No. 14-10018

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DANIEL FRIAS,

Plaintiff-Appellee,

v.

ARTURO TORREZ, United States Customs and Border Protection Officer, formerly known as John Doe,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

The plaintiff, Daniel Frias, was stopped by Agent Arturo Torrez while traveling in a truck on the highway. When asked whether he was "legal," Frias admitted to Agent Torrez that he was not. Agent Torrez arrested him – which, in the immigration context, is the way an alien who is believed to be illegally in the United States is detained for removal proceedings. See Reno v. Flores, 507 U.S. 292, 307 (1993) ("the deportation process ordinarily begins with a warrantless arrest"). In Frias's case, removal proceedings were in fact commenced against him, although at some point they were terminated.

In this Bivens action against Agent Torrez, Frias claims that his arrest had nothing to do with immigration removal proceedings. See Pl. Br. 26 ("almost entirely irrelevant to any immigration removal proceedings"); Pl. Br. 29 (claims "do not arise from the deportation process"); Pl. Br. 35 ("almost totally irrelevant to removal proceedings"). In fact, Frias asserts that "[t]his is not an immigration case" at all. Pl. Br. 48. That assertion is simply not correct. Frias was arrested because of his immigration status, not because he was suspected of having committed a crime. Indeed, Frias's brief itself belies his assertion that this is not an immigration case. It cites numerous immigration cases, discusses immigration procedures, cites Frias's counsel's own law review article on roving immigration patrols by the Border Patrol (Pl. Br. 37 n.13), and even provides a short history of

immigration terminology (Pl. Br. 30 n.9). Frias's apparent goal is to recharacterize this as a criminal-enforcement case so that his arrest looks like a police arrest that can be challenged in a Bivens action rather than as an immigration arrest leading to civil removal proceedings in which an alien may use the comprehensive remedial scheme that Congress provided in the Immigration and Nationality Act (INA).

Given Frias's mistaken characterization of his arrest, it is not surprising that the arguments he makes in his brief are flawed.

I. Frias is wrong in arguing that he has the right to bring a Bivens action in this context. First, his argument that this case does not present a new "context" conflicts with Supreme Court case law and is contradicted by this Court's recent decision in Hernandez v. United States, Nos. 11-50792, 12-50217, 12-50301, 2014 WL 2932598, at *18 (5th Cir. June 30, 2014). Second, because Congress created a comprehensive and intricate remedial scheme in the INA for immigration, and specifically for removal proceedings, Supreme Court case law does not support supplementation of that remedial scheme through judicial extension of the Bivens damages remedy to immigration removal cases. Third, contrary to Frias's contention (and that of the amici), Supreme Court case law does not demand that an alternative remedial scheme provide a plaintiff with monetary compensation or deter violations. Finally, this Court's decision in Hernandez, which allowed a Bivens remedy for excessive force having nothing to do with an arrest or with the

immigration removal process at all (which did not apply), does not support the extension of a Bivens remedy to the context of removal.

II. Frias is also wrong in arguing that a stop without reasonable suspicion (as we assume for purposes of this appeal is what happened) necessarily precludes a finding of arguable probable cause for an arrest. Like the district court, Frias confuses the issue of admissibility of evidence in a hypothetical criminal prosecution with the issue of arguable probable cause supporting the arrest. Had Agent Torrez arrested Frias on criminal charges and had the government prosecuted Frias for a crime, the cases Frias cites might have some relevance to the admissibility of his confession. But they have nothing to do with probable cause – and even less to do with arguable probable cause, which is the standard when qualified immunity is raised as a defense in a civil damages action.

ARGUMENT

I. A BIVENS REMEDY SHOULD NOT BE EXTENDED TO THE CONTEXT OF IMMIGRATION REMOVAL PROCEEDINGS.

A. Immigration Removal Proceedings Are A New "Context" For Purposes Of Extending The Bivens Remedy.

As we explained in the opening brief (pp. 13-14), the Supreme Court has been cautious about extending the Bivens remedy into new contexts. Schweiker v. Chilicky, 487 U.S. 412, 421 (1988). Indeed, since Carlson v. Green, 446 U.S. 14 (1980), the Court has "consistently refused to extend Bivens liability to any new

context or new category of defendants." Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001). See Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009) (one reason Supreme Court has not extended Bivens remedy to new contexts is that "implied causes of action are disfavored"). It has been aptly observed that "[w]hatever presumption in favor of a Bivens-like remedy may once have existed has long since been abrogated." Vance v. Rumsfeld, 701 F.3d 193, 198 (7th Cir. 2012) (en banc), cert. denied, 133 S. Ct. 2796 (2013).

Frias (Pl. Br. 21-26), echoed by the amici (Amici Br. 5-13), contends that this is not a new context at all. Rather, he argues, his claim is for damages arising out of an arrest allegedly in violation of the Fourth Amendment, just like the claim in Bivens itself. Pl. Br. 24 ("The plaintiff in Bivens had been subjected to an unlawful, warrantless search and seizure by federal narcotics officers which resulted in his arrest, upon less than probable cause. Frias has brought a Bivens claims against a federal agent for his unlawful, warrantless seizure of him resulted in his arrest, upon less than probable cause.") (citation omitted); see Amici Br. 9 ("Because the present case involves alleged Fourth Amendment violations by federal officers, just as in Bivens, it is not a 'new context.'"). Frias's contention is mistaken for two reasons.

First, when the Supreme Court has spoken of exercising caution in extending Bivens to a new context, it has treated even slight differences in context as signifi-

cant. See, e.g., Wilkie v. Robbins, 551 U.S. 537, 549-50 (2007) (new context involves new constitutional claim); Malesko, 534 U.S. at 70 (new category of defendant); Chilicky, 487 U.S. at 423 (new alternative remedy); Chappell v. Wallace, 462 U.S. 296, 304 (1983) (new type of employer: the military); Bush v. Lucas, 462 U.S. 367, 378-79 (1983) (new constitutional provision and new alternative remedy). The reason for defining contexts narrowly is that the Supreme Court has transformed the rigid demand for precise words from Congress that was originally required by Bivens into a loose balancing of policy considerations by the courts. See Wilkie, 551 U.S. at 550 ("any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee"); id. (first question is "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages," and second question also requires courts to "make the kind of remedial determination that is appropriate for a common-law tribunal") (internal quotation marks omitted). A new context must be defined narrowly, because even a slight variation of context will likely present a different balance of policy considerations. That is one reason the Supreme Court did not consider the matter closed in Chilicky simply because it had already permitted a Bivens claim to go forward in Davis v. Passman, 442 U.S. 228 (1979), an earlier due-process case. Chilicky

presented a different type of due-process claim and also offered an alternative statutory remedy. That was an entirely new context, despite the identity of constitutional provision.

Both Frias and the amici argue that this Court's decision in Martinez-Aguero v. Gonzalez, 459 F.3d 618 (5th Cir.), cert. denied, 549 U.S. 1096 (2006), where the Court considered a qualified-immunity appeal in a Bivens case against an immigration agent, is proof that Bivens remedies should be broadly available in immigration cases. Pl. Br. 25; Amici Br. 6-7. It is not. As we noted in our opening brief (p. 26 n.10), the question whether a Bivens remedy is available at all in the immigration context was not addressed in Martinez-Aguero, a case in which the Court assumed a Bivens remedy existed. The amici appear to concede as much. Amici Br. 7 (case did not "explicitly" hold a Bivens remedy was available). Nor did the agent whose appeal was decided in Martinez-Aguero make the argument in his brief that INA remedies foreclosed a Bivens remedy. (The appellant's brief in Martinez-Aguero may be found at 2005 WL 6056630.)

In contrast, in the present case, the question is whether a Bivens remedy may be extended to the new context of immigration, and specifically to the context of the removal process, in the face of the comprehensive remedial scheme that Congress provided under the INA. See Mirmehdi v. United States, 689 F.3d 975, 981 (9th Cir. 2012), cert. denied, 133 S. Ct. 2336 (2013). This is not just a Fourth

Amendment case, as Frias contends; it is a Fourth Amendment case where there is a comprehensive alternative remedy, which did not exist in Bivens. It therefore represents a new context.

Second, if there were any remaining doubt that Frias is mistaken and that this in fact is a new context, this Court's recent decision in Hernandez v. United States, Nos. 11-50792, 12-50217, 12-50301, 2014 WL 2932598 (5th Cir. June 30, 2014), conclusively refutes Frias's position: "Instead of an amendment-by-amendment ratification of Bivens actions, we are bound to examine each new context – that is, each new 'potentially recurring scenario that has similar legal and factual components.'" Id. at *17 (quoting Arar v. Ashcroft, 585 F.3d 559, 572 (2d Cir. 2009) (en banc), cert. denied, 560 U.S. 978 (2010)). Despite precedent allowing a Bivens action for excessive force in the domestic law-enforcement context, id. at *18, Hernandez held that an action against a Border Patrol agent "for his conscience-shocking use of excessive force across the nation's borders" presented a new context for purposes of the Bivens remedy. Id. Similarly, immigration removal proceedings are a new context, separate and apart from domestic law-enforcement. Mirmehdi, 689 F.3d at 981 ("Deportation proceedings are such a context, unique from other situations where an unlawful detention may arise.").

B. In Light Of The Comprehensive Remedial Scheme Of The INA, A Bivens Remedy Should Not Be Created To Seek Damages Arising Out Of An Arrest Leading To Removal Proceedings Against The Plaintiff.

Given the alternative remedial scheme that Congress created in the INA, this Court should not extend the Bivens remedy to claims arising out of the removal process.

1. In The INA, Congress Limited The Remedies Available To Aliens Who Are Subjected To Removal Proceedings.

a. We explained in our opening brief (pp. 20-23) that the INA is a comprehensive statutory scheme, and that "[c]ongressional attention" to the INA has been "frequent and intense." Chilicky, 487 U.S. at 425. Congress has revisited the INA frequently – for example, in the Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 – and has carefully refined the INA's provisions, including its remedies. Congress has never offered a damage remedy for unlawful arrest to aliens who are arrested for being illegally in the United States and are placed in removal proceedings. Under 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) (en banc).

This is the theory behind the Ninth Circuit's decision in Mirmehdi, which we

argued in our opening brief (pp. 18-23) is persuasive. In enacting and amending the INA, Congress gave "frequent and intense" attention to the statutory scheme, Chilicky, 487 U.S. at 425, and "despite multiple changes to the structure of appellate review in the Immigration and Nationality Act, Congress never created [a damages] remedy." Mirmehdi, 689 F.3d at 982. "Special factors" counsel hesitation when Congress's failure to provide a damages remedy has not been "inadvertent." Chilicky, 487 U.S. at 423. "Congress is in a better position to decide whether or not the public interest would be served by creating" a damages remedy. Bush, 462 U.S. at 390.

b. Frias first contends that the Supreme Court has imposed onerous requirements on alternative remedies to Bivens, in the absence of which they are not adequate. But the requirements Frias cites are no longer good law. Frias quotes Carlson's exposition of the standard for alternative remedies, Pl. Br. 23 – that Congress must have "provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." 446 U.S. at 18-19. That standard is no longer valid; it has been significantly altered by later decisions. Congress need no longer "explicitly declare[]" that an alternative remedy is "a substitute" for Bivens; to the contrary, the Court now requires "appropriate judicial deference to indications that congressional inaction has not been inadvertent." Chilicky, 487 U.S. at 423 (emphasis

added). Nor must the alternative remedy be "equally effective" or even provide any relief at all to the particular plaintiff, let alone monetary relief; the Court has since rejected "the notion that statutory violations caused by unconstitutional conduct necessarily require remedies in addition to the remedies provided generally for such statutory violations." Chilicky, 487 U.S. at 427; see Bush, 462 U.S. at 388 (no Bivens remedy although statutory nonmonetary remedies "do not provide complete relief for the plaintiff"); Feit v. Ward, 886 F.2d 848, 854 (7th Cir. 1989) ("determining whether the particular remedies available to the plaintiff claiming a violation of his constitutional rights are meaningful and adequate is unnecessary").

Second, Frias argues, contrary to Mirmehdi, that the INA is not an adequate remedy, because his claim actually has nothing to do with immigration at all. See Pl. Br. 26 ("almost entirely irrelevant to any immigration removal proceedings"); Pl. Br. 29 (claims "do not arise from the deportation process"); Pl. Br. 35 ("almost totally irrelevant to removal proceedings"). This is a rather peculiar assertion for a man who was arrested by a Border Patrol agent, detained pending a determination whether to proceed with removal, actually placed in removal proceedings under the INA, and eventually released by an immigration judge. Frias was not arrested on suspicion of having committed a crime; he was arrested so that removal proceedings could be commenced. Whether it "preceded the initiation of deportation proceedings" or not, Pl. Br. 29, his arrest was an essential, integral part of the removal

process. See Reno v. Flores, 507 U.S. at 307 ("the deportation process ordinarily begins with a warrantless arrest").[1]

Third, Frias repeatedly claims we are arguing that all actions by immigration agents "should be free from judicial scrutiny." Pl. Br. 31; see also Pl. Br. 1, 18. This is not true at all. We fully support the remedies provided in the INA, including judicial remedies, as a means by which persons in removal proceedings may obtain whatever judicial scrutiny Congress has decided is appropriate for them. Congress has never decided that judicial scrutiny should include not only judicial review but also money damages.

Fourth, Frias says that the INA has no remedy for Fourth Amendment violations. Pl. Br. 32-46. Now, it is true that the rights of an alien in removal proceedings are limited. But while the exclusionary rule does not apply in those

[1] Frias argues that Mirmehdi denied a Bivens remedy "only in the context of claims for wrongful detention pending deportation." Pl. Br. 29. But Frias's own claim in this case is for wrongful detention pending deportation. Agent Torrez arrested him, and he was detained, pending commencement of the removal proceedings against him. And Frias also seems somewhat confused about Mirmehdi in any event. He argues that Mirmehdi actually decided a "very narrowly drawn issue: whether it was necessary to 'extend Bivens in order for illegal immigrants to recover for unlawful detention during deportation proceedings,'" Pl. Br. 29 (quoting Mirmehdi, 689 F.3d at 981), adding that the Ninth Circuit "answered that question in the negative." In fact, Mirmehdi answered that question in the affirmative, not the negative. What "extending Bivens" means is allowing a Bivens remedy in a new context. The Ninth Circuit held that it would be necessary to extend Bivens, and it concluded that such an extension of Bivens was unwarranted.

proceedings, INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984), evidence obtained in violation of the Fourth Amendment may be excluded if the violation is "egregious." Id. at 1050-51. Frias disparages this remedy, saying that "the very most the person can hope for is the exclusion of evidence and termination of proceedings." Pl. Br. 37. But termination of removal proceedings is a huge victory for Frias, who has admitted to being illegally in the United States. Frias obtained his release through INA procedures. (Even if he had not, he would have been able to file a habeas petition to challenge his arrest and ongoing detention. 28 U.S.C. 2241.)

We will now address in a separate section the argument, made by both Frias and the amici, that alternative remedial schemes are inadequate unless they deter constitutional violations and provide compensation to the injured party.

2. The Supreme Court Does Not Require That An Alternative Remedial Scheme Deter Constitutional Violations Or Provide Monetary Compensation.

Both Frias and the amici argue that the comprehensive remedial scheme of the INA is inadequate, because it does not sufficiently deter constitutional violations, Pl. Br. 43-45; Amici Br. 16-19, and because it does not offer compensation for constitutional violations. Pl. Br. 37, 44-45; Amici Br. 20-22. Their argument is completely without merit.

a. First, under Supreme Court case law, deterrence or lack of deterrence

does not determine whether a Bivens remedy should be created in the face of an alternative statutory remedy. In fact, in Bush v. Lucas, the Court explicitly "assume[d]" that "civil service remedies against the Government * * * do not adequately deter the unconstitutional exercise of authority by supervisors," 462 U.S. at 372 & n.8, and yet the Court nevertheless denied a Bivens remedy.

Since Carlson, which was decided 34 years ago, the principle of deterrence has never led the Court to create a new Bivens action. Rather, the Court has invoked deterrence in two other ways that lend no support to Frias's reliance on deterrence and, indeed, tend to undermine it: (a) it has warned of the deterrent effects of litigation and liability on government officials,[2] and (b) and has cited deterrence to explain why a new Bivens action should not be created.[3] While deterrence may be one of the goals of Bivens, a desire for increased deterrence

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[2] See Chilicky, 487 U.S. at 447 (Bivens claims could "deter[] those officials brave enough to accept such employment from legitimate efforts to ensure that only those truly unable to work receive benefits") (internal quotation marks omitted); Bush, 462 U.S. at 389 ("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").

[3] See Malesko, 534 U.S. at 70-71 (doubtful that deterrence works against corporation, and even if it does, it would not justify creation of Bivens action against corporation); FDIC v. Meyer, 510 U.S. 471, 485-86 (1994) (if Bivens action against federal agencies were allowed, it would over-deter agencies and under-deter individuals, because there would be no qualified immunity for agencies and plaintiffs would all sue them instead of individuals).

does not in itself warrant creation of a new Bivens damages remedy; one can always increase deterrence by creating such a remedy, and the Supreme Court has not done so. Courts "should defer to Congress in this regard." Shreiber v. Mastrogiovanni, 214 F.3d 148, 153 (3d Cir. 2000).

b. Second, both Frias and the amici also insist that compensation is a necessary element of an alternative remedy to a Bivens action. Both rely on Minneci v. Pollard, 132 S. Ct. 617 (2012), for the notion that it is necessary that the alternative remedy "provide roughly similar incentives for potential defendants to comply with the [Constitution] while also providing roughly similar compensation to victims of violations." Minneci, 132 S. Ct. at 625 (quoted at Pl. Br. 45; Amici Br. 13, 21). Their argument is predicated on a basic logical fallacy.

In Minneci, the Supreme Court considered state tort actions as the alternative remedy, not a comprehensive federal statutory scheme created by Congress and frequently revisited, and the Court's entire discussion of compensation in Minneci must be understood in that context. After first holding that state tort law, and not just federal law, may be considered as an alternative to Bivens, the Court held that the particular state tort remedies were adequate. Minneci, 132 S. Ct. at 624-25. It was in so holding that the Court observed that the state tort remedies provided "roughly similar compensation." Id. at 625. That is, the Court held that the existing state tort remedies were sufficient to foreclose a Bivens remedy; it did

not hold that compensation was necessary to foreclose a Bivens remedy. To the contrary, when the Court explained that these state tort remedies "need not be perfectly congruent" with the Bivens remedy, id. at 625, it cited Bush for the principle that even administrative remedies may be adequate, "though they 'do not provide complete relief.'" Id. (quoting Bush v. Lucas, 462 U.S. at 388). Administrative remedies do not provide compensation as a general matter. See Malesko, 534 U.S. at 74 ("Inmates in respondent's position also have full access to remedial mechanisms established by the BOP, including suits in federal court for injunctive relief and grievances filed through the BOP's Administrative Remedy Program (ARP).").

The Supreme Court has never required that an alternative remedy provide compensation. See Chilicky, 487 U.S. at 425 (Congress failed to give the plaintiff Social Security disability claimants "a remedy in damages for emotional distress or for other hardships suffered because of delays in their receipt of Social Security benefits"). In Chilicky, it did not matter that the plaintiffs' predicament was caused by unconstitutional conduct; 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 421-22. And along the path toward its ultimate holding in Wilkie, the Supreme Court held that the availability of administrative and judicial review under the Administrative

Procedure Act – which does not permit an award of damages, 5 U.S.C. 702 – would foreclose a Bivens remedy arising out of final agency action. 551 U.S. at 553-54 (citing Robbins v. Wilkie, 433 F.3d 755, 772 (10th Cir. 2006)). See also Western Radio Servs. Co. v. U.S. Forest Serv., 578 F.3d 1116, 1122-23 (9th Cir. 2009), cert. denied, 559 U.S. 1106 (2010) (while APA provides no money damages, it is an alternative remedy that prevents creation of a Bivens remedy).

Frias and the amici, however, start with Minneci's statement that the alternative state tort remedy does provide compensation, and they somehow convert that into must provide compensation. In logical terms, the fallacy is that they have taken a sufficient condition (compensation → adequate) and are arguing that it is in fact a necessary condition (compensation ← adequate). See Roberts v. Sea-Land Servs., Inc., 132 S. Ct. 1350, 1362 (2012) (Court "did not hold that the groups of 'employees entitled to compensation' and 'employees awarded compensation' were mutually exclusive. The former group includes the latter: The entry of a compensation order is a sufficient but not necessary condition for membership in the former."); Opulent Life Church v. City of Holly Springs, 697 F.3d 279, 296 n.18 (5th Cir. 2012) ("But this argument fails because it rests on a basic logical fallacy. A substantial burden may well be (and probably is) sufficient to establish irreparable injury, but it surely is not necessary."); Greene v. Doruff, 660 F.3d 975, 978 (7th Cir. 2012) ("Philosophers make a useful distinction between what they

call 'necessary' and 'sufficient' conditions.").

There is simply no basis for the notion that a Bivens remedy must be available unless the INA provides a compensatory remedy.

3. The Additional Arguments Raised By The Amici Are Meritless.

The amici add a few additional arguments to those raised by Frias. All are without merit.

First, the amici claim that, whatever limits the Supreme Court has put on Bivens since 1980, it has never "questioned its core holding." Amici Br. 10. This is simply wrong. As Prof. Laurence Tribe has recognized, the decision in Wilkie represents a "genuine departure from Bivens's 'core holding.'" Laurence H. Tribe, Death by a Thousand Cuts: Constitutional Wrongs without Remedies after *Wilkie v. Robbins*, 2006-2007 Cato Sup. Ct. Rev. 23, 70 (2007). Indeed, to say the Court has never questioned its core holding in Bivens ignores reality. Since 1980, when Carlson was decided, the Supreme Court has turned down every single attempt to extend Bivens in any way – a total of eight cases in a row, from Bush all the way through Minneci. And recently, the Court has on three separate occasions gone out of its way to suggest, on its own initiative, that a Bivens action might be unavailable in cases in which the government had not even raised that issue. See Wood v. Moss, 134 S. Ct. 2056, 2066 (2014); Reichle v. Howards, 132 S. Ct. 2088, 2093 n.4 (2012); Ashcroft v. Iqbal, 556 U.S. at 675 (all questioning whether there is a

Bivens remedy in First Amendment cases). Further, as we mentioned earlier, the Court has relaxed the standards for alternative remedies that it originally set forth in Bivens. So the amici's claim is way off the mark; rather than adhering to the "core holding" of Bivens, the Court can be more accurately described as limiting Bivens to its own facts and to those claims the Court accepted up until 1980.

Second, the amici suggest that we are arguing that Bivens does not apply to non-citizens. Amici Br. 12. That is not the case. We do not question that a Bivens action may be available to non-citizens in appropriate circumstances. The amici, however, contend that our argument in this case is based solely on Frias's non-citizen status. Amici Br. 27. It is not.[4] Instead, our argument is based on the INA remedies in the removal process, a process that naturally is going to involve non-citizens like Frias. That is what removal is all about. Our argument has to do with the comprehensive nature of those remedies, not with the fact that Frias is a non-citizen.[5]

Finally, the amici latch on to a provision in the INA having to do with state

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[4] See, e.g., Turner v. United States, No. 4:13-cv-932, 2013 WL 5877358 (S.D. Tex. Oct. 31, 2013) (no Bivens remedy for American citizen teenager who was deported after repeatedly lying about identity to officials).

[5] For his part, Frias makes a similar assertion – that we think the Fourth Amendment does not apply to non-citizens (even though he admits we never say this). Pl. Br. 32 n.11. If that were our argument, we would not be discussing probable cause in connection with qualified immunity.

officers working with immigration officers under an inter-governmental agreement and suggest that this provision shows that Congress affirmatively intended to allow Bivens remedies. Amici Br. 14-16. The provision cited by the amici treats such a state officer as "acting under color of Federal authority for purposes of determining the liability, and immunity from suit" of the officer in civil litigation. 8 U.S.C. 1357(g)(8). But contrary to the amici, all this means is that state officers working together with federal immigration officers are treated the same in litigation. It neither adds to nor subtracts from the Bivens status quo. Had the defendants in Hernandez in fact been state officers working with the Border Patrol – or, for that matter, had Agent Torrez been such a state officer – section 1357(g)(8) would simply mean that their liability and defenses are absolutely the same as they are for federal officers.

C. This Court's Decision In Hernandez v. United States Does Not Change The Calculus Here.

This Court's recent decision in Hernandez v. United States does not change the appropriate analysis in this case.

1. In Hernandez, the Court addressed on its own an issue that none of the parties in that case had briefed, an issue that also was not raised at oral argument: whether a Bivens remedy was available in a case alleging that a Border Patrol agent had used excessive force in shooting a teenager on the other side of the Mexican border. The reason the parties had not raised the issue is that the con-

trolling issue was extraterritoriality; Bivens actions are already recognized for excessive-force claims; and in a cross-border shooting case, there was no connection with the immigration process under the INA. In Hernandez, the Court held (a) that the INA remedial scheme is "not relevant to this case," because the teenager was not being brought into the U.S. immigration system, 2014 WL 2932598, at *19; and (b) alternatively, that special factors do not counsel hesitation in creating a Bivens remedy. Id. at *20-*21. On the latter point, the Court declined to follow a broad interpretation of the Ninth Circuit's decision in Mirmehdi, which the Court understood to foreclose a Bivens remedy whenever the case involved "immigration issues." Id. at *20. According to the Court, it was particularly unnecessary to foreclose that remedy, because the case involved "domestic law enforcement and nothing more." Id. at *21.

2. Frias argues that Hernandez "directly rejected the Mirmehdi rationale" that a Bivens remedy may not be extended to the immigration context. Pl. Br. 49-51. This is a misinterpretation of Hernandez, and Hernandez does not govern on the facts of this case.

Hernandez did conclude that Mirmehdi was inapplicable in a case alleging excessive force by a Border Patrol agent, who shot a teenager on the other side of the Mexican border. But as the Court observed in Hernandez, those allegations involve nothing more than ordinary law enforcement – which is why neither the

government nor the individual defendants argued special factors there. Moreover, the INA remedies were irrelevant to the question of remedy, because immigration proceedings could not possibly have been commenced against the teenager, who, as the Court noted, could not have been detained even if he had survived, because he was inside Mexico. 2014 WL 2932598, at *19.

The present case stands in stark contrast with Hernandez. Here, Agent Torrez arrested Frias while in this country, in order to detain him for purposes of commencing removal proceedings against him. Reno v. Flores, 507 U.S. at 307 ("the deportation process ordinarily begins with a warrantless arrest"). Removal proceedings were in fact commenced against Frias. His counsel invoked the INA remedies before the immigration judge, and the removal proceedings were terminated.

In other words, unlike Hernandez, Frias's case is nothing but a typical immigration case in which removal proceedings have been brought against an alien – who in this case admitted he was not "legal." Frias invoked his INA remedies and got relief through termination of the proceedings against him. See Wilkie, 551 U.S. at 551-52 (plaintiff not entitled to Bivens remedy; though he was criminally prosecuted and acquitted, he "had some procedure" – a jury trial – "to defend and make good on his position"). The availability of remedies under the INA, therefore, precludes the creation of a Bivens remedy against the arresting Border

Patrol agent.

For these reasons, this Court's criticism of the broader implications of Mirmehdi in its opinion in Hernandez should not foreclose the application of Mirmehdi in a case like this.[6]

II. AGENT TORREZ IS ENTITLED TO QUALIFIED IMMUNITY, BECAUSE HE HAD ARGUABLE PROBABLE CAUSE TO ARREST FRIAS FOR PURPOSES OF REMOVAL.

In our opening brief (pp. 27-38), we explained that, assuming Frias may pursue a Bivens remedy, Agent Torrez is entitled to qualified immunity on the wrongful-arrest claim, because Frias's admission that he was not "legal" gave

[6] In a footnote in Hernandez, the Court suggested that the exclusion of Bivens actions from coverage under the Westfall Act represented an affirmative congressional endorsement of Bivens actions. Hernandez, 2014 WL 2932598, at *18 n.11 ("The Westfall Act also shows that Congress intended to make a Bivens remedy available in most circumstances."). The Court clarified that it meant that "Congress has indicated an intent to preserve the availability of Bivens actions at least in those instances where an alternative remedial scheme does not preclude it." Id. (emphasis added). This is a tautology: A Bivens remedy exists when an alternative remedial scheme does not preclude it. To put it differently, it is more accurate to say that Congress's intent in the Westfall Act was to maintain the Bivens status quo while eliminating common-law tort actions against individual government officials by substituting the United States as the defendant in place of the individual. The Hernandez footnote cannot mean anything more than that. While the Supreme Court has considered the availability of a Bivens remedy in four cases since the enactment of the Westfall Act, it has never – not once – even hinted at the relevance of the Westfall Act to that question, and in all four of those cases, the Supreme Court has rejected the creation of a Bivens remedy. Given that the Westfall Act inference is not consistent with the Supreme Court's subsequent analysis, this Court should construe the Hernandez footnote narrowly to express the tautology that a Bivens remedy is available when it is not foreclosed.

Agent Torrez at least arguable probable cause for the arrest. The purpose of the arrest was not to detain Frias to prosecute him for a crime; it was to detain him for commencement of removal proceedings against him based on his being illegally in the United States. See Reno v. Flores, 507 U.S. at 307.

Frias contends that Agent Torrez is not entitled to qualified immunity, Pl. Br. 51-58, but he entirely ignores the qualified-immunity context. Although this Court has held that an officer is entitled to qualified immunity on an arrest claim if he had "arguable probable cause," Club Retro, L.L.C. v. Hilton, 568 F.3d 181, 207 (5th Cir. 2009) (a plaintiff must demonstrate the absence of "arguable (that is, reasonable but mistaken) probable cause for the arrests"); Mendenhall v. Riser, 213 F.3d 226, 230 (5th Cir. 2000), cert. denied, 531 U.S. 1071 (2001) (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam)) ("'Even law enforcement officials who "reasonably but mistakenly conclude that probable cause is present" are entitled to immunity.'"), Frias nowhere addresses arguable probable cause in his brief.

Instead of dealing with qualified immunity, which is the actual issue on appeal, Frias demands that this case be treated as if it presented an evidentiary question of admissibility in a criminal prosecution. Thus, he relies on Wong Sun v. United States, 371 U.S. 471 (1963), a case involving the "fruit of the poisonous tree" doctrine in criminal prosecutions, to support his argument that everything

following Agent Torrez's (assumed) unlawful stop of Frias is necessarily unlawful. Pl. Br. 57-58. But the "fruit of the poisonous tree" doctrine – a type of exclusionary rule – does not apply in removal proceedings. INS v. Lopez-Mendoza, 468 U.S. at 1050; see Jenkins v. City of New York, 478 F.3d 76, 91 n.16 (2d Cir. 2007) ("This Court previously has held that the fruit of the poisonous tree doctrine cannot be invoked to support a section 1983 claim, for the doctrine 'is an evidentiary rule that operates in the context of criminal procedure' and 'has generally been held to apply only in criminal trials.'").[7]

Frias also spends several pages of his brief arguing that the Fourth Amendment applies in civil cases as well as criminal ones. Pl. Br. 52-56. His argument knocks at an open door. We do not question that point. Contrary to Frias's assertion about our brief, our argument actually depends on the Fourth Amendment. We argue that Agent Torrez needed probable cause to arrest Frias (which is a Fourth Amendment concept); that when Frias sued him for damages under Bivens, Frias had to show that Agent Torrez lacked arguable probable cause (a Fourth Amendment concept); and that Frias's admission that he was not "legal" in fact

[7] Frias freely acknowledges that the exclusionary rule does not apply in removal proceedings. See, e.g., Pl. Br. 38-39 ("when Torrez violates the Fourth Amendment, his illegal conduct will not necessarily result in the exclusion of any resulting evidence of alienage in a removal case"). Indeed, the fact that the exclusionary rule does not apply is an important part of his argument that the INA is not an adequate alternative remedy to a Bivens action.

provided probable cause (and certainly arguable probable cause) to justify the immigration arrest. The principal problem with the district court's analysis – and with Frias's – is that its focus is not on probable cause at all; it is on the exclusionary rule that applies in criminal prosecutions. The exclusionary rule does not apply in an immigration proceeding, and it does not apply in this civil action. No matter how many times Frias insists that exclusionary-rule principles should apply (even while admitting that the rule itself does not), this is a case about arguable probable cause. Frias never addresses that issue.

Agent Torrez is entitled to qualified immunity.

CONCLUSION

For the foregoing reasons and those given in our opening brief, the district court's order should be reversed and the case remanded with instructions to dismiss all Bivens claims against Agent Torrez because there is no Bivens remedy, or, alternatively, to dismiss the arrest claim based on qualified immunity.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief is proportionately spaced, using Times New Roman, 14 point type. Based on a word count under Microsoft Word 2010, this brief contains 6,271 words, including the footnotes, but excluding the tables, statement of related appeals, certificates, and addenda.

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2014, I served the foregoing Reply Brief by filing the brief through the ECF system, with which all counsel are registered.

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