

SENATE RESOLUTION NO.157

Senators Irwin, Geiss, McMorrow and Chang offered the following resolution:

1 A resolution to condemn the United States Supreme Court's
2 decision in *Egbert v. Boule* and to urge the federal government to
3 protect the people from rights abuses by Border Patrol agents by
4 amending the Immigration and Nationality Act of 1952 and creating a
5 statutory damages remedy against Border Patrol agents for
6 violations of the United States Constitution.

7 Whereas, In *Bivens v. Six Unknown Named Agents of the Federal*
8 *Bureau of Narcotics*, the United States Supreme Court established
9 the right to sue federal agents for damages if, acting under color
10 of federal law, they violate rights under the United States
11 Constitution. The threat of accountability is an important
12 deterrent to prevent rights violations before they happen, and the

1 remedy of damages is needed to compensate individuals when
2 violations of their rights cause damage to their persons or
3 property. Without *Bivens* actions or causes of actions created by
4 Congress, constitutional rights lack teeth, placing constitutional
5 liberties in jeopardy; and

6 Whereas, The Fourth Amendment to the Constitution of the
7 United States secures people's bodies, homes, and personal property
8 from unreasonable searches and seizures, and it guards against the
9 excessive use of force by law enforcement. This Amendment is meant
10 to protect the people from the sort of abuse seen in *Bivens*, where
11 an individual, rank-and-file federal law enforcement officer
12 unlawfully entered the private property of a United States citizen
13 within the United States without a warrant and used
14 unconstitutional excessive force against that citizen; and

15 Whereas, In the 2022 case *Egbert v. Boule*, the Supreme Court
16 gutted *Bivens*, vastly restricting a valuable tool for defending the
17 Constitution. The Court's opinion defied precedent and created a
18 new test for whether a *Bivens* action should be allowed, a test that
19 could hardly ever be satisfied. This closes the door on cases, like
20 *Egbert* itself, that are nearly identical to the facts of *Bivens* and
21 fall squarely within its initial, core concern: Fourth Amendment
22 search and seizure. While it does not overrule *Bivens*, the Court
23 has left only a husk, with no real power to defend the Constitution
24 and the rights of the people; and

25 Whereas, Even if some *Bivens* actions could survive *Egbert*,
26 this case fully immunized Border Patrol agents from suits seeking
27 damages for violations of the Constitution committed in the course
28 of their duties. The Court held that the threat of litigation
29 against Border Patrol agents would interfere with the regulation of

1 the conduct of agents at the border, which has national security
2 implications. As a result, the Court found that it must be left to
3 Congress to decide how to encourage Border Patrol agents to comply
4 with the Constitution; and

5 Whereas, Under the Immigration and Nationality Act of 1952,
6 Border Patrol agents can exercise many powers without a warrant.
7 Border Patrol agents generally have the power to interrogate aliens
8 and make arrests for certain violations of law, and they have extra
9 powers within a "reasonable distance" of the external boundaries of
10 the United States. Federal regulations establish this "reasonable
11 distance" as 100 air miles from the land boundaries and territorial
12 sea of the United States. Within this 100-mile zone, Border Patrol
13 agents can conduct warrantless searches of certain vehicles for
14 aliens. Additionally, within 25 miles of the external boundaries,
15 they can access private lands, though not dwellings, for the
16 purpose of patrolling the border to prevent the illegal entry of
17 aliens into the United States without a warrant. Warrantless entry
18 onto farms for the purpose of interrogating a person believed to be
19 an alien about their right to be in the United States is also
20 prohibited. But even in these warrantless operations, Border Patrol
21 agents remain subject to the Constitution and can violate
22 constitutional rights; and

23 Whereas, Michigan's proximity to the United States border
24 gives Border Patrol agents more power to operate without a warrant
25 inside this state. According to documents obtained by the American
26 Civil Liberties Union of Michigan, U.S. Customs and Border
27 Protection claims that the entire state of Michigan falls within
28 the 100-mile zone for warrantless vehicle searches, because the
29 Great Lakes count as international waterways. This increases the

1 number of potential interactions between Michigan residents and
2 Border Patrol agents, which creates more opportunities for
3 violations of constitutional rights - rights that, under *Egbert*,
4 cannot be vindicated with damages actions. As a result, the
5 constitutional rights of Michigan residents are uniquely threatened
6 by the *Egbert* decision; and

7 Whereas, The Supreme Court was incorrect to grant Border
8 Patrol agents blanket immunity from *Bivens* actions. Rank-and-file
9 Border Patrol agents perform commonplace law enforcement
10 activities, such as interrogations and arrests, including arrests
11 for felonies unrelated to immigration. These activities are
12 materially indistinguishable from the facts of *Bivens* and do not
13 always implicate national security. Individuals whose rights are
14 violated by Border Patrol agents should have the right to seek
15 *Bivens* actions in their individual cases; and

16 Whereas, Unless the Supreme Court reverses its decision in
17 *Egbert* or a damages remedy is created under federal statute, the
18 people are left powerless to enforce their constitutional rights
19 using damages actions against Border Patrol agents, and possibly
20 against any federal employees. Eviscerating this vital mechanism of
21 deterrence threatens the rights of all under the Constitution, and
22 especially the rights of the people of Michigan; and

23 Whereas, Congress should exercise its legislative power to
24 create a statutory cause of action for damages caused by a Border
25 Patrol agent's violation of the United States Constitution. The
26 Court in *Egbert* held that Congress is the more competent branch to
27 authorize a damages remedy against Border Patrol agents. Congress
28 should wield this expertise to calibrate a remedy that will
29 adequately deter violations of the Constitution and make victims

1 whole while simultaneously safeguarding our national security; now,
2 therefore, be it

3 Resolved by the Senate, That we condemn the United States
4 Supreme Court's decision in *Egbert v. Boule* for practically
5 eliminating *Bivens* actions and immunizing United States Border
6 Patrol agents from this powerful tool to defend the United States
7 Constitution and provide meaningful redress to those whose rights
8 are violated; and be it further

9 Resolved, That we urge the United States Congress to pass and
10 the President of the United States to sign an amendment to the
11 Immigration and Nationality Act of 1952 to define the "reasonable
12 distance" from the external boundaries of the United States as 10
13 air miles, to enshrine our Fourth Amendment rights against
14 excessive and intrusive warrantless searches and seizures; and be
15 it further

16 Resolved, That we urge the United States Congress to pass and
17 the President of the United States to sign a law creating a
18 statutory damages remedy against Border Patrol agents for
19 violations of rights protected by the United States Constitution,
20 to replace the *Bivens* actions barred by *Egbert*; and be it further

21 Resolved, That copies of this resolution be transmitted to the
22 Supreme Court of the United States, the President of the United
23 States, the Speaker of the United States House of Representatives,
24 the President of the United States Senate, and the members of the
25 Michigan congressional delegation.