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*Constitutional Remedies — Bivens Actions —  
Excessive Force — Retaliation — Egbert v. Boule*

Fifty-one years ago, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>1</sup> the Supreme Court announced a cause of action for money damages against federal officials under the Fourth Amendment.<sup>2</sup> Over the next decade, the Court extended this cause of action to new contexts under the Fifth and Eighth Amendments.<sup>3</sup> Then, the Court began to retreat, rejecting *Bivens* liability in the next eleven cases to raise such claims, often because of the presence of alternative remedies that the Court viewed as implicitly foreclosing *Bivens* relief.<sup>4</sup> Last Term, in *Egbert v. Boule*,<sup>5</sup> the Court continued this streak, declining to extend *Bivens* to a Fourth Amendment excessive-use-of-force claim and a First Amendment retaliation claim against a Customs and Border Protection (CBP) agent.<sup>6</sup> In reaching this conclusion, the Court determined that CBP’s administrative grievance process “independently foreclose[d]” extending *Bivens*.<sup>7</sup> Because this administrative process provided little protection or meaningful relief for complainants, the Court set a new floor for “alternative remedies” that foreclose a *Bivens* cause of action. Consequently, the Court implicitly rejected many potential *Bivens* claims, since the administrative procedures at most federal law enforcement agencies surpass this floor.

Robert Boule owned the Smuggler’s Inn, a bed-and-breakfast straddling the Canadian border in Blaine, Washington.<sup>8</sup> Blaine is a hub for cross-border traffic — both legal and illegal.<sup>9</sup> Boule took advantage of this traffic by offering lodging and transportation to those crossing the border.<sup>10</sup> As a result, he was well known to CBP, which had apprehended numerous individuals and seized large quantities of contraband at Boule’s inn.<sup>11</sup> CBP agent Erik Egbert had interacted with Boule many times.<sup>12</sup> Boule also, on occasion, served as a government informant: he would let federal agents know when persons of interest visited.<sup>13</sup>

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<sup>1</sup> 403 U.S. 388 (1971).

<sup>2</sup> *Id.* at 397.

<sup>3</sup> See *Davis v. Passman*, 442 U.S. 228, 248–49 (1979); *Carlson v. Green*, 446 U.S. 14, 18–20 (1980).

<sup>4</sup> See *Egbert v. Boule*, 142 S. Ct. 1793, 1799–800 (2022) (collecting cases); Stephen I. Vladeck, *The Disingenuous Demise and Death of Bivens*, 2019–2020 CATO SUP. CT. REV. 263, 273–74 (2020).

<sup>5</sup> 142 S. Ct. 1793 (2022).

<sup>6</sup> *Id.* at 1800.

<sup>7</sup> *Id.* at 1806.

<sup>8</sup> *Id.* at 1800.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1800–01.

<sup>11</sup> *Id.* at 1800.

<sup>12</sup> *Id.* at 1801.

<sup>13</sup> *Id.* at 1800–01.

In 2014, per his usual practice, Boule informed Egbert that a Turkish national was visiting the inn.<sup>14</sup> Believing that there was “no legitimate reason a person would travel from Turkey to stay at a rundown bed-and-breakfast on the border in Blaine,” Egbert investigated.<sup>15</sup> As the visitor arrived at the Inn, Egbert followed him onto Boule’s property.<sup>16</sup> Then, after an apparent change of heart, Boule ordered Egbert to leave.<sup>17</sup> Egbert refused.<sup>18</sup> Instead, according to Boule, Egbert threw Boule aside and pushed him to the ground.<sup>19</sup> Once he determined the guest’s documents were valid, Egbert left.<sup>20</sup> But Boule claimed this altercation set off a tit for tat between Egbert and Boule.<sup>21</sup> Boule reported Egbert’s conduct to his CBP supervisors.<sup>22</sup> Boule also filed a Federal Tort Claims Act<sup>23</sup> (FTCA) administrative claim with CBP.<sup>24</sup> For his part, Egbert referred Boule’s business to multiple state and federal agencies for investigation, including the Washington Department of Licensing, Whatcom County Assessor’s Office, Social Security Administration, and Internal Revenue Service.<sup>25</sup>

After Boule failed to obtain redress through these alternative avenues — CBP denied his FTCA claim and took no action against Egbert for his alleged misconduct — he sued Egbert in the U.S. District Court for the Western District of Washington.<sup>26</sup> He raised *Bivens* claims under the Fourth, First, and Fourteenth Amendments.<sup>27</sup> The district court dismissed each claim at summary judgment.<sup>28</sup> The court determined that “allowing [Boule’s Fourth Amendment] claim to proceed would be an unwarranted extension of *Bivens* into a new context”<sup>29</sup> because Egbert was acting under a different legal mandate than the officials in other *Bivens* claims.<sup>30</sup> Further, since the claims “raise[d] significant separation-of-powers concerns” involving national security,<sup>31</sup> the court determined there were “special factors [that] preclude[d]” an extension

<sup>14</sup> *Id.* at 1801.

<sup>15</sup> *Id.* (quoting Joint Appendix at 104, *Egbert* (No. 21-147)).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *See id.* at 1801–02.

<sup>22</sup> *Id.*

<sup>23</sup> 28 U.S.C. §§ 1346(b), 2671–2680.

<sup>24</sup> *Egbert*, 142 S. Ct. at 1802.

<sup>25</sup> *Id.*; *id.* at 1812 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

<sup>26</sup> *Id.* at 1802 (majority opinion); Complaint for Damages at 1, *Boule v. Egbert*, No. 17-cv-00106 (W.D. Wash. Aug. 24, 2018).

<sup>27</sup> Complaint for Damages, *supra* note 26, ¶¶ 18, 20.

<sup>28</sup> *Egbert*, 142 S. Ct. at 1802.

<sup>29</sup> Order Denying Plaintiff’s Motion for Summary Judgment Regarding Fourth Amendment Violation at 5, *Boule*, No. 17-cv-00106.

<sup>30</sup> *Id.* at 9.

<sup>31</sup> *Id.* at 10.

into this new context.<sup>32</sup> The First Amendment also “clearly present[ed] a new context” and national security concerns again counseled hesitation.<sup>33</sup> Boule appealed both rulings.<sup>34</sup>

The Ninth Circuit reversed.<sup>35</sup> Writing for the panel, Judge Fletcher<sup>36</sup> held that both claims arose in new contexts but no special factors counseled against extension.<sup>37</sup> As to the Fourth Amendment claim, he distinguished *Hernández v. Mesa*,<sup>38</sup> in which the Supreme Court had rejected a *Bivens* claim against a CBP agent who had shot a Mexican child across the United States–Mexico border.<sup>39</sup> Unlike the CBP agent in *Hernández*, Egbert “was not policing th[e] border or trying to prevent illegal entry,” making this “a conventional Fourth Amendment claim,”<sup>40</sup> one that was “part and parcel of the ‘common and recurrent sphere of law enforcement.’”<sup>41</sup> Thus, there were no special factors counseling against the Fourth Amendment claim.<sup>42</sup> The court also held “[t]here is even less reason to hesitate in extending *Bivens*” to the First Amendment context here because “[r]etaliation is a well-established . . . claim,” and Egbert’s retaliation was unrelated to his official duties.<sup>43</sup> Finally, the court determined there were no available alternative remedies: the Westfall Act precludes recovery under state law and the FTCA excludes recovery for constitutional violations.<sup>44</sup>

Over the dissent of twelve judges, the Ninth Circuit denied rehearing en banc.<sup>45</sup> Judge Bumatay’s dissent argued that under modern doctrine “the judicial practice of creating constitutional causes of action is widely considered disfavored — if not a dead letter.”<sup>46</sup> He provided four reasons against extending *Bivens* to First Amendment claims: congressional silence on remedies for retaliation claims,<sup>47</sup> contrary Supreme Court pre-

<sup>32</sup> *Id.* at 11.

<sup>33</sup> Order Granting Defendant’s Motion for Summary Judgment at 8, *Boule*, No. 17-cv-00106.

<sup>34</sup> *Boule v. Egbert*, 980 F.3d 1309, 1313 (9th Cir. 2020).

<sup>35</sup> *Id.* at 1312.

<sup>36</sup> Judge Fletcher was joined by Judges Graber and Freudenthal. Judge Freudenthal was sitting by designation from the District of Wyoming.

<sup>37</sup> *Boule*, 980 F.3d at 1313–16.

<sup>38</sup> 140 S. Ct. 735 (2020).

<sup>39</sup> *Boule*, 980 F.3d at 1314 (citing *Hernández*, 140 S. Ct. at 740, 744, 746–47, 749).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1315 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017)).

<sup>42</sup> *Id.* at 1313.

<sup>43</sup> *Id.* at 1316.

<sup>44</sup> *Id.* at 1316–17.

<sup>45</sup> See *Boule v. Egbert*, 998 F.3d 370, 373, 384 (9th Cir. 2021). Along with denying rehearing en banc, the panel issued a new opinion, superseding the prior opinion. *Id.* at 373. With this reissued decision, the court provided additional elaboration on its conclusion that *Bivens* should be extended to First Amendment retaliation claims, see *id.* at 389–91, and clarified its ruling as to Fourth Amendment claims, see *id.* at 387–89.

<sup>46</sup> *Id.* at 374 (Bumatay, J., dissenting from denial of rehearing en banc). Judge Bumatay was joined by Judges Callahan, Ikuta, Bennett, Ryan Nelson, Lee, and VanDyke.

<sup>47</sup> *Id.* at 378–79.

cedent,<sup>48</sup> precedent from other circuits rejecting First Amendment *Bivens* claims,<sup>49</sup> and availability of alternative remedies for Boule.<sup>50</sup> And for the Fourth Amendment claim, “national security, and specifically, the conduct of agents at the border, is a red light to *Bivens* extensions.”<sup>51</sup> Judge Owens’s separate dissent called for legislation to resolve the *Bivens* morass,<sup>52</sup> and Judge Bress’s dissent emphasized that the extension of *Bivens* to these new contexts was “significantly out of step” with recent Supreme Court precedent.<sup>53</sup>

The Supreme Court reversed.<sup>54</sup> Writing for the majority, Justice Thomas<sup>55</sup> first provided a new gloss on the Court’s restrictive standard for extending the *Bivens* remedy to new contexts. Five years prior, in *Ziglar v. Abbasi*,<sup>56</sup> the Court had crystallized its *Bivens* extension inquiry into two steps: (1) whether the claim arises in a “new context” and (2) whether there are any “special factors counselling hesitation.”<sup>57</sup> But here, Justice Thomas wrote that this two-step inquiry “often resolve[s] to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy.”<sup>58</sup> The national security concerns the Court had identified in *Hernández* created such a reason.<sup>59</sup> Any differences between *Hernández* and Boule’s case, such as whether the officer was a few feet from the border or straddling it, were “too granular” for the *Bivens* extension inquiry.<sup>60</sup> The Court also held it would not extend *Bivens* to First Amendment retaliation claims because almost any adverse government action can be grounds for a retaliation claim.<sup>61</sup> The ease with which these claims could be alleged raises the concern they might deter officials’ lawful conduct.<sup>62</sup>

Further, the Court held that alternative remedies “independently foreclose[d]” extending *Bivens* to Boule’s Fourth Amendment claim.<sup>63</sup>

<sup>48</sup> *Id.* at 379–80.

<sup>49</sup> *Id.* at 380–81.

<sup>50</sup> *Id.* at 381–82.

<sup>51</sup> *Id.* at 383.

<sup>52</sup> *Id.* at 384 (Owens, J., dissenting from denial of rehearing en banc).

<sup>53</sup> *Id.* (Bress, J., dissenting from denial of rehearing en banc). Judge Bress was joined by Judges Bade, Collins, and Forrest (formerly Hunsaker).

<sup>54</sup> *Egbert*, 142 S. Ct. at 1800.

<sup>55</sup> Justice Thomas was joined by Chief Justice Roberts and Justices Alito, Kavanaugh, and Barrett.

<sup>56</sup> 137 S. Ct. 1843 (2017).

<sup>57</sup> *Id.* at 1857 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001); *Carlson v. Green*, 446 U.S. 14, 18 (1980)); see also *Egbert*, 142 S. Ct. at 1803.

<sup>58</sup> *Egbert*, 142 S. Ct. at 1803; see also *id.* at 1805 (“A court faces only one question: whether there is any rational reason (even one) to think that Congress is better suited to ‘weigh the costs and benefits of allowing a damages action to proceed.’” (quoting *Abbasi*, 137 S. Ct. at 1858)).

<sup>59</sup> *Id.* at 1804 (citing *Hernández v. Mesa*, 140 S. Ct. 735, 747 (2020)).

<sup>60</sup> *Id.* at 1806.

<sup>61</sup> *Id.* at 1807.

<sup>62</sup> See *id.*

<sup>63</sup> *Id.* at 1806.

CBP bears a statutory mandate to “control, direc[t], and supervis[e] . . . all employees,” and regulations require it to conduct investigations and accept complaints by aggrieved parties.<sup>64</sup> Since Boule could, and did, initiate an investigation by filing a grievance with the agency, he had an adequate alternative remedy, even though he had no right to participate in, or to request judicial review of, CBP’s determination.<sup>65</sup> Justice Thomas concluded that the minimal procedures sufficed to create an “adequate level of deterrence” against constitutional violations.<sup>66</sup>

Justice Gorsuch concurred in the judgment to note that he would “take the next step and acknowledge explicitly what the Court leaves barely implicit” by overruling *Bivens*.<sup>67</sup> In his view, the federal courts have no role in creating new causes of action in a system of separated powers.<sup>68</sup> He then criticized the Court’s “case-specific analysis” as he “[c]andidly . . . struggle[d] to see how this set of facts differ[ed] meaningfully from those in *Bivens* itself.”<sup>69</sup>

Justice Sotomayor concurred in the judgment in part and dissented in part.<sup>70</sup> She concurred in the judgment that *Bivens* should not be extended to First Amendment retaliation claims.<sup>71</sup> However, she would have “arrive[d] at that conclusion by following precedent rather than by applying the Court’s new, single-step inquiry.”<sup>72</sup> She dissented from the majority’s conclusion on the Fourth Amendment claim.<sup>73</sup> In her view, Boule’s claim did not arise in a new context, nor did it present any special factors counseling hesitation.<sup>74</sup> Merely bringing a claim against an employee of a different federal agency could not create a new context.<sup>75</sup> To assert otherwise would render every *Bivens* claim a new context, since *Bivens* involved the now-defunct Federal Bureau of Narcotics.<sup>76</sup> Further, Justice Sotomayor argued, the only special factor that raised separation of powers concerns was that this interaction between Egbert and Boule took place near the border.<sup>77</sup> Yet, it took place exclusively on U.S. soil, exclusively between U.S. citizens — a far cry from *Hernández*’s cross-border shooting of a foreign citizen.<sup>78</sup> Finally, Justice Sotomayor

<sup>64</sup> *Id.* (alterations in original) (quoting 8 U.S.C. § 1103(a)(2)).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1807.

<sup>67</sup> *Id.* at 1810 (Gorsuch, J., concurring in the judgment).

<sup>68</sup> *See id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (Sotomayor, J., concurring in the judgment in part and dissenting in part). Justice Sotomayor was joined by Justices Breyer and Kagan.

<sup>71</sup> *Id.* at 1811.

<sup>72</sup> *Id.* at 1817.

<sup>73</sup> *Id.* at 1811.

<sup>74</sup> *Id.* at 1814.

<sup>75</sup> *Id.* at 1815.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1816.

<sup>78</sup> *Id.*

criticized the majority's conclusion that Boule had alternative remedies.<sup>79</sup> Before, the Court had only ever found sufficient alternative remedies where claimants had opportunities to participate, obtain judicial review, and secure "at least some meaningful relief."<sup>80</sup> CBP's investigation provided none of that to Boule.<sup>81</sup>

The Court's holding that CBP's grievance process was an adequate alternative remedy sets a new floor for the alternative remedies analysis and likely precludes new *Bivens* remedies against most federal law enforcement agencies. Prior to this decision, several lower courts had argued that *Bivens* plaintiffs must receive some individual relief to redress the specific harm they faced. But in *Egbert*, the Court confronted a remedial system that failed to provide any direct relief to the plaintiff and nevertheless found that it independently foreclosed *Bivens* relief. The Court thus rejected the argument that direct relief to the plaintiff is necessary, instead reducing the touchstone of the alternative remedies inquiry into whether there is adequate deterrence. And because most federal agencies have similar grievance processes, this conclusion is likely to foreclose extensions of *Bivens* against most federal law enforcement agents.

Whether alternative remedies are available has long been central to the *Bivens* inquiry. In *Bivens* itself, the Court discussed a plaintiff's inability to obtain relief for a Fourth Amendment violation under state tort law and noted there was not "another remedy, equally effective in the view of Congress."<sup>82</sup> As Justice Harlan noted, it was "damages or nothing" for Webster Bivens because he could not avail himself of any other remedies.<sup>83</sup> A decade later, the Court noted that it would not extend *Bivens* relief where "Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution."<sup>84</sup> The Court then held that several alternative remedies foreclosed *Bivens* relief, such as the civil service system for a wrongfully discharged federal employee,<sup>85</sup> administrative tribunals to contest the denial of Social Security benefits,<sup>86</sup> and tort law claims wherever available.<sup>87</sup> For over forty years, the Court treated the question

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<sup>79</sup> *Id.* at 1821–23.

<sup>80</sup> *Id.* at 1822.

<sup>81</sup> *Id.* at 1821.

<sup>82</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971); *see also id.* at 390–98 (discussing the inadequacy of state law remedies).

<sup>83</sup> *Id.* at 410 (Harlan, J., concurring in the judgment).

<sup>84</sup> *Carlson v. Green*, 446 U.S. 14, 18–19 (1980); *see also Davis v. Passman*, 442 U.S. 228, 248 (1979) ("And, of course, were Congress to create equally effective alternative remedies, the need for damages relief might be obviated." (citing *Bivens*, 403 U.S. at 397)).

<sup>85</sup> *See Bush v. Lucas*, 462 U.S. 367, 385–90 (1983).

<sup>86</sup> *See Schweiker v. Chilicky*, 487 U.S. 412, 424–25 (1988).

<sup>87</sup> *See, e.g., Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72–73 (2001) (concluding that the ability to bring state tort law damages action against private defendants meant a prisoner did not "lack effective remedies," *id.* at 72).

of whether there were alternative remedies as the first step in the *Bivens* extension inquiry.<sup>88</sup> And still, under the Court's recent formulation of the inquiry in *Abbasi*, an alternative remedial structure may be a sufficient basis to foreclose a *Bivens* cause of action.<sup>89</sup>

Over the past several decades, however, the Supreme Court and lower courts have fluctuated on how comparable the remedy must be to secure money damages under *Bivens*.<sup>90</sup> As the Court shifted to a more stringent approach to extending *Bivens* claims, it went from looking for remedies "equally effective" as *Bivens* relief<sup>91</sup> to merely "meaningful" remedies.<sup>92</sup> And the Court indicated that such remedies, even if not "perfectly congruent,"<sup>93</sup> ought to provide "roughly similar incentives for potential defendants" not to violate the Constitution and "roughly similar compensation to victims of violations."<sup>94</sup> Relying on this language, some lower courts have indicated that alternative remedies must give some direct relief to claimants before such remedies are deemed adequate.<sup>95</sup> Thus, where an agency's internal administrative process failed to provide any potential of monetary relief for retrospective harms, those courts held the remedy could not foreclose a *Bivens* cause of action.<sup>96</sup>

By holding that Boule had alternative remedies that independently foreclosed a *Bivens* claim, the Court rejected the position that a plaintiff must be entitled to some form of individual relief.<sup>97</sup> The Court focused

<sup>88</sup> See *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) ("[T]he decision whether to recognize a *Bivens* remedy may require two steps. In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." (citing *Bush*, 462 U.S. at 378)).

<sup>89</sup> *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017) ("[I]f there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action.").

<sup>90</sup> See John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723, 730-31 (2008).

<sup>91</sup> Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing Bivens After Minneci*, 90 WASH. U. L. REV. 1473, 1487 (2013) (quoting *Carlson v. Green*, 446 U.S. 14, 19 (1980); *Davis v. Passman*, 442 U.S. 228, 248 (1979)).

<sup>92</sup> *Id.* at 1486 (quoting *Bush*, 462 U.S. at 368, 386).

<sup>93</sup> *Minneci v. Pollard*, 565 U.S. 118, 129 (2012).

<sup>94</sup> *Id.* at 130.

<sup>95</sup> See, e.g., *Quintero Perez v. United States*, 8 F.4th 1095, 1105 (9th Cir. 2021); *Hernández v. United States*, 757 F.3d 249, 273-74 (5th Cir. 2014), *rev'd en banc*, 785 F.3d 117 (5th Cir. 2015) (per curiam), *vacated*, 137 S. Ct. 2003 (2017) (per curiam); *Engel v. Buchan*, 710 F.3d 698, 707 (7th Cir. 2013).

<sup>96</sup> See, e.g., *Hoffman v. Preston*, 26 F.4th 1059, 1070 (9th Cir. 2022) ("[W]hen a prisoner is physically injured due to an officer's unconstitutional actions, the harm can 'only be remedied by money damages,' which are not available through the [Bureau of Prisons'] grievance process." (quoting *Bistran v. Levi*, 912 F.3d 79, 92 (3d Cir. 2018)); *Bistran*, 912 F.3d at 92 ("The administrative grievance process is not an alternative because it does not redress [the plaintiff's] harm, which could only be remedied by money damages." (citing *Nyhuis v. Reno*, 204 F.3d 65, 70 (3d Cir. 2000))).

<sup>97</sup> The Court did, however, rightly decline to hold that the FTCA complaint process alone foreclosed the *Bivens* remedy. See *Egbert*, 142 S. Ct. at 1822 n.7 (Sotomayor, J., concurring in the judgment in part and dissenting in part). Because of the extensive administrative process laid out in the FTCA and its implementing regulations, see 28 C.F.R. §§ 14.1-11 (2021), one Ninth Circuit

on a CBP grievance process and investigation that were more restrictive than either avenue of relief in the two cases the Court compared it to — *Hernández* and *Correctional Services Corp. v. Malesko*.<sup>98</sup> In *Hernández*, Department of Justice investigators and prosecutors, in conjunction with CBP and Department of Homeland Security officials, had investigated the agent for potential civil and criminal misconduct.<sup>99</sup> Likewise, the Federal Bureau of Prisons’ administrative process at issue in *Malesko* is “substantial; it contains its own statutes of limitations, filing procedures, and appeals process. And prisoners may retain attorneys for assistance with the process.”<sup>100</sup> Further, while that program does not award monetary damages, it does permit changes to the policies affecting applicants and other direct relief for applicants.<sup>101</sup> By contrast, CBP’s investigation of Egbert could provide no recovery for Boule or individual redress for his injuries. Rather, it focused on the future of Egbert’s employment with CBP.<sup>102</sup> Thus, the Court departed from its prior consideration of whether a plaintiff received some form of individual redress or “roughly similar” compensation, instead asking whether the alternative remedies deter constitutional violations.<sup>103</sup> Presumably, then, merely having a process for filing a complaint against an employee,

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dissent argued it constituted an alternative remedy for *Bivens* purposes. *Boule v. Egbert*, 998 F.3d 370, 384 (9th Cir. 2021) (Bumatay, J., dissenting from denial of rehearing en banc) (“[Boule] was able to [file a tort claim] because of the administrative remedy provided by the FTCA. Even if the FTCA remedy does not provide the ‘exact same kind of relief’ as *Bivens*, the mere existence of such an alternative is reason to hesitate here.” (footnote omitted) (quoting *Oliva v. Nivar*, 973 F.3d 438, 444 (5th Cir. 2020), cert. denied, 141 S. Ct. 2669 (2021), reh’g denied, 141 S. Ct. 2886 (2021))); see also *Oliva*, 973 F.3d at 444 (“A person in [the plaintiff’s] situation first proceeds through the [Department of Veteran Affairs]’s administrative process. Then he can bring his claims under the FTCA. [The plaintiff] followed that process. . . . [His] own conduct shows there is an alternative remedial scheme for his claims.” (citations omitted)). The Supreme Court, however, has long held that the ability to bring an FTCA claim does not foreclose a *Bivens* remedy, see *Carlson v. Green*, 446 U.S. 14, 19–21 (1980), in part because the FTCA excludes claims “brought for a violation of the Constitution,” 28 U.S.C. § 2679(b)(2)(A); see also *Hernández v. Mesa*, 140 S. Ct. 735, 748 n.9 (2020). To be sure, a plaintiff who brings an FTCA action must first exhaust their administrative remedies by filing a claim with the appropriate federal agency. 28 U.S.C. § 2675(a); see also *McNeil v. United States*, 508 U.S. 106, 112 (1993) (holding exhaustion requirement jurisdictional). Yet, treating this administrative process as an alternative would effectively nullify the FTCA’s exception for *Bivens* remedies and Congress’s intent that the two serve as “parallel, complementary causes of action.” *Carlson*, 446 U.S. at 20; see also *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001). This interpretation would also preclude *Bivens* claims across all federal agencies that allow FTCA claims. See 28 U.S.C. § 2672 (explaining that accepting an FTCA award “constitute[s] a complete release” of claims against the U.S. government related to that subject matter).

<sup>98</sup> 534 U.S. 61 (2001).

<sup>99</sup> See *Hernández*, 140 S. Ct. at 740 & n.1 (citing Press Release, U.S. Dep’t of Just., Off. of Pub. Affs., Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca (Apr. 27, 2012), <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca> [<https://perma.cc/E8V3-STZN>]).

<sup>100</sup> *Pinson v. U.S. Dep’t of Just.*, 514 F. Supp. 3d 232, 243 (D.D.C. 2021) (quoting *Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 524 (6th Cir. 2020)).

<sup>101</sup> See *Mack v. Yost*, 968 F.3d 311, 321 (3d Cir. 2020).

<sup>102</sup> See Joint Appendix, *supra* note 15, at 177, 182–84.

<sup>103</sup> See *Egbert*, 142 S. Ct. at 1806–07.

with the possibility of an internal investigation, provides a sufficient remedy to foreclose *Bivens* claims.<sup>104</sup>

Given the Court's approval of this limited process, grievance procedures at other federal law enforcement agencies are likely to foreclose new *Bivens* causes of action. Consider that the Department of Justice and the Department of Homeland Security account for eighty percent of federal law enforcement officers.<sup>105</sup> Each department has a grievance process akin to that provided in *Egbert*. Just as the CBP Office of the Inspector General (OIG) accepts complaints and investigates alleged violations,<sup>106</sup> the Department of Justice OIG provides a grievance and investigation process that is required by both statute and regulation.<sup>107</sup> In addition, the office is statutorily required to make available to the public a means of filing "complaints alleging abuses of civil rights and civil liberties" by any department employees and to review those complaints.<sup>108</sup> Several departmental components have additional procedures for complaints against their own agents.<sup>109</sup> And the internal review process at CBP applies to the other components of the Department of Homeland Security, including Immigration and Customs Enforcement.<sup>110</sup> Nor are these the only federal law enforcement agencies that provide

<sup>104</sup> See *id.* at 1807 ("[W]e have no warrant to doubt that the consideration of Boule's grievance against Agent Egbert secured adequate deterrence and afforded Boule an alternative remedy.").

<sup>105</sup> See CONNOR BROOKS, BUREAU OF JUST. STAT., NCJ 251922, FEDERAL LAW ENFORCEMENT OFFICERS, 2016 — STATISTICAL TABLES (2019), <https://bjs.ojp.gov/content/pub/pdf/fleo16st.pdf> [<https://perma.cc/S6NQ-QNE2>].

<sup>106</sup> 8 C.F.R. § 287.10(a)–(b) (2021).

<sup>107</sup> 5 U.S.C. app. § 8E(d) ("The Attorney General shall ensure by regulation that any component of the Department of Justice receiving a nonfrivolous allegation of criminal wrongdoing or administrative misconduct by an employee of the Department of Justice . . . shall report that information to the Inspector General."); 28 C.F.R. § 0.29c(a) (2021) ("Evidence and non-frivolous allegations of criminal wrongdoing or serious administrative misconduct by Department employees shall be reported to the OIG, or to a supervisor or a Department component's internal affairs office . . .").

<sup>108</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 1001, 115 Stat. 272, 391 (codified at 5 U.S.C. app. § 8E note (Review of Civil Rights Complaints by the Department of Justice)). The OIG interprets this provision narrowly to include only civil rights violations based upon certain ethnicities and religions and refers other complaints to the relevant agency or component. See OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT 3–4 (2021), <https://www.oversight.gov/sites/default/files/oig-reports/DOJ/21-107.pdf> [<https://perma.cc/FRR2-VB2X>].

<sup>109</sup> For example, as discussed above, the Federal Bureau of Prisons has an extensive Administrative Remedy Program for claims against its officers, required by statute and regulation. See FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. 1330.18, ADMINISTRATIVE REMEDY PROGRAM (2014), [https://www.bop.gov/policy/progstat/1330\\_018.pdf](https://www.bop.gov/policy/progstat/1330_018.pdf) [<https://perma.cc/5LRF-3RHY>]. By regulation, the Director of the U.S. Marshals Service is required to conduct an "[i]nvestigation of alleged improper conduct on the part of U.S. Marshals Service personnel." 28 C.F.R. § 0.1111(n) (2021); see also 28 U.S.C. § 561(g) (requiring Director to "supervise and direct" the Service).

<sup>110</sup> See 8 C.F.R. § 287.8 (2021). This process is complemented by statutory remedies available to those in detention. See *Alvarez v. U.S. Immigr. & Customs Enf't*, 818 F.3d 1194, 1208 (11th Cir. 2016) (holding *Bivens* action was foreclosed by Immigration and Nationality Act's "host of review procedures tailored to the differently situated groups of aliens that may be present in the United States").

such processes. Other agencies, such as the National Park Service and the Department of State's Bureau of Diplomatic Security — each with over 1000 law enforcement agents — have internal review procedures akin to CBP's grievance process.<sup>111</sup> And because *Bivens* relief is mostly available for only those claims brought against law enforcement agents under the Fourth and Eighth Amendments,<sup>112</sup> these procedures could dramatically limit *Bivens* claims.

Much of the commentary surrounding the Court's decision in *Egbert* has focused on how finely the Court evaluates the facts to identify differences between previous *Bivens* claims approved by the Court and how the majority reframed the two-step process for extending *Bivens*.<sup>113</sup> But the Court's determination that CBP's internal disciplinary process was a sufficient alternative remedy — even though it afforded Boule no direct relief — is likely to have an equally large impact on limiting the expansion of *Bivens* to new contexts. Courts are likely to find that few, if any, federal agencies lack remedies like CBP's. Thus, even in other “run-of-the-mill Fourth Amendment case[s]”<sup>114</sup> like *Egbert*, courts will be inclined to find that *Bivens* causes of action are foreclosed.

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<sup>111</sup> BROOKS, *supra* note 105. State Department employees must report “serious, noncriminal misconduct” by agency law enforcement agents. 22 U.S.C. § 3929(c)(6)(A)(iv); *see also* U.S. DEP'T OF STATE, 1 FOREIGN AFFAIRS MANUAL § 262.4 (2022) (requiring senior officials to “[o]versee[] investigations of allegations of malfeasance, misfeasance, and nonfeasance related to Department personnel, and conduct[] investigations into criminal and administrative misconduct involving personnel”). The National Park Service provides a comprehensive policy for investigating complaints against law enforcement employees. *See* NAT'L PARK SERV., 9 LAW ENFORCEMENT PROGRAM: REFERENCE MANUAL 209 (2015), <https://www.nps.gov/aboutus/foia/upload/RM-9-redacted-V-2.pdf> [<https://perma.cc/8R4W-H6RV>].

<sup>112</sup> *See* James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 118–19, 125 (2009).

<sup>113</sup> *See, e.g.*, Ian Millhiser, *The Supreme Court Gives Lawsuit Immunity to Border Patrol Agents Who Violate the Constitution*, VOX (June 8, 2022, 1:00 PM), <https://www.vox.com/23159672/supreme-court-egbert-boule-bivens-law-enforcement-border-patrol-immunity> [<https://perma.cc/2ZLP-LGZY>]; Matt Ford, *The Supreme Court Keeps Chipping Away at Your Constitutional Rights*, NEW REPUBLIC (June 8, 2022), <https://newrepublic.com/article/166725/thomas-bivens-boule-egbert-decision> [<https://perma.cc/E8J3-4A7Z>].

<sup>114</sup> *Boule v. Egbert*, 998 F.3d 370, 389 (9th Cir. 2021) (internal quotation marks omitted).