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

BRIEF FOR THE APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Daniel Frias v. Arturo Torrez, No. 14-10018

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

The appellant is a U.S. Customs and Border Protection agent who has been sued in his individual capacity and potentially is personally liable for the damages sought by the plaintiff-appellee. We request oral argument to help the Court explore the significant issues in this case.

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STATEMENT OF JURISDICTION

The plaintiff in this Bivens[1] and Federal Tort Claims Act action asserted jurisdiction in district court for the Bivens claims pursuant to 28 U.S.C. 1331. On October 31, 2013, the district court entered an order that, among other things, denied summary judgment based on qualified immunity to an agent of the U.S. Customs and Border Protection. The district court's order is immediately appealable under 28 U.S.C. 1291 as a collateral order, see Mitchell v. Forsyth, 472 U.S. 511 (1985), to review the purely legal issues raised in this appeal. Behrens v. Pelletier, 516 U.S. 299, 313 (1996) ("summary judgment determinations are appealable when they resolve a dispute concerning an 'abstract issu[e] of law' relating to qualified immunity – typically, the issue whether the federal right allegedly infringed was 'clearly established'") (citation omitted); id. at 312-13 ("Denial of summary judgment often includes a determination that there are controverted issues of material fact, see Fed. Rule Civ. Proc. 56, and Johnson [v. Jones, 515 U.S. 304 (1995),] surely does not mean that every such denial of summary judgment is nonappealable."); Good v. Curtis, 601 F.3d 393, 397 (5th Cir.), cert. denied, 131 S. Ct. 206 (2010). When an order denying qualified immunity is appealed, the court of appeals also has jurisdiction over the issue of

[1] See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

whether the district court properly "devise[d] a new Bivens damages action." Wilkie v. Robbins, 551 U.S. 537, 549 & n.4 (2007).

The notice of appeal, filed on December 30, 2013, is timely under 28 U.S.C. 2107(b) and Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

This action arises out of a traffic stop conducted by Border Patrol Agent Arturo Torrez of the truck in which the plaintiff, Daniel Frias, was riding. Agent Torrez stopped the truck, because it appeared to him that there were undocumented aliens lying down on the truck's backseat. When Agent Torrez questioned Frias about his citizenship, Frias admitted that he was not "legal." Frias was arrested and subsequently placed in removal proceedings. Frias contends that the immigration stop and arrest violated his Fourth Amendment rights. The other occupant of the vehicle is not a plaintiff in this case.

This appeal presents the following issues:

1. Whether the procedures available for challenging constitutional violations in the removal process under the Immigration and Nationality Act constitute "special factors" counseling against the creation of a Bivens remedy in connection with (a) an allegedly unreasonable immigration stop of the vehicle in which Frias was traveling and (b) Frias's arrest.

2. Whether Agent Torrez was entitled to qualified immunity, because,

assuming the undisputed facts and Frias's version of the disputed facts, Frias has not shown that Agent Torrez lacked "arguable probable cause" for the arrest based on Frias's admission that he was not "legal."

STATEMENT OF THE CASE

A. Background.

The plaintiff, Daniel Frias, brought this Bivens action against Border Patrol Agent Arturo Torrez, alleging that Agent Torrez violated his Fourth Amendment rights by pulling over the vehicle in which Frias was riding, without reasonable suspicion. Frias claims that Agent Torrez stopped the truck principally because he believed the driver was Hispanic. According to Frias's version of the facts, while the truck was stopped, Agent Torrez asked him whether he was "legal," and Frias responded that he was not. On the basis of this admission, Agent Torrez arrested Frias so that he would be detained pending a decision whether to remove him under the immigration laws. Frias was subsequently placed in removal proceedings, which eventually were terminated.

The district court denied Agent Torrez's motion to dismiss Frias's amended complaint and reserved a ruling on qualified immunity until summary judgment. Following discovery, the district court denied Agent Torrez's motion for summary judgment based on qualified immunity, finding that genuine issues of material fact regarding the initial stop precluded summary judgment regarding either the stop or

the arrest, and that, in light of the factual disputes, Torrez was not entitled to qualified immunity regarding the arrest.

Agent Torrez now takes this interlocutory appeal.

B. Facts.

The following discussion sets forth the undisputed facts, along with Frias's version of any disputed facts. See Pasco v. Knoblauch, 566 F.3d 572, 576 (5th Cir. 2009) ("If the district court found that genuine factual disputes exist, we must accept the plaintiff's version of the facts as true to the extent supported by the summary judgment record.").

Frias alleges that, on April 28, 2010, he was driving a flat-bed four-door Dodge truck on Interstate Highway 20 (I-20), just outside Abilene, Texas, with his white colleague George Taylor as a passenger. ROA.231-33 (Compl. ¶¶ 17, 26, 34).[2] The truck had a company logo on its side, and the model was common in the area. ROA.231-32 (Compl. ¶¶ 18, 19). The windows into the vehicle were not tinted and visibility into the cab was clear. ROA.232 (Compl. ¶¶ 24-25). As the vehicle traveled west on I-20 during daylight hours, ROA.232 (Compl. ¶ 26), Agent Torrez was on duty in his CBP vehicle, driving on the eastbound side of I-20. ROA.1103 (Op. at 3).

[2] Unless otherwise specified, references to the complaint are to the Second Amended Complaint, filed after the district court largely denied the motion to dismiss the First Amended Complaint.

When he was about fifty yards away, Agent Torrez saw the truck in which Frias was riding and observed what he believed to be bodies lying in the backseat. ROA.1103 (Op. at 3). This belief was based on Agent Torrez's 28 years of experience as a Border Patrol agent, during which he often saw illegal aliens lying down in vehicles attempting to hide. ROA.333 (Mtn. for Summ. Judg. at 2). At his deposition, he testified that the bags in the back seat "looked like bodies based on prior experience[,] what I've seen before." ROA.390 (Torrez Dep. at 126). In order to investigate further, he turned around onto the westbound side of I-20, and ran a "1028," or vehicle information check, see ROA.621 (Torrez Dep. at 21), to determine the origin of the plaintiff's truck. ROA.1103 (Op. at 3). Agent Torrez pulled up next to the truck, again observing what he believed were bodies in the back seat. Id.; ROA.377 (Torrez Dep. at 92).[3]

Frias contends that Agent Torrez stopped the truck "principally upon his perception that the Truck had a Hispanic driver." ROA.234 (Compl. ¶ 42). According to Agent Torrez, however, the "1028" revealed that the truck was from out of the area, and Agent Torrez turned on his emergency lights and pulled the truck over. ROA.1103 (Op. at 3). The truck stopped at the side of the road, and Agent Torrez approached the vehicle from the passenger side. Id. The parties

[3] Frias contends that the back seat was empty, ROA.826 (Frias Decl. ¶¶ 16-18), although Taylor has confirmed that there were bags on the back seat. ROA.358-59 (Taylor Decl. ¶ 5).

dispute what happened after the truck stopped, but this is Frias's version: Frias claims that he was driving, ROA.231 (Compl. ¶ 17), not Taylor,[4] and that Agent Torrez asked Frias, in Spanish, for identification. ROA.239 (Compl. ¶ 62). Frias claims that he gave Agent Torrez a valid New Mexico driver's license, and that after reviewing it, Agent Torrez placed Frias in handcuffs. ROA.239 (Compl. ¶¶ 63-67).[5] Agent Torrez asked whether Frias had any other form of identification, and Frias said no. ROA.241 (Compl. ¶¶ 78-79). After asking Taylor for identification (but, according to Frias, not examining it), Agent Torrez told Frias that he would spend years in jail if he lied to him, and he asked Frias whether he was "legal." ROA.241 (Compl. ¶¶ 84-85). "Mr. Frias responded no." ROA.241 (Compl. ¶ 86). On the basis of this admission, Torrez arrested Frias, and Frias was subsequently placed in removal proceedings, which were eventually terminated. ROA.255 (Compl. ¶ 110).

C. Proceedings Below.

1. Frias brought this action against Agent Torrez under Bivens, alleging

[4] Agent Torrez testified that Taylor was driving, with Frias in the passenger seat. ROA.374-75 (Torrez Dep. at 89-90).

[5] Agent Torrez testified that he handcuffed Frias only after questioning him about his immigration status. ROA.706 (Torrez Dep. at 106). This dispute is immaterial; as the district court held in denying the motion to dismiss, the act of handcuffing Frias was not unreasonable, even if Frias is right that it happened before he was questioned about his immigration status. ROA.217 (Order at 12).

that the initial stop and subsequent arrest violated his Fourth Amendment rights, and against the United States under the Federal Tort Claims Act (FTCA), alleging false imprisonment and assault. Frias also sought relief under the Declaratory Judgment Act and the Administrative Procedure Act (APA).

Agent Torrez and the United States moved to dismiss the First Amended Complaint, and the district court granted the motion in part. It dismissed, with prejudice, the declaratory claims against the United States for lack of jurisdiction, noting that there was no agency action, let alone final agency action, supporting a waiver of sovereign immunity under the APA. ROA.220-21 (Order at 15-16). And the court granted the motion to dismiss, without prejudice, the FTCA claims for assault and false imprisonment, holding, among other things, that the use of handcuffs by Agent Torrez was reasonable. ROA.210-14 (Order at 15-19). But it also held that it had jurisdiction despite the jurisdictional bar of 8 U.S.C. 1252(a)(2)(B)(ii), which divests the courts of jurisdiction over certain discretionary actions of the Attorney General. ROA.210-12 (Order at 5-7). And, relying heavily on a district court decision from Connecticut, the court concluded that special factors did not warrant foreclosing Frias from bringing a Bivens action. ROA.212-14 (Order at 7-9) (citing Diaz-Bernal v. Myers, 758 F. Supp.2d 106 (D. Conn. 2010)). The court declined to rule on Agent Torrez's assertion of qualified immunity, noting that he was asserting immunity only as to the arrest claim and

would not be able to avoid discovery even if qualified immunity were granted. The court also decided that, because some of the allegations of the complaint were unclear, qualified immunity would be more appropriately decided on summary judgment. ROA.214-15 (Order at 9-10).

Frias then filed his Second Amended Complaint, and the parties engaged in some discovery. At the close of discovery, Agent Torrez and the United States moved for summary judgment.

2. In the order now under appeal, the district court granted the motion in part and denied it in part.

The court found that disputes of material fact precluded a grant of summary judgment on the Bivens claim. First, with respect to the stop, the court considered the question whether there were bags in the back seat of the truck (appearing to be people hiding) to be crucial and disputed. Agent Torrez testified that he saw something in the back seat that turned out to be bags, while Frias contended that there were no bags in the back seat and that he had cleaned the truck that morning. ROA.1113 (Op. at 13). While there were other factors relevant to reasonable suspicion, the court held that, without the bags in the back seat, there was nothing about the truck that gave reasonable suspicion for a stop. ROA.1114 (Op. at 14). And without the bags, the lack of reasonable suspicion, according to the court, was clearly established. ROA.1116-18 (Op. at 16-18).

Second, the court held that the lawfulness of the arrest had to be evaluated in light of the lawfulness of the stop. ROA.1120 (Op. at 20). But the court determined that there were disputed material facts regarding both the reason for the stop and the way in which the arrest occurred. Given the dispute over the reason for the stop, the court could not say whether Agent Torrez had a lawful purpose in interrogating Frias. ROA.1121 (Op. at 21). The court also could not determine whether "events that occurred during the stop were a continuation of the seizure or gave rise to a crime unrelated to the stop itself." Id. If Agent Torrez detained Frias after it became clear that the bags in the back seat were not people who were hiding, then the detention exceeded the justification for the stop, but if "an unrelated crime" was committed during the stop, this could have justified the prolonged detention. ROA.1121-22 (Op. at 21-22). The trouble, according to the court, was that the facts were in dispute. The court held that if Frias lied to Agent Torrez before admitting he was an alien, that lie would justify an arrest, but if Frias simply admitted he was an alien, that was merely an inculpatory statement that was not separate from the purpose of the stop. ROA.1122 (Op. at 22). Given the fact disputes, the court could not say whether the arrest was tainted by the allegedly unlawful stop. ROA.1123 (Op. at 23).

The court also denied summary judgment on the FTCA claims, ROA.1126-28 (Op. at 26-28), but it granted summary judgment on the remaining APA and

declaratory judgment claims against Agent Torrez, noting that there was no agency action and therefore no jurisdiction. ROA.1123-25 (Op. at 23-25).

SUMMARY OF ARGUMENT

In this Bivens action against a Border Patrol agent, Arturo Torrez, Frias alleges that Agent Torrez lacked reasonable suspicion to conduct an immigration stop of the truck in which he was riding. Frias alleges that Agent Torrez lacked reasonable suspicion for the immigration stop and, consequently, lacked probable cause for his ensuing arrest. Frias was placed in removal proceedings, but those proceedings have been terminated.

The district court's denial of qualified immunity at the summary-judgment stage should be reversed for two fundamental reasons:

I. Contrary to the district court's conclusion, Frias has no Bivens remedy at all. As the Ninth Circuit held in Mirmehdi v. United States, 689 F.3d 975 (9th Cir. 2012), cert. denied, 133 S. Ct. 2336 (2013), a Bivens remedy should not be created to allow an alien to bring a damages claim against federal agents connected with his removal proceedings. The Supreme Court has repeatedly turned down attempts to extend Bivens into new contexts, and the Ninth Circuit correctly held that removal proceedings are such a new context. Congress created a comprehensive and intricate remedial scheme in the Immigration and Nationality Act, and the Supreme Court has held that the existence of such a remedial system is a reason for

declining to extend the Bivens remedy. Given Congress's repeated attention to remedies under the INA, its failure to provide damages there could not have been inadvertent. In addition, immigration issues have a tendency to affect broader concerns, like diplomacy, foreign policy, and national security. These concerns are another reason counseling hesitation in extending Bivens.

II. Even if Bivens may be extended to claims like the one brought by Frias, Agent Torrez is entitled to qualified immunity on the arrest claim.

In order to defeat qualified immunity on the arrest claim at the summary-judgment stage, Frias must show that Agent Torrez lacked arguable probable cause – a reasonable (if mistaken) belief that probable cause supported the arrest. Agent Torrez had probable cause for the arrest based on Frias's admission that he was not "legal." Frias's position is that once we accept (as we do, solely for purposes of this appeal) that the initial stop was not supported by reasonable suspicion, it necessarily follows that the arrest was without probable cause. But the district court, properly, rejected that view, holding that "[a]n individual is not immune from arrest or prosecution just because the police effectuate an otherwise valid arrest in an illegal manner." ROA.1119 (Op. at 19).

The district court, however, did not address whether there was arguable probable cause for the arrest. In fact, it did not even resolve whether there was actual probable cause, because the court instead analyzed case law involving the

application of the exclusionary rule in the criminal context, which it believed was "instructive." ROA.1120 (Op. at 20). But the analogy is inapt, because the exclusionary rule does not apply in civil immigration cases, and the case law on the exclusionary rule cannot be retrofitted into the analysis of arguable probable cause.

The undisputed fact is that when Agent Torrez asked Frias whether he was "legal," Frias said no. Reasonable officers in the position of Agent Torrez could have believed that Frias's admission that he was not "legal" provided probable cause for his arrest, regardless of the validity of the initial stop. The district court therefore erred in denying Agent Torrez qualified immunity on the arrest claim.

STANDARD OF REVIEW

This Court "review[s] the district court's denial of summary judgment predicated on qualified immunity de novo." Pasco v. Knoblauch, 566 F.3d 572, 575 (5th Cir. 2009) (citing Haggerty v. Texas Southern Univ., 391 F.3d 653, 655 (5th Cir. 2004)). In that review, "to the extent that the district court found that genuine factual disputes exist," this Court "accept[s] the plaintiff's version of the facts (to the extent reflected by proper summary judgment evidence) as true." Haggerty, 391 F.3d at 655.

ARGUMENT

I. THE COMPREHENSIVE REMEDIAL SCHEME UNDER THE IMMIGRATION LAWS PRECLUDES EXTENDING A BIVENS REMEDY TO AN ACTION BROUGHT BY AN ALIEN IN REMOVAL PROCEEDINGS.

The district court denied qualified immunity, but an issue that precedes the determination of qualified immunity is whether Frias may pursue a Bivens remedy in this case at all. See Wilkie v. Robbins, 551 U.S. 537, 549 n.4 (2007). The district court erred in allowing him to do so.

A. The Supreme Court Has Never Extended The Bivens Remedy Since 1980.

Although the Supreme Court in Bivens at first accepted that a damages remedy could be inferred directly under the Constitution, in its two subsequent decisions, Davis v. Passman, 442 U.S. 228 (1979), and Carlson v. Green, 446 U.S. 14 (1980), the Court reached the end of the road. During the 34 years since it decided Carlson, the Supreme Court has "responded cautiously to suggestions that Bivens remedies be extended into new contexts." Schweiker v. Chilicky, 487 U.S. 412, 421 (1988). So cautious has the Court been that it has in fact never extended Bivens since 1980. See Minneci v. Pollard, 132 S. Ct. 617, 622-23 (2012) (citing cases); Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001) ("Since Carlson we have consistently refused to extend Bivens liability to any new context or new category of defendants."); Arar v. Ashcroft, 585 F.3d 559, 571 (2d Cir.

2009) (en banc), cert. denied, 560 U.S. 978 (2010). As the Court has made clear, a Bivens action is "not an automatic entitlement no matter what other means there may be to vindicate a protected interest," and "in most instances we have found a Bivens remedy unjustified." Wilkie, 551 U.S. at 550; see Western Radio Servs. Co. v. U.S. Forest Service, 578 F.3d 1116, 1119 (9th Cir. 2009), cert. denied, 559 U.S. 1106 (2010) (Court has "focused increased scrutiny on whether Congress intended the courts to devise a new Bivens remedy, and in every decision since Carlson, across a variety of factual and legal contexts, the answer has been 'no.'"); Nebraska Beef, Ltd. v. Greening, 398 F.3d 1080, 1084 (8th Cir. 2005), cert. denied, 547 U.S. 1110 (2006) ("There is a presumption against judicial recognition of direct actions for violations of the Constitution by federal officials or employees * * *.") (citation and internal quotation marks omitted).

In Malesko, the Supreme Court observed that Bivens "rel[ied] largely on earlier decisions implying private damages actions into federal statutes" – decisions from which the Court has since "retreated" – that reflect an understanding of private rights of action that the Court has "abandoned." 534 U.S. at 67 & n.3. See also Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009) (Bivens liability has not been extended to new contexts, "[b]ecause implied causes of action are disfavored"); Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004) ("a decision to create a private right of action is one better left to legislative judgment in the great majority of

cases"); Robinson v. Sherrod, 631 F.3d 839, 842 (7th Cir.), cert. denied, 132 S. Ct. 397 (2011) ("Bivens is under a cloud, because it is based on a concept of federal common law no longer in favor in the courts").

In addition, the Supreme Court has altered the standard to make it more difficult for a court to find reasons to create a Bivens remedy. Initially, courts were to infer a Bivens remedy unless there were "special factors" counseling hesitation or there was another remedy that Congress explicitly considered a substitute for Bivens. See Carlson, 446 U.S. at 18-19. Over the years, however, the Court has expanded the concept of "special factors" and has accepted alternative remedies as adequate, whether or not they were explicitly declared to be adequate and whether or not a particular plaintiff even had a statutory remedy. See Chilicky, 487 U.S. at 423; Bush v. Lucas, 462 U.S. 367, 388 (1983). Under Bush and Chilicky, "it is the comprehensiveness of the [alternative] statutory scheme involved, not the 'adequacy' of specific remedies extended thereunder, that counsels judicial abstention." Spagnola v. Mathis, 859 F.2d 223, 227 (D.C. Cir. 1988) (en banc); see Bennett v. Barnett, 210 F.3d 272, 276 (5th Cir.), cert. denied, 531 U.S. 875 (2000) (Postal Reorganization Act is a comprehensive remedial scheme, which "(via the plaintiffs' collective bargaining agreements) pre-empts Bivens claims like those asserted in this case"). The Court has explained that "special factors" counsel hesitation when Congress's failure to provide a damages

remedy has not been "inadvertent." Chilicky, 487 U.S. at 423; see Zuspann v. Brown, 60 F.3d 1156, 1161 (5th Cir. 1995), cert. denied, 516 U.S. 1111 (1996) ("not an oversight") (internal quotation marks omitted).

In Wilkie, the Supreme Court not only reinforced the limits it had established in Bush, Chilicky, and similar decisions, but also directed courts that do not find that an alternative statutory remedy is a "special factor" counseling against creation of a Bivens remedy to undertake an additional analysis before agreeing to create such a remedy: "weighing reasons for and against the creation of a new cause of action, the way common law judges have always done." 551 U.S. at 554; see Minneci, 132 S. Ct. at 621.

Wilkie did not even require that the alternative remedy be a remedy at all; it could also be a "process." 551 U.S. at 550. In referring to an "alternative, existing process for protecting the interest," id. (emphasis added), Wilkie echoed earlier language in Chilicky, which spoke of "meaningful safeguards or remedies for the rights of persons." 487 U.S. at 425 (emphasis added). A "process" or "safeguard," thus, need not be a court remedy. See, e.g., Judicial Watch, Inc. v. Rossotti, 317 F.3d 401, 410-11 (4th Cir.), cert. denied, 540 U.S. 825 (2003) ("With respect to alleged misconduct by individual IRS employees, Congress has also provided for a variety of 'safeguards and remedies.' Specifically, Congress created the Treasury Inspector General for Tax Administration, an entity separate and distinct from the

IRS, with responsibility for investigating allegations of misconduct by IRS employees.") (citation omitted); Bagola v. Kindt, 131 F.3d 632, 643 (7th Cir. 1997) (noting that in Bush v. Lucas, "procedural safeguards" under the Civil Service Reform Act included "the power to hold a 'trial-type hearing' and to secure the attendance and testimony of agency officials").

The Supreme Court has never extended Bivens to Fourth Amendment seizure claims in the immigration context.[6] And twice in the past five years, the Court has gone out of its way to raise doubts about the existence of a Bivens remedy in cases in which the parties had not even suggested that one was unavailable. See Reichle v. Howards, 132 S. Ct. 2088, 2093 n.4 (2012) ("We have never held that Bivens extends to First Amendment claims. * * * We need not (and do not) decide here whether Bivens extends to First Amendment retaliatory arrest claims."); Iqbal, 556 U.S. at 675 ("Petitioners do not press this argument, however, so we assume, without deciding, that respondent's First Amendment claim is actionable under Bivens.").

It is not surprising, then, that commentators have suggested that the Supreme

[6] Although this is a Fourth Amendment claim, like the claim in Bivens, it does not follow ineluctably that a remedy exists here. The Supreme Court has limited the Bivens remedy by context and has not authorized it on an amendment-by-amendment basis. Compare Davis v. Passman, 442 U.S. 228 (1979) (allowing a Bivens remedy in a Fifth Amendment due-process case), with Schweiker v. Chilicky, 487 U.S. 412 (1988) (declining to allow a Bivens remedy in a Fifth Amendment due-process case).

Court has altered the "core holding" of Bivens. 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). As Professor Tribe has put it, "the best that can be said of the Bivens doctrine [after Wilkie] is that it is on life support with little prospect of recovery." Id. at 26. See Michael P. Robotti, Separation of Powers and the Exercise of Concurrent Constitutional Authority in the Bivens Context, 8 Conn. Pub. Int. L.J. 171, 183 (Spring/Summer 2009) ("The sheer breadth of these exceptions [as applied in Wilkie] indicates that Bivens has lost all force; a Bivens remedy is no longer a viable means to remedy a constitutional violation. Under the current formulation of the Bivens exceptions, there are almost no circumstances in which a Bivens remedy must be recognized.").

B. The Ninth Circuit's Decision In Mirmehdi Holding That The Comprehensive Remedial Scheme Under The INA Precludes Creation Of A Bivens Damages Remedy Is Persuasive And Should Be Followed.

Applying the principles set forth in the previous section, the Ninth Circuit in Mirmehdi v. United States, 689 F.3d 975 (9th Cir. 2012), cert. denied, 133 S. Ct. 2336 (2013), held that aliens who had been detained during removal proceedings could not pursue a Bivens remedy against the federal officers who had been involved in their detention. That decision is correct, and its reasoning should be followed in this case.

1. Mirmehdi was an immigration case. The plaintiffs were four Iranian

brothers who applied for political asylum in 1998. The following year, the government commenced removal proceedings against them after their former immigration attorney was charged with immigration fraud and began to cooperate with a federal investigation. Eventually, the plaintiffs were granted withholding of removal, because of a likelihood of mistreatment if removed to Iran, and because the government failed to show that they were involved in terrorist activity.

The Mirmehdi plaintiffs then filed suit against various defendants, and included a Bivens action against two federal agents, one with the FBI and one the INS, who had investigated them in connection with the MEK, an Iranian group that was at the time designated as a foreign terrorist organization, and one of whom had testified at a bond revocation hearing. The district court dismissed most of the claims, and the remainder were settled. The Ninth Circuit affirmed, but on an entirely different theory.

Agreeing with the Second Circuit, the Ninth Circuit held that "'Congress has established a substantial, comprehensive, and intricate remedial scheme in the context of immigration.'" 689 F.3d at 982 (quoting Arar, 585 F.3d at 572). Under Supreme Court precedent, "[t]he complexity and comprehensiveness of the existing remedial system is another factor among a broad range of concerns counseling

hesitation before allowing a Bivens remedy." Id.[7] Although Congress did not provide any damages remedy in the INA, "Congress's failure to include monetary relief can hardly be said to be inadvertent," in light of the "multiple changes to the structure of appellate review in the Immigration and Nationality Act." Id. Another concern for the court was that "immigration issues 'have the natural tendency to affect diplomacy, foreign policy, and the security of the nation,' which further 'counsels hesitation' in extending Bivens." Id. (quoting Arar, 585 F.3d at 574).

2. The decision in Mirmehdi is correct. The INA is a comprehensive statutory scheme, and "[c]ongressional attention" to the INA has been "frequent and intense." Chilicky, 487 U.S. at 425. See Mirmehdi, 689 F.3d at 982 ("despite multiple changes to the structure of appellate review in the Immigration and Nationality Act, Congress never created [a damages] remedy"). The INA deals with the highly complex subject of immigration, and Congress – in both the Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 – carefully recast and streamlined the INA's provisions, including those relating to remedies. Congress's deci-

[7] The Ninth Circuit observed that "[i]t is well established that immigrants' remedies for vindicating the rights which they possess under the Constitution are not coextensive with those offered to citizens." Mirmehdi, 689 F.3d at 981 (citing Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 488 (1999) ("As a general matter * * * an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation.")).

sion not to provide damages in the INA certainly has not been inadvertent.

Instead of damages, the INA offers quasi-judicial hearings and appeals, as well as judicial review, of many significant government decisions. For example, aliens like the plaintiff who are detained by immigration authorities pursuant to 8 U.S.C. 1226(a) are entitled to adversarial bond hearings, 8 C.F.R. 236.1(d), with the right to appeal to the BIA, 8 C.F.R. 1003.38. If bond is revoked, 8 U.S.C. 1226(b), the alien is entitled to an adversarial revocation hearing, with similar appeal rights. If action is taken to remove the alien, he is entitled to an adversarial, trial-type hearing on that, too. 8 U.S.C. 1229a(b); cf. Altamirano-Lopez v. Gonzales, 435 F.3d 547, 550 (5th Cir. 2006) (alien not entitled to those rights at hearing on motion to reopen). During such a hearing, the alien is entitled to examine and attempt to discredit the evidence relied on by the government, to cross-examine government witnesses, and to present his own evidence and witnesses. 8 U.S.C. 1229a(b)(4); 8 C.F.R. 1003, Subpart C.

Moreover, while the exclusionary rule generally does not apply in removal proceedings, see INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) ("we are persuaded that the * * * balance between costs and benefits comes out against applying the exclusionary rule in civil deportation hearings held by the INS"), an alien who believes that he was stopped without reasonable suspicion in violation of the Fourth Amendment may move during the removal process to suppress the

evidence obtained during the stop. See, e.g., Matter of Toro, 17 I. & N. Dec. 340, 1980 WL 121885 (BIA 1980). In removal proceedings, the question is not whether the evidence was obtained in violation of the Constitution, as it is when there is an exclusionary rule; the question, instead, is whether the alien has been denied fundamental fairness:

> To be admissible in deportation proceedings, evidence must be probative and its use fundamentally fair so as to not deprive respondents of due process of law as mandated by the fifth amendment. We have concluded that evidence resulting from a search and seizure in violation of fourth amendment rights is not for that reason alone excludable from civil deportation proceedings. See Matter of Sandoval, Interim Decision 2725 (BIA 1979). Every fourth amendment violation will not of necessity result in a finding that the admission of resulting evidence is fundamentally unfair. The circumstances surrounding an arrest and interrogation, however, may in some cases render evidence inadmissible under the due process clause of the fifth amendment.

Matter of Toro, 17 I. & N. Dec. at 343 (citations omitted); see Lopez-Mendoza, 468 U.S. at 1050-51 & n.5 (citing Matter of Toro and noting that "the BIA held that evidence will be excluded if the circumstances surrounding a particular arrest and interrogation would render use of the evidence obtained thereby 'fundamentally unfair'"; and in holding that the exclusionary rule generally does not apply in civil deportation proceedings, Court stated that "we do not deal here with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained")

(emphasis added); Bustos-Torres v. INS, 898 F.2d 1053, 1055 (5th Cir. 1990) ("The test for admissibility of evidence in a deportation proceeding is whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law.").

Judicial review of removal orders is also available. 8 U.S.C. 1252. In addition, aliens who are detained are entitled to file a petition for habeas corpus to challenge their detention. These procedures provide another "means to be heard," Wilkie, 551 U.S. at 552, and they counsel hesitation in judicial creation of a Bivens damage remedy to supplement them. See Arar, 585 F.3d at 574 ("Hesitation is a pause, not a full stop, or an abstention; and to counsel is not to require. 'Hesitation' is 'counseled' whenever thoughtful discretion would pause even to consider.").

C. The District Court's Decision To Allow A Bivens Remedy To Proceed Was In Error.

The district court held, in denying Agent Torrez's earlier motion to dismiss,[8] that special factors did not counsel against the creation of a Bivens remedy in this case. The court primarily relied on a case from the District of Connecticut, Diaz-

[8] Special Agent Torrez raised this argument in his motion to dismiss but, after it was rejected by the district court, did not raise it again in his motion for summary judgment, given the law-of-the-case concerns. Agent Torrez did not file an interlocutory appeal of the order denying his motion to dismiss, and this appeal is our first opportunity to present the issue to this Court. Because the issue is "'directly implicated'" by the invocation of qualified immunity here, this Court has jurisdiction to consider it. Wilkie v. Robbins, 551 U.S. at 549 n.4 (quoting Hartman v. Moore, 547 U.S. 250, 257 n.5 (2006)).

Bernal v. Myers, 758 F. Supp.2d 106 (D. Conn. 2010). Reliance on that decision was mistaken.

In the district court's assessment, the rationale of Diaz-Bernal was that the INA "'does not govern the specific claims at issue (that is, constitutional violations that preceded removal proceedings)'" and that, absent a Bivens remedy, "'the present plaintiffs would have no forum in which to seek a remedy for the defendants' alleged constitutional violations.'" ROA.213 (Order at 8) (quoting Diaz-Bernal, 758 F. Supp. 2d at 128-29). Contrary to the district court, however, this rationale creates a false division between the initial stop and arrest on the one hand and the removal proceedings on the other. Frequently, it is the stop and arrest together that are the first step for removal of an alien who is not lawfully present in the United States. Undocumented aliens rarely walk into an immigration office and ask to be deported. The stop and arrest are an integral part of the process. See Reno v. Flores, 507 U.S. 292, 307 (1993) ("the deportation process ordinarily begins with a warrantless arrest"); 8 U.S.C. 1357(a)(1) & (2); 8 C.F.R. 287.8(c)(2). The removal proceedings under the INA are precisely the way an alien challenges the initiation of proceedings against him. 8 C.F.R. 287.3(b).

It is undoubtedly true that the removal proceedings do not provide a forum for the alien to seek damages for alleged constitutional violations during the stop and arrest, but that is not the key legal question when analyzing whether a Bivens

remedy may be created. Under Bush and Chilicky, "it is the comprehensiveness of the [alternative] statutory scheme involved, not the 'adequacy' of specific remedies extended thereunder, that counsels judicial abstention." Spagnola v. Mathis, 859 F.2d at 227. 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. A Bivens remedy need not be created simply because the alternative remedy does not offer compensation, as Frias argued below. ROA.172 (Pl. Resp. to Motion to Dism. at 19) ("there is no actual compensatory remedy" in removal proceedings). 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." Chilicky, 487 U.S. at 421-22.

The Ninth Circuit's decision in Mirmehdi holds that a Bivens remedy should not be extended to the "immigration context." Mirmehdi, 689 F.3d at 983; see id. at 981 ("Deportation proceedings are such a context, unique from other situations

where an unlawful detention may arise."). Although this Court and other circuits have not yet decided whether or not to follow Mirmehdi, several district courts have followed its holding,[9] and two more have specifically declined to create a Bivens remedy for the alien to challenge alleged Fourth Amendment violations in the initial arrest. See Kareva v. United States, No. 1:12cv267, 2013 WL 97966 (S.D. Ohio Jan. 8, 2013) (arrest without probable cause); Dukureh v. Hullett, No. C11-1866, 2012 WL 3154966, at *5 (W.D. Wash. Aug. 2, 2012) ("Dukureh claims Fourth Amendment violations by federal agents during an initial arrest").[10]

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[9] Turner v. United States, 2013 WL 5877358 (S.D. Tex. Oct. 31, 2013) (deportation of teenager who repeatedly lied about identity to officials); Manunga v. Costa Mesa Police Dept., 2013 WL 3989577 (C.D. Cal. Aug. 1, 2013) (wrongful pre-removal detention); Yongping Zhou v. Holder, 2013 WL 3923446 (C.D. Cal. July 26, 2013) (wrongful detention); D'Alessandro v. Chertoff, 2011 WL 6148756 (W.D.N.Y. Dec. 12, 2011) (detention without periodic custodial reviews), appeal pending, No. 12-576 (2d Cir.).

[10] The district court's reliance on Martinez-Aguero v. Gonzalez, 459 F.3d 618 (5th Cir.), cert. denied, 549 U.S. 1096 (2006), ROA.213 (Order at 8), where this Court considered a qualified-immunity appeal in a Bivens case against an immigration agent, is misplaced. The question posed here – whether a Bivens remedy is available at all in the immigration context – was completely absent from that case. The Court simply assumed a Bivens remedy existed; it never discussed alternative remedies or any of the post-Bivens cases that addressed whether a Bivens remedy is available, and in fact the decision was issued before the Supreme Court had even decided Wilkie v. Robbins or Minneci v. Pollard, its two most recent ventures in this area. In addition, the agent who filed the appeal in Martinez-Aguero did not argue in his brief that a Bivens remedy was unavailable in a case challenging immigration matters in light of the INA; his argument was that the Fourth Amendment did not apply at all, because aliens not admitted to the United States have no constitutional rights.

In this case, Frias was placed in removal proceedings but was ultimately released when those proceedings were terminated. That termination itself vindicates Frias's challenge to his initial stop and arrest. See Wilkie, 551 U.S. at 551-52 (Robbins "exercised his right to jury trial on the criminal complaints" against him and achieved "rapid acquittal"; this constituted a "procedure to defend and make good on his position" and did not justify creation of a Bivens remedy based on the charges).

For these reasons, the district court erred in holding that Frias was entitled to pursue a Bivens remedy here.

II. ALTERNATIVELY, AGENT TORREZ IS ENTITLED TO QUALIFIED IMMUNITY ON THE ARREST CLAIM, BECAUSE FRIAS HAS FAILED TO ESTABLISH THAT AGENT TORREZ LACKED ARGUABLE PROBABLE CAUSE TO ARREST HIM.

Even if a Bivens remedy were available to an alien who is arrested and placed in removal proceedings following a roadside stop, the district court erred in denying qualified immunity to Agent Torrez on the arrest claim.[11] A plaintiff claiming false arrest "must clear a significant hurdle to defeat qualified immunity. '[T]here must not even "arguably" be probable cause for the search and arrest for

[11] We do not raise qualified immunity with respect to the stop claim; we assume, solely for purposes of this appeal, that Agent Torrez lacked reasonable suspicion for the stop. (Our argument in Point I, however, respecting the availability of a Bivens remedy, applies to both the stop and the arrest. If there is no Bivens remedy, both claims here must be dismissed.)

immunity to be lost.'" Brown v. Lyford, 243 F.3d 185, 190 (5th Cir.), cert. denied, 534 U.S. 817 (2001) (citation omitted). In other words, if reasonable officers could have believed there was probable cause, even if the court later finds that probable cause was absent, the defendants are entitled to qualified immunity.

Thus, to defeat qualified immunity, Frias must show that, on his version of the facts, Agent Torrez did not have arguable probable cause to arrest him based on Frias's undisputed statement that he was not "legal." He has not done so, and the district court's reliance on the "fruit of the poisonous tree" doctrine is mistaken; that doctrine has no relevance in the removal context.

A. Even Crediting Frias's Version Of The Facts, Agent Torrez Is Entitled To Qualified Immunity, Because He Had Arguable Probable Cause For The Arrest.

In light of Frias's admission that he was not "legal," Agent Torrez had at least arguable probable cause to arrest him.

1. When a plaintiff claims that he was arrested in violation of the Fourth Amendment, and the defendant moves for summary judgment based on qualified immunity, the plaintiff must adduce evidence showing the absence of probable cause. See Devenpeck v. Alford, 543 U.S. 146, 152 (2004) ("a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed"); Lacey v. Maricopa County, 693 F.3d 896, 918 (9th Cir. 2012) (en banc) ("To

maintain an action for false arrest against Wilenchik, Lacey must plead facts that would show Wilenchik ordered or otherwise procured the arrests and the arrests were without probable cause."); McCabe v. Parker, 608 F.3d 1068, 1075 (8th Cir. 2010) ("Lack of probable cause is a necessary element of all the claims [the plaintiffs] brought arising from the allegedly unlawful arrests."); Price v. Roark, 256 F.3d 364, 369 (5th Cir. 2001) (quoting Wells v. Bonner, 45 F.3d 90, 95 (5th Cir. 1995)) ("we have found that '[i]f there was probable cause for any of the charges made * * * then the arrest was supported by probable cause, and the claim for false arrest fails'").[12]

Probable cause is a "practical and common-sensical standard" that is based on a "totality of the circumstances." Florida v. Harris, 133 S. Ct. 1050, 1055 (2013). "A police officer has probable cause to conduct a search when 'the facts available to [him] would "warrant a [person] of reasonable caution in the belief"' that contraband or evidence of a crime is present." Id. (quoting Texas v. Brown, 460 U.S. 730, 742 (1983) (plurality opinion)). "The probable cause requirement does not demand any showing that such a belief is correct or more likely true than false." United States v. Pack, 612 F.3d 341, 352 n.7 (5th Cir.) (citation and inter-

[12] Cf. Hartman v. Moore, 547 U.S. at 265-66 ("Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's [malicious prosecution] case, and we hold that it must be pleaded and proven.").

nal quotation marks omitted), modified, 622 F.3d 383 (5th Cir.), cert. denied, 131 S. Ct. 620 (2010); see United States v. Watson, 273 F.3d 599, 602-03 (5th Cir. 2001) ("The arresting officer need only know with 'fair probability' that the defendant committed the felony, which requires more than a 'bare suspicion' but less than a preponderance of evidence.") (quoting United States v. Garcia, 179 F.3d 265, 269 (5th Cir. 1999), cert. denied, 530 U.S. 1222 (2000)).

Indeed, when a defendant raises qualified immunity as a defense, the question becomes whether the plaintiff has demonstrated the absence of "arguable (that is, reasonable but mistaken) probable cause for the arrests." Club Retro, L.L.C. v. Hilton, 568 F.3d 181, 207 (5th Cir. 2009). As this Court has stressed:

> When an individual asserts a claim for wrongful arrest, qualified immunity will shield the defendant officers from suit if "'a reasonable officer could have believed [the arrest at issue] to be lawful, in light of clearly established law and the information the [arresting] officers possessed.' Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity."

Mendenhall v. Riser, 213 F.3d 226, 230 (5th Cir. 2000), cert. denied, 531 U.S. 1071 (2001) (bracketed words in original) (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam)). See Cortez v. McCauley, 478 F.3d 1108, 1120 (10th Cir. 2007) (en banc) ("law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity").

2. An arrest in this context, of course, is not an arrest for a crime; it is a

means of detaining the alien pending a decision whether to remove him under the immigration laws. Removal is a civil matter. Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) ("Removal is a civil, not criminal, matter."); Lopez-Mendoza, 468 U.S. at 1038 ("deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry"); United States v. Lopez-Ortiz, 313 F.3d 225, 230 (5th Cir. 2002), cert. denied, 537 U.S. 1135 (2003) ("Removal hearings are civil proceedings, not criminal * * *."). To demonstrate that Agent Torrez lacked arguable probable cause to arrest him in order to detain him pending possible removal, Frias would have to show that he was lawfully present in the United States. See 8 U.S.C. 1229a(c)(2)(B) (alien has the burden of proving, "by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission."); Lopez-Mendoza, 468 U.S. at 1039 ("In many deportation cases the INS must show only identity and alienage; the burden then shifts to the respondent to prove the time, place, and manner of his entry"). Not only did Frias not make such a showing but he actually told Agent Torrez that he was not "legal." ROA.214 (Compl. ¶¶ 85-86).

An alien who admits to a Border Patrol agent that he is not "legal" cannot possibly show that the agent lacked probable cause (let alone arguable probable cause) to arrest him. See Lopez-Mendoza, 468 U.S. at 1045 (describing regulations requiring that "no one be arrested unless there is an admission of illegal

alienage or other strong evidence thereof").[13] That is exactly where we are in this case, and as we will now show, the district court's theory for denying qualified immunity on the arrest claim addresses the wrong legal question.

B. The District Court Erred In Focusing On Exclusionary Rule Principles, Instead Of Arguable Probable Cause.

In analyzing whether there was probable cause for the arrest, the district court did not actually focus on the question of probable cause, despite the fact that Frias's admission made the answer to that question obvious. Instead, the court analyzed the completely different question whether evidence obtained after an unlawful stop would be excluded in a subsequent criminal trial. That is the wrong question here. There is no exclusionary rule in removal cases, other than for "egregious" Fourth Amendment violations.

1. The district court mentioned the issue of probable cause in its decision, but it did so primarily by discussing the parties' conflicting arguments: "The parties disagree whether Torrez had probable cause to arrest Frias and, more importantly, whether and to what extent the alleged illegality of the initial stop affects the Court's analysis of the subsequent arrest." ROA.1119 (Op. at 19). The court explained that Agent Torrez was arguing that probable cause was satisfied by

[13] This assumes, of course, that the agent does not possess additional information that contradicts the alien's admission. Frias makes no claim there is such contrary information here.

Frias's admission that he was not "legal," while Frias was arguing that "the legality of the arrest is tied to the legality of the stop, and, because the stop violated his constitutional right, so too did the later arrest." Id. Frias was also arguing that, once Agent Torrez realized there were no people being smuggled in the rear of the truck, he had no basis on which to continue to detain Frias and the eliciting of the admission was illegal. Id.

While the court held, contrary to Frias's position, that "[a]n individual is not immune from arrest or prosecution just because the police effectuate an otherwise valid arrest in an illegal manner," ROA.1119 (Op. at 19) (citing United States v. Hudson, 405 F.3d 425, 440 (6th Cir. 2005)), the court then shifted its focus away from probable cause for the arrest and toward the exclusionary rule in a subsequent prosecution. The reason for this shift, the court explained, was that, in its view, the case law on exclusion of evidence in criminal proceedings was "instructive" on the issue of whether the arrest of Frias was lawful after an unlawful stop. ROA.1120 (Op. at 20).[14]

[14] Oddly, the district court justified its shift to this different legal issue by invoking qualified immunity. The court maintained that the "driving concern" of qualified immunity, like that of the Fourth Amendment, was to hold officials accountable, and that, given "these complementary interests," it "seems appropriate to consider the legality of the arrest in light of the lawfulness of the preceding stop." ROA.1120 (Op. at 20). But contrary to the district court, the "driving concern" of qualified immunity is not to hold officers accountable; it is to protect them from the burdens of litigation, as Pearson v. Callahan, 555 U.S. 223 (2009), (….footnote continued)

2. The district court's focus on the law of exclusion of evidence in this immigration case is wrong. The exclusionary rule does not apply in an immigration case, and in any event, the case law on the exclusionary rule has no relevance to whether an arrest was supported by arguable probable cause.

In Wong Sun v. United States, 371 U.S. 471 (1963), the Supreme Court held that certain evidence was "fruit of the poisonous tree" and had to be excluded as evidence in a criminal trial, because "it would not have come to light but for the illegal actions of the police." Id. at 488. Here, however, Frias was not prosecuted; he was placed in civil removal proceedings, where the doctrine of "fruit of the poisonous tree" and the exclusionary rule do not apply. See Lopez-Mendoza, 468 U.S. at 1050 ("we are persuaded that the * * * balance between costs and benefits comes out against applying the exclusionary rule in civil deportation hearings held by the INS"); Ali v. Gonzales, 440 F.3d 678, 681 (5th Cir. 2006) (per curiam) ("the exclusionary rule does not ordinarily apply to removal proceedings").

More important, the "fruit of the poisonous tree" doctrine and the exclusionary rule do not apply in a civil damages action like this one. "In the complex and

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the very case the court cited, states: "we have made clear that the 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that '"insubstantial claims"' against government officials [will] be resolved prior to discovery.'" Id. at 231 (quoting Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987)). The need for accountability on the part of public officials is the reason that the immunity is qualified and not absolute, but it is hardly the "driving concern" of qualified immunity.

turbulent history of the rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state." United States v. Janis, 428 U.S. 433, 447 (1976); 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.'") (quoting Townes v. City of New York, 176 F.3d 138, 145 (2d Cir.), cert. denied, 528 U.S. 964 (1999)); Wren v. Towe, 130 F.3d 1154, 1158 (5th Cir. 1997) (per curiam), cert. denied, 525 U.S. 815 (1998) ("Supreme Court has never applied the exclusionary rule to civil cases, state or federal"). This is especially true when the evidence to be introduced in removal proceedings is the alien's identity and immigration status. See United States v. Roque-Villanueva, 175 F.3d 345, 346 (5th Cir. 1999) ("Even if the Defendant was illegally stopped, neither his identity nor his INS file [is] suppressible.").

For these same reasons, the district court erred in relying on exclusionary-rule cases holding that evidence must be excluded when the "taint" of the original Fourth Amendment violation has not been sufficiently "purged." ROA.1120-22 (Op. at 20-22). The court never explained why this case law is in any way relevant to the immigration removal process, where the exclusionary rule does not apply. The principal case to which the district court turned for "guidance," ROA.1120

(Op. at 20), was Brown v. Illinois, 422 U.S. 590 (1975), a murder case. In Brown, the petitioner's arrest was indisputably without probable cause, 422 U.S. at 605 ("impropriety of the arrest was obvious" and detectives essentially conceded as much), and the question in Brown was whether a confession that followed Miranda warnings should have been excluded at the criminal trial, despite the warnings, because the "causal chain" between the confession and the unlawful arrest had not been broken. Brown, 422 U.S. at 602. Brown provides no "guidance" about the issue in this case – whether an arrest is based on probable cause if predicated on an admission following an unlawful stop. It deals entirely with exclusion of evidence.

Nevertheless, working backward from exclusion principles – which, again, have no relevance to immigration removal proceedings (absent an "egregious" Fourth Amendment violation) – the district court set up a distinction between crimes that were related to the stop and crimes that were separate from the reasons for the stop. In the court's view, if Agent Torrez's version of facts is correct, and Frias lied to him, that could support an arrest for lying to a federal agent, but if Frias's version of facts is correct, all he did was admit that he was not "legal," and the arrest based on that admission was not separate from the reasons for the stop. ROA.1122 (Op. at 22). The district court's distinction is creative – and it might be persuasive in a case in which the person was arrested for a crime and subsequently prosecuted – but, as we have noted, the arrest here was not for a crime; it was for

unlawful presence in the United States, which renders a person subject to removal under the immigration laws, a civil process, and not to criminal prosecution. Arizona v. United States, 132 S. Ct. at 2499; see also 8 U.S.C. 1226(a) ("On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."). The statement that Frias made, admitting that he was not "legal," provided Agent Torrez with probable cause to arrest for that purpose. At the very least, there was arguable probable cause, in that reasonable officers in Agent Torrez's position could have believed that there is probable cause to arrest an alien who admits that he is not "legal," Club Retro, L.L.C., 568 F.3d at 207, even if a court later holds that the initial stop was not based on reasonable suspicion.

Exclusionary-rule principles in criminal cases have little application to civil actions seeking damages for false arrest under the Fourth Amendment. In a criminal case, evidence might be excluded because a search accompanying the arrest was unreasonable or because a post-arrest interrogation was not preceded by Miranda warnings. But the fact that evidence is ultimately excluded does not necessarily mean that there was not probable cause for the original arrest. Indeed, if evidence is excluded in a criminal case because it was obtained in violation of the Fourth Amendment, the government may still proceed with the prosecution, and it is often possible to convict without the tainted evidence. In contrast, a civil

damages action claiming false arrest does not look at whether the evidence obtained might be excluded at a criminal trial; the question is simply whether there was probable cause for the arrest.

Because, in this case, the district court's decision ultimately does not even resolve the issue of probable cause – let alone arguable probable cause – it offers no valid rationale for its ruling. By relying on exclusionary-rule principles that have no application to removal proceedings, all it does is to force Agent Torrez to stand trial in this case and face personal liability in damages. In short, it was not clearly established that Border Patrol agents who determine that probable cause supports arresting an alien may be held liable for doing so if their earlier stop later turns out not to have been supported by reasonable suspicion. Agent Torrez is entitled to qualified immunity on the arrest claim.

CONCLUSION

For the foregoing reasons, 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,[15]

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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 9,659 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 April 24, 2014, I served the foregoing Brief for the Appellant by filing the brief through the ECF system, with which all counsel are registered.

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