No. 15-888

In the Supreme Court of the United States

ALEJANDRO GARCIA DE LA PAZ, ET AL., PETITIONERS

v.

JASON COY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Petitioners are undocumented aliens who are not lawfully in the United States. In separate incidents, petitioners were arrested by U.S. Customs and Border Protection agents and were detained in order to commence removal proceedings against them. Petitioners sued the agents in their personal capacities under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that the agents, in stopping and arresting petitioners, violated petitioners' rights under the Fourth Amendment.

The question presented here is:

Whether an undocumented alien is entitled to judicial creation of a damages remedy under *Bivens* to challenge his or her allegedly unconstitutional stop and arrest by U.S. Border Patrol agents enforcing the immigration laws.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 786 F.3d 367. The opinion of the district court in the *Garcia* case (Pet. App. 25a-62a) is reported at 954 F. Supp. 2d 532. The opinion of the district court in the *Frias* case denying a motion to dismiss (Pet. App. 63a-81a) is not published in the *Federal Supplement*. The other opinion of the district court in the *Frias* case, denying a motion for summary judgment, is also not published in the *Federal Supplement*. The order of the court of appeals denying rehearing (Pet. App. 82a-88a) is reported at 804 F.3d 1200.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2015. A petition for rehearing was denied on October 14, 2015. A petition for a writ of certiorari

was filed on January 12, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners in these consolidated cases are aliens who are not lawfully in the United States. Pet. App. 2a. They are attempting to sue U.S. Border Patrol agents under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violations of their Fourth Amendment rights that allegedly occurred when the agents stopped and arrested them in connection with their lack of immigration status. The district court allowed both cases to proceed, but the court of appeals rejected the creation of a new *Bivens* remedy in these circumstances and ordered the cases dismissed. See Pet. App. 2a, 32a-49a, 70a-72a.

1. a. Petitioner Alejandro Garcia de la Paz alleges that on October 11, 2010, he was a passenger in the front seat of a red Ford F-150 truck with an extended cab. The driver and three others were also in the truck. The four men had been working near Vanderpool, Texas, and in the late afternoon, they were traveling back to San Antonio, going north on Ranch Road 187, a two-lane road, and then east on Ranch Road 337, another two-lane road, heading toward San Antonio. Pet. App. 4a.

Respondents in this case are two Border Patrol agents, Jason Coy and Mario Vega. The agents were traveling south in separate U.S. Customs and Border Protection (CBP) vehicles on Ranch Road 187 when they noticed Garcia's truck turn east onto Road 337. Pet. App. 4a. After following the truck on Road 337, the agents pulled over the truck to interrogate the occupants about their immigration status. *Id.* at 27a.

Garcia alleges that the agents decided to pull them over "[b]ased principally upon their perception that the Truck had a Hispanic driver and other Hispanics inside." *Ibid.* (quoting *Garcia* Compl. ¶ 42).

After the truck had stopped, Agent Vega asked Garcia whether he was a U.S. citizen. Pet. App. 4a. Garcia replied that he was not a citizen. *Garcia* D. Ct. Doc. 33-1, Tab A, ¶ 19 (Feb. 14, 2013) (Garcia Decl.); see Pet. App. 4a.[1] Garcia was then detained. Pet. App. 4a.

The Department of Homeland Security (DHS) subsequently initiated removal proceedings against Garcia. Those proceedings have now been administratively closed, at Garcia's request. Pet. App. 4a-5a; see A200-889-127, Order of the Immigration Judge (Sept. 12, 2013) (not part of record in this case). In accordance with agency enforcement priorities, DHS does not currently plan to continue removal proceedings against Garcia.

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[1] According to the Border Patrol agents, Garcia also admitted that he was not lawfully in the United States. See *Garcia* D. Ct. Doc. 12-1, Ex. 1, ¶ 13 (Jan. 14, 2013) (Vega Decl.); *Garcia* D. Ct. Doc. 12-1, Ex. 2, ¶¶ 9, 11 (Coy Decl.); but see *Garcia* D. Ct. Doc. 33-1, Tab A, ¶¶ 19-20 (Garcia Decl.) (denying that he made this statement). In the district court, Garcia's counsel directly conceded that Garcia was an "undocumented alien." *Garcia* D. Ct. Doc. 47, at 3 (Sept. 12, 2013). And at oral argument in the court of appeals, petitioners' counsel acknowledged that his clients did not have lawful status in the United States. See *Garcia* C.A. Oral Arg. Recording (17:40-19:00), http://www.ca5.uscourts.gov/OralArgRecordings/13/13-50768_9-3-2014.mp3. The court of appeals subsequently described petitioners as "illegal aliens," Pet. App. 2a, and petitioners do not dispute that characterization in their petition to this Court.

b. Garcia sued Agents Coy and Vega in the United States District Court for the Western District of Texas seeking damages for violations of the Fourth Amendment under *Bivens*. Garcia alleged that the agents had unlawfully stopped him because he is Hispanic. Pet. App. 2a. The agents moved to dismiss or, in the alternative, for summary judgment, arguing that they were entitled to qualified immunity and that the district court should not extend the *Bivens* remedy to situations in which plaintiffs can raise their constitutional claims in the deportation process under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq*. Pet. App. 34a, 41a.[2]

The district court denied the motion in relevant part. Pet. App. 32a-49a. The court held that the alternative process available to Garcia under the INA did not foreclose a *Bivens* remedy, *id.* at 32a-35a, distinguishing the Ninth Circuit's decision in *Mirmehdi* v. *United States*, 689 F.3d 975 (2012), cert. denied, 133 S. Ct. 2336 (2013). The court also held that certain provisions of the immigration laws did not deprive the court of jurisdiction, Pet. App. 35a-41a, and that the agents were not entitled to qualified immunity on the claim of unlawful stop and arrest. *Id.* at 41a-49a. The court declined to address the summary-judgment portion of the motion without first allowing discovery. *Id.* at 50a.

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[2] Garcia also sued the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, and all three defendants under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, seeking a declaratory judgment that they were violating two provisions of the immigration laws. Pet. App. 5a. Those claims are not at issue here.

2. a. Petitioner Daniel Frias alleges that on April 28, 2010, he was driving a flat-bed four-door Dodge truck west on Interstate Highway 20 (I-20), just outside Abilene, Texas, with his colleague George Taylor as a passenger. Respondent Arturo Torrez, a Border Patrol agent, was on duty in his CBP vehicle, driving eastward on I-20. According to his deposition testimony, when Agent Torrez was about fifty yards away, he observed what he (incorrectly) believed to be bodies lying in the backseat of the truck in which Frias was riding. Pet. App. 3a; see *Frias* C.A. ROA 390 (Torrez Dep.). In Agent Torrez's experience as a Border Patrol agent, undocumented aliens often lie down in vehicles in an attempt to hide, and he later testified that the bags in the back seat "looked like bodies based on prior experience[,] what I've seen before." *Frias* C.A. ROA 390 (Torrez Dep.).[3]

Agent Torrez stopped the truck and questioned Frias and Taylor. Frias alleges that Agent Torrez's decision to stop the truck was based on Frias's "Hispanic appearance." Pet. App. 64a. Frias has conceded that when Agent Torrez inquired about his immigration status, Frias informed him that Frias was not lawfully in the United States. *Frias* C.A. ROA 241 (*Frias* Compl. ¶ 86). On the basis of this admission, Agent Torrez arrested Frias.

DHS subsequently initiated removal proceedings against Frias. Pet. App. 3a. Those proceedings were

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[3] Agent Torrez's recollection that there were bags in the back seat was consistent with that of the passenger in the car, see *Frias* C.A. ROA at 358-359 (Taylor Decl. ¶ 5) (stating that there were bags in the back seat of the truck), but was in conflict with that of Frias, see *id.* at 826 (Frias Decl. ¶¶ 16-18) (stating that back seat was empty).

eventually terminated in accordance with DHS enforcement priorities. See *ibid.* DHS does not currently plan to pursue removal proceedings against Frias.

b. Represented by the same counsel as Garcia, Frias sued Agent Torrez in the United States District Court for the Northern District of Texas, seeking damages under *Bivens* for alleged Fourth Amendment violations in his stop and arrest. Pet. App. 3a.[4] Agent Torrez moved to dismiss the first amended complaint, and the district court held that special factors did not warrant foreclosing Frias from bringing a *Bivens* action. *Id.* at 70a-72a (citing *Diaz-Bernal* v. *Myers*, 758 F. Supp. 2d 106 (D. Conn. 2010)). The court declined to rule on Agent Torrez's assertion of qualified immunity, both because some of the allegations of the complaint were unclear and because the court believed that qualified immunity would be more appropriately decided on summary judgment. *Id.* at 72a-74a. Frias then filed his second amended complaint, and the parties engaged in discovery. At the close of discovery, Agent Torrez moved for summary judgment, and the district court denied the motion in relevant part, finding that disputes of material fact precluded a grant of summary judgment on the *Bivens* claims arising out of the stop and arrest. *Frias* C.A. ROA 1112-1121.

3. In both cases, respondents filed interlocutory appeals from the denial of qualified immunity and also argued that a *Bivens* remedy should not be extended to the circumstances presented. Pet. App. 2a-6a. The

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[4] Frias also sued the United States under the FTCA, alleging false imprisonment and assault, and sought relief under the Declaratory Judgment Act, 28 U.S.C. 2201, and the APA. Pet. App. 3a-4a. Those claims are not at issue here.

court of appeals consolidated the cases for purposes of oral argument and reversed. The court recognized that there are "compelling arguments in favor" of qualified immunity on these facts. *Id.* at 7a n.3. Nonetheless, the court declined to decide the qualified-immunity issues. *Id.* at 7a. Instead, the court held that "aliens involved in civil immigration enforcement actions cannot sue the arresting agents" under *Bivens* "for simply stopping and detaining them." *Id.* at 6a-7a.

The court of appeals explained that petitioners had "predicate[d] their claim on an analogy between the Fourth Amendment violations they allegedly endured and the facts in *Bivens*, * * * [and] equate[d] civil immigration enforcement actions with federal criminal law enforcement." Pet. App. 8a. But the court recognized that this Court has rejected an amendment-by-amendment approach under which a *Bivens* remedy is always available for an alleged Fourth Amendment violation simply because *Bivens* itself involved a Fourth Amendment claim. *Ibid.* The court emphasized that an implied right of action under the Constitution is not "'an automatic entitlement,'" *ibid.* (quoting *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007)), and that "courts must 'respond[] cautiously to suggestions that *Bivens* remedies be extended,'" *id.* at 9a (quoting *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988)). The court noted that when deciding whether to recognize a *Bivens* remedy, courts "must examine each new context—that is, each new potentially recurring scenario that has similar legal and factual components." *Id.* at 8a (citation and internal quotation marks omitted).

The court of appeals explained that under this Court's decision in *Wilkie*, "federal courts may not step in to create a *Bivens* cause of action if '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.'" Pet. App. 14a (quoting *Wilkie*, 551 U.S. at 550). It noted that "[e]ven if no such alternative process exists, however, a court 'must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed * * * to any special factors counselling hesitation before authorizing a new kind of federal litigation.'" *Ibid.* (quoting *Wilkie*, 551 U.S. at 550). Applying that two-part analysis, the court held (1) that there is "an alternative process for protecting the Fourth Amendment rights of illegal aliens subjected to unconstitutional traffic stops and arrests"; and (2) that "special factors require denying a *Bivens* remedy for their claims arising out of civil immigration enforcement proceedings." *Ibid.*

With respect to the alternative process, the court of appeals emphasized Congress's extensive regulation of immigration and alien status, and the intricate removal procedures of the INA:

> Aliens are entitled to notice of the initiation of removal proceedings, 8 U.S.C. § 1229(a)(1), bond, *id.* § [1]226(a)(2), an adversarial removal hearing, *id.* § 1229a(b)(4), and the right to appeal, *id.* § 1252. At the removal hearing, individuals have a right to representation by competent counsel, *id.* § [1]229a(b)(4)(A), the right to examine the evidence against them, *id.* § 1229a(b)(4)(B), and the right to present evidence, *id.* An individual dissat-

> isfied with the result of the removal hearing may pursue multiple levels of appellate review. Initially, individuals can appeal to the Board of Immigration Appeals. 8 C.F.R. § 1003.1(b). Under some circumstances, the Attorney General can review the decisions of the BIA. 8 C.F.R. § 1003.1(h)(1)(i)-(iii). If that fails, an individual can seek review in federal court. 8 U.S.C. § 1252.

Pet. App. 15a. The court added that other provisions of the INA and its regulations are "specifically designed to protect the rights of illegal aliens" by imposing standards for their arrest and detention. *Id.* at 16a. While the exclusionary rule does not apply in immigration proceedings, evidence seized under "egregious" circumstances inconsistent with fundamental fairness may be excluded. *Id.* at 16a-17a (citing *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1050-1051 (1984)).[5]

The court of appeals acknowledged that these protections under the INA and regulations do not include monetary damages to the alien for violations of the Fourth Amendment. Pet. App. 18a. But it explained that under this Court's precedent, "[t]he INA need not provide an exact equivalent to *Bivens*," and "[t]he absence of monetary damages in the alternative remedial scheme is not ipso facto a basis for a *Bivens* claim." *Id.* at 17a-18a. Here, the court emphasized, "Congress's failure to provide an individual damages remedy [for constitutional violations in the immigration context] 'has not been inadvertent.'" *Ibid.* (quoting *Chilicky*, 487 U.S. at 423). The court traced the

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[5] The court of appeals also cited DHS's internal standards addressing review of allegations that aliens' rights have been violated. Pet. App. 17a.

course of congressional attention to the immigration laws, documenting that—through this legislation—Congress "has indicated 'that the Court's power should not be exercised.'" *Id.* at 19a (citation omitted). It further noted that "[o]nce the legislature has chosen a remedial scheme, federal courts are not free to supplement it." *Ibid.* The court concluded that Congress had sent an "emphatic message" requiring courts "to abstain from subjecting immigration officers to *Bivens* liability for civil immigration detention and removal proceedings." *Id.* at 20a.

The court of appeals also held—in the alternative—that special factors counsel against extending the *Bivens* remedy to this situation. Pet. App. 20a-24a. The court reasoned that creating a damages remedy would be unlikely to have a significant deterrent effect, because DHS regulations already constrain the behavior of Border Patrol agents and "[a]gency norms" are "closely tailored to conform with constitutional standards." *Id.* at 20a-21a. A damages remedy would not provide "meaningful compensation" in any event, because the damages in this type of case are minimal and the ultimate remedy for aliens in petitioners' situation is in "termination of removal proceedings through the INA's many available avenues." *Id.* at 21a-22a.

The court of appeals also emphasized that imposing personal liability could deter agents from enforcing the immigration laws and would be a particular problem in cases involving mass arrests of aliens, which often occur in chaotic situations. Pet. App. 22a-23a. The court also expressed concern that a judicially-created *Bivens* remedy could impose on the consti-

tutional authority of Congress and the Executive Branch over immigration. *Id.* at 23a.

Last, the court of appeals noted the possibility of creating a "tidal wave of litigation," given that there are approximately 11 million aliens who are not authorized to be in the United States. Pet. App. 23a.

> It is an easy exercise for aliens, even without an attorney, to file suit alleging, as in these cases, that there was no reasonable suspicion for their stops, arrests or detentions. Extending *Bivens* actions to millions of illegal aliens could cripple immigration enforcement with the distraction, cost, and delay of lawsuits, even as it exposed enforcement officers to personal liability simply for doing their job.

Id. at 24a. Because the costs of extending the *Bivens* remedy to this context "significantly outweigh any largely conjectural benefits," the court held that special factors counseled against extending that remedy. *Ibid.*[6]

4. Petitioners did not seek rehearing or rehearing en banc before the court of appeals. Nonetheless, the

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[6] The court of appeals also noted that two other circuits had "specifically found that deportation proceedings and extraordinary rendition under the immigration law constitute new contexts under *Bivens* and have declined to impose judicially created remedies in those situations." Pet. App. 13a (citing *Mirmehdi*, 689 F.3d 975, and *Arar* v. *Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc), cert. denied, 560 U.S. 978 (2010)). The Eleventh Circuit has recently reached a similar conclusion. See *Alvarez* v. *U.S. Immigration & Customs Enforcement*, No. 14-14611, 2016 WL 1161445, at *11-*16 (Mar. 24, 2016) (rejecting *Bivens* remedy for undocumented alien claiming that he was unconstitutionally detained by DHS for a prolonged period of time in connection with efforts to remove him from the United States and relying on *Mirmehdi* and the Fifth Circuit's decision in this case).

court *sua sponte* considered rehearing the case, ultimately denying panel rehearing and voting 11-4 to deny rehearing en banc. Pet. App. 83a. Judge Prado wrote a dissent for three of the four judges who voted to rehear the case. *Id.* at 84a-88a.

The dissent argued that this case is directly governed by *Bivens* and thus does not present a new context in which to consider creating a remedy for money damages. Pet. App. 85a. It also asserted that the panel decision conflicts with the Second Circuit's decision in *Turkmen* v. *Hasty*, 789 F.3d 218 (2015), petitions for cert. pending, Nos. 15-1358, 15-1359, 15-1363 (all filed May 2016), which permitted aliens a *Bivens* remedy against federal prison officers for allegedly violating the Fourth Amendment rights of aliens detained in connection with post-September 11 investigation of possible terrorism. Pet. App. 87a-88a; see *Turkmen*, 789 F.3d at 224, 237.

ARGUMENT

Petitioners in this case are undocumented aliens who seek money damages from Border Patrol agents who stopped and arrested them in an effort to enforce the federal immigration laws. Petitioners ask this Court to create a new remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for undocumented alien plaintiffs whose Fourth Amendment rights are allegedly violated in such circumstances. The court of appeals correctly declined to extend *Bivens* to the context presented by these cases, and its decision does not squarely conflict with any decision by this Court or any other court of appeals. Further review is unwarranted.

1. The court of appeals rejected petitioners' request to extend *Bivens* to the context presented here, in which undocumented alien plaintiffs are suing Border Patrol agents for stopping and arresting them in an effort to enforce the federal immigration laws. Pet. App. 14a-24a. That decision is correct.

a. In its 1971 decision in *Bivens*, this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009) (citation omitted). The Court held that federal officials acting under color of federal law could be sued for money damages for violating the plaintiff's Fourth Amendment rights by conducting a warrantless search of his home. In creating that common-law action, the Court noted that there were "no special factors counseling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396-397.

Bivens "rel[ied] largely on earlier decisions implying private damages actions into federal statutes"—decisions from which the Court has since "retreated" and that reflect an approach to recognizing private rights of action that the Court has since "abandoned." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 & n.3 (2001) (citations omitted). This Court's "more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988). "The Court has therefore on multiple occasions declined to extend *Bivens* because Congress is in a better position to decide whether or not the public interest would be served by the creation of new substantive legal liability." *Holly* v. *Scott*, 434 F.3d 287,

290 (4th Cir.) (citation and internal quotation marks omitted), cert. denied, 547 U.S. 1168 (2006); see *Iqbal*, 556 U.S. at 675 (stating that *Bivens* liability has not been extended to new contexts "[b]ecause implied causes of action are disfavored").

Indeed, in the 40 years since *Bivens* itself, the Court "has extended it twice only: in the context of an employment discrimination claim in violation of the Due Process Clause; and in the context of an Eighth Amendment violation by prison officials." *Arar* v. *Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc) (citations omitted), cert. denied, 560 U.S. 978 (2010). Since 1980, the Court "ha[s] consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68; see *Minneci* v. *Pollard*, 132 S. Ct. 617, 622-623 (2012) (listing cases). Moreover, three times in recent years, this Court has itself raised doubts—*sua sponte*—about the existence of a *Bivens* remedy in cases in which the parties had not raised that issue themselves. See *Wood* v. *Moss*, 134 S. Ct. 2056, 2066 (2014); *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 n.4 (2012); *Iqbal*, 556 U.S. at 675.

This Court has set forth a two-part analysis to determine whether to extend *Bivens* to a new context. First, a court should ask whether there is "any alternative, existing process for protecting" the plaintiff's interests; if so, such an established process implies that Congress "expected the Judiciary to stay its *Bivens* hand" and "refrain from providing a new and freestanding remedy in damages." *Wilkie* v. *Robbins*, 551 U.S. 537, 550, 554 (2007). An alternative process can foreclose a *Bivens* remedy even though it may not provide "complete relief" for the plaintiff. *Bush* v.

Lucas, 462 U.S. 367, 388 (1983); see *Chilicky*, 487 U.S. at 423. Under *Bush* and *Chilicky*, "it is the comprehensiveness of the [alternative] statutory scheme involved, not the 'adequacy' of specific remedies extended thereunder, that counsels judicial abstention." *Spagnola* v. *Mathis*, 859 F.2d 223, 227 (D.C. Cir. 1988) (per curiam) (en banc) (citation omitted).

Second, "even in the absence of [such] an alternative" process, inferring a remedy under *Bivens* is still disfavored, and a court must make an assessment "appropriate for a common-law tribunal" of whether judicially created relief is warranted, "paying particular heed * * * to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Wilkie*, 551 U.S. at 550 (quoting *Bush*, 462 U.S. at 378). Hesitation is especially warranted when it appears that Congress's "inaction" with respect to providing an express damages remedy "has not been inadvertent." *Chilicky*, 487 U.S. at 423.

b. The court of appeals correctly applied the two-part *Wilkie* framework in declining to extend *Bivens* to the context of petitioners' claims of an unlawful stop and arrest by Border Patrol agents enforcing the federal immigration laws. As the court explained, the comprehensive statutory scheme established by the INA—along with other "special factors" arising in the immigration context at issue here—make clear that the courts should not impose a damages remedy in these circumstances.

First, the court of appeals correctly recognized that the statutory scheme for immigration proceedings established by the INA reflects Congress's judgment that no damages remedy is warranted here. The court explained that the INA establishes "an

elaborate remedial system that has been constructed step by step [by Congress], with careful attention to conflicting policy considerations." Pet. App. 15a (quoting *Bush*, 462 U.S. at 388). The court highlighted the intricate rules Congress established to govern removal proceedings, including important protections for the rights of aliens and procedures authorizing administrative appeals and judicial review. *Id.* at 15a-16a. It also noted the INA's direct regulation of the authority of Border Patrol agents to search and arrest suspected aliens and DHS regulations implementing those standards and establishing procedures under which Fourth Amendment violations by federal agents can be investigated and appropriate action can be taken. *Id.* at 16a-17a. The court pointed out that although there is no exclusionary rule for illegally seized evidence in immigration proceedings, "evidence seized under egregious circumstances may be suppressed." *Ibid.* (citing *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984)).

The court of appeals also emphasized the close attention Congress has paid to fine-tuning the immigration laws, concluding that "[a] fair reading of legislative developments pertaining to immigration leads ineluctably to the conclusion that Congress's failure to provide an individual damages remedy 'has not been inadvertent.'" Pet. App. 18a (quoting *Chilicky*, 487 U.S. at 423). The court emphasized Congress's amendments to the INA in 1965, 1976, 1986, 1990, 1996, and 2005, as well as its consideration of "numerous immigration bills" in more recent years. *Id.* at 18a-19a. The court explained that "[d]espite its repeated and careful attention to immigration matters, Congress has declined to authorize damage remedies

against individual agents involved in civil immigration enforcement," and it concluded that "[t]he institutional silence speaks volumes and counsels strongly against judicial usurpation of the legislative function." *Id.* at 19a.

Second, the court of appeals analyzed the policy considerations associated with extending *Bivens* liability to the circumstances presented here, holding that "[t]he special factors unique to the immigration context far outweigh any benefits that might accrue from authorizing *Bivens* suits." Pet. App. 20a. The court explained that imposing *Bivens* liability is unlikely to enhance deterrence of constitutional violations in any significant way, especially in light of established statutory and regulatory constraints on misconduct. That conclusion is both reasonable and supported by this Court's decision in *Lopez-Mendoza*, which likewise rejected deterrence-based arguments when holding that the exclusionary rule does not necessarily apply to immigration proceedings. 468 U.S. at 1042-1043.

The court of appeals also noted that in cases like this one—involving removable aliens—the "damages available in a *Bivens* action would be minimal," and thus a *Bivens* remedy would not "provide meaningful compensation to the victims" of the alleged constitutional violation. Pet. App. 21a. Garcia's counsel essentially conceded that same point in the district court, explaining that the true purpose of Garcia's lawsuit was not to obtain financial compensation for damages actually suffered by the plaintiff, but rather to "build a record" to show a pattern of unlawful conduct by federal agents that might eventually support a

separate "class action" or suit seeking injunctive relief. *Garcia* D. Ct. Doc. 47, at 3, 7; see *id.* at 3-7.

The court of appeals also correctly emphasized that the "speculative benefits" associated with extending *Bivens* liability to this context would "come at significant costs." Pet. App. 22a. It emphasized that imposing liability in these circumstances could promote risk-aversive behavior by Border Patrol agents, who could respond to such a development by "too readily shirk[ing] [their] duty" and avoiding "many of the mass arrests that are critical to immigration enforcement in workplaces and safe houses." *Ibid.* The court explained—again relying on *Lopez-Mendoza*—that agents facing potential exposure to *Bivens* liability would need to be prepared to present "'a precise account of exactly what happened in each particular arrest,'" and that the chaos and confusion often accompanying such enforcement actions make it essentially "impossible" to produce such an account. *Id.* at 22a-23a (quoting *Lopez-Mendoza*, 468 U.S. at 1049-1050).

The court of appeals also noted two other special factors counseling against extending *Bivens* liability: (1) the fact that policy choices over immigration and foreign relations are constitutionally committed to Congress and the Executive Branch, and (2) the possibility that a *Bivens* remedy in this context could unleash a "tidal wave of litigation" in light of the hundreds of thousands of arrests of undocumented aliens made by Border Patrol agents each year. Pet. App. 23a-24a (noting that CBP apprehended 420,789 undocumented aliens in 2013). With respect to the latter consideration, the court noted that "[e]xtending *Bivens* actions to millions of illegal aliens could cripple

immigration enforcement with the distraction, cost, and delay of lawsuits, even as it exposed enforcement officers to personal liability simply for doing their job." *Id.* at 24a.

2. Petitioners' principal argument for certiorari (Pet. 11-21) is that the court of appeals erred in refusing to recognize a *Bivens* remedy in these circumstances. None of their arguments has merit.

a. Petitioners begin by asserting (Pet. 11) that this case is "identical to *Bivens*" in "all material respects" because it involves a Fourth Amendment claim against federal officers acting under the color of federal law. They imply (Pet. 11-12) that, because of that similarity between the cases, *Wilkie*'s two-part analysis governing the extension of *Bivens* to new contexts does not apply here.

Petitioners' argument rests on the erroneous assumption that the Court's recognition of an implied remedy for a Fourth Amendment claim in *Bivens* means that a *Bivens* remedy is necessarily available for *every* Fourth Amendment violation, regardless of context. This Court has rejected such an amendment-by-amendment approach to deciding whether the *Bivens* remedy is available in a particular case. For example, although the Court recognized a *Bivens* remedy for a Fifth Amendment due-process claim in *Davis* v. *Passman*, 442 U.S. 228, 230 (1979), it rejected a *Bivens* remedy for a Fifth Amendment due-process claim in *Chilicky*, 487 U.S. at 419, 429. And while *Carlson* v. *Green*, 446 U.S. 14, 23 (1980), allowed a *Bivens* remedy for alleged Eighth Amendment violations in the prison context, this Court denied the same remedy for Eighth Amendment violations in *Malesko*, 534 U.S. at 74, and *Minneci*, 132 S. Ct. at 623. This

Court's decisions thus make clear that in deciding whether to recognize a *Bivens* remedy in a given circumstance, it is not enough that the plaintiff alleges the violation of a constitutional right that has previously given rise to a *Bivens* remedy in a different context.

This case is different from *Bivens* insofar as it involves undocumented aliens who were stopped and detained by Border Patrol agents enforcing the federal immigration laws. Unlike *Bivens*, this case implicates the INA, DHS policies and procedures, and the special constitutional and policy considerations underlying immigration law. *Bivens*, by contrast, involved a run-of-the-mill, criminal-law-enforcement search and arrest based on asserted violations of the narcotics laws; it did not involve the immigration context in any way. In these circumstances, the court of appeals was correct to apply *Wilkie* and consider whether the process established by the INA and other special immigration-related factors provide a "convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550.

b. Petitioners also criticize (Pet. 12-17) the court of appeals' analysis of the INA and agency implementing regulations as establishing an alternative process for protecting the Fourth Amendment rights of undocumented aliens subjected to unconstitutional stops and arrests. Their basic argument (*ibid.*) is that the statutory and regulatory scheme is inadequate because it fails to provide any means of monetary compensation to victims of unconstitutional conduct.

Petitioners misunderstand the core purpose of the inquiry into alternative processes. As this Court indi-

cated in *Wilkie*, the inquiry is principally aimed at uncovering whether "Congress expected the Judiciary to stay its *Bivens* hand"—not at second-guessing Congress's policy determinations and creating a *Bivens* remedy in any circumstance where the statutory remedy does not (in a court's view) sufficiently compensate the victim of a constitutional violation. 551 U.S. at 554; see *Bush*, 462 U.S. at 378 (emphasizing significance of Congress's intent); Pet. App. 14a-15a. As this Court noted in *Chilicky*, "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," courts should not recognize new *Bivens* remedies. 487 U.S. at 423. And as the en banc D.C. Circuit has unanimously explained, "it is the comprehensiveness of the [alternative] statutory scheme involved, not the 'adequacy' of specific remedies extended thereunder, that counsels judicial abstention." *Spagnola*, 859 F.2d at 227 (citation omitted).

Petitioners are thus wrong to imply that courts must recognize a *Bivens* remedy in any situation where the alternative process fails to provide the victim of unconstitutional conduct with financial compensation for his or her injuries. In *Chilicky*, for example, the Court declined to recognize a damages remedy for alleged due process violations resulting in the delayed provision of disability benefits. 487 U.S. at 414. It did so in light of the elaborate scheme for adjudicating disability claims under the Social Security Act, 42 U.S.C. 301 *et seq.*, even though that scheme failed to provide any financial compensation "for emotional distress or for other hardships suffered" as a

result of the constitutional violations. *Chilicky*, 487 U.S. at 425. The Court rejected a *Bivens* remedy even while acknowledging that its decision would mean that there was no "prospect of relief for injuries that must now go unredressed." *Ibid.* The Court explained that the "absence of statutory relief for a constitutional violation * * * does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." *Id.* at 421-422.

This Court has articulated the same principle in other cases. In *Bush*, for example, the Court made clear that even *administrative* remedies may be adequate—and may thus preclude a *Bivens* remedy—even though they "do not provide complete relief" in the form of money damages for the harm inflicted by unconstitutional conduct. 462 U.S. at 388; see *Minneci*, 132 S. Ct. at 625. In short, the absence of financial compensation does not itself necessarily require the creation of a constitutional cause of action under *Bivens*.[7]

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[7] See generally, *e.g.*, *Atterbury* v. *United States Marshals Serv.*, 805 F.3d 398, 406 (2d Cir. 2015) ("[C]ourts are not required to recognize a *Bivens* remedy even when a plaintiff would otherwise be completely remediless.") (citing *Dotson* v. *Griesa*, 398 F.3d 156, 168-169 (2d Cir. 2005), cert. denied, 547 U.S. 1191 (2006)); *Western Radio Servs. Co.* v. *United States Forest Serv.*, 578 F.3d 1116, 1120 (9th Cir. 2009) ("Even where Congress has given plaintiffs no damages remedy for a constitutional violation, the Court has declined to create a right of action under *Bivens* when doing so 'would be plainly inconsistent with Congress' authority in this field.'") (citation omitted), cert. denied, 559 U.S. 1106 (2010); *Moore* v. *Glickman*, 113 F.3d 988, 994 (9th Cir. 1997) (rejecting assertion that "the adequacy of the remedy determines when an administrative remedy precludes a *Bivens* claim," and holding that

Petitioners also argue (Pet. 14) that the immigration enforcement scheme set forth in the INA and agency regulations is irrelevant to the *Bivens* analysis because—rather than compensating victims for past harms—it establishes "prophylactic rules designed to *prevent* deprivations of constitutional rights from occurring in the first place." As noted above, however, the purpose of the inquiry into alternative processes is to discern the intent of Congress. It is entirely plausible that Congress would prefer to protect constitutional rights through prophylactic measures—including rules governing stops and arrests and a robust process for investigating violations by Border Patrol agents, see Pet. App. 16a-17a, 20a-21a—rather than by allowing personal-liability suits directly against immigration officers. And Congress's decision to create meaningful, prospective "*safeguards*" for constitutional rights—and not merely retrospective "*remedies*"—can weigh against the judicial extension of *Bivens*. *Chilicky*, 487 U.S. at 425 (emphasis added).

Finally, petitioners criticize (Pet. 15) the court of appeals' reliance on the INA provisions governing removal proceedings, arguing that "[t]hose procedures are wholly immaterial to petitioners, whose immigration proceedings have been closed." But the government's exercise of prosecutorial discretion not to pursue removal in their cases is not a reason to recognize a *Bivens* remedy in all cases involving un-

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APA remedies—non-monetary by definition—"preclude a *Bivens* action even when that relief is incomplete"); *Feit* v. *Ward*, 886 F.2d 848, 854 (7th Cir. 1989) ("the 'special factors' doctrine does not require a foray into the meaningfulness of a [plaintiff's alternative] remedies").

documented aliens detained by Border Patrol agents enforcing the immigration laws. In any event, the key point with respect to the immigration laws is that Congress has established—and repeatedly revisited—a detailed and comprehensive set of provisions addressing the rights of aliens and the proceedings available. If Congress had wanted to give undocumented aliens the right to sue Border Patrol agents for money damages based on alleged constitutional violations, it would have said so expressly.

c. Petitioners also challenge (Pet. 17-21) the court of appeals' alternative holding that special, immigration-related factors counsel against judicial recognition of a *Bivens* remedy in the circumstances presented here. None of their criticisms hits the mark.

First, petitioners are wrong to dispute the court of appeals' conclusion that a *Bivens* remedy "is unlikely to provide significant, much less substantial, additional deterrence" of constitutional violations. Pet. App. 20a. Petitioners argue (Pet. 17) that the court erred by looking to DHS regulations and norms when analyzing the potential for deterrence. But those are precisely the sorts of considerations that this Court identified as being "perhaps most important" when conducting a virtually identical deterrence analysis and concluding that the criminal-law exclusionary rule does not apply to deportation hearings. *Lopez-Mendoza*, 468 U.S. at 1044-1045 (emphasizing the agency's "comprehensive scheme for deterring Fourth Amendment violations by its officers"). Petitioners' criticism of the court of appeals' reliance on agency regulations is not consistent with *Lopez-Mendoza*.

Second, petitioners also err in (briefly) contesting (Pet. 18) the court of appeals' conclusion that "undoc-

umented immigrants in petitioners' situation will not obtain 'meaningful compensation'" if afforded a *Bivens* remedy. Petitioners attack (*ibid.*) this conclusion as unduly "speculative," but they do not explain why it is likely that they (or other undocumented aliens in analogous circumstances) would obtain any significant compensation even if they could establish a constitutional violation. Indeed, Garcia's own counsel conceded in the district court that "[t]here's no pot of gold at the end of the rainbow here" and that the real underlying purpose of the suit was not to obtain compensation for Garcia, but rather to secure a court order declaring the agents' conduct unlawful that could be used in future litigation (presumably on behalf of other clients) against the government for injunctive relief. *Garcia* D. Ct. Doc. 47, at 6-7. The court of appeals stated that "it is hard to see what compensation—if any—Frias and Garcia would be entitled to under the facts of this case," Pet. App. 22a, and it reasonably relied on that conclusion to inform its policy analysis under the second part of the *Wilkie* analysis.

Third, petitioners attack (Pet. 18) the court of appeals' commonsense recognition that creating a new *Bivens* remedy could deter Border Patrol agents from vigorously enforcing the immigration laws. In their view (*ibid.*), the court appeared to premise its analysis "on the belief that it is a *good* thing for federal officers to be able to violate the Constitution without fear of the consequences." Petitioners are attacking a straw man. The court of appeals obviously did not endorse the prospect of constitutional violations; rather, it simply pointed out that the creation of a *Bivens* remedy—and the prospect of personal

liability—could over-deter agents and lead them to forego entirely lawful enforcement measures. Pet. App. 22a-23a. This Court relied on similar concerns about over-deterrence when it rejected *Bivens* liability for federal employees accused of violating the First Amendment rights of their subordinates in *Bush*. See 462 U.S. at 389 (noting that "if management personnel face the added risk of personal liability for decisions that they believe to be a correct response to improper criticism of the agency, they would be deterred from imposing discipline in future cases"); cf. *Lopez-Mendoza*, 468 U.S. at 1049-1050 (noting that applying exclusionary rule to immigration proceedings would deter use of lawful enforcement tactics).

Fourth, petitioners deny (Pet. 18-20) that recognizing a *Bivens* remedy in the circumstances here would raise separation-of-powers concerns, arguing that the court of appeals "entirely disregarded this Court's repeated holdings, for more than a century, that noncitizens who are present in this country are entitled to the full protection of the Constitution." But the issue in this case is not whether aliens present inside the United States have Fourth Amendment rights; the court of appeals plainly understood that they do. Pet. App. 10a-11a (discussing *Martinez-Aguero* v. *Gonzalez*, 459 F.3d 618, 620 (5th Cir.), cert. denied, 549 U.S. 1096 (2006)). Rather, the issue here is whether the judiciary should impose personal liability on Border Patrol agents—in the absence of any express directive from Congress—as a means of securing those rights. The court of appeals correctly concluded that the immigration context raises unique policy and constitutional considerations. The fact that undocumented aliens inside the United States enjoy

certain constitutional protections does not mean that they are automatically entitled to sue Border Patrol agents enforcing the immigration laws for money damages under *Bivens*.

Finally, petitioners are wrong to argue (Pet. 20) that the court of appeals erred in noting that creation of a *Bivens* remedy in these circumstances could lead to a flood of litigation. Petitioners assert that this Court "has itself already recognized 'that apprehension of many lawsuits is not a good reason to refrain from creating a *Bivens* action,'" *ibid.* (quoting *Wilkie*, 551 U.S. 561 n.11), but the quoted language in fact merely summarizes the argument made in Justice Ginsburg's dissenting opinion. See *Wilkie*, 551 U.S. at 561 n.11 ("*Justice Ginsburg points out* that apprehension of many lawsuits is not a good reason to refrain from creating a *Bivens* action.") (emphasis added).

Here, the court of appeals was right to be concerned about the possibility that a *Bivens* remedy for undocumented aliens against Border Patrol agents who enforce the immigration laws could lead to significant litigation. As the court noted, CBP apprehended over 400,000 aliens in 2013 alone, and aliens would likely find it an "easy exercise" to file suits alleging that "there was no reasonable suspicion for their stops, arrests, or detentions." Pet. App. 24a. Such litigation "could cripple immigration enforcement with the distraction, cost, and delay of lawsuits." *Ibid.*[8] In

[8] DHS already faces significant resource constraints with respect to its enforcement of the immigration laws. An estimated 11 million undocumented aliens currently live in the United States, Pet. App. 23a, and Congress has appropriated approximately $6 billion for "enforcement of immigration and customs laws, detention and removals, and investigations," Consolidated Appropria-

these circumstances, Congress's failure to provide an express damages remedy "has not been inadvertent." *Chilicky*, 487 U.S. at 423. The court of appeals' decision to that effect was correct and does not warrant further review.

3. Petitioners also argue that the decision below conflicts with the Second Circuit's decision in *Turkmen* v. *Hasty*, 789 F.3d 218 (2015), petitions for cert. pending, Nos. 15-1358, 15-1359, 15-1363 (all filed in May 2016). There, the Second Circuit held that undocumented aliens apprehended in the aftermath of the September 11 terrorist attacks could pursue a *Bivens* claim against Attorney General John Ashcroft, Federal Bureau of Investigation Director Robert Mueller, Commissioner of the Immigration and Naturalization Service James Ziglar, and federal prison officials, alleging that their constitutional rights were violated while they were held in federal detention facilities. *Id.* at 224-225, 264-265. In doing so, the court rejected the prison officials' argument that the plaintiffs' status as illegal aliens necessarily meant that the case presented a "new *Bivens* context" subject to the two-part *Wilkie* analysis. *Id.* at 236 (criticizing Judge Raggi's dissent); see *id.* at 267-280 (Raggi, J., dissenting in part).

The Fifth Circuit's decision in this case does not conflict with *Turkmen*. The Fifth Circuit did not hold

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tions Act of 2016, Pub. L. No. 114-113, H.R. 2029, Div. F, Tit. II, 114th Cong., 1st Sess. 256; DHS Appropriations Act of 2015, Pub. L. No. 114-4, Tit. II, 129 Stat. 42. In light of these constraints, in any given year, more than 95% of the undocumented population will not be removed. See DHS, Office of Immigration Statistics, *2013 Yearbook of Immigration Statistics*, tbl. 39 (Aug. 2014); DHS Press Release, *DHS Releases End of Year Statistics* (Dec. 19, 2014).

that undocumented aliens are categorically barred from pursuing *Bivens* claims or that any case involving an undocumented-alien plaintiff implicates a "new *Bivens* context," in which the decision whether to recognize a *Bivens* remedy must be determined from scratch. *Turkmen*, 789 F.3d at 236. Rather, the court held that no *Bivens* remedy is available in the particular circumstances presented here, in which undocumented aliens wish to sue the Border Patrol agents who stopped and arrested them as part of their efforts to enforce the immigration laws.

Moreover, the Second Circuit's *Turkmen* decision had no occasion to address whether a *Bivens* remedy would be available in the circumstances presented here, and the court's analysis did not resolve that question.[9] Indeed, the Second Circuit expressly distinguished the issues presented in *Turkmen* from those resolved in *Mirmehdi* v. *United States*, 689 F.3d

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[9] The Department of Justice is representing Attorney General Ashcroft and Director Mueller in *Turkmen*, and we recently filed a petition for certiorari disputing (among other things) the Second Circuit's holding that whether a claim falls within a recognized *Bivens* context turns simply on whether a *Bivens* remedy had previously been authorized in cases involving (1) the same constitutional rights, and (2) the same "mechanism of injury." *Turkmen*, 789 F.3d at 235; see Pet. for Cert., *Ashcroft, et al.* v. *Turkmen*, at 13-19, No. 15-1359 (filed May 9, 2016). It is not clear how the Second Circuit would resolve this case, in which the precise mechanism of injury alleged—a stop and arrest by Border Patrol agents enforcing the immigration laws—has not previously given rise to *Bivens* liability. See *Turkmen*, 789 F.3d at 235 n.15 (indicating that mechanism of injury depends on context, and that employment-discrimination claims in civilian and military contexts involve different mechanisms of injury for *Bivens* purposes); *id.* at 237 (defining relevant "mechanism" as "an unreasonable search *performed by a prison official*") (emphasis added).

975, 981-983 (2012), cert. denied, 133 S. Ct. 2336 (2013), where the Ninth Circuit held that there was no *Bivens* remedy for unlawful detention during removal proceedings. *Turkmen*, 789 F.3d at 236 n.16. The Second Circuit explained that *Mirmehdi* is "plainly inapposite here where the [plaintiffs] do not challenge the fact that they were detained, but rather the conditions in which they were detained." *Ibid.* To the extent that *Turkmen* governs only cases involving challenges to conditions of confinement, it has no bearing on petitioners' cases, which involve an alleged Fourth Amendment violation. For all of these reasons, there is no conflict of authority on the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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