREYER: -- alcohol, tobacco
18 and so forth. I thought those were just right
19 at the heart of Bivens.

20 MR. HUSTON: Sure. Your Honor --

21 JUSTICE BREYER: Okay. So now they
22 have the same job basically if you look at it in
23 terms of arresting people for violations of
24 federal law. They have the same authority to
25 carry weapons. They have the same whatever.

1 They -- they have the -- what's the word -- they
2 have the same basic obligation providing police
3 protection.

4 But you are saying all those people to
5 whom Bivens now applies, if the person they are
6 arresting is a person who has a connection with,
7 let's say, foreign dubious groups abroad, no
8 Bivens action?

9 MR. HUSTON: Yes, that's right, Your
10 Honor. And I think this --

11 JUSTICE BREYER: Would you call that a
12 extension of Bivens or a drawing back of what
13 people thought Bivens was about?

14 MR. HUSTON: I think Abbasi explained
15 that when an officer is operating pursuant to a
16 different statutory or legal mandate, that does
17 give rise to a new context at some point.

18 JUSTICE BREYER: Oh, no, this is --

19 MR. HUSTON: It doesn't --

20 JUSTICE BREYER: -- the same mandate,
21 the FBI. The same mandate, the DEA. They see a
22 person walking down New York City with a bomb,
23 okay, and so they arrest him, and in the course
24 of that arrestment -- arresting him, they do
25 something that's shocking or contrary to the

1 Constitution, and that person with the bomb is
2 connected with somebody in a foreign country.

3 And you're saying that person with the
4 bomb has no Bivens action?

5 MR. HUSTON: That's correct, Your
6 Honor. I think that's illustrated by the
7 Court's opinion in Abbasi, where the Court
8 talked about the difference between conditions
9 of confinement claims like the ones that were at
10 issue in Carlson and confinement claims like the
11 ones that were at issue in Abbasi.

12 And the Court said the key difference
13 is that Abbasi was a case about national
14 security dissension, and that made all the
15 difference, even though, at one level of
16 generality --

17 JUSTICE KAGAN: And -- and how is this
18 a case about national security? I mean, Justice
19 Breyer gave you one hypothetical, but this is a
20 much more prosaic case. I mean, the -- the --
21 the agent goes in and goes onto somebody's
22 private property and, essentially, it's to check
23 on the status of a guest, the immigration status
24 of a guest. Are you legally in this country or
25 not?

1 I mean, what does that have -- you
2 know, sure, you know, borders have something to
3 do with national security, but every time an --
4 a border agent checks on immigration status of a
5 person we kind of wave our arms and say national
6 security and say there's no Bivens remedy
7 because of that?

8 MR. HUSTON: Your Honor, the Court in
9 Hernandez said that the protection of the
10 border, the prevention of the unlawful entry of
11 persons and drugs and other contraband, has a
12 clear and substantial connection to national
13 security.

14 JUSTICE KAGAN: I mean, Hernandez --

15 MR. HUSTON: I think that's --

16 JUSTICE KAGAN: -- is a very different
17 kind of case, right? It's a cross-border
18 shooting, and, you know, it clearly had
19 implications for the relationship between the
20 United States and Mexico, you know.

21 So whatever you think of Hernandez,
22 there obviously was a dissent in that, but --
23 but assume -- you know, assume that the majority
24 was right. This is not Hernandez, is it?

25 MR. HUSTON: I agree that there's a

1 factual difference. The cross-border aspect of
2 Hernandez, which was important to the analysis,
3 is not present here. That's certainly true.
4 But if I might just say two things about why I
5 think there are other features of Hernandez that
6 go --

7 JUSTICE KAGAN: Canada is not going to
8 much care whether this border agent went on
9 to -- you know -- you know, checked out this
10 guy's citizenship or -- or legality in this --

11 MR. HUSTON: Your --

12 JUSTICE KAGAN: -- country.

13 MR. HUSTON: -- Your Honor, I very
14 respectfully but very vigorously disagree with
15 that. The -- the -- the agents at -- who work
16 at the border in Blaine will tell you that their
17 most important partnership is with the Royal
18 Canadian Mounted Police. We work together with
19 them to police our shared border. They protect
20 their side for our benefit. We protect our side
21 for their benefit. And it's that mutual
22 cooperative relationship, which involves daily
23 type of liaising, that really is what enables us
24 to protect the border.

25 So I do think that if you have a

1 situation like the one that Hernandez was
2 concerned about, where the prospect of Bivens
3 liability chills border agents in performance of
4 their duties, that is something that affects
5 Canada in a very real way. It means more people
6 are sneaking across the border into Canada.

7 But it's not just about preventing
8 people from going into Canada. Agent Egbert was
9 on the property that day because the Turkish
10 guest had undertaken objectively suspicious
11 travel across the world to stay at a rundown
12 bed-and-breakfast at a site that is notorious
13 for cross-border smuggling.

14 Again, the agents who deal with this
15 property, it is a constant headache. They've
16 had years where there have been multiple
17 incidents per week of people coming across the
18 border into the United States from Canada.

19 And the agent suspected that day that
20 that's why the Turkish guest was there, to
21 facilitate the unlawful entry of persons or
22 drugs or other things across the border into the
23 United States or potentially to smuggle himself
24 or other contraband --

25 JUSTICE KAGAN: That's what the --

1 MR. HUSTON: -- outside the United
2 States.

3 JUSTICE KAGAN: -- agent says, but
4 this is a summary judgment motion where we take
5 the facts not as the agent says, right? And --
6 and, if you do that, all that this is, is an
7 unremarkable check as to whether a guest was
8 lawfully in the country.

9 MR. HUSTON: Well, Your -- Your Honor,
10 I think we're happy to take the facts in the
11 light most favorable to Respondent, but, again,
12 the Fourth Amendment, it creates an objective
13 standard of reasonableness, and I think the
14 facts here gave ample reason for an objective
15 suspicion that this guest was involved in
16 cross-border smuggling activity.

17 And, again, I think Hernandez said
18 that cross-border smuggling activity, preventing
19 the unlawful entry of persons and drugs, has a
20 clear and substantial connection to national
21 security. I think the Court was exactly right
22 about that.

23 And, for the reasons I mentioned, I
24 also think that agents' effective performance of
25 their duties at the border does make a very

1 significant difference to our foreign partners,
2 to our Canadian partners.

3 JUSTICE BARRETT: Mr. Huston --

4 CHIEF JUSTICE ROBERTS: Mr. Huston,
5 give me a hypothetical case where your office
6 would say Bivens permits a cause of action.

7 MR. HUSTON: Sure, Your Honor. In a
8 case involving an FBI agent or an agent of the
9 Park Police or the Marshals Service, something
10 other than the Federal Bureau of Narcotics or
11 its successor, the DEA, but that is a routine
12 domestic search-and-seizure claim or a excessive
13 force claim, the government has not argued
14 either before or after Abbasi that those cases
15 give rise to special factors.

16 Now, of course, the list of things
17 that can create special factors, as Abbasi
18 explained, is non-exhaustive, and so the Court
19 really needs to consider the full picture. It
20 makes a difference if the FBI agent is there, in
21 Justice Breyer's hypothetical, to protect
22 national security, to go after a guy with a
23 bomb. And it makes a difference if you're
24 trying to prevent the enter -- entry of drugs or
25 -- or illegal persons at the border.

1 But, in a route -- in that sort of
2 routine, run-of-the-mill Fourth Amendment case
3 by an FBI agent, we don't see special factors
4 that counsel --

5 JUSTICE BARRETT: Mr. --

6 CHIEF JUSTICE ROBERTS: It's a special
7 factor if drugs -- drugs are involved?

8 MR. HUSTON: Well, in -- no, I'm
9 sorry, Your Honor, not just the drugs. Drugs
10 were, of course, the basis for the investigation
11 in Bivens itself, but it's a special factor if
12 you are protecting the border because it's --
13 it's a special factor anytime the agent's
14 statutory mission is to protect national
15 security. And the Court has explained that
16 cross-protect -- effective protection of the
17 border implicates directly national security.

18 JUSTICE GORSUCH: Mr. Huston, if I
19 understand your response to the Chief Justice,
20 cases identical to Bivens, the government
21 concedes and the -- and the three cases we've
22 recognized are -- are permissible, but anything
23 beyond that we're going to have to do special
24 factors. Is that a fair characterization?

25 MR. HUSTON: Yes, it is, Your Honor.

1 And can I -- can I -- I would just like to say
2 one word about why I think that's the right way
3 to approach it. That's because I think step 1
4 of the two-step analysis is really just designed
5 to perform a quick check to make sure that there
6 are or are not special factors.

7 And it's really at the step 2 that the
8 Court performs the full analysis. And you can
9 see this in both the application of the test in
10 Abbasi and Hernandez, where the discussion of
11 whether the context was new was very, very
12 brief. Most of the analytical work was being
13 done at step 2 on special factors, and that took
14 --

15 JUSTICE GORSUCH: Which is why you
16 think it was appropriate for the Ninth Circuit
17 to go to step 2 in this case?

18 MR. HUSTON: Absolutely. We think
19 these -- these contexts are clearly new, both of
20 them, Your Honor, and -- but we also, of course,
21 you know, respectfully disagree with the Ninth
22 Circuit's conclusion that there are not special
23 factors in this case. So --

24 JUSTICE KAVANAUGH: When you get to
25 step 2, can you imagine a case where it would

1 ever be the situation where the special factors
2 would not apply?

3 MR. HUSTON: Yes. I -- I think it's
4 the answer --

5 JUSTICE KAVANAUGH: What would be an
6 example of that?

7 MR. HUSTON: I think it's the answer I
8 gave to the Chief Justice. In a routine
9 domestic search-and-seizure context or an
10 excessive force claim involving a U.S. citizen
11 by an FBI agent, that passes step 1, it's a new
12 context because that agent has a different
13 mission than the agent in Bivens.

14 But we would not argue that there are
15 special factors counseling hesitation unless the
16 case has facts like it implicates national
17 security or something like that.

18 JUSTICE GORSUCH: Is -- is it --

19 JUSTICE BARRETT: Mr. Huston, can I
20 ask --

21 JUSTICE GORSUCH: Go ahead.

22 JUSTICE BARRETT: -- a question about
23 the government's position on the level of
24 generality at which we analyze new contexts? So
25 you've gotten a lot of questions about, well,

1 would this count, would that count.

2 Would it be the position of the United
3 States that after Abbasi we should construe the
4 new context against recognizing so that we would
5 expect a very, very close fit, maybe not the
6 Tuesday/Thursday, Monday/Wednesday examples that
7 Justice Breyer was giving you, but is it the
8 position of the United States that essentially
9 the Court has said that Bivens remedies are so
10 disfavored that we should always err on the side
11 of narrowness? Is that the position of the
12 United States?

13 MR. HUSTON: I think that's basically
14 right, Your Honor. I think it follows directly
15 from the Court's statements in Abbasi that a new
16 context is broad and that even a minor extension
17 still qualifies as an extension.

18 But I -- I actually think the
19 skepticism of Bivens is -- is just as important
20 at step 2. We think that the institutional
21 competence of the courts, the fact that creating
22 a cause of action is fundamentally a legislative
23 function, not an exercise of the judicial power,
24 mean that any extension of Bivens is disfavored,
25 and, thus, when the Court is conducting a step 2

1 analysis, it should be quite skeptical before it
2 recognizes new cause -- new Bivens causes of
3 action.

4 JUSTICE BREYER: Well, yes, but you're
5 defining -- that wasn't quite the question, I
6 thought, that -- that you were asking, Justice
7 Barrett.

8 She was saying, all right, we see a
9 new factor or could be a new factor, could not.
10 Should we approach it with skepticism as to
11 whether it is a new factor or not?

12 Now, there, why is skepticism
13 justified? It can't be because -- see, if it
14 isn't a new factor, it falls within what has
15 already been recognized as something that was --
16 Congress either wanted or at least permitted, et
17 cetera.

18 The reason I ask that is Justice
19 Harlan's opinion in Bivens, which I think is
20 interesting, traces Bivens the right for a court
21 to have such a -- a rule way, way back, back to
22 really the common law, back to England, back to
23 -- and to John Marshall in -- in -- and --
24 and -- and so what's the reason -- and John --
25 John Marshall in Marbury versus Madison, you

1 know, rights and remedies and so forth.

2 So I got your point, don't extend it.
3 But I haven't got your point of whether we
4 consider the differences here in this case
5 something that would be extending it or not to
6 recognize it would be narrowing it? How do we
7 do that?

8 MR. HUSTON: Well --

9 JUSTICE BREYER: And why favor the
10 one? Why have the presumption one way rather
11 than the other? That's a little elaboration of
12 what I took as --

13 MR. HUSTON: The Court has said that
14 its conception of what makes something a new
15 Bivens context is broad and that even a modest
16 extension is still an extension. And the reason
17 for that is because the -- Justice Harlan in
18 dissent in Bivens -- or, I'm sorry, not --
19 Justice Harlan's concurring opinion in Bivens
20 and the great Chief Justice's opinion were
21 referring to common law remedies for common law
22 injuries.

23 And that's very different, as this
24 Court has explained, from a federal court,
25 which, of course, doesn't create general common

1 law.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas?

5 JUSTICE THOMAS: Nothing.

6 CHIEF JUSTICE ROBERTS: Anything
7 further, Justice Breyer? No?

8 Justice Alito? No?

9 Justice Gorsuch?

10 Justice Barrett? No?

11 Thank you, counsel.

12 Ms. Ellsworth.

13 ORAL ARGUMENT OF FELICIA H. ELLSWORTH

14 ON BEHALF OF THE RESPONDENT

15 MS. ELLSWORTH: Mr. Chief Justice, and
16 may it please the Court:

17 Mr. Boule's Fourth Amendment claim is
18 materially indistinguishable from Bivens itself.
19 A federal law enforcement agent entered private
20 property without a warrant and used excessive
21 force, just like the federal agents in Bivens,
22 as the Court's questions have indicated.

23 The fact that the federal agent
24 inquired about the visa status of Mr. Boule's
25 guest in the process does not make this case any

1 different from the other instances of law
2 enforcement overreach in the search-and-seizure
3 context in which this Court has long recognized
4 that a Bivens remedy lies.

5 And this case has none of the foreign
6 policy or extraterritoriality concerns that
7 animated the Court's decision in Hernandez.
8 Instead, this is a case like the Court observed
9 in -- in Abbasi, where Bivens has continuing
10 force and even necessity.

11 Mr. Boule's First Amendment claim
12 addresses conduct that is similar to the conduct
13 that this Court assumed in Hartman versus Moore
14 could be remedied via Bivens, but even if it is
15 a new context, there is no reason to withhold
16 the remedy here.

17 There's no national security
18 considerations, no conceivable national security
19 considerations with regard to the First
20 Amendment claim, and no alternative
21 administrative remedial scheme that exists.

22 Awarding damages for federal
23 officer -- individual damages for federal
24 officer misconduct has long-standing roots
25 dating back to the founding and remains

1 appropriate, albeit more limited, today.

2 And as the Court has observed on
3 several occasions, Congress in the Westfall Act
4 preserved the availability of individual damages
5 for constitutional violations.

6 Although the reach of Bivens may be
7 narrow, the need for the remedy persists, and
8 the argument that the Court should not recognize
9 a Bivens remedy in any new case flies in the
10 face of this Court's decision just five terms
11 ago in Abbasi and also would contravene the
12 historical foundations allowing individual
13 damages to right a federal officer's
14 constitutional wrong.

15 Mr. Boule's case -- claims satisfy the
16 framework set forth in Abbasi and should be
17 allowed to proceed.

18 I'd welcome the Court's questions.

19 JUSTICE THOMAS: But aren't -- aren't
20 you up against the fact that we have declined to
21 apply or extend Bivens in recent history? We've
22 almost universally declined to expand it in --
23 into new contexts?

24 MS. ELLSWORTH: That's -- that's
25 correct, Justice Thomas. And we don't think

1 this is a new context for all the reasons that
2 some of the Court's questions of my friend
3 indicated. This is an unlawful entry without a
4 warrant, and this is excessive force on private
5 property against a U.S. citizen on domestic
6 soil.

7 None of the reasons that the Court has
8 found would be a Bivens extension in any prior
9 cases apply here. And even if the Court were to
10 go to the next step, none of the reasons that
11 have been offered that might counsel hesitation
12 would be a reason to withhold a Bivens remedy
13 here or to think that Congress would not want a
14 damages remedy in this instance.

15 JUSTICE KAVANAUGH: What about Mr.
16 Huston's reference to Canada and the cooperation
17 with Canada, and so this is the border context
18 and it's not just near the border, but there
19 actually is interaction with the Canadian
20 authorities on this kind of activity?

21 MS. ELLSWORTH: So I -- a couple
22 responses to that, Justice Kavanaugh.

23 First of all, I -- I hear the
24 government and -- and Petitioner to be saying
25 that the actual proximity to the border doesn't

1 matter to the position here, that, in fact, the
2 position is that Border Patrol agents writ large
3 should not be subjected to Bivens. So I don't
4 think this actual proximity and the cooperation
5 with Canada is -- is particularly relevant here.

6 I -- Agent Egbert would take the
7 position that this conduct is not subject to
8 Bivens if it happened 20 miles away because of
9 the immigration-related context that supposedly
10 applies.

11 And that, to Justice Breyer's
12 questions, the 83 agencies, the 5,500-mile land
13 border with Canada, the idea that Bivens doesn't
14 apply anywhere in that swath would sweep with
15 far too broad a brush.

16 Now I think it is possible -- and the
17 Court's decision in Hernandez, of course,
18 recognizes this -- that there are certain
19 functions that may be performed by Border Patrol
20 agents which may create a new context or may be
21 a -- a reason counseling hesitation, but not
22 every function performed by a Border Patrol
23 agent falls into that category, and the conduct
24 of Agent Egbert here certainly does not.

25 JUSTICE BARRETT: Ms. Ellsworth, what

1 if this had happened -- you know, Smuggler's Inn
2 was very, very close to the border. What if
3 this exact same encounter at which Boule alleges
4 there was excessive force had happened not on
5 his property but right next to the border? What
6 then?

7 MS. ELLSWORTH: So, as a -- as a
8 factual matter, his property is right next to
9 the border.

10 JUSTICE BARRETT: He is next to the
11 border? Okay.

12 MS. ELLSWORTH: It's about 10 feet
13 away.

14 JUSTICE BARRETT: But, like, what if
15 -- what if we push it up, like, right, right by
16 the border, it's not his driveway, it's right,
17 right by the border? Does -- does that change
18 things for you?

19 MS. ELLSWORTH: I don't think it does,
20 Your Honor, I really don't, because the -- the
21 -- the conduct that the agent was engaged in
22 here was ordinary law enforcement conduct. He
23 was following up on a tip given to him by Mr.
24 Boule to come and inquire about the -- or talk
25 to this Turkish guest.

1 And once that -- once he followed up
2 on that tip, if you look at Joint Appendix 108,
3 the agent left. There was no further concern,
4 no further sort of exigency at the moment.

5 So I don't think what -- how -- the
6 proximity to the border makes a difference.

7 JUSTICE BARRETT: So what would he
8 have to do for Bivens not to apply?

9 I mean, the -- you know, Boule has
10 been involved in smuggling activity in the past.
11 His -- his B&B is called Smuggler's Inn. His
12 license plate says "SMUGLER." You know, there's
13 this Turkish national who's staying and there's
14 suspicion that he's going to, which, in fact, he
15 did, cross the border into Canada illegally, and
16 -- and this is what Agent Egbert is following up
17 on.

18 What would have to be present? Can
19 you give me a set of facts in which Bivens then
20 would not apply?

21 MS. ELLSWORTH: Certainly, and I think
22 it's the Hernandez case, at least is one
23 example. It's actively patrolling the border,
24 attempting to prevent illegal entry, right?
25 That's what Agent Mesa was doing in Hernandez.

1 That is one of the factors that the Court found
2 convincing as to why Bivens shouldn't apply
3 there, although the extraterritoriality and the
4 foreign relations concerns played a far larger
5 role at least in the Court's opinion.

6 JUSTICE SOTOMAYOR: What --

7 JUSTICE GORSUCH: Counsel -- oh, go
8 ahead, please.

9 JUSTICE SOTOMAYOR: What I find so
10 strange about this case is that Mr. Boule is the
11 one who told the agent about this visitor,
12 didn't he?

13 MS. ELLSWORTH: That's correct,
14 Justice Sotomayor.

15 JUSTICE SOTOMAYOR: And --

16 MS. ELLSWORTH: Mr. Boule was a
17 government informer -- informant for ICE.

18 JUSTICE SOTOMAYOR: Assuming that
19 that's public knowledge now. And so -- and I
20 think that Mr. Boule told him he was coming from
21 a -- from an airport, correct?

22 MS. ELLSWORTH: That's correct. He
23 told him he had flown into the country at
24 Kennedy Airport in New York and was arriving in
25 the area at Seattle Tacoma.

1 JUSTICE SOTOMAYOR: All right. I
2 still don't understand why the agent had to wait
3 until the car got to the inn, why he couldn't,
4 if he was curious, have stopped the car
5 anywhere?

6 MS. ELLSWORTH: Well, that's exactly
7 right, Justice Sotomayor. He could have stopped
8 the car outside of the property. He could have
9 stopped the car on the way from the airport. As
10 Justice Barrett's question indicated, the car
11 has a distinctive license plate. Agent Egbert
12 was familiar with it. There was no need to
13 enter the property in order to conduct the visa
14 check.

15 JUSTICE SOTOMAYOR: So I guess your
16 answer is really that whatever the writ large
17 activity of an agent is, we should be looking at
18 what the activity was in this case?

19 MS. ELLSWORTH: I think the specific
20 activity is something the Court has typically
21 considered in -- in Bivens, the Bivens context
22 in order to --

23 JUSTICE SOTOMAYOR: And so, as you see
24 the activity, it's not smuggling; it's an
25 immigration violation?

1 MS. ELLSWORTH: Exactly. It has
2 nothing to do with alleged smuggling, and, of
3 course, as I noted, Mr. Boule was cooperating
4 with the government rather than in opposition to
5 it.

6 But, if the fact that the agent is
7 conducting a visa check is sufficient to remove
8 the conduct from the ambit of Bivens altogether,
9 that would have extremely broad implications far
10 beyond border patrol. I mean --

11 JUSTICE ALITO: What if it happened
12 right at the border? Suppose that someone runs
13 across the border carrying a big bag of drugs,
14 and a Border Patrol agent sees that person and
15 then tackles the person and allegedly uses
16 excessive force in detaining the person.

17 What would you say about that?

18 MS. ELLSWORTH: That case would be
19 much more similar to the conduct in Hernandez.
20 And, again, the agent would be actively both
21 stationed at the border, right, stationed at a
22 checkpoint of some sort, but also attempting to
23 prevent illegal entry, right?

24 That is the difference in the -- if
25 we're talking about the law enforcement conduct,

1 that is one of the differences between what was
2 -- Agent Mesa was doing in Hernandez and Agent
3 Egbert --

4 JUSTICE ALITO: Well, how -- okay.
5 How about if it's the other way? This person is
6 running toward Canada, and the Border Patrol
7 agent tackles the person two feet from the
8 Canadian border.

9 MS. ELLSWORTH: Again, I think it
10 would depend on whether the agent was actually
11 stationed at the border, attempting to prevent
12 unlawful entry and exit. That's not the
13 circumstance here, but I think that would be a
14 closer case because, again, that is an
15 individual Border Patrol agent who's actively
16 engaged in trying to stop cross-border conduct,
17 crime, whatever you call it.

18 That's very different from a law
19 enforcement officer who comes onto somebody's
20 property following up on a tip and then, as the
21 allegations of the -- the case reached this
22 Court, engages in excessive force. It's a
23 different --

24 JUSTICE ALITO: At -- at what point do
25 you think he -- this is not the Bivens question,

1 but just to understand the background of this,
2 at what point do you claim the agent violated
3 your client's Fourth Amendment rights? This is
4 a public accommodation, right? So --

5 MS. ELLSWORTH: So --

6 JUSTICE ALITO: -- presumably, anybody
7 can walk up to the door of it. Wouldn't that be
8 the case?

9 MS. ELLSWORTH: The district court
10 found, at the Petition Appendix 65a, that the
11 area where Agent Egbert attempted to question
12 the Turkish guest, where he was standing and
13 where Mr. Boule asked him to leave, was the
14 curtilage of the property, which is protected
15 within the Fourth Amendment. It is an area very
16 similar to the area that the Court found in the
17 Collins versus Virginia case was curtilage
18 protected by the Fourth Amendment as well.

19 So I -- that is what -- the initial
20 Fourth Amendment violation is that area, the
21 fenced-in area right in front of the front door
22 of Mr. Boule's home --

23 JUSTICE ALITO: Well, I mean, suppose
24 --

25 MS. ELLSWORTH: -- which is also --

1 JUSTICE ALITO: -- he wanted to -- to
2 rent a room there. He can -- he could enter,
3 right? He could walk up to the door to enter.
4 Suppose he wanted to speak to a guest. I mean,
5 this is not -- I'm just trying to -- this seems
6 like not the biggest Fourth Amendment case that
7 we've -- we've ever seen.

8 MS. ELLSWORTH: So -- so let me give a
9 few responses, Justice Alito.

10 First of all, the -- the district
11 court found that this was curtilage. That was
12 not disturbed on appeal by the Ninth Circuit.
13 So I don't think that question is before the
14 Court. But taking the question --

15 JUSTICE ALITO: Well, I don't know
16 that the issue is whether it's curtilage or not
17 because it's a commercial establishment. But go
18 ahead.

19 MS. ELLSWORTH: Take -- taking the
20 question, when Agent Egbert was in this area of
21 the property and Mr. Boule asked him to leave,
22 that is the moment --

23 JUSTICE ALITO: Yeah. Okay.

24 MS. ELLSWORTH: -- at which the search
25 became an unlawful search.

1 JUSTICE ALITO: Okay.

2 JUSTICE GORSUCH: Counsel --

3 JUSTICE KAGAN: Can I take you back to

4 --

5 JUSTICE GORSUCH: Oh, please. No, go
6 ahead.

7 JUSTICE KAGAN: -- Justice Kavanaugh's
8 question about U.S./Canada relations? And, as I
9 understood it, the way you responded to him is,
10 look, Petitioner's view would extend far beyond
11 the border, just anytime a Border Patrol agent
12 is involved.

13 But how about if we narrowed
14 Petitioner's view and we said, okay, it's Border
15 Patrol agents acting near the border? Does that
16 have implications almost as a matter of
17 necessity for U.S./Canada relations?

18 MS. ELLSWORTH: I don't think it does
19 as a matter of necessity. It's going to -- it's
20 going to depend on the facts because not all
21 Border Patrol agents are engaged in conduct that
22 is actively protecting the border at all times.
23 The mission of the Border Patrol is much broader
24 than that, and there are Border Patrol agents
25 who at various times, as Justice Breyer's

1 question to my friend indicated, are engaged in
2 normal domestic law enforcement activities.

3 So it does -- it depends on the
4 activity that the agent is involved in. And I
5 would just note --

6 JUSTICE KAGAN: And why does this
7 activity fall on one side of the line rather
8 than the other side of the line?

9 MS. ELLSWORTH: Because, again, the
10 agent was following up on a tip. That's normal
11 law enforcement activity. The fact that the
12 tip, though --

13 JUSTICE KAGAN: Well, doesn't it make
14 a difference what the tip was about?

15 MS. ELLSWORTH: Well, and the fact
16 that the tip related to -- first of all, the tip
17 was, I have a legal -- you know, somebody who's
18 legally in the country coming to my property.
19 So there's some factual dispute here or -- or
20 lack of clarity that would need to be decided by
21 a fact finder. As Your Honor noted, this comes
22 to the Court on summary judgment.

23 But, more importantly, if immigration
24 related -- if following up on somebody's
25 immigration status were sufficient to remove

1 conduct from the ambit of Bivens, that would --
2 that -- that sweeps every federal agent, that
3 sweeps local agents, state agents. I mean,
4 immigration checks are something that are
5 extremely common.

6 JUSTICE KAVANAUGH: But, here, it's a
7 tip, to follow up on Justice Kagan's questions,
8 a tip about someone who's present, and the
9 officer, exercising experience, says, well, this
10 person staying there is likely to cross the
11 border or possible to cross the border into
12 Canada. So it's an illegal crossing, although
13 in the opposite direction of the cases that the
14 Border Patrol is usually dealing with. And that
15 goes back to the Canada/U.S. cooperation.

16 But this is not just an illegal
17 presence case. It seems to me, from the
18 officer's perspective, it's an illegal crossing
19 investigation or a potential illegal crossing.

20 MS. ELLSWORTH: So a few responses to
21 that, Justice Kavanaugh.

22 First of all, the -- the record belies
23 that claim, right? At Joint Appendix 108, the
24 agent came. Once he had checked the visa, he
25 said our job there was done as Border Patrol

1 agents and left.

2 The second point I would make is,
3 unlike in Hernandez, we do not have the
4 government of Canada before this Court
5 indicating that they disagree with the position
6 taken by the lower courts or the position taken
7 by the agency. And the animating -- the foreign
8 relations animating factor in Hernandez, at
9 least as I read it, related to the -- the -- the
10 problem with foreign relations that it would
11 create for a court, this Court, to somehow
12 contradict the judgment that the executive had
13 made.

14 But the third point I would make is --
15 JUSTICE ALITO: But, in Hernandez --
16 JUSTICE KAGAN: So it's obvious --
17 JUSTICE ALITO: -- the -- the
18 government of Mexico did not object to having
19 that suit go forward.

20 MS. ELLSWORTH: No, the government of
21 Mexico, of course, as -- as the Court --

22 JUSTICE ALITO: Uh-huh. Okay.

23 MS. ELLSWORTH: -- is well aware was
24 -- was supporting the availability of Bivens,
25 but that would have been in contravention of the

1 executive's decision not to discipline Officer
2 Mesa.

3 JUSTICE KAGAN: I mean, I would think
4 it's obviously true that, you know, Prime
5 Minister Trudeau is not sitting up late thinking
6 about this case. But is -- is that what's
7 required?

8 MS. ELLSWORTH: Something more than
9 the fact of it being proximate to Canada, I
10 think, has to be required for this Court to
11 think that foreign relations somehow come into
12 play. And there's no suggestion, even the
13 government's representation at argument today,
14 that there's any interest by the government of
15 Canada in this particular case or in the conduct
16 that Agent Egbert was involved in somehow being
17 remedied or not remedied.

18 And if it were sufficient that Agent
19 Egbert is a Customs and Border Protect --
20 Protection officer for that to eliminate the
21 availability of Bivens, none of this Court's
22 discussion in Hernandez would have been
23 necessary, right? That -- Agent Mesa was a CBP
24 officer as well, and the Court went to great
25 lengths to explain why it was that Bivens was

1 not available there.

2 It certainly wasn't sufficient either
3 that he was affiliated with CBP or even that the
4 conduct in question was so close to the border.
5 There were many more considerations that the
6 Court took into account.

7 JUSTICE GORSUCH: Counsel --

8 CHIEF JUSTICE ROBERTS: I think it's
9 important to keep in mind why we're asking all
10 these questions and I -- about the border, and
11 I -- I think we may have missed the sort of
12 important context.

13 It's not whether we think there's
14 going to be some, you know, connection to
15 international affairs but whether Congress,
16 given that context, would want there to be a
17 private right of action against a federal
18 officer but not enough to say something about
19 it.

20 In other words, we're wondering -- and
21 this is -- I -- I wonder if your friend on the
22 other side is -- is doing a little bit of double
23 counting. We start by saying there has to be
24 special considerations, but isn't one of the
25 special considerations the likelihood that

1 Congress would want their agents to be facing
2 this type of -- of liability, whether it's
3 something that's going to present a problem by
4 the -- at the border in -- in every case or not?

5 MS. ELLSWORTH: Well, let's talk about
6 what Congress has said here. We have two
7 indications to the extent that we can read --
8 read anything into them of what Congress thinks
9 about this.

10 The first is Section 1357(g)(8), which
11 subjects state officers who are deputized as --
12 as CBP officers to the same types of liability
13 and the same types of immunity as they would be
14 under federal law. So that's a suggestion by
15 Congress and understanding that there may well
16 be civil suits that arise out of conduct like
17 this.

18 The second indication that we have is
19 the Westfall Act, which, of course, doesn't
20 speak to the border context, but it does speak
21 to the fact that Congress has not seen fit to
22 eliminate the remedy of individual damages for
23 -- against constitutional violations for federal
24 officers.

25 CHIEF JUSTICE ROBERTS: Well, but, I

1 mean, the argument on the other side is that's
2 your alternative remedy, the Westfall Act.

3 MS. ELLSWORTH: And if the --

4 CHIEF JUSTICE ROBERTS: You don't need
5 a Bivens action.

6 MS. ELLSWORTH: If the Westfall -- if
7 the FTCA were sufficient to be an alternative
8 remedy, first of all, that would have to -- that
9 would contravene this Court's guidance in
10 Carlson and Malesko about the FTCA and Bivens
11 meaning to co-exist.

12 But the second point I would make is
13 the Westfall Act explicitly exempts Bivens
14 actions. That's what the Court said in Hui
15 versus Castaneda, and the Westfall Act was
16 enacted against the backdrop of this Court's
17 Bivens jurisprudence at least as it existed in
18 1988, which was, respectfully, far broader than
19 it is today.

20 So, to -- to the extent we can read
21 anything into what Congress has done in the
22 Westfall Act, I think it -- it certainly doesn't
23 counsel against a Bivens remedy in this case in
24 the Fourth Amendment context.

25 JUSTICE GORSUCH: Counsel, if I

1 understand you correctly, you disagree with the
2 Ninth Circuit at the first step, is that right?

3 The Ninth Circuit said this is a new
4 context, and you say it is not a new context
5 because the actions of the officers here are
6 pretty similar to those in Bivens.

7 MS. ELLSWORTH: That's correct. The
8 Ninth Circuit found this to be a modest
9 extension. Respectfully, we submit that it's
10 not an extension of Bivens, and so the special
11 factors don't --

12 JUSTICE GORSUCH: Right.

13 MS. ELLSWORTH: -- need to be
14 considered.

15 JUSTICE GORSUCH: So I -- I -- I
16 guess, you know, part of my -- here's my big
17 concern. I'll lay it out.

18 We have a disagreement about the level
19 of generality we're supposed to apply at step 1,
20 whether this is or isn't a new context. And one
21 side argues that we should look at it more
22 broadly, perhaps you. This is more like Bivens
23 at a high level of generality. And the other
24 side tells us we have to get down to the
25 nitty-gritty, and -- and any deviation from any

1 specific thing is enough to create special
2 factors.

3 And then we go to the special factors,
4 and it's a whole list of disparate
5 considerations that are pretty hard to balance,
6 I think, we could all agree. And we're told
7 that, really, the agency matters, but, on the
8 other side, we're told no, it's the conduct that
9 matters in the specific case.

10 And, in between, it could be the
11 conduct that could potentially matter in those
12 circumstances that an officer entering might --
13 might face. It could be a law enforcement call
14 that turns into an immigration call or an
15 immigration call that turns into a law
16 enforcement call.

17 And then we're talk -- then we talk
18 about the border, and there, we know that if
19 it's a shot across the border, that's bad. But
20 the Smuggler's Inn, which has been disparaged in
21 its quality today --

22 MS. ELLSWORTH: Unfairly.

23 JUSTICE GORSUCH: -- unfairly, I'm
24 sure, is sufficiently far from the border that
25 it -- that it's okay, and then we -- well, then

1 we had a series of hypotheticals about, well,
2 what -- what if -- what if the driveway were a
3 little closer and -- and, you know -- or
4 whatever.

5 And I guess I'm just stuck, all right?
6 What -- what -- what is a good and faithful
7 judge supposed to try and do with all of this
8 mess, acknowledging the fact too that this Court
9 hasn't recognized a new Bivens action in
10 decades? As you say, the law was very different
11 in 1988 than it is today. Help.

12 MS. ELLSWORTH: So let -- let me do my
13 best, Justice Gorsuch.

14 I -- I think that the Court should
15 look to the guidance in Abbasi from five terms
16 ago, and I know that Hernandez is an intervening
17 case, but I think Hernandez is almost sui
18 generis given the facts of that case.

19 And if the Court looks at Abbasi, the
20 framework that was set out in Abbasi provides
21 the Court guidance for what to consider and how
22 to weigh that, and, in fact, one of the claims
23 in Abbasi against the individual jailers, as the
24 Court is aware, was sent back to the Second
25 Circuit to consider whether special factors

1 counsel hesitation.

2 So the Court did, in fact, recognize a
3 new context in *Abbasi*. It found that because
4 the claim was brought -- the conditions of
5 confinement claim was brought under the Fifth
6 Amendment rather than the Eighth Amendment, that
7 was a new context, a modest extension, and sent
8 it back to the Second Circuit for consideration.

9 Now, in the interest of candor, the
10 Second Circuit or the district court found that,
11 in fact, there were special factors counseling
12 hesitation in that case.

13 But the -- the fact remains that the
14 framework that was set forth in *Abbasi I* I think
15 allows the Court to consider and weigh these
16 different competing factors in the way that
17 courts do every day in the qualified immunity
18 context, in applying the exclusionary rule, in
19 various other factors.

20 JUSTICE GORSUCH: Well, you know, in
21 those contexts -- take qualified immunity. I --
22 I -- I -- I kind of get my head around at least
23 what I'm supposed to try to do there, right, is
24 the law clearly established, and I look on the
25 books and see if I can find it.

1 Here, we can't even agree on step 1,
2 whether this is a new -- I mean, how many years
3 on from Bivens and we can't even agree what a
4 new context is?

5 MS. ELLSWORTH: Well --

6 JUSTICE GORSUCH: And then -- and
7 then, when we get to the special factors, I
8 mean, I think, as our discussion today has
9 illuminated, it isn't exactly like looking on
10 the books to see if there's a case on point.

11 MS. ELLSWORTH: And I would say that
12 the lower courts have not respectfully struggled
13 to -- to quite the same degree with applying
14 the -- the Abbasi framework.

15 There have been -- and they're cited
16 in all the briefs -- there have been cases since
17 Abbasi where lower courts have -- have concluded
18 that a Fourth Amendment unlawful search and
19 seizure, like we submit this case, is not a new
20 context and that Bivens applies.

21 And there have been many other cases
22 where the Court has concluded either it's a new
23 context or that special factors apply and has
24 denied --

25 JUSTICE GORSUCH: Except for you argue

1 on the first one that the Ninth Circuit's wrong,
2 that this isn't a new context, right? I mean,
3 you say, well, the lower courts have had no
4 problem finding this isn't a new context, except
5 for this one did.

6 MS. ELLSWORTH: Well, the Sixth
7 Circuit in -- in the -- the case cited in our
8 brief at page 31 found no new context in a
9 Fourth Amendment --

10 JUSTICE GORSUCH: So we have a
11 disagreement between the Sixth and Ninth Circuit
12 on whether this is new context?

13 MS. ELLSWORTH: Well, it's, obviously,
14 different cases. But I don't think that -- I
15 mean, I think the Court can also consider the
16 same factors that the Court considers in
17 determining whether something is a new context.
18 They seem to bleed over into the special factors
19 as well. Either way you slice them here, I
20 don't think --

21 JUSTICE GORSUCH: That's another
22 problem. What do we do about that? The same
23 considerations at step 1 bleed into step 2,
24 and -- and -- and normally, when we have a
25 two-step test, we have two steps. And, here,

1 it's kind of, as you say, one and a half.

2 MS. ELLSWORTH: Well, and either way,
3 whether the Court considers under step 1 or the
4 Court considers it under step 2, none of the
5 factors that were outlined in *Abbasi*, nor any
6 other factors that have been raised by either
7 the United States or Petitioner, are a reason
8 why this Fourth Amendment claim should not be
9 allowed to proceed.

10 JUSTICE BARRETT: Ms. Ellsworth, let
11 me ask you a question, the questions following
12 up that Justice Breyer and I were asking about
13 skepticism and given that the Court hasn't
14 recognized a new *Bivens* claim in decades, given
15 that the Court has said that they're disfavored.

16 When we're asking these questions
17 about level of generality and going through the
18 factors, do you think our precedent puts a thumb
19 on the scale of skepticism and a thumb on the
20 scale counseling the Court to treat it as a new
21 context?

22 MS. ELLSWORTH: I don't think the -- I
23 don't think the -- I -- I think it's fair to say
24 that the Court has treated *Bivens* claims with
25 skepticism over the past several decades. That

1 is certainly fair.

2 The -- I don't think the Court has put
3 a thumb on the scale in favor of finding a new
4 context per se. And like I said, in *Abbasi*, the
5 Court found --

6 JUSTICE BARRETT: No, in favor of not
7 finding a new context.

8 MS. ELLSWORTH: In -- in favor of not
9 finding a new context, yes.

10 I think what the Court has done has
11 been appropriately guarded in expanding the
12 remedy of -- of *Bivens* beyond where it has
13 already been recognized.

14 And, of course, it has been recognized
15 time and again not just in *Bivens* but in *Wilson*
16 versus *Layne* and in other cases in the
17 Fourth Amendment context.

18 JUSTICE BARRETT: So, like, just so
19 far we would try to apply precedents so that if
20 it looks just like *Bivens*, if it's a Fourth
21 Amendment excessive force claim or, you know, if
22 it's another Fourth Amendment, say, unreasonable
23 search-and-seizure claim, in those contexts, we
24 would say, okay, fair application of *Bivens*
25 means this is exactly the same, but we don't

1 have to have any skepticism when we're
2 considering the factors about extending it into
3 new areas? We're just kind of faithfully
4 applying it like we would any other precedent,
5 rather than trying to narrow it?

6 MS. ELLSWORTH: I -- I think the Court
7 has already narrowed Bivens substantially. And
8 I don't read the Court's more recent decisions
9 as attempting to further narrow it but rather
10 attempting to determine how to fit individual
11 cases within the framework that has been set
12 forth.

13 And -- and, of course, this two-step
14 framework that we're talking about really was
15 only announced in its current form in the Abbasi
16 case five years ago. Prior to that, there
17 were -- alternative remedies were playing a
18 larger role in the Court's determination of
19 whether Bivens was available.

20 JUSTICE KAGAN: So do I read you right
21 in saying something like, look, what Bivens has
22 become is basically a remedy for Fourth
23 Amendment violations, and whatever skepticism
24 you might have outside of that context -- I
25 mean, I guess there are a couple of other

1 contexts, right, but -- but -- but the big --
2 the bulk of Bivens claims are Fourth Amendment
3 claims. Whatever skepticism you might have
4 outside of that, it's inappropriate to import
5 into Fourth Amendment search/excessive force
6 cases?

7 MS. ELLSWORTH: I -- that's -- I think
8 that's correct, Your Honor, and that's --
9 certainly, that's what -- what courts have
10 called the core or heartland of Bivens. It's
11 what this Court in Abbasi recognized was the
12 area in which Bivens had continuing force and
13 necessity.

14 And so the -- the Fourth Amendment
15 claim seems much less difficult. I --

16 JUSTICE BARRETT: So that makes your
17 First Amendment claim a lot more difficult.

18 MS. ELLSWORTH: The First Amendment
19 claim is -- is -- is an uphill battle, Your
20 Honor. The First Amendment claim was found to
21 be an -- a new context by the Ninth Circuit.

22 The Hartman versus Moore case did not
23 hold that Bivens was available in the First
24 Amendment context, but it did, of course, state
25 that when the vengeful officer is federal, a

1 Bivens remedy lies. Whether that amounts to
2 recognizing a Bivens claim or not, the -- the
3 idea that special factors counsel hesitation in
4 the First Amendment context we think is not
5 appropriate in this case or not appropriate in
6 the narrow type of First Amendment retaliation
7 claim that Mr. Boule is bringing here.

8 This is not a retaliation claim that
9 relates to malicious prosecution or to arrest or
10 to anything else that's within, as the Ninth
11 Circuit put it, "the scope of the official
12 duties of the officer." What we have here is
13 Agent Egbert calling and sending a publicly
14 available news article to these other agencies
15 with, we -- we allege, retaliatory motive in --
16 in retaliation for Mr. Boule's complaints to
17 supervisors about the conduct on March 20, 2014.

18 That's the type of retaliation this
19 Court has called straightforward in terms of
20 issues of causation. And while it may be an
21 extension of Bivens to recognize the First
22 Amendment claim, it is not one in which there
23 are any special factors that counsel hesitation.
24 There's no national security concerns. There's
25 no administrative regime that could be available

1 to Mr. Boule to otherwise press these claims.

2 The state law claims that both the
3 Petitioner and the United States have suggested
4 would be available to Mr. Boule are not
5 available, again, because of the Westfall Act
6 because the conduct, while it is not part of his
7 official duties, would fall outside his scope of
8 employment for purposes of Washington law, which
9 is where this Court looks.

10 And the FTCA is -- while it may be an
11 alternative remedy in some senses, it is not an
12 exclusive remedy to Bivens. Mr. Boule also was
13 not able to actually bring his First Amendment
14 claims under the FTCA for -- for time-barred
15 reasons.

16 But, putting that to the side, the
17 FTCA and the Bivens continue to co- -- and
18 Bivens continue to co-exist, and so that's not a
19 reason why the First Amendment claim should not
20 be recognized here.

21 JUSTICE KAGAN: On -- on the Fourth
22 Amendment front, how do we -- how should we
23 properly handle invocations of national security
24 by the government?

25 MS. ELLSWORTH: Well, I would -- I

1 would remind the Court that the government
2 didn't see fit to invoke national security or
3 participate in this case until it reached this
4 Court. So the government did not participate in
5 the Ninth Circuit or the district court and
6 suggest that there were some national security
7 concerns attendant to this claim against a
8 Border Patrol officer.

9 But I think what the Court should
10 consider is whether the -- the specific type of
11 claim that would be recognized, which, again,
12 here is going to be a garden-variety
13 search-and-seizure claim on private property
14 against a U.S. citizen, that whether there's
15 some national security considerations that are
16 attendant to that, and -- and -- and there are
17 none. The only national security considerations
18 that have been invoked are the fact that Agent
19 Egbert is affiliated with the Border Patrol.

20 And that's not sufficient. There may
21 be some Border Patrol functions that do
22 implicate national security. In fact, surely
23 there are. But this is not one of them.

24 JUSTICE ALITO: Do you think it
25 matters -- and -- and do I understand your last

1 answer to mean that it matters what a particular
2 Border Patrol agent's usual duties are as
3 opposed to what the Border Patrol agent is doing
4 at the time of the alleged tort?

5 MS. ELLSWORTH: I -- I think it's the
6 latter, Justice Alito. I think it's the conduct
7 that the agent is involved in at the time.

8 JUSTICE ALITO: Well, so, here, he's
9 following up on a call from your client about
10 somebody -- why did your client call the agent
11 about this individual?

12 MS. ELLSWORTH: Actually, the -- Agent
13 Egbert had stopped Mr. Boule. He performed a --
14 a vehicle stop on the road earlier that morning.
15 And, during the course of that stop, Mr. Boule
16 informed Agent Egbert that there would be
17 somebody arriving at the inn that evening.

18 JUSTICE ALITO: And why did he inform
19 him of that?

20 MS. ELLSWORTH: That is not clear from
21 the record. That's the type of factual
22 development that we would hope to have the
23 opportunity to develop at trial.

24 JUSTICE ALITO: You mean, if -- if --
25 if he knew that one of us was going to check in

1 to the Smuggler's Inn and he happened to be
2 stopped by a Border Patrol agent, well -- he
3 would say, well, by the way, well, it's -- maybe
4 --

5 JUSTICE KAGAN: Suspicious characters.
6 (Laughter.)

7 JUSTICE ALITO: Yeah. Any ordinary
8 person was checking in to the -- to the -- the
9 Smuggler's Inn, he would have told the -- the
10 agent?

11 MS. ELLSWORTH: I -- I don't have the
12 answer to that, Justice Alito. I mean, I think
13 it's important to keep in mind a few things.

14 JUSTICE ALITO: And did he tell him
15 that his employees had driven all the way to
16 Seattle to pick up this person and drive the
17 person back for a two-hour drive?

18 MS. ELLSWORTH: Yes, that's the --
19 that is, in fact, typically the -- one of the
20 services that Mr. Boule provided was to pick
21 people up at the airport.

22 JUSTICE ALITO: Everybody?

23 MS. ELLSWORTH: But one thing to just
24 --

25 JUSTICE ALITO: Everybody who checks

1 in to the Smuggler's Inn, he does that?

2 MS. ELLSWORTH: I -- I don't know if
3 it's an add-on or if it's part of the -- part of
4 the rate, Your Honor.

5 (Laughter.)

6 MS. ELLSWORTH: But Mr. Boule, of
7 course, is -- is working with the government,
8 previously with CBP, and at the time of the
9 incident in question, he was working with
10 Immigrations and Customs Enforcement. So
11 whether that's the reason for him having
12 informed Agent Egbert of this or not I don't
13 have the answer to.

14 But the fact of the matter is having a
15 -- a government informant tell an officer that
16 somebody is arriving legally in the country, I
17 just don't think it's reasonable to consider
18 that to be some reasonable suspicion to -- to
19 come onto the property.

20 But I don't think the Court needs to
21 delve into those details and certainly needn't
22 weigh them. The question is whether this type
23 of function, coming to check on the visa status
24 on private property on U.S. soil --

25 JUSTICE ALITO: How -- how far was

1 this actually from the border? From the point
2 where this incident occurred, how far from there
3 to Canada?

4 MS. ELLSWORTH: It's very close. It's
5 maybe 20 feet. It's not far at all from the
6 border. The property -- Mr. Boule's property
7 actually crosses over into Canada.

8 JUSTICE ALITO: Twenty feet?

9 MS. ELLSWORTH: The proximity to the
10 border is not an -- to -- to make sure that the
11 Court is clear, we are not arguing that this is
12 somehow far enough from the border that it
13 doesn't implicate the actual line.

14 The issue here is that the -- the
15 conduct that the agent was involved in has
16 nothing to do with trying to prevent people from
17 crossing over to the United States or even from
18 trying to leave the United States into Canada --

19 JUSTICE ALITO: Why -- why do you say
20 that?

21 MS. ELLSWORTH: Because the conduct
22 that the agent was involved in was following up
23 to ask a question about the visa status of this
24 individual. He's not trying to attempt to stop
25 people from crossing into the country when he

1 went onto Mr. Boule's property to ask these
2 questions.

3 JUSTICE KAGAN: As I understand it,
4 the government is now suggesting that that is
5 what they were concerned with. It -- it seems
6 as though there's just a -- a difference in
7 one's view of the facts here. Is that correct?

8 MS. ELLSWORTH: And I -- I -- I come
9 to this Court with the record that I have. In
10 Joint Appendix 108 is Agent Egbert's sworn
11 declaration -- declaration indicating that after
12 he checked the guest's visa status, there was
13 nothing more for him to do as a Border Patrol
14 agent and he left.

15 CHIEF JUSTICE ROBERTS: This may be
16 the same question I tried to ask earlier, but
17 I've given it a little more thought, so I might
18 be able to phrase it better.

19 We've been talking about does this
20 agent in this case have something to do with the
21 border, is it affected in some way, and the
22 idea, I guess, is, if it is, maybe there
23 shouldn't be a Bivens action, but there -- if
24 there isn't, maybe there should be.

25 But the context is sort of we're --

1 we're -- we're stepping into the authority that
2 would normally be vested in Congress in terms of
3 whether or not to provide a cause of action.
4 And if Congress were sitting down saying should
5 there be a cause of action, it's not going be
6 parsing the particular facts, say, well, there
7 should be a cause of action if this, this, and
8 this. Presumably, they would say Border Patrol
9 agents are not liable for actions on the part of
10 this or something like that.

11 And shouldn't we take that into
12 account and -- and not be so terribly concerned
13 about the particular facts but more what
14 Congress would think about the consequences for
15 its border agents and -- and whether it would
16 draw a particular line on that basis?

17 MS. ELLSWORTH: Let me try and answer
18 that question in a few different ways.

19 The first is the -- what the Court
20 would be doing here were it to recognize --
21 affirm the Ninth Circuit and recognize the
22 availability of Bivens would be to -- to find
23 that this conduct falls within a cause of action
24 that the Court has already implied in Bivens in
25 the Fourth Amendment context, to go to Justice

1 Kagan's point. So I don't think the -- the
2 Court would be involved in -- in that form of
3 implying a cause of action here because it would
4 fit within the conduct of Bivens.

5 But Congress has not -- there --
6 there's no suggestion in the statutory
7 background here that Congress has made any
8 statements that suggest that it does not view
9 Border Patrol agents as being susceptible to
10 Bivens or -- or would have concerns here.

11 And I don't think the Court would need
12 to engage in the type of weighing that your
13 question suggests in order to determine that
14 this conduct, which we can -- we can make it a
15 higher level of generality, following up on a
16 tip, going onto private property, questioning an
17 individual, and using excessive force,
18 allegedly, all of those -- that's all conduct
19 that court -- the Court is able to weigh and
20 judge and weighs and judges in a variety of
21 different cases.

22 And it's not conduct -- not -- it
23 wouldn't require the sort of line-drawing that I
24 think some of the factual questions have -- have
25 suggested.

1 And the idea that the Border Patrol
2 writ large can't be subjected to a Bivens
3 action, not only would it sweep very broadly,
4 but it's also contrary to, you know, the Court's
5 decision in -- in Hernandez and -- and some
6 other lower courts' decisions that have allowed
7 Bivens cases to go forward against Border Patrol
8 agents, Immigrations and Custom Enforcement
9 agents, and other agents who are involved in
10 either border security or immigration-related
11 matters, so long as there is not a national
12 security reason to hesitate, which, in this
13 case, there's not.

14 CHIEF JUSTICE ROBERTS: Thank you.

15 Anything further? No?

16 Thank you, counsel.

17 MS. ELLSWORTH: Thank you, Mr. Chief
18 Justice.

19 CHIEF JUSTICE ROBERTS: Rebuttal, Ms.
20 Harris?

21 REBUTTAL ARGUMENT OF SARAH M. HARRIS
22 ON BEHALF OF THE PETITIONER

23 MS. HARRIS: Thank you, Mr. Chief
24 Justice. Three quick points.

25 First of all, there's been a lot of

1 debate about how to define a new context and
2 what is new in this context.

3 I think the question -- one of the
4 questions is what is the heartland of Bivens, is
5 it really anytime a law enforcement officer
6 happens to be performing regular law enforcement
7 duties or it's something else?

8 I do think that that is not quite
9 presented here because the actual duties of
10 whether you look at the Border Patrol or what
11 Agent Egbert is acting under are specific
12 statutory authorities for the Border Patrol
13 involving immigration enforcement, illegal entry
14 and exit. That's 6 U.S.C. 211 and 8 U.S.C.
15 1357.

16 We are not talking about the -- about
17 the boundaries of figuring out what did the
18 Court mean in Abbasi by the context in which
19 there would not be new extensions of Bivens.

20 So I think a lot of that debate just
21 depends on how -- you know, what happens when
22 you do have a Bivens extension, and I think that
23 is this case.

24 And the -- the second point I would
25 like to make is how broadly should the Court be

1 looking at the officer's functions or the facts
2 on the ground. And I think there really is a
3 contrast between our positions.

4 As perhaps the Chief's most recent
5 question indicates, I don't think it's -- it's
6 right to think that Congress would be looking at
7 the granular details of whether Agent Egbert
8 should have stopped someone, you know, 50 meters
9 from the Smuggler's Inn or at the Smuggler's Inn
10 driveway or perhaps on the road up to the
11 Smuggler's Inn.

12 I think the question that this Court's
13 cases have looked at -- and Hernandez is a
14 particularly good example -- is what is the type
15 of conduct that the officer is engaged in? It's
16 not, you know, Agent Mesa in Hernandez engaged
17 in a purportedly unjustified cross-border
18 killing of a teenager.

19 It is situations where Border Patrol
20 agents might be needing to use or use -- use --
21 use force or, here, situations in which Border
22 Patrol agents are concededly performing
23 immigration functions.

24 I think that has to be right because,
25 if you were to allow a Bivens claim in this

1 context, you would be having the prospect of
2 liability hanging over officers' heads, and they
3 need to know sort of not just, you know, if you
4 visit the Smuggler's Inn you'll be -- you'll be
5 subject to Bivens liability but, more broadly,
6 if you are engaged in an immigration search and
7 you have to use force, what are the contours of
8 your liability going to look like.

9 And then zooming out even further,
10 courts have to ask, I think, under Abbasi and
11 Hernandez, what are the costs of that going to
12 be for the Border Patrol? What are the
13 litigation costs? What are the systemic costs
14 going to look like? What's the deterrent effect
15 on top of all of the other remedies that are out
16 there for dealing with this type of conduct,
17 including the internal investigations Congress
18 has mandated?

19 So I think that really is the right
20 level of generality. And one confirmation of
21 that is that courts of appeals other than the
22 Ninth Circuit have, indeed, suggested that
23 immigration enforcement and the conduct of
24 agents at the border are always going to be
25 special factors because they are so intimately

1 tied to national security and immigration
2 functions. And those are two things that have
3 always been entrusted particularly to the
4 political branches.

5 And the fact that courts of appeals
6 have been saying that other than the Ninth
7 Circuit, I think, also gives some comfort that
8 that is a workable rule, it has not produced bad
9 consequences in those circuits, and those are
10 three circuits, the Fifth, the Sixth, and the
11 Eleventh, have said that now for, you know, at
12 least several years. So I think that should
13 give some additional comfort.

14 And just one third point, which is
15 that the state of play now is there are 60 cases
16 in the courts of appeals after Abbasi; only two
17 extensions from the Ninth Circuit. I think that
18 strongly suggests the time for Bivens extensions
19 may have been done.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel. The case is submitted.

23 (Whereupon, at 11:11 a.m., the case
24 was submitted.)

25

Official

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