**No. 21-56282**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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DENISE MEJIA,

*Plaintiff–Appellee*,

v.

WESLEY MILLER, Bureau of Land Management Officer,
in his individual and official capacity,

*Defendant–Appellant*,

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On Appeal from the United States District Court
for the Central District of California (Riverside)
No. 5:20-cv-1166-SB-SP
Hon. Stanley Blumenfeld, Jr., District Judge

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# MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA & AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF PETITION FOR REHEARING EN BANC

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## MOTION FOR LEAVE TO FILE

Pursuant to Federal Rule of Appellate Procedure 29, proposed amici curiae respectfully move the court for leave to file the accompanying amici curiae brief in this case. Plaintiff–Appellee Denise Mejia consents to this motion for leave to file. Defendant–Appellant Wesley Miller does not consent.

## INTEREST OF AMICI CURIAE

The American Civil Liberties Union Foundation ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and the Nation's civil rights laws. The ACLU of Southern California, ACLU of Northern California, and the ACLU of Washington are state affiliates of the ACLU. The ACLU and its affiliates appear frequently before this Court, both as counsel representing parties and as amicus curiae. The ACLU has litigated numerous cases involving damages claims implied under the U.S. Constitution, *see Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in this Court and other federal courts. The ACLU and its affiliates filed amicus briefs in *Bivens* itself, *see* Br. of ACLU, Amicus Curiae, *Bivens*, 403 U.S. 388 (No. 301), 1970 WL 122681, as well as in the Supreme Court's recent *Bivens* cases, *see* Br. for Amici Curiae ACLU, *et al.*, in Support of Respondent, *Egbert v. Boule*, 142 S. Ct. 1793 (2022) (No. 21-147), 2022 WL 296795; Br. Amici Curiae

of the ACLU et al. in Support of Petitioners, *Hernandez v. Mesa*, 140 S. Ct. 735 (2020) (No. 17-1678), 2019 WL 3854466; and Br. of the ACLU, *et al.*, as Amici Curiae in Support of Respondents, *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (Nos. 15-1358, 15-1359, 15-1363), 2016 WL 7473959.

## ARGUMENT

The Petition for Rehearing En Banc concerns a panel opinion that conflicts with Supreme Court opinions regarding when courts can and should recognize claims for damages when federal officers violate people's constitutional rights, particularly the well-established Fourth Amendment right protecting against the use of excessive force by law enforcement. *See Bivens*, 403 U.S. 388. Amici bring extensive experience in *Bivens* cases to this full Court's reconsideration of the panel opinion, and have a longstanding interest in the implementation and protection of such constitutional rights. Since the original *Bivens* action itself, amici have represented the rights and interests of their members and their mission to defend and advance civil rights and civil liberties in cases where courts consider whether to recognize damages actions brought directly under the Constitution. *See supra* Interest of Amici Curiae.

Amici's brief provides additional legal arguments and considerations implicated by the panel opinion, including how it disturbs the settled expectations of both the public and law enforcement when it comes to violations of individuals'

Fourth Amendment rights. Amici have extensive expertise in helping courts decide cases involving the rights of personal security and privacy bottomed in the Fourth Amendment. *See, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (ACLU as counsel). Amici also provide additional arguments about the potential ramifications of the panel's ruling that the location of the events at issue on federal lands constitutes a reason not to recognize the plaintiff's constitutional claim.

## CONCLUSION

The Court should grant the motion for leave to file the brief amici curiae.

Dated: February 9, 2023

Respectfully submitted,

/s/ Brett Max Kaufman

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# BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, & AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF PETITION FOR REHEARING EN BANC

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## CORPORATE DISCLOSURE STATEMENT

Amici curiae are non-profit entities that do not have parent corporations, and no publicly held corporation owns 10 percent or more of any stake or stock in amici. *See* Fed. R. App. P. 26.1.

Dated: February 9, 2023

Respectfully submitted,

/s/ Brett Max Kaufman
Brett Max Kaufman

*Counsel for Amici Curiae*

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## STATEMENT OF AMICI CURIAE[1]

The American Civil Liberties Union Foundation ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and the Nation's civil rights laws. The ACLU of Southern California, the ACLU of Northern California, and the ACLU of Washington are state affiliates of the ACLU. The ACLU and its affiliates appear frequently before this Court, both as counsel representing parties and as amicus curiae. The ACLU has litigated numerous cases involving *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in this Court and other federal courts, including the Supreme Court of the United States.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for amici certify that no person or entity, other than amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part.

## SUMMARY OF ARGUMENT

In rejecting plaintiff Denise Mejia's damages claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for excessive force against a Bureau of Land Management ("BLM") officer, the panel created a conflict with the Supreme Court and other circuits. While purporting to apply the Supreme Court's long-settled two-part *Bivens* analysis, *see, e.g.*, *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022) (citing *Hernandez v. Mesa*, 140 S. Ct. 735, 742–43 (2020), and *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858–60 (2017)), the panel sowed confusion by appearing to suggest that *Egbert* might have set forth a new test. Op. at 6–7. The panel also erred in concluding that Mejia's claim presented a new *Bivens* context because the defendant is a Bureau of Land Management officer and because the events giving rise to this case took place on public land. Those conclusions conflict not only with the Supreme Court's *Bivens* opinion itself, but also with the Supreme Court's and federal circuit courts' subsequent *Bivens* decisions, as well as Congress's endorsement of the scope of *Bivens* liability set forth in those decisions. The panel separately erred, and put itself at odds with Supreme Court decisions, by identifying "special factors," where there are none, to deny Mejia's claim. Finally, as the panel's decision carries with it dire consequences for regularly recurring, run-of-the-mill Fourth Amendment claims against federal officers, it presents an important matter for this Court's en banc review.

## ARGUMENT

### I. The panel's rejection of Mejia's *Bivens* claim defies Supreme Court precedent and conflicts with the law of other circuits.

The panel decision is at odds with the Supreme Court's most recent *Bivens* opinions. It also defies *Bivens* itself. Faced with a case that is in every meaningful way on par with the original *Bivens* decision, the panel erroneously upended the expectations of the public and Fourth Amendment actors and supplanted the Supreme Court's judgment about the continued scope of Fourth Amendment *Bivens* claims.

#### A. In *Egbert*, the Supreme Court reaffirmed its two-part test for courts to apply in *Bivens* cases.

Rehearing en banc—or, at least, amendment of the panel opinion—is warranted because the panel has potentially sowed confusion by focusing on the Supreme Court's observation in *Egbert* that the familiar two-step *Bivens* 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" than the courts in the particular circumstances of a plaintiff's claim. Op. 6–7 (emphasis added). As the panel acknowledged by going on to apply the longstanding two-part test, *Egbert* did not set out any new *Bivens* standard or overrule *Bivens*—despite the arguments by defendant and the United States that the Supreme Court should do so. Rather, *Egbert* reaffirmed the "two step[]" inquiry required in *Bivens* cases, and re-endorsed the

result in *Bivens* itself. 142 S. Ct. at 1803; *see Abbasi*, 137 S. Ct. at 1856–57. That familiar two-step test asks (1) whether the case presents a new context, i.e., whether it is "meaningfully different from the three cases in which the Court has implied a damages action"; and, if so, then (2) whether there are "special factors" counselling hesitation before "allowing a damages action to proceed," including whether Congress has provided alternative statutory remedies. *Egbert*, 142 S. Ct. at 1803 (cleaned up); *see Abbasi*, 137 S. Ct. at 1860 (listing six factors suggesting that a *Bivens* claim lies in a new context).

### B. The panel's conclusion that Mejia's claim presents a new *Bivens* context conflicts with *Bivens* itself as well as the decisions of other federal circuit courts.

This case presents a claim squarely within the original *Bivens* "search-and-seizure" context. *Abbasi*, 137 S. Ct. at 1856. It is settled, the Court explained in *Abbasi*, that, in the context of such claims, the *Bivens* decision "vindicate[s] the Constitution by allowing some redress for injuries" and "provides instruction and guidance to federal law enforcement officers going forward." *Id.* at 1856–57. "[I]n this common and recurrent sphere of law enforcement," the Court wrote, "[t]he settled law of *Bivens* . . . and the undoubted reliance upon it as a fixed principle in the law[] are powerful reasons to retain it in that sphere." *Id.* at 1857.

To be sure, the Supreme Court has warned against expansion of the damages remedy into new contexts. But it has repeatedly reaffirmed that *Bivens* remains the

law at least in the classic contexts in which implied constitutional damages liability arose. *See Bivens*, 403 U.S. 388; *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980). The panel cited Justice Gorsuch's suggestion, in his *Egbert* concurrence, that the Supreme Court has imposed such a "heightened restriction on *Bivens*" that it has essentially "le[ft] a door ajar even as it devises a rule that ensures no one ever will walk through." Op. 9 (cleaned up) (quoting *Egbert*, 142 S. Ct. at 1810 (Gorsuch, J., concurring in the judgment)). But Justice Gorsuch offered that observation not as an articulation of the actual standard but as a criticism and call for the Court to go further and overrule *Bivens* outright—which the majority did not do in *Egbert*, and which the Court has refused to do over and over. Indeed, every time the Court has rejected *Bivens* claims because they presented new contexts, it has explicitly declined to abolish *Bivens* liability altogether. *See, e.g.*, *Egbert v. Boule*, 142 S. Ct. 457, 457 (2021) (mem.) (denying certiorari on that question). In so doing, it has continued to affirm that classic *Bivens* claims are available.

The panel's rejection of Mejia's claim flies in the face of these instructions. The panel concluded that "[t]his case is not the rare exception" to the Supreme Court's instruction that "in all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts." Op. at 11 (quotation marks omitted) (quoting *Egbert*, 142 S. Ct. at 1800). But this case is, like *Bivens* itself, one

of the rare exceptions where the Court has recognized and continues to recognize a damages remedy. The panel ignored that principle, and its opinion flips the Supreme Court's three most recent *Bivens* decisions on their heads by ignoring the fundamental point that ordinary Fourth Amendment claims like Mejia's are not a new context, and by finding similarities with facts in *Egbert*, *Hernandez*, and *Abbasi* that are not present in this case.

Mejia's excessive-force claim is not "different in a meaningful way from previous *Bivens* cases decided by" the Supreme Court—namely, *Bivens*, which involved an excessive force claim against federal drug-enforcement officers.[2] *Abbasi*, 137 S. Ct. at 1859; *see Hernandez*, 140 S. Ct. at 743; *see also Egbert*, 142 S. Ct. at 1803. Both this case and *Bivens* involved claims that federal law enforcement officers used excessive force in making an arrest. *Compare* Op. 2 ("Mejia alleges that Miller used excessive force while attempting an arrest"), *with Bivens*, 403 U.S. at 389 (plaintiff alleged that federal officers "employed" "unreasonable force . . . in making his arrest"); *see Hernandez*, 140 S. Ct. at 744 ("*Bivens* concerned an allegedly unconstitutional arrest and search").[3] That is

[2] The officers in *Bivens* worked for the now-defunct Federal Bureau of Narcotics, which was housed within the Department of the Treasury. *See Notaro v. United States*, 363 F.2d 169, 171 (9th Cir. 1966).

[3] While the *Abbasi* Court referred to the "search-and-seizure context" of *Bivens*, that includes claims of excessive force, like those in *Bivens*, which the Supreme Court

precisely the kind of claim that *Abbasi* reaffirmed as occurring in a "common and recurrent sphere of law enforcement" that is "reli[ed] upon" by the public and federal officers "as a fixed principle in law." 137 S. Ct. at 1857.

By contrast, when the Supreme Court applied the "new context" inquiry in *Abbasi*, *Hernandez*, and *Egbert*, it found meaningful differences that are not present here. The facts in those cases demonstrate what new contexts for *Bivens* purposes look like: they all departed from the Fourth Amendment run-of-the-mill because they involved factors that courts are ill-suited to assess: national-security interests, border security, or activity affecting diplomatic relations with a foreign country. This case—which involves a federal officer, in the exercise of ordinary police duties, allegedly using excessive force during a traffic stop on federal lands in the interior of the country, as to which decades of law have cabined executive action—is not like those.

The panel's "new context" determination also conflicts with the Supreme Court's discussion of critical factors in *Abbasi*, and relies upon two factors that are not "meaningful." *Abbasi*, 137 S. Ct. at 1859.

First, the panel relied on the fact that Mejia's claim arose "on public lands," "a place where Mejia had no expectation of privacy," rather than "in his home." Op.

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has made clear are analyzed as Fourth Amendment seizures. *Graham v. Connor*, 490 U.S. 386, 394–95 (1989); *Tennessee v. Garner*, 471 U.S. 1, 7–10 (1985).

10. But this supposed distinction confuses distinct Fourth Amendment concepts. Whether a person enjoys an expectation of privacy in a particular place or property is a question relevant to whether the Fourth Amendment's warrant requirement applies. *See, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018). Excessive-force claims do not arise from the warrant clause but rather from the Fourth Amendment's proscription on unreasonable searches and seizures. *Graham*, 490 U.S. at 395. When the Supreme Court in *Abbasi* discussed the "settled law of *Bivens* in this common and recurrent sphere of law enforcement," 137 S. Ct. at 1857, it was referring precisely to this well-known type of Fourth Amendment reasonableness framework. That framework has long bound every federal law enforcement officer in their dealings with the public. As those officers surely know, even when federal law enforcement properly executes a valid warrant (and therefore does not violate the subject's reasonable expectation of privacy), using excessive force still violates the Fourth Amendment.

Second, the panel relied on the fact that BLM does not "ha[ve] the same [legal] mandate as agencies enforcing federal anti-narcotics law." Op. at 9. But the panel did not at all explain why this is a *meaningful* distinction. And it is not. In *Bivens*, the Supreme Court described the damages claim it was endorsing as concerning the "guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal

authority." 403 U.S. at 392; *see id.* at 391 (framing the claim as about violating "the Fourth Amendment's protection against unreasonable searches and seizures by federal agents"). Even if the narcotics agency in *Bivens* and the BLM operate in different administrative bailiwicks, Op. at 9, the functions performed by the officers in *Bivens* and in this case were identical—they both were making an arrest under standard police authority. That distinguishes both cases from *Egbert*, *Hernandez*, and *Abbasi*, which involved federal officers performing national-security, border-protection, and high-level policy functions. *See Egbert*, 142 S. Ct. at 1804–06;[4] *Hernandez*, 140 S. Ct. at 739; *Abbasi*, 137 S. Ct. at 1864.[5] The differences between *Bivens* and this case do not remotely rise to the level of differences the Supreme Court has found to be meaningful in its recent *Bivens* decisions.[6] In requiring

[4] Indeed, the defendant in *Egbert* argued that a *Bivens* remedy should not be available because the case involved a different agency (Customs and Border Protection) enforcing a different legal mandate (the immigration laws). *See* Br. for Pet'r at 35, *Egbert v. Boule*, 142 S. Ct. 1793 (2022) (No. 21-147), 2021 WL 6118300. The Court declined to adopt the defendant's argument, instead concluding only that *Bivens* was unavailable because of the border enforcement context. *See* 142 S. Ct. at 1804–06.

[5] A panel of this Court recently relied upon similar types of distinctions to reject a *Bivens* claim because it arose in a new context. *See Pettibone v. Russell*, No. 22-35183, 2023 WL 1458886, at *6 (9th Cir. Feb. 2, 2023) (defendant was a "high-level supervisor" accused of "ordering or acquiescing in unconstitutional conduct" rather than engaging in it himself, and was "directing a multi-agency operation" while "carrying out an executive order").

[6] The panel also found it meaningful that in "[t]he only case in which the [Supreme] Court has considered any kind of *Bivens* claim against BLM officers," *Wilkie v. Robbins*, 551 U.S. 537 (2007), the Court rejected the claim. Op. at 9. But, as the panel acknowledged, *Wilkie* involved a Fifth Amendment due process claim by "a

exacting sameness rather than looking for meaningful distinctions, the panel did what the Supreme Court declined to do in *Egbert*, *Hernandez*, and *Abbasi*: broadly foreclose a garden-variety Fourth Amendment *Bivens* claim as arising in a new context.

Finally, rehearing en banc is warranted because the panel's decision conflicts with the decisions of other circuits. *See* 9th Cir. R. 35-1.[7] In *Greenpoint Tactical Income Fund LLC v. Pettigrew*, 38 F.4th 555 (7th Cir. 2022), the Seventh Circuit allowed a *Bivens* claim against a Federal Bureau of Investigation agent and explained that *Egbert* "does not change" *Bivens*'s "continued force in its domestic Fourth Amendment context." *Id.* at 564 & n.2. In a pre-*Egbert* case, *Jacobs v. Alam*, 915 F.3d 1028 (6th Cir. 2019), the Sixth Circuit rejected the defendants' argument that the plaintiff's excessive-force claim under the Fourth Amendment arose in a new context simply because it had some "factual differences" from *Bivens*. *Id.* at 1038 (claim was a "run-of-the-mill challenge to standard law enforcement

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landowner alleging retaliation for exercising property rights," *id.*—not a garden-variety Fourth Amendment *Bivens* claim arising in the ordinary context of a traffic stop.

[7] The panel's decision also conflicts with this Court's conclusion, in a memorandum disposition, that while the plaintiff's Fourth Amendment *Bivens* claim for an unlawful wiretap presented a new context, his Fourth Amendment claim for unlawful search and arrest did not, because it arose "in virtually the same search-and-seizure context" as *Bivens* itself. *See Brunoehler v. Tarwater*, 743 F. App'x 740, 742–44 (9th Cir. 2018).

operations that fall well within *Bivens* itself" (cleaned up)). The Fourth Circuit has noted the same thing in dicta. *See Hicks v. Ferreyra*, 965 F.3d 302, 311 (4th Cir. 2020) (explaining that the plaintiffs' Fourth Amendment *Bivens* claim against Park Police officers within the Department of the Interior—"line-level agents of a federal criminal law enforcement agency"—was "not an extension of *Bivens* so much as a replay."). Finally, "it has long been the practice of courts in [the Second] Circuit to permit *Bivens* claims [under the Fourth Amendment] arising from the use of excessive force in an arrest." *Lehal v. Cent. Falls Det. Facility Corp.*, No. 13CV3923, 2019 WL 1447261, at *12 (S.D.N.Y. Mar. 15, 2019) (citing district court cases in the Second Circuit); *see Bueno Diaz v. Mercurio*, 442 F. Supp. 3d 701, 709 (S.D.N.Y. 2020) (concluding the same in a post-*Abbasi* case); *see also McLeod v. Mickle*, 765 F. App'x 582, 583 (2d Cir. 2019) (allowing Fourth Amendment *Bivens* claim against Forest Service officer within Department of the Interior). All of these cases make clear that the panel in this case went too far by rejecting the plaintiff's Fourth Amendment *Bivens* claim.

### C. The panel's conclusion that special factors counsel hesitation against recognizing a constitutional claim in this case conflicts with Supreme Court precedent.

The panel's "special factors" analysis also defies the Supreme Court's past cases. In *Egbert*, as in *Hernandez*, the Supreme Court held that special factors were present where a claim—even if brought under the Fourth Amendment—implicated

national security and border security considerations best addressed by the political branches. Following *Hernandez*, the *Egbert* Court concluded that in the border security context, courts were not "competent to authorize a damages action . . . against Border Patrol agents generally." 142 S. Ct. at 1806 (citing *Hernandez*, 140 S. Ct. at 746–47). Likewise, in *Abbasi*, the Supreme Court concluded that special factors barred a *Bivens* claim where the plaintiffs' claims "challenge[d] the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil" because "[t]hose claims bear little resemblance to the three *Bivens* claims the Court has approved in the past." 137 S. Ct. at 1860.

None of that can be said here. Mejia's claim does not implicate border or national security, and it does not raise a challenge to high-level government policy. The panel did not even suggest otherwise. Nonetheless, it concluded that judicial recognition of a constitutional damages remedy for Mejia would be inappropriate, in part because allowing Mejia's excessive-force claim "would have 'systemwide consequences' for BLM's mandate to maintain order on federal lands," introducing "uncertainty." Op. 10 (quotation marks omitted) (quoting *Egbert*, 142 S. Ct. at 1803). As discussed above, though, recognizing a damages claim like Mejia's would simply reaffirm the existing and longstanding understanding of Fourth Amendment rights that the Court acknowledged in *Abbasi*. Moreover, Congress has acceded to

the Supreme Court's approach to the three traditional *Bivens* contexts. When, in 1988, Congress made the Federal Tort Claims Act ("FTCA") "the exclusive remedy for most claims against Government employees arising out of their official conduct," *Hui v. Castaneda*, 559 U.S. 799, 806 (2010), Congress "left *Bivens* where it found it." *Hernandez*, 140 S. Ct. at 748 n.9. In other words, Congress considered the option that it was "better equipped [than the courts] to create a damages remedy" for constitutional violations in the classic *Bivens* vein, *Egbert*, 142 S. Ct. at 1803–04, and decided that it was not.

Further, the panel's conclusion that Mejia had alternative remedies, the existence of which also counsels against recognizing a damages claim, Op. 10–11, conflicts with both *Egbert* and *Hernandez* for two reasons. First, the panel concluded that a BLM complaint form available on the Internet was an alternative remedy that barred judicial recognition of a damages claim. But in *Egbert* and *Hernandez*, the Supreme Court relied on the fact that administrative investigations *had actually taken place*. *See Egbert*, 142 S. Ct. at 1806 (year-long internal investigation); *Hernandez*, 140 S. Ct. at 740–41, 745 (Department of Justice investigation into plaintiff's death concluded that no policy had been violated and DOJ declined to bring charges). By contrast, the panel here pointed merely to a website apparently available to the public for making complaints about BLM officers to the Office of Professional Responsibility. The panel did so without relying upon any record

evidence that this process was or would have been available to Mejia at the time of the alleged incident, any evidence that it would have been effective in triggering (let alone would have compelled) the kind of intense administrative investigations that the Supreme Court found meaningful in *Egbert* and *Hernandez*, or any evidence concerning the legal authority conferred (or limitations) upon the Office of Professional Responsibility to investigate the particular conduct at issue. *See* Pet. 14–15 (because the BLM's complaint form compels no investigation, any resulting investigation would be "just an act of administrative grace").

Second, even as the panel acknowledged that relief under the FTCA might only be available to Mejia "on a different legal theory," Op. 9–10, it concluded that the FTCA was an alternative remedy sufficient to bar *Bivens* relief for Mejia. But that judgment defies the Supreme Court's FTCA analysis in *Hernandez*, discussed above. *See* 140 S. Ct. at 748 n.9 (When Congress made the FTCA the exclusive damages remedy for most tort claims against federal officers, it deliberately "left *Bivens* where it found it.").

Whether through the theoretical possibility of an internal BLM administrative investigation or some kind of FTCA claim, there is "warrant to doubt" that Mejia could have "secured adequate deterrence" through either alternative remedy. *Egbert*, 142 S. Ct. at 1807 (citing *Hernandez*, 140 S. Ct. at 744–45); *see* Pet. 10–13. The

panel's conclusion that Mejia's *Bivens* claim should be rejected was therefore wrong under the Supreme Court's precedents.

## II. The panel decision is of exceptional importance because it will undermine fundamental Fourth Amendment rights protecting against common violations by federal officers.

Rehearing en banc is also warranted because the panel decision will radically undermine the public's expectations and incentivize federal officers who are carrying out ordinary police duties to violate basic Fourth Amendment rights. *See* Fed. R. App. P. 35(a)(2).

The plaintiff in this case was driving a recreational vehicle with her husband on public lands near the Joshua Tree National Park when the defendant BLM officer attempted to conduct a traffic stop for speeding and failing to yield to a park ranger. Op. 2. The BLM officer fired multiple shots at Ms. Mejia during this traffic stop, striking her twice. *Id.* This BLM officer, like other federal police officers who have been sued under *Bivens*, was carrying out the most ordinary police duties: traffic enforcement. *See, e.g.*, *Martin v. Malhoyt*, 830 F.2d 237, 240–42 (D.C. Cir. 1987) (*Bivens* claims for Fourth Amendment violations by federal Park Police conducting vehicle stops on federal property in Washington, D.C.); *Walker v. Ham*, No. 3:14-CV-104, 2016 WL 4718192, at *1 (S.D. Tex. Sept. 8, 2016) (unpublished op) (*Bivens* claim against U.S. Fish and Wildlife Service officers who pulled over plaintiff's vehicle for a burned-out tail light within a national wildlife refuge). And

federal courts are perfectly capable of adjudicating excessive-force claims against a variety of federal officers. *See, e.g.*, *Martin*, 830 F.2d at 262 (granting summary judgment for defendant federal officers on plaintiffs' Fourth Amendment claims based on conclusion that the officers had not used excessive force); *Walker*, 2016 WL 4718192, at *5 (granting summary judgment for the defendant officers because the disputed evidence demonstrated that they used reasonable force); *see also, e.g.*, *McLeod*, 765 F. App'x at 583 (Forest Service officer); *Ferreyra*, 965 F.3d at 311 (Park Police officers); *Hemry v. Cooke*, 572 F. Supp. 3d 1126, 1142 (D. Wyo. 2021) (National Park Service rangers), *appeal pending sub nom. Hemry v. Ross*, No. 22-8002 (10th Cir. Jan. 10, 2022); *Chambers v. United States*, No. 5:11-CV-420-OC-10TBS, 2013 WL 4080118 (M.D. Fla. Aug. 13, 2013) (Forest Service employee).

The panel's rule categorically rejecting *Bivens* claims arising from seizures on federal lands has potentially sweeping impacts. "The federal government owns roughly 640 million acres, about 28% of the 2.27 billion acres of land in the United States." Carol Hardy Vincent & Laura A. Hanson, Cong. Rsch. Serv., R42346, Federal Land Ownership: Overview and Data, at 1 (2020), https://crsreports.congress.gov/product/pdf/R/R42346/18. The BLM is one of four federal agencies, along with the U.S. Fish and Wildlife Service, the National Park Service, and the U.S. Forest Service, that collectively administers most of that territory. *Id.* Within the Ninth Circuit, the federal government owns even more land

proportionally; for example, in Nevada, the U.S. owns 80.1% of the land. *Id.* "[F]ederal land ownership is concentrated in Alaska (60.9%) and 11 coterminous western states (45.9%), in contrast with lands in the other states (4.1%)." *Id.* The federal government owns 61.9% of the land in Idaho, 52.3% of Oregon, 45.4% of California, 38.6% of Arizona, 29.0% of Montana, 28.6% of Washington, and 20.2% of Hawaii. *Id.* at 7–8. In addition to the four largest land-managing federal agencies, "[n]umerous other federal agencies," such as the Post Office, administer smaller amounts of federal lands. *Id.* at 3.

Residents of the states in the Ninth Circuit use federal lands for recreation, to take care of important matters such as an errand at the Post Office or a medical appointment at a Social Security Administration office, or simply to drive from Point A to Point B—for instance, from Gold Point, Nevada, to Point Reyes, California. To categorically exclude garden-variety Fourth Amendment claims from the protection of *Bivens* liability for any of these situations will subject countless people to a restrictive rule that the Supreme Court never countenanced in *Egbert* or any other case.

## CONCLUSION

Amici urge the Court to grant the petition for rehearing en banc.

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Respectfully submitted,

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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