No. 13-50768

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ALEJANDO GARCIA DE LA PAZ,

Plaintiff-Appellee,

v.

JASON COY, U.S. CUSTOMS AND BORDER PROTECTION OFFICER,
MARIO VEGA, U.S. CUSTOMS AND BORDER PROTECTION OFFICER,

Defendants-Appellants.

ON REVIEW FROM A DECISION OF THE
U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL AND THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS AMICI CURIAE IN SUPPORT OF THE PLAINTIFF-APPELLEE.

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CORPORATE DISCLOSURE STATEMENT UNDER RULE 26.1

I, Mary Kenney, attorney for Amicus Curiae, the American Immigration Council, certify that we are a non-profit organization which does not have any parent corporations or issue stock and, consequently, there exists no publicly held corporation which owns 10% or more of our stock.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby certifies that the following listed persons have an interest in the outcome of this case. These representations are made to permit Judges of this Court to evaluate possible disqualification or recusal.

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TABLE OF CONTENTS

I. INTRODUCTION AND STATEMENT OF *AMICI* 1

II. ARGUMENT 3

A. THE DISTRICT COURT PROPERLY DETERMINED THAT PLAINTIFF'S FOURTH AMENDMENT CLAIMS AGAINST FEDERAL IMMIGRATION OFFICERS DO NOT PRESENT A "NEW CONTEXT." 5

1. This Court previously has afforded injured parties a *Bivens* remedy for constitutional violations by immigration officers and, thus, Plaintiff's case does not present a "new context" 5

2. Plaintiff's Claims Fit Within *Bivens*' Core Holding and Purpose ... 7

B. ALTHOUGH THIS CASE DOES NOT PRESENT A "NEW CONTEXT," EVEN IF IT DID, THE DISTRICT COURT CORRECTLY RECOGNIZED THE AVAILABILITY OF A *BIVENS* REMEDY 11

1. The INA Does Not Provide an Alternative Remedial Scheme for Protecting Plaintiff's Interests or Compensating Him – Monetarily or Otherwise 11

a. The INA Evidences Congressional Intent to Allow Damages Remedies 12

b. The INA Does Not Provide "Roughly Similar Incentives" for Potential Defendants to Comply With the Fourth Amendment as Would a Bivens Remedy 14

c. The INA Does Not Provide Victims with Any Compensation, Let Alone "Roughly Similar Compensation" to a *Bivens* Remedy 17

2. There Are No Special Factors Counseling Hesitation In This Case 19

a. Plaintiff Is Entitled to Protection of the Fourth Amendment 21

b. *Bivens* Actions Are Available In Fields Over Which Congress Has Plenary Power 22

c. Defendants' Position Creates Virtually Blanket Immunity for Unconstitutional Conduct by Federal Immigration Officials 25

3. *Mirmehdi* Is Neither Binding Nor Applicable 27

III. CONCLUSION 31

TABLE OF AUTHORITIES

Cases

Aguilar v. ICE, 811 F. Supp. 2d 803 (S.D.N.Y. 2011) 6

Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) ..... passim

Ballesteros v. Ashcroft, 452 F.3d 1153 (10th Cir. 2006) 7

Bennett v. Barnett, 210 F.3d 272 (5th Cir. 2000) 20, 21

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) ..... passim

Castillo v. Skwarski, No. 08-5683, 2009 U.S. Dist. LEXIS 115169 (W.D. Wash. Dec. 10, 2009) 26

Castro v. Cabrera, 742 F.3d 595 (5th Cir. 2014) 22

Cesar v. Achim, 542 F. Supp. 2d 897 (E.D. Wis. 2008) 18

Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) 1, 7, 9

Cotzojay v. Holder, 725 F.3d 172 (2d Cir. 2013) 18

Davis v. Passman, 442 U.S. 228 (1979) 8

De La Paz v. Coy, 954 F. Supp. 2d 532 (W.D. Tex. 2013) 1, 4, 19, 27

Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) 24

Diaz-Bernal v. Myers, 758 F. Supp. 2d 106 (D. Conn. 2010) 18

Diouf v. Chertoff, No. 07-03977 (C.D. Cal. May 6, 2008) 26

Doe v. Neveleff, No. 11-cv-00907 (W.D. Tex. filed Oct. 19, 2011) 27

Engel v. Buchan, 710 F.3d 698 (7th Cir. 2013) 19

FDIC v. Myer, 510 U.S. 471 (1994) 9

Fiallo v. Bell, 430 U.S. 787 (1977).....23

Franco-de Jerez v. Burgos, 876 F.2d 1038 (1st Cir. 1989).....6

Galvan v. Press, 347 U.S. 522 (1954) 22

Goldstein v. Moatz, 364 F.3d 205 (4th Cir. 2004).....25

Guerra v. Sutton, 783 F.2d 1371 (9th Cir. 1986).....10

Guzman v. United States, No. CV 08-01327 GHK (C.D. Cal. May 11, 2010).....26

Hudson Valley Black Press v. IRS, 409 F.3d 106 (2d Cir. 2005).....17

Humphries v. Various Fed. USINS Emp., 164 F.3d 939 (5th Cir. 1999) 2

INS v. Chadha, 462 U.S. 919 (1983) 23

Jama v. U.S. I.N.S., 334 F. Supp. 2d 662 (D.N.J. 2004).....26

Jasinski v. Adams, 781 F.2d 843 (11th Cir. 1986).....6

Khorrami v. Rolince, 493 F. Supp. 2d 1061 (N.D. Ill. 2007).....18

Lynch v. Cannatella, 810 F.2d 1363 (5th Cir. 1987).....26

Martinez-Aguero v. Gonzalez, 459 F.3d 618 (5th Cir. 2006)..... passim

Matter of Avetisyan, 25 I&N Dec. 688 (BIA 2012) 29

Matter of G-N-C, 22 I&N Dec. 281 (BIA 1988).....29

Matter of Sandoval, 17 I&N Dec. 70 (BIA 1979).....7

McClurg v. Kingsland, 42 U.S. (1 How.) 202 (1843) 25

Minneci v. Pollard, __ U.S. __, 132 S. Ct. 617 (2012) 8, 12, 18

Mirmehdi v. United States, 689 F.3d 975 (9th Cir. 2012) 3, 27, 28, 30

Muskrat v. U.S., 219 U.S. 346 (1911).....2

Papa v. United States, 281 F.3d 1004 (9th Cir. 2002)..... 2, 6, 10

Ramirez v. Webb, 719 F. Supp. 610 (W.D. Mich. 1989).....6

Riley v. United States, No. 00-cv-06225 ILG/CLP (E.D.N.Y. filed Oct. 17, 2000) 26

Sanchez v. Rowe, 870 F.2d 291 (5th Cir. 1989).....6, 10

Schweiker v. Chilicky, 487 U.S. 412 (1988) 17

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 10

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1988) 25

Sugrue v. Derwinski, 26 F.3d 8 (2d Cir. 1994).....20

TRW Inc. v. Andrews, 534 U.S. 19 (2001).....13

United States v. Nordic Village, Inc., 503 U.S. 30 (1992).....14

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) 22

Wilkie v. Robbins, 551 U.S. 537 (2007)..... passim

Wilkinson v. United States, 440 F.3d 970 (8th Cir. 2006).....25

Yamataya v. Fisher, 189 U.S. 86 (1903) 23

Zadvydas v. Davis, 533 U.S. 678 (2001) 22

Zuspan v Brown, 60 F.3d 1156 (5th Cir. 1995) 20, 21

Statutes

8 U.S.C. § 1201 14

8 U.S.C. § 1227(a)(1)(E)(iii) 30

8 U.S.C. § 1227(a)(1)(H) 30

8 U.S.C. § 1227(a)(7) 30

8 U.S.C. § 1229(a)(1)(D) 21

8 U.S.C. § 1229a 14

8 U.S.C. § 1229a(a) 21

8 U.S.C. § 1229a(a)(2) 21

8 U.S.C. § 1229a(c)(2) 21

8 U.S.C. § 1229b(b)(2) 30

8 U.S.C. § 1231(b)(3) 30

8 U.S.C. § 1357 13

8 U.S.C. § 1357(g)(7) 2, 13, 14

8 U.S.C. § 1357(g)(8) 2, 13

28 U.S.C. § 2241 28

Regulations

8 C.F.R. § 1.1(q) 22

8 C.F.R. § 212.5 30

8 C.F.R. § 274a.12(14) 30

8 C.F.R. § 274a.12(18)-(20).....30

8 C.F.R. § 274a.12(22).....30

8 C.F.R. § 274a.12(24).....30

8 C.F.R. § 274a.12(a)(11-13).....30

8 C.F.R. § 274a.12(c)(8)-(11).....30

8 C.F.R. § 1003.10(b).....29

8 C.F.R. § 1239.1.....15

Other Authorities

CBP website, *available at* http://www.cbp.gov/border-security/along-us-borders.15

EOIR website, *available at* http://www.justice.gov/about/about.html.....15

ICE website, *available at* http://www.ice.gov/about/offices/leadership/opla/.....15

Immigration Court Backlog Tool, *available at* http://trac.syr.edu/phptools/immigration/court_backlog/.....16

Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Officers, All Special Agents in Charge and All Chief Counsel (Jun. 17, 2011) *available at* https://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.....7

Memorandum from William J. Howard, Principal Legal Advisor, ICE, "Prosecutorial Discretion" (Oct. 24, 2005), *available at* http://www.lexisnexis.com/legalnewsroom/immigration/b/insidenews/archive/2006/05/09/ice-on-prosecutorial-discretion.aspx.....16

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New York University School of Law and Families for Freedom, *Uncovering USBP, Bonus Programs for United States Border Patrol Agents and the Arrest of Lawfully Present Individuals* (Jan. 2013), *available at* http://familiesforfreedom.org/sites/default/files/resources/Uncovering%20USBP-FFF%20Report%202013.pdf 17

NIPNLG, Termination or Administrative Closure of Removal Proceedings Based on Prima Facie Eligibility for DACA and Sample Motion, available at http://nationalimmigrationproject.org/publications.htm 29

I. INTRODUCTION AND STATEMENT OF AMICI[1]

Amici Curiae National Immigration Project of the National Lawyers Guild and American Immigration Council proffer this brief to assist the Court in reviewing the District Court's decision holding that a remedy under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) is available where Fourth Amendment violations stem from a racially motivated vehicle stop and arrest by officers employed by U.S. Border Patrol, the law enforcement arm of U.S. Customs and Border Protection (CBP), a component agency of the Department of Homeland Security (DHS). *See De La Paz v. Coy*, 954 F. Supp. 2d 532, 541-42 (W.D. Tex. 2013). Amici urge the Court to uphold the District Court's findings.

As the Supreme Court has stressed, recognizing a remedy under *Bivens* serves to deter future constitutional violations by holding federal officers accountable for unlawful actions, while also providing victims with the only viable compensation for the injuries they suffered. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) (recognizing the dual purpose of a *Bivens* case). Both are critical factors here. Moreover, this Court and other courts have allowed *Bivens*

[1] Under Federal Rule of Appellate Procedure 29(c)(5), amici state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person — other than amici, their members, or their counsel — contributed money that was intended to fund preparing or submitting the brief.

claims to proceed in cases like the instant case, which involve noncitizens whose constitutional rights were violated by immigration agents. *See, e.g.*, *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 627 (5th Cir. 2006); *Humphries v. Various Fed. USINS Emp.*, 164 F.3d 939, 944 (5th Cir. 1999); and *Papa v. United States*, 281 F.3d 1004 (9th Cir. 2002). This Court should reject Defendants' contention that *Bivens* is not available to noncitizens who may – or also may not – later face removal proceedings. In fact, the Immigration and Nationality Act (INA) plainly demonstrates that Congress recognizes the availability of damages actions to remedy constitutional violations by officers acting under the color of immigration law. 8 U.S.C. §§ 1357(g)(7) and (g)(8).

Significantly, because this Court previously has recognized *Bivens* actions for constitutional violations committed by immigration officers, the context presented here is not a "new" one. *Accord Arar v. Ashcroft* 585 F.3d 559, 572 (2d Cir. 2009) (en banc) (explaining that a "new context" is not presented where courts have recognized a *Bivens* claim in the same circumstances). This Court could not have exercised jurisdiction over the *Bivens* claims in *Martinez-Aguero* and *Humphries* if the remedy was not available. To hold otherwise here would impermissibly render those decisions advisory. *See Muskrat v. U.S.*, 219 U.S. 346, 356 (1911) ("As we have already seen by the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies'").

Finally, as the District Court correctly found, *Mirmehdi v. United States*, 689 F.3d 975 (9th Cir. 2012), relied upon by Defendants, is not binding on this Court and is distinguishable on the merits.

The National Immigration Project is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. Both organizations have an interest in ensuring that noncitizens are not unduly prevented from pursuing remedial suits in response to unconstitutional action by federal officers.

II. ARGUMENT

Wilkie v. Robbins, 551 U.S. 537, 550 (2007) governs the determination of whether a *Bivens* claim arises in a "new context" and, if so, whether a *Bivens* remedy is available. As the Second Circuit, sitting *en banc*, has held, and this Court should find, a context is "new" if "no court has previously afforded a *Bivens* remedy" in that particular scenario (context). *Arar v. Ashcroft*, 585 F.3d at 572. If

courts previously have afforded *Bivens* remedies for factually and legally similar claims, the context is not "new" and a *Bivens* remedy is available.

If, *and only if*, a court identifies a "context" as "new," should the Court decide, using a two-part inquiry, whether to recognize a *Bivens* remedy. *See Arar*, 585 F.3d at 563 (citing *Wilkie*, 551 U.S. at 550). A court must consider: (1) the availability of an alternative remedial scheme which would adequately compensate the plaintiff; and (2) the presence of any special factors which would outweigh *Bivens*' deterrent effect. *Wilkie*, 551 U.S. at 550.

Here, the District Court correctly determined that Plaintiff's claims under the Fourth Amendment do not arise in a "new context." *De La Paz*, 954 F. Supp. 2d at 542 (citing *Humphries*, *supra*). Specifically, the District Court held that the INA does not provide a comprehensive remedial scheme and special factors do not outweigh the necessity of individual liability for Defendants' violations of Plaintiff's rights.[2] *Amici* urge the Court to affirm this holding.

***

[2] The District Court also correctly held that the INA does not deprive it of jurisdiction. *De La Paz*, 954 F. Supp. 2d at 542-45. Because Defendants did not appeal this holding, the issue is not before this Court and need not be addressed. However, should the Court conclude otherwise, *amici* would welcome the opportunity to brief this issue.

A. THE DISTRICT COURT PROPERLY DETERMINED THAT PLAINTIFF'S FOURTH AMENDMENT CLAIMS AGAINST FEDERAL IMMIGRATION OFFICERS DO NOT PRESENT A "NEW CONTEXT."

1. This Court previously has afforded injured parties a *Bivens* remedy for constitutional violations by immigration officers and, thus, Plaintiff's case does not present a "new context."

In *Arar*, the Second Circuit identified the "new context" at issue as "international rendition, specifically 'extraordinary rendition.'" 585 F.3d at 572. Importantly, the court reasoned that the "context" was "new" because "*no* court has previously afforded a *Bivens* remedy for extraordinary rendition." *Id*. (emphasis added). Unlike a claim for damages arising out of extraordinary rendition, courts regularly recognize personal damage liability of federal employees in the context presented here: that is, for both Fourth Amendment violations and constitutional violations committed by immigration officers. This Court should adopt the Second Circuit's approach and find that because this and other courts previously have afforded a *Bivens* remedy against immigration officers, the context is not new.

In *Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006), this Court held that an immigration officer was not entitled to qualified immunity with respect to a *Bivens* claim brought by a noncitizen who alleged that the officer violated her Fourth Amendment rights by physically assaulting and arresting her without provocation. The court found that the noncitizen plaintiff was protected by

the Fourth Amendment. *Id.* at 625. Additionally, finding that the immigration officer did not enjoy qualified immunity, the court necessarily, although not explicitly, found that a *Bivens* remedy was appropriate.

The "context" presented in *Martinez-Aguero* is precisely that presented here: an allegation of a Fourth Amendment violation by an immigration officer. *Martinez-Aguero* demonstrates that since *Bivens*, courts will accept and adjudicate *Bivens* actions against immigration officers. *See, e.g.*, *Sanchez v. Rowe*, 870 F.2d 291, 292, 296 (5th Cir. 1989) (plaintiff prevailed at trial on *Bivens* claim for malicious beating by immigration agent); *Ramirez v. Webb*, 719 F. Supp. 610 (W.D. Mich. 1989) (award under *Bivens* against immigration officer for unlawful detention); *Papa*, *supra* (reversing dismissal of *Bivens* claims against immigration agents on behalf of noncitizen killed in detention); *Franco-de Jerez v. Burgos*, 876 F.2d 1038 (1st Cir. 1989) (allowing case to proceed to discovery against immigration officer on *Bivens* claim where noncitizen held incommunicado for ten days); *Jasinski v. Adams*, 781 F.2d 843 (11th Cir. 1986) (affirming denial of summary judgment in *Bivens* challenge to detention and search by immigration officer at checkpoint); *Aguilar v. ICE*, 811 F. Supp. 2d 803, 819 (S.D.N.Y. 2011) (finding a complaint alleging that immigration agents created a policy pursuant to which unconstitutional conduct occurred adequately stated a *Bivens* claim).

And importantly, courts – including the Board of Immigration Appeals (BIA) – and DHS recognize, at least in dicta, the availability of *Bivens* remedies for constitutional violations by federal immigration officers against noncitizens in removal proceedings. *See, e.g.*, *Ballesteros v. Ashcroft*, 452 F.3d 1153, 1160 (10th Cir. 2006) ("No remedy for the alleged constitutional violations would affect the BIA's final order of removal. Any remedy available to Mr. Ballesteros would lie in a *Bivens* action."); *Matter of Sandoval*, 17 I&N Dec. 70, 82 (BIA 1979) (citing *Bivens* for the proposition that "civil or criminal actions against the individual officer may be available."). *Cf.* Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement (Jun. 17, 2011) (recognizing the availability of litigation to noncitizens seeking to protect civil rights) *available at* https://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.

2. Plaintiff's Claims Fit Within *Bivens*' Core Holding and Purpose.

Plaintiff's claims also do not present a new context because they fit squarely within *Bivens*' "core holding" that money damages may be sought from "federal officers who abuse their constitutional authority." *Malesko*, 534 U.S. at 67. Notably the Supreme Court has characterized *Bivens* as "[holding] that the victim of a Fourth Amendment violation by federal officers had a claim for damages." *Wilkie*, 551 U.S. at 549. No Supreme Court decision has narrowed this reading of *Bivens* such that it would encompass only a subcategory of Fourth Amendment

violations by federal officers. Because the present case involves alleged Fourth Amendment violations by federal officers, just as in *Bivens*, it is not a "new context."

In *Bivens*, the Court provided a remedy where federal agents violated the Fourth Amendment when, without a warrant or probable cause, they entered and searched the plaintiff's apartment, arrested him using unreasonable force, interrogated him, and conducted a visual strip search. *Bivens*, 403 U.S. at 390-91. The Court "held that the *Fourth Amendment* implicitly authorized a court to order federal agents to pay damages to a person injured by the agents' violation of the Amendment's constitutional strictures." *Minneci v. Pollard*, __ U.S. __, 132 S. Ct. 617, 621 (2012) (explaining *Bivens*). In support, the *Bivens* Court explained that "'[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.'" *Id.* at 622 (quoting *Bivens*, 403 U.S. at 395).

Subsequently, in *Davis v. Passman*, the Court extended *Bivens* to cover Fifth Amendment substantive due process violations where a U.S Congressman terminated an assistant's employment on the basis of her sex. 442 U.S. 228, 230 and n.3 (1979). In *Carlson v. Green*, the Court recognized a *Bivens* remedy under the Eighth Amendment when federal prison agents ignored the medical advice of a

prisoner's doctors and failed to administer competent medical attention, and these actions allegedly led to his death. 446 U.S. 14 (1980).

Whatever limitations the Court since has placed on *Bivens*, it has not questioned its core holding. The Court also never has questioned the propriety of a damages remedy where the threat of individual liability is necessary, either to deter future unconstitutional acts or to ensure that the plaintiff has a remedy to compensate for the constitutional harm. *Malesko*, 534 U.S. at 67-8, 70. Here, recognizing a *Bivens* remedy serves both purposes.

First, recognizing a *Bivens* remedy is necessary to deter future acts of abuse, discrimination and mistreatment by individual Border Patrol agents. In *Carlson*, the Court reasoned that *Bivens* "serves a deterrent purpose," has the potential for an award of "punitive damages," permits a trial by a jury of one's peers, and allows the federal judiciary to redress federal constitutional violations. 446 U.S. at 21-23. These rationales all apply here. The threat of individual officer liability is critical to deter imposition of similar unconstitutional stops, searches and arrests against a vulnerable population. *FDIC v. Myer*, 510 U.S. 471, 485 (1994) ("It must be remembered that the purpose of *Bivens* is to deter *the officer*.") (emphasis in original). In addition, the availability of punitive damages is warranted given the racial profiling involved. Moreover, the availability of a jury trial is necessary, both to determine the amount of any damages and to promote public accountability

and transparency. Lastly, the fact that these violations were conducted by federal immigration officers under the guise of enforcing federal immigration policy strongly favors recognition of a *Bivens* claim rather than reliance on state law remedies.

Second, and as discussed below in § II.B.1, without a *Bivens* remedy, Plaintiff would have no effective means to redress the harms caused by Defendants. The INA is not compensatory or remedial. Moreover, the plain language of the INA itself contemplates the availability of damages remedies.

Finally, that the victim of the mistreatment is not a U.S. citizen does not alter the availability of the remedy. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 736-37 (2004) (noting that respondent proposes creation of a cause of action for "any seizure of an alien in violation of the Fourth Amendment, *supplanting the actions under … Bivens [ ] that now provide damage remedies for such violations*") (emphasis added); *Martinez-Aguero*, 459 F.3d at 627 (holding *Bivens* available where INS officer beat and yelled profanities at a defenseless noncitizen); *Guerra v. Sutton*, 783 F.2d 1371, 1375 (9th Cir. 1986) (finding *Bivens* available where immigration officers assisted in searches and arrests "without knowledge of the details of the warrant which they claimed authorized their actions"); *Papa*, 281 F.3d at 1010-11 (reversing district court dismissal of *Bivens* claim where federal officers "knowingly plac[ed] [immigration detainee] in harm's way"); *Sanchez*,

870 F.2d at 292, 296 (noncitizen awarded damages for malicious beating by Border Patrol agents must elect between *Bivens* and Federal Tort Claims Act remedy).

* * * * * * * * * *

In sum, because prior precedent recognizes the appropriateness and availability of a *Bivens* remedy in analogous circumstances and because Plaintiff's case fits within *Bivens*' core holding and purpose, the Court should find that *Bivens* relief to remedy Fourth Amendment violations by federal immigration officials is not a new context.

B. ALTHOUGH THIS CASE DOES NOT PRESENT A "NEW CONTEXT," EVEN IF IT DID, THE DISTRICT COURT CORRECTLY RECOGNIZED THE AVAILABILITY OF A *BIVENS* REMEDY.

Even if this Court were to conclude that claims against Border Patrol agents present a "new context," the District Court properly concluded that Plaintiff's claims satisfy the *Wilkie* test because (1) the INA does not provide an alternative remedial scheme; and (2) no "special factors" counsel hesitation.

1. The INA Does Not Provide an Alternative Remedial Scheme for Protecting Plaintiff's Interests or Compensating Him – Monetarily or Otherwise.

In *Wilkie*, the Supreme Court stated that the existence of an "alternative remedial scheme" alone is not enough to find a *Bivens* remedy inappropriate. Rather, the "alternative existing process for protecting the interest" must "amount[]

to a convincing reason" for the court to refrain from extending a *Bivens* remedy. *Wilkie,* 551 U.S. at 550 (citation omitted). Any alternative remedial scheme must serve to deter future constitutional violations and provide adequate compensation for the victims. *See Minneci*, 132 S. Ct. at 625 ("[I]n principle, the question is whether, in general, state tort law remedies provide *roughly similar incentives* for potential *defendants* to comply with the Eighth Amendment while also providing *roughly similar compensation* to *victims* of violations.") (emphasis added).

Here, the INA does not serve either purpose. First, Congress, through the INA, is keenly aware of, and has acquiesced to, the availability of damage remedies. Second, the INA does not provide *any* incentive for potential defendants to comply with the Fourth Amendment's prohibition against unlawful search and seizure. Third, the INA does not authorize *any* compensation to victims of racial profiling and unlawful arrests and, thus, is not remotely compensatory. In sum, the INA does not "amount[] to a convincing reason," *Wilkie*, 551 U.S. at 550, to deny a *Bivens* remedy for constitutional violations which are not covered by, and cannot be remedied through, that Act.

a. The INA Evidences Congressional Intent to Allow Damages Remedies.

The INA itself demonstrates that Congress recognizes damages actions as available to remedy constitutional violations. Congress demonstrated its awareness of, and acquiescence to, the availability of damage remedies in two

provisions that establish certain limited authority for state and local officials to enforce the immigration laws. Congress specified that such state or local officers and employees "shall not be treated as a Federal employee for any purpose other than for purposes of . . . sections 2671 through 2680 of Title 28 [the Federal Tort Claims Act] (relating to tort claims)." 8 U.S.C. § 1357(g)(7). The provision immediately following states:

> [a]n officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting *under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.*

8 U.S.C. § 1357(g)(8) (emphasis added). Because these provisions are intended to make state and local officers who carry out enforcement under the immigration laws liable in damage actions to the same extent as federal officers, it presupposes that federal immigration officers already are liable in such actions.

Congress obviously would not have included this language if it considered the INA to be a comprehensive remedial scheme. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction that a statute ought … to be so construed that … no clause, sentence, or word shall be superfluous, void, or insignificant'") (citation omitted). On the contrary, it explicitly contemplated that sources other than the INA would provide damage remedies against state and local officials who violate the law when acting under §

1357, which gives them authority to, *inter alia*, detain noncitizens incident to deportation.[3] *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (holding that "a statute must, if possible, be construed in such a fashion that every word has some operative effect.").

b. The INA Does Not Provide "Roughly Similar Incentives" for Potential Defendants to Comply With the Fourth Amendment as Would a *Bivens* Remedy.

The "comprehensive administrative scheme" provided for in the INA governs noncitizens' admission to and removal from the United States. *See, e.g.*, 8 U.S.C. §§ 1201 (Issuance of Visas); 1229a (Removal Proceedings). Unlike the monetary damages provided under *Bivens*, there is nothing in the INA's admission and removal scheme that would act as an incentive to deter future misconduct by CBP agents.

"It is almost axiomatic that the threat of damages has a deterrent effect … surely particularly so when the individual official faces personal financial liability." *Carlson*, 446 U.S. at 21 (citations omitted). As the Court noted, underlying the doctrine of qualified immunity is the "fear that exposure to personal liability would otherwise deter [public officials] from acting at all." *Id.* at n.7. In

[3] The explicit reference to the Federal Tort Claims Act (FTCA) in § 1357(g)(7) cannot be read to imply that Congress intended to permit *only* suits under the FTCA, and not under *Bivens*. Congress legislated against the backdrop of *Carlson*, 446 U.S. at 9-24, which held that the availability of a remedy under the FTCA does not preclude a *Bivens* action for the same injury.

contrast, whether an arrested noncitizen ultimately is removed does not personally impact the arresting CBP agent. In fact, in the vast majority of cases, the arresting agent will not know the ultimate outcome of the individual's removal proceeding.

DHS is charged with enforcing the INA. Within DHS, the U.S. Border Patrol "is the mobile, uniformed law enforcement arm of U.S. Customs and Border Protection … responsible for securing U.S. borders between ports of entry."[4] Although U.S. Border Patrol agents may issue a charging document in a removal proceeding, *see, e.g.*, 8 C.F.R. § 1239.1, that is the extent of their authority related to removal proceedings. Attorneys within an entirely distinct component agency of DHS, Immigration and Customs Enforcement (ICE), represent the government as the prosecutor.[5] Still another agency, the Executive Office for Immigration Review (EOIR) within the Department of Justice, houses the immigration judges and the BIA that are responsible for adjudicating removal proceedings and administrative appeals.[6]

It is the ICE attorney who decides whether to continue to prosecute a removal case to its conclusion or, instead, whether to exercise prosecutorial

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[4] *See* CBP website, *available at* http://www.cbp.gov/border-security/along-us-borders.

[5] *See* ICE website, *available at* http://www.ice.gov/about/offices/leadership/opla/ ("[Office of Principle Legal Advisor] also is the exclusive legal representative for the U.S. government in exclusion, deportation and removal proceedings [ ].").

[6] *See* EOIR website, *available at* http://www.justice.gov/about/about.html.

discretion while the case is ongoing.[7] In some cases, an exercise of prosecutorial discretion will lead to the termination of a removal proceeding or to administrative closure as happened here. *See* Plaintiff's April 23, 2014 Rule 28(j) Letter.

Even when a removal case does proceed to completion, it can take years. According to one source, the average number of days that a removal case is pending before an immigration judge in Texas is 439. *See* Immigration Court Backlog Tool, *available at* http://trac.syr.edu/phptools/immigration/court_backlog/. Many cases involve appeals beyond the immigration court, and thus would pend even longer. Because Border Patrol agents arrest large numbers of individuals each year, there is no reason why an agent would remember a particular case from one or more years earlier.

Thus, even if an agent did learn of the outcome of a particular removal proceeding, it would not serve as a deterrent to unlawful future behavior. On the contrary, U.S. Border Patrol's policy of closely monitoring and circulating arrest numbers within the agency provides an incentive to individual agents to focus their efforts on making *as many arrests as possible*, whether lawful or not, because U.S. Border Patrol rewards arrests through the money it allocates to fund discretionary

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[7] *See, e.g.*, Memorandum from William J. Howard, Principal Legal Advisor, ICE, "Prosecutorial Discretion" (Oct. 24, 2005), *available at* http://www.lexisnexis.com/legalnewsroom/immigration/b/insidenews/archive/2006/05/09/ice-on-prosecutorial-discretion.aspx.

bonuses to arresting officers, in the form of cash bonuses, vacation time and gift cards. *See* New York University School of Law and Families for Freedom, *Uncovering USBP, Bonus Programs for United States Border Patrol Agents and the Arrest of Lawfully Present Individuals* (Jan. 2013) (uncovering nearly 300 wrongful arrests by Border Patrol agents and nearly $1 million in cash and other incentives to arresting officers), *available at* http://familiesforfreedom.org/sites/default/files/resources/Uncovering%20USBP-FFF%20Report%202013.pdf. Such programs entice agents to focus on the quantity, not legality, of arrests and, as such, agents are not deterred from conducting unlawful arrests.

c. The INA Does Not Provide Victims with *Any* Compensation, Let Alone "Roughly Similar Compensation" to a *Bivens* Remedy.

The INA's "scheme" is not compensatory or remedial. Because the INA does not provide for monetary compensation,[8] it is not comparable to suits for damages under *Bivens*. For noncitizen victims of constitutional violations caught up in the immigration system, "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in judgment).

[8] *See Schweiker v. Chilicky*, 487 U.S. 412, 428-29 (1988) (finding *Bivens* remedy not available because Congress adequately addressed unlawful termination of disability benefits by providing for the "belated restoration of back benefits"); *Hudson Valley Black Press v. IRS*, 409 F.3d 106, 111-13 (2d Cir. 2005) (finding that Congress "provided a mechanism by which aggrieved taxpayers may bring a civil action for damages").

Additionally, the INA is not remedial. Immigration courts are powerless to hold CBP or other federal officers accountable for constitutional violations, which result, *inter alia*, in suffering, emotional distress, and humiliation. *See*, *e.g.*, *Cesar v. Achim*, 542 F. Supp. 2d 897, 900 (E.D. Wis. 2008) (stating that the INA contains "nothing of a remedial nature, much less an intricate and carefully crafted remedial scheme") (internal quotation marks and citation omitted); *Khorrami v. Rolince*, 493 F. Supp. 2d 1061, 1074 (N.D. Ill. 2007) ("While [the INA] is comprehensive in terms of regulating the in-flow and outflow of aliens, it is not comprehensive in terms of providing a remedy for [constitutional violations]"); *Diaz-Bernal v. Myers*, 758 F. Supp. 2d 106, 127-29 (D. Conn. 2010) ("[the INA] does not provide a remedial scheme for violations committed by immigration officials outside of removal proceedings"). As noted, CBP officials are not subject to EOIR's jurisdiction and, consequently, immigration courts and the BIA have no adjudicatory, injunctive or even advisory authority over CBP officials.

At most, an immigration court could suppress evidence and terminate removal proceedings based on a constitutional violation, but even this potential relief, which immigration courts rarely grant,[9] does not compensate victims in a "roughly similar" manner, *Minneci*, 132 S. Ct. at 625, to a damage award. In

[9] *See*, *e.g.*, *Cotzojay v. Holder*, 725 F.3d 172 (2d Cir. 2013) (remanding because violation met the egregious standard for suppression, but noting that "This Court has never found a violation sufficiently severe, and therefore egregious, to require suppression in a removal hearing.").

rejecting the availability of habeas corpus as an adequate alternative remedy, the Seventh Circuit reasoned:

> But the habeas remedy is limited to securing prospective relief from unlawful incarceration, halting the ongoing harm from a conviction prejudicially tainted by a constitutional violation—a powerful remedy to be sure, but not a *compensatory* one. The habeas writ is akin to an injunction; it cannot provide a retrospective compensatory remedy.

Engel v. Buchan, 710 F.3d 698, 706 (7th Cir. 2013) (italics in original). Similarly here, any reprieve provided by an immigration court via termination or suppression does not retrospectively compensate the plaintiff for deprivation of his constitutional right to be free from unlawful arrest.

* * * * * * * * * *

For these reasons, the INA is not an alternative remedial scheme that operates as an incentive to deter constitutional violations by federal immigration officers, and it does not compensate noncitizen victims of constitutional violations. Therefore, this Court should find that the INA does not provide an alternative remedial scheme sufficient to supplant a *Bivens* remedy.

2. There Are No Special Factors Counseling Hesitation In This Case.

The District Court implicitly determined that the second prerequisite for implying a *Bivens* remedy – that special factors do not counsel hesitation – also was satisfied in this case. *De la Paz*, 954 F. Supp. 2d at 541-42. Although special factors are not easily defined, they must be "substantial enough to justify the

absence of a damages remedy." *Arar*, 585 F.3d at 573; *see also Bennett v. Barnett*, 210 F.3d 272, 276 (5th Cir. 2000).

In *Zuspan v Brown*, this Court held that special factors counseled hesitation in recognizing a *Bivens* remedy in the context of a claim of an unconstitutional denial of a property interest in veterans' benefits. 60 F.3d 1156, 1161 (5th Cir. 1995) (citing *Sugrue v. Derwinski*, 26 F.3d 8, 12 (2d Cir. 1994)). This Court recognized the "elaborate remedial structure" created by Congress with respect to veterans' benefits; the comprehensive review of disputes over veterans' benefits; and the specific preclusion of judicial review over these benefit disputes, the combination of which indicated that "Congress' failure to create a remedy against individual VA employees was 'not an oversight.'" *Zuspan*, 60 F.3d at 1161. For these same reasons, the Second Circuit concluded in *Sugrue*, that "the scheme of review for veterans' benefit claims provides meaningful remedies in a multitiered and carefully crafted administrative process." *Sugrue*, 26 F.3d at 12 (describing the nonadversarial system of adjudicating benefits; the role that employees play in assisting claimants in the hearing; and claimants' right to the benefit of the doubt in proving benefit claims).

In short, in *Zuspan* and *Sugrue*, the alternate scheme addressed the very grievances that the plaintiffs would have raised in their *Bivens* actions – the claim of unlawful denial of veterans' benefits. In contrast the immigration removal

statute provides no remedy whatsoever for a noncitizen such as Plaintiff. The purpose of a removal proceedings is to enforce the immigration laws, not provide a benefit to a noncitizen. 8 U.S.C. § 1229a(a). "Charges" are leveled against the noncitizen. 8 U.S.C. §§ 1229(a)(1)(D) and 1229a(a)(2). The removal hearing – unlike the veterans' benefits hearing – is adversarial; a DHS attorney represents the government as a prosecutor. No benefit of the doubt is given the noncitizen; instead, the burden of proof is on the noncitizen to establish his or her right to be admitted to or remain in the United States. 8 U.S.C. § 1229a(c)(2).

In *Bennett v. Barnett*, 210 F.3d 272, 275-76 (5th Cir. 2000), this Court again relied upon a comprehensive scheme for adjudicating the plaintiff's grievance as a "special factor" weighing against recognition of a *Bivens* remedy. As in *Zuspan*, and unlike the present case, this scheme – collective bargaining and dispute resolution procedures for postal workers – allowed the plaintiff redress over the very claims that would have been at issue in the *Bivens* case. Importantly, a removal proceeding under the INA is not designed to address the Plaintiff's claims or to compensate him; therefore, the Court should find that the existence of such a proceeding is not a special factor.

a. Plaintiff Is Entitled to Protection of the Fourth Amendment.

Plaintiff's immigration status is not a special factor. As this Court recently reaffirmed, Plaintiff is entitled to constitutional protection irrespective of his

immigration status. "As a general matter [the Fourth Amendment] applies to aliens within U.S. territory." *Castro v. Cabrera*, 742 F.3d 595, 599-600 n.4 (5th Cir. 2014) (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) and *Martinez-Aguero*, 459 F.3d at 624-25); *see also Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (stating that the "Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.") (citations omitted). Although *Castro* held that Fourth Amendment protections did not extend to noncitizens at a port of entry, i.e., who were seeking or denied entry and who had not yet physically entered the United States, that is not Plaintiff's situation. Plaintiff already had physically entered the country and was living and working here.[10]

b. *Bivens* Actions Are Available In Fields Over Which Congress Has Plenary Power.

The plenary power that Congress exercises over immigration – that is, the "power of Congress over the admission of aliens and their right to remain," *Galvan v. Press*, 347 U.S. 522, 530 (1954) – is not implicated in a challenge that federal

[10] Under immigration regulations, Plaintiff is not subject to the "entry fiction" discussed in *Castro*, 742 F.3d at 599-600. *See* 8 C.F.R. § 1.1(q) (defining an "arriving alien" as an applicant for admission coming or attempting to come into the United States *at a port-of-entry*, or an alien seeking transit through the United States *at a port-of-entry*, or an alien *interdicted in international or United States waters* and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport.) (emphasis added).

employees conducted an illegal vehicle stop and arrest in violation of the Fourth Amendment. The fact that Congress has authority over immigration policy cannot mean that Congress condones federal officers violating constitutional rights during the execution of these policies. Taken to its logical conclusion, Defendants' position would mean that Congress' plenary power allows federal immigration officers to perpetrate flagrant and grave violations of constitutional rights with impunity. This is a position that the Supreme Court has repeatedly rejected.

As early as 1903, the Court admonished:

> [The Supreme Court] has never held …that administrative officers, when executing … a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution.

Yamataya v. Fisher, 189 U.S. 86, 100 (1903). Since then, the Court has reiterated this position frequently. *See*, *e.g.*, *Fiallo v. Bell*, 430 U.S. 787, 792 n.4 (1977) ("[i]n the enforcement of [immigration] policies, the Executive Branch … must respect the procedural safeguards of due process … [even if] the formulation of these policies is entrusted exclusively to Congress") (quotations omitted); *INS v. Chadha*, 462 U.S. 919, 941-942 (1983) (Congress must choose "a constitutionally permissible means of implementing" its plenary power).

More recently, the Sixth Circuit enforced exactly such a constitutional limitation on the implementation of immigration policies in a post-September 11 case involving removal cases which the Attorney General (AG) had designated of

"special interest" because of security concerns. *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002). A noncitizen whose case was so designated, along with others, challenged the AG's policy of closing hearings in these cases to the public. *Id*. at 683-84. The government argued that the plenary power doctrine "supersedes" any First Amendment right of access, a claim the court rejected. *Id*. at 686 n.7. The government also argued that this doctrine required judicial deference to all immigration policies, whether substantive or non-substantive. *Id*. at 686. The court demonstrated, through a detailed description of Supreme Court precedent, that it is only *substantive* immigration policies that are subject to the plenary power doctrine; non-substantive policies, such as the procedural policy before the court, were not entitled to deference. *Id.* at 688-94 (emphasis added).

Here, the complaint demonstrates that Defendants far exceeded the constitutional limits placed upon the government's plenary power. In light of the alleged abuse of authority, the plenary power doctrine is not relevant; it is not a "special factor" which should be considered.

Moreover, even were this not so, federal plenary power is not unique to the immigration context. In other contexts in which Congress exercises plenary power, courts have not hesitated to allow plaintiffs to proceed with a *Bivens* claim that, as here, does not implicate that power.

For example, although Congress possesses plenary power over Indian affairs, *see, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1988), the Court in *Wilkinson v. United States*, 440 F.3d 970 (8th Cir. 2006), permitted plaintiffs to pursue *Bivens* claims against a Bureau of Indian Affairs officer. Similarly, in a *Bivens* suit against patent officers, the court rejected the defendants' claim of immunity. *Goldstein v. Moatz*, 364 F.3d 205 (4th Cir. 2004). As in the immigration context, Congress has plenary power "to legislate upon the subject of patents." *McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843).

c. Defendants' Position Creates Virtually Blanket Immunity for Unconstitutional Conduct by Federal Immigration Officials.

Amici underscore the breadth of abusive conduct potentially immunized from *Bivens* remedies by Defendants' position. Defendants contend that *Bivens* is not available for Plaintiff where federal officials violated his Fourth Amendment right to be free from unlawful searches and seizures, a position predicated entirely on Plaintiff's status as a noncitizen. If this position is adopted by this Court, it would be next to impossible for victims of egregious wrongdoing to obtain any remedy for mistreatment by federal officials acting under color of the immigration laws.

Officials acting under color of immigration authority too often have detained and, in some cases, removed U.S. citizens[11] and illegally detained lawfully present noncitizens.[12] Additionally, noncitizens with various forms of immigration status have brought damage actions asserting claims of shocking abuse in immigration detention. *See, e.g.*, *Lynch v. Cannatella*, 810 F.2d 1363, 1367 (5th Cir. 1987) (alleging "severe mistreatment" of stowaways detained during attempted entry to U.S., including being "shackled and forced to perform labor," being "hosed down with a fire hose that slammed them against the iron walls of their cells," being "drugged," and beaten); *Martinez-Aguero*, 459 F.3d at 620-21 (Border Patrol agent not entitled to qualified immunity for kicking a woman in the back and pushing her against a concrete wall, triggering epileptic seizures); *Jama v. U.S. I.N.S.*, 334 F. Supp. 2d 662, 666 (D.N.J. 2004) (asylum seekers alleged they were "tortured, beaten, harassed" and "subjected to abysmal living conditions" in detention); *Diouf v. Chertoff*, No. 07-03977 (C.D. Cal. May 6, 2008) (damages action under *Bivens* and FTCA by noncitizens who were forcibly drugged with powerful anti-psychotic

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[11] *See, e.g.*, *Castillo v. Skwarski*, No. 08-5683, 2009 U.S. Dist. LEXIS 115169 (W.D. Wash. Dec. 10, 2009) (U.S. citizen veteran, detained for over seven months and ordered removed, settled *Bivens* suit); *Guzman v. United States*, No. CV 08-01327 GHK (C.D. Cal. May 11, 2010) (American citizen with mental disability who was detained and removed, settled damages suit).

[12] *See, e.g.*, *Riley v. United States*, No. 00-cv-06225 ILG/CLP (E.D.N.Y. filed Oct. 17, 2000) (*Bivens* and FTCA claims for unlawful detention, shackling and strip search of lawful permanent resident upon return to U.S., settled for monetary damages).

medications during attempts to remove them); *Doe v. Neveleff*, No. 11-cv-00907 (W.D. Tex. filed Oct. 19, 2011) (*Bivens* claim by three female asylum-seekers on behalf of a class, seeking redress for sexual assault while in ICE custody).

Bivens is a critical deterrent to such abuse. Without it, federal immigration officers will have license to violate constitutional rights with impunity, and victims of abuses will have no remedy. The Court should avoid this consequence by preserving its availability.

3. *Mirmehdi* Is Neither Binding Nor Applicable.

This Court should reject any reliance on *Mirmehdi v. United States*, 689 F.3d 975 (9th Cir. 2012). The Ninth Circuit declined to recognize a *Bivens* remedy against immigration officers for "illegal immigrants to recover for unlawful detention during deportation proceedings." *Id*. at 981. As the District Court correctly reasoned, *Mirmehdi* is not binding on this Court and is inapposite to the instant case. *De La Paz*, 954 F. Supp. 2d at 541-42.

In *Mirmehdi*, four brothers brought a damages action against immigration and FBI officers for, *inter alia*, both unlawful detention and inhumane detention conditions. *Mirmehdi*, 689 F.3d at 980. These claims stemmed from allegations that the officers unlawfully conspired to place them in and detain them during deportation proceedings. *Id*. at 979. The parties settled the detention conditions

claim. *Id*. at 980. This is significant because the detention conditions claim was one for which courts long have recognized a *Bivens* remedy.

The court went on to consider the availability of a *Bivens* remedy to challenge the legality of plaintiffs' detention during deportation proceedings and concluded that it arose in a "new context." *Mirmehdi*, 689 F.3d at 981. The factual and legal basis for Plaintiff's claims stands in stark contrast to those in *Mirmehdi*. Plaintiff does not challenge the legality of his detention during removal proceedings; rather, he claims that the stop and arrest that preceded his detention were unconstitutional in that they were racially motivated and lacked probable cause. Thus, because the Ninth Circuit considered a factually and legally different claim, its "new context" finding is not relevant to the analysis of Plaintiff's search and seizure claims.

Furthermore, *Mirmehdi's* analysis regarding whether to extend a *Bivens* remedy also is distinguishable. The court concluded that a *Bivens* remedy was not available because plaintiffs took advantage of two alternative remedial schemes to challenge the legality of their detention: in their removal hearing and through a habeas petition under 28 U.S.C. § 2241. *Mirmehdi*, 689 F.3d at 982. In contrast, Plaintiff here has no remedy as the removal proceeding is an enforcement proceeding and in no way remedial or compensatory. *See* § II.B.1., supra. Moreover, even were this not so, Plaintiff's removal case is administratively

closed, meaning it has been removed from the active docket of the immigration court for an indefinite period. *See* Plaintiff's April 23, 2014 Rule 28(j) Letter. *See Matter of Avetisyan*, 25 I&N Dec. 688, 696 (BIA 2012) (identifying factors an immigration judge considers in determining whether to administratively close a case). Furthermore, should U.S. Citizenship and Immigration Services grant Plaintiff's pending application for Deferred Action for Childhood Arrivals (DACA), *see* Plaintiff's April 23, 2014 Rule 28(j) Letter, the immigration court could terminate Plaintiff's removal proceedings altogether. *See* 8 C.F.R. § 1003.10(b) (requiring immigration judges to "exercise [their] independent judgment and discretion and [ ] take any action consistent with their authorities under the [INA] and regulations that is appropriate and necessary for the disposition of such cases."); *Matter of G-N-C*, 22 I&N Dec. 281, 284 (BIA 1988) (after evaluating factors underlying a motion to terminate, an immigration judge must provide an informed adjudication.).[13] Thus, given the current administrative closure of Plaintiff's removal proceeding and the prospect of future termination, Defendant's contention that a removal proceeding is a viable remedy for his constitutional injuries is particularly unfounded in this case.

[13] *See also* NIPNLG, Termination or Administrative Closure of Removal Proceedings Based on Prima Facie Eligibility for DACA and Sample Motion, available at http://nationalimmigrationproject.org/publications.htm.

Finally, *Mirmehdi* is critically flawed. Insofar as the court attempts to justify its holding by asserting that the opinion is limited to *Bivens* actions by "illegal immigrants" arising in the deportation context, *see id*. at 1079 n.3, 1082 (Silverman, J., concurring), that limitation is untenable because federal immigration law contains no such category; rather, the INA's entry, admission, and removal scheme creates various categories of individuals whose status cannot be so easily described.

For example, officials have authority to permit inadmissible noncitizens to come into the United States, *see* 8 C.F.R. § 212.5; to allow those who are removable to remain here, *see* 8 U.S.C. §§ 1227(a)(1)(E)(iii), (a)(1)(H), (a)(7); and to grant various forms of relief to removable non-citizens, some of which are mandatory. *See*, *e.g*., 8 U.S.C. §§ 1229b(b)(2) (cancellation for certain battered spouses and children); 1231(b)(3) (mandatory prohibition against removal of individuals subject to persecution). Even those ordered removed by an immigration judge may be permitted to remain and work here. *See* 8 C.F.R. § 274a.12(a)(11-13), (c)(8)-(11), (14), (18)-(20), (22), (24) (listing categories of individuals who can receive permission to work in the U.S. even after removal order).

In short, for all of these reasons, *Mirmehdi* is not relevant here.

III. CONCLUSION

For the foregoing reasons, amici urge the Court to affirm the District Court's decision recognizing a *Bivens* remedy in this case.

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Dated: April 30, 2014

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of Amici Curiae with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on April 30, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFCATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that this brief complies with page and type-volume limitations because this brief contains 6,986 words and is 31 pages in length, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with typeface and type style requirements because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 Times New Roman.

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