No. 14-10018

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DANIEL FRIAS,

Plaintiff-Appellee,

v.

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

Defendant-Appellant.

ON REVIEW FROM A DECISION OF THE
U.S. DISTRICT COURT FOR THE NORTHERN 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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Dated: July 10, 2014

I, Trina Realmuto, attorney for *Amicus Curiae*, the National Immigration Project of the National Lawyers Guild, 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.

Daniel Frias, Plaintiff-Appellee
Arturo Torrez, Defendant-Appellant
David Antón Armendáriz, Counsel for Plaintiff-Appellee
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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, a law enforcement arm of U.S. Customs and Border Protection (CBP), a component of the Department of Homeland Security (DHS). *See Frias v. Torrez*, No. 3:12-cv-1296-B, 2013 U.S. Dist. LEXIS 15864 (N.D. Tex. Feb. 6, 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); *see also Hernandez v. United States of America*, Nos. 11-50792, 12-50217, 12-50301, __

[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.

F.3d __, 2014 U.S. App. LEXIS 12307, *59 (5th Cir. June 30, 2014) (citations omitted) (same). Both are critical factors here.

Moreover, this Court and other courts have allowed *Bivens* claims to proceed in cases such as this, which involve noncitizens whose constitutional rights were violated by immigration agents. *See, e.g.*, *Hernandez, supra*; *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 Defendant's contention that *Bivens* is not available to noncitizens who may or – as the plaintiffs here and in *Hernandez* demonstrate – 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).

As explained in *Hernandez*, this Court previously has recognized a *Bivens* remedy in the context presented here: a Border Patrol agent who allegedly violated the Fourth Amendment when arresting a noncitizen within the United States. 2014 U.S. App. LEXIS 12307 at *56-57 (citing *Martinez-Aguero*, 459 F.3d at 625); *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). In fact, 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) ("[B]y the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies.'").

Finally, the *Hernandez* Court also declined to follow *Mirmehdi v. United States*, 689 F.3d 975 (9th Cir. 2012), relied upon by Defendant. *Hernandez* explained in depth why the Ninth Circuit's "special factors" analysis was in error. Even if this were not the case, however, *Mirmehdi* 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 prevented from pursuing remedial suits in response to unconstitutional action by federal officers.

II. ARGUMENT

The Supreme Court's decision in *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) governs 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 where "'similar legal and factual components'" exist, the context is not "new" and a *Bivens* remedy is available. *Hernandez*, 2014 U.S. App. LEXIS 12307 at *56 (quoting *Arar*, 585 F.3d at 572).

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; *see also Hernandez*, *supra*, at *57-58.

Here, the District Court correctly determined that Plaintiff's claims under the Fourth Amendment do not arise in a "new context." *Frias*, 2013 U.S. Dist. LEXIS 15864 at *11-12. Although pre-dating *Hernandez*, the District Court's decision is

in accord with this Court's rationale and conclusions. 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 Defendant's violations of Plaintiff's rights.[2] The Court should affirm.

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). Similarly, in *Hernandez*, this Court identified the context at issue as that of an alleged violation of the Fifth Amendment rights of a Mexican national outside the United States who was killed by a Border Patrol agent who

[2] The District Court also correctly held that the INA does not deprive it of jurisdiction. *Frias*, 2013 U.S. Dist. LEXIS 15864 at *7-10. Because Defendant 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.

fired at least two gun shots from within the country.[3] 2014 U.S. App. LEXIS 12307 at *56. After reviewing the facts of Supreme Court cases analyzing *Bivens* claims under the Fifth Amendment, the Court determined that the context was new because it was factually dissimilar from those cases. *Id*. at 56.

In doing so, however, *Hernandez* specifically recognized this court's prior precedent which "permitted a non-citizen to bring a *Bivens* action against Border Patrol agents for false arrest and excessive use of force under the Fourth Amendment for events occurring at the border." *Id*. at *57-8 (citing *Martinez-Aguero*, 459 F.3d at 625).

Unlike a claim for damages for either an allegedly unlawful extraordinary rendition or Fifth Amendment challenge to a cross-border shooting, courts regularly recognize personal damage liability of federal employees in the context presented here: that is, both for Fourth Amendment violations and for 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.

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[3] The Court determined that the deceased did not have sufficient ties to the United States to support a Fourth Amendment claim, and instead evaluated the case under the "conscience-shocking" standard of the Fifth Amendment. *Hernandez*, 2014 U.S. App. LEXIS 12307 at *28-43.

For example, 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 the Fourth Amendment 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 have repeatedly accepted and adjudicated *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); *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 fact, this Court found that immigration enforcement "involve[s] questions of precisely *Bivens*-like domestic law enforcement and nothing more." *Hernandez*, 2014 U.S. App. LEXIS 12307 at *69. In so concluding, the Court rejected the Ninth Circuit's implication to the contrary. *Id*. (citing *Mirmehdi*, 689 F.3d at 983 (citations omitted)). This Court explained further that accepting *Mirmehdi*'s conclusions "would require [the Fifth Circuit] to abandon [its] prior case law, in which [it] ha[s] permitted Bivens actions to proceed against immigration officers." *Id*. at *60-70 (citing *Martinez-Aguero*, *supra*, and *Lynch v. Cannatella*, 810 F.2d 1363, 1367 (5th Cir. 1987)). The Court concluded that there was no reason to give immigration officers "special solicitude now." *Id*. at *70.

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 similar unconstitutional stops, searches and arrests against a vulnerable population in the future. *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 Defendant.

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); *Hernandez*, 2014 U.S. App. LEXIS 12307 at *67-8 n.12 ("Our circuit has previously recognized that an alien may be entitled to a damages remedy against federal officers."); *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).

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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 a federal immigration official 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) ("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.[4] *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992)

[4] 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 19-24, which held that the availability of a remedy under

(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 generally 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*, nothing in the INA's admission and removal scheme would act as an incentive to deter future misconduct by Border Patrol 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 contrast, whether an arrested noncitizen ultimately is removed does not personally impact the arresting Border Patrol agent. In fact, in the vast majority of cases, the

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the FTCA does not preclude a *Bivens* action for the same injury. *Accord Hernandez*, 2014 U.S. App. LEXIS 12307 at *59 n. 11 (citing Congressional intent as evident in Westfall Act of 1988 and cases interpreting it).

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."[5] 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.[6] Still another agency, the Executive Office for Immigration Review (EOIR) within the Department of Justice, houses the immigration judges and the BIA, which are responsible for adjudicating removal proceedings and administrative appeals.[7]

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

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

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

discretion while the case is ongoing.[8] Here, the ICE attorney moved to dismiss proceedings as not being in the best interests of DHS, and the immigration judge granted this motion. *See* Appendix Exhibits A and B. Consequently, Plaintiff is not facing removal and thus, even if the INA did provide a "remedy," it would not be available to him. *Accord Hernandez*, 2014 U.S. App. LEXIS 12307 at *61 (finding the immigration system "not relevant" because deceased would not have been subject to it had he lived). In other cases, an ICE attorney may exercise prosecutorial discretion and move to administratively close a removal proceeding, thus essentially staying the action indefinitely.

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.

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[8] *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.

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 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,[9] 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).

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

[9] *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").

a remedial scheme for violations committed by immigration officials outside of removal proceedings"). As noted, CBP officers are not subject to EOIR's jurisdiction and, consequently, immigration courts and the BIA have no adjudicatory, injunctive or even advisory authority over CBP officers.

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,[10] does not compensate victims in a "roughly similar" manner, *Minneci*, 132 S. Ct. at 625, to a damage award. In 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.

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[10] *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 "[t]his Court has never found a violation sufficiently severe, and therefore egregious, to require suppression in a removal hearing.").

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 determined that the second prerequisite for implying a *Bivens* remedy – that special factors do not counsel hesitation – also was satisfied in this case. *Frias*, 2013 U.S. Dist. LEXIS 15864 at *12-14. This Court's decision in *Hernandez* confirms the correctness of the District Court's holding.

In *Hernandez*, this Court reviewed the "handful" of judicially recognized classes of "special factors," namely cases involving military defendants and cases arising from government actions in its "War on Terror." *Hernandez*, 2014 U.S. App. LEXIS 12307 at *64 (discussing cases). Without hesitation, the Court found that the case did not implicate any of these special factors. *Id*. at *65. The Court reasoned that, first, defendant, a Border Patrol agent, "did not act in a military setting" and, second, that "his actions did not implicate national security." *Id*. Similarly here, Defendant Torrez, also a Border Patrol agent, was not acting in a military setting or in any kind of national security situation when, without probable cause, he stopped Mr. Frias while he was driving on a highway and arrested him.

The *Hernandez* Court also rejected the notion of "immigration-related cases" as a special factor counseling hesitation for two main reasons. First, relying on its discussion of the alternative remedies factor, the court concluded that the case "does not present an 'immigration' context." *Id*. at *65. Similarly, here, for the reasons set forth in § II.B.1., *supra*, the INA does not provide an alternative remedial scheme sufficient to protect Plaintiff's interest and deter future constitutional violations and, thus, Plaintiff's case also does not present an "immigration" context.

Second, the *Hernandez* Court held that, even if immigration were a "new" context, the Fifth Circuit would not follow the Ninth Circuit's decision in *Mirmehdi*, in which the court declined to recognize a *Bivens* remedy against immigration officers for unlawful detention during deportation proceedings. *Hernandez*, 2014 U.S. App. LEXIS 12307 at *65. Relying on *Arar v. Ashcroft*, *supra*, an extraordinary rendition case, the *Mirmehdi* Court cited as special factors diplomacy, foreign policy, and national security concerns. *Mirmehdi*, 689 F.3d at 982-83 (citing *Arar*, 585 F.3d at 574). The *Hernandez* Court criticized the Ninth Circuit's reliance on these factors as overly broad. The Court explained that the Second Circuit, in its decision in *Arar*, expressly recognized ("with more than a dash of understatement") that the case was "not a typical immigration case;" in fact, so much so that it could not rely on the availability of the INA "for any of its

holdings." *Hernandez*, 2014 U.S. App. LEXIS 12307 at *66 (citing *Arar*, 585 F.3d at 571, 573, 574).

Next, the *Hernandez* Court held that immigration policy concerns alone do not provide "cause to hesitate, let alone halt, in granting a *Bivens* remedy." *Hernandez*, 2014 U.S. App. LEXIS 12307 at *66. Finding that the Supreme Court's decision in *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) recognized a Congressional interest in protecting noncitizens from mistreatment, the *Hernandez* Court stated:

> This strong national commitment to aliens' rights not only militates in favor of a uniform, federal policy, as the Court concluded in *Arizona v. United States*; it also militates in favor of the availability of some federal remedy for mistreatment at the hands of those who enforce our immigration laws. Where those who allege mistreatment have a right but lack a remedy, as here, the Supreme Court suggests that Congress would want some remedy to be available.

2014 U.S. App. LEXIS 12307 at *67.

Similarly here, Plaintiff has a Fourth Amendment right to be free from an unlawful search and seizure.[11] Both the Supreme Court's decision in *Arizona* and

[11] "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). In *Castro*, this Court held that Fourth Amendment protections did not extend to noncitizens at a port of entry, i.e., those who were seeking or denied entry and who had not yet physically entered the

Congress' inclusion of damages language in 8 U.S.C. § 1387(g)(7) and (g)(8) (*see* § II.B.1.a., *supra*) compel the conclusion that "Congress would want some remedy to be available." *Id*. That Congress has authority over immigration policy simply cannot mean that Congress condones federal officers violating constitutional rights during the execution of these policies.[12] 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.[13]

United States. That is not Plaintiff's situation, however. Plaintiff already had physically entered the country and was living and working here. *Hernandez*, 2014 U.S. App. LEXIS 12307 at *29-36 (discussing Fourth Amendment's invocation where a plaintiff has sufficient, voluntary connections with the United States).

[12] *Accord Yamataya v. Fisher*, 189 U.S. 86, 100 (1903) ("[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."); *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); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 688-94 (6th Cir. 2002) (holding that only substantive immigration policies are subject to the plenary power doctrine).

[13] 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

Finally, contrary to the conclusion in *Mirmehdi* (689 F.3d at 983), the *Hernandez* Court held that "foreign policy objectives" and "foreign intelligence products" have no significance in situations involving immigration officers acting in a normal domestic-law enforcement capacity. *Hernandez*, 2014 U.S. App. LEXIS 12307 at *69. "[T]o accept the [*Mirmehdi* Court's] conclusion" about a heightened foreign policy interest, the Court said, "would require [it] to abandoning [] prior case law" recognizing *Bivens* remedies against immigration officers. Id. at *69-70 (citing *Martinez-Aguero*, 459 F.3d at 621-25 and *Lynch*, 810 F.2d at 1374).

The Court further noted that the claim presented in *Hernandez* was "not unlike" the claim presented in *Bivens*; they both involved the unreasonable use of force by federal agents for which legal standards are "well established and easily administrable." *Id*. at *71 (citations omitted). Plaintiff's claim, like the claim presented in *Bivens*, also involved a stop and arrest in violation of the Fourth Amendment, for which the legal standards are "well established and easily administrable." *Id.*[14]

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immigration context, Congress has plenary power "to legislate upon the subject of patents." *McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843).

[14] Although this Court need not go beyond the *Hernandez* Court's rationale to find that *Mirmehdi* is not relevant here, the decision is inapplicable for at least three additional reasons. First, the factual and legal basis for Plaintiff's claims stands in stark contrast to those in *Mirmehdi*, where four brothers brought a damages action against immigration and FBI officers for, *inter alia*, both unlawful

3. Defendant's Position Conflicts With the Rationale in *Hernandez* and Would Create Virtually Blanket Immunity for Unconstitutional Conduct by Federal Immigration Officials.

Defendant's position – that *Bivens* is not available to Plaintiff where federal officials violated his Fourth Amendment right to be free from unlawful searches and seizures – is predicated entirely on Plaintiff's status as a noncitizen. This Court has rejected the notion of treating immigration status as a basis to preclude a *Bivens* remedy. *Hernandez*, 2014 U.S. App. LEXIS 12307 at *67 n.12. Moreover, any other conclusion would make it virtually impossible for victims of egregious wrongdoing to obtain any remedy for mistreatment by federal officials acting under color of the immigration laws.

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detention and inhumane detention conditions. *Mirmehdi*, 689 F.3d at 980. Here, 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.

Second, in *Mirmehdi*, 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. Here, there are no removal proceedings; DHS filed a motion to dismiss because "continued removal proceedings [were] not in the best interests of the Department" and the Immigration Judge granted the motion, thereby terminating the proceedings. *See* Appendix Exhibits A and B.

Finally, insofar as the court in *Mirmehdi* 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 981 n.3, 986 (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.

In *Hernandez*, the Court held that "alienage does not amount to a special factor." 2014 U.S. App. LEXIS 12307 at *67 n.12. The Court reasoned that it already determined that noncitizens have Fifth Amendment substantive due process rights and, therefore, to consider noncitizen status again "would be to double count our reasons for not providing a substantive right." *Id.* Likewise, it is well established that noncitizens inside the United States have Fourth Amendment rights (*see* n.11, *supra*), and, therefore, it would be improper to "double count" Plaintiff's immigration status. *Id.*

Furthermore, officials acting under color of immigration authority too often have detained and, in some cases, removed U.S. citizens[15] and illegally detained lawfully present noncitizens.[16] Additionally, noncitizens with various forms of immigration status have brought damage actions asserting claims of shocking abuse in immigration detention. *See, e.g., Lynch, supra,* at 1367 (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

[15] *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).

[16] *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).

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 by noncitizens who were forcibly drugged with powerful anti-psychotic medications during attempts to remove them); *Doe v. Neveleff*, No. 11-cv-00907 (W.D. Tex., filed Oct. 19, 2011) (class action seeking redress for sexual assault of female asylum-seekers 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.

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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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 July 10, 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 6,983 words and is 30 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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