CASE NO. 13-50768

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ALEJANDRO GARCIA DE LA PAZ

Plaintiff-Appellee,

v.

JASON COY, United States Customs and Border Protection Officer;
MARIO VEGA, United States Customs and Border Protection Officer,

Defendants-Appellants

BRIEF FOR PLAINTIFF-APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

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:

Alejandro Garcia de la Paz, Plaintiff-Appellee
Jason Coy, Defendant-Appellant
Mario Vega, Defendant-Appellant
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/s David Antón Armendáriz
David Antón Armendáriz

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellee does not request oral argument but his counsel is available if needed.

/s David Antón Armendáriz
David Antón Armendáriz

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Pg

Statutes:

Regulations:

Rules:

Miscellaneous:

STATEMENT OF JURISDICTION

This appeal concerns Plaintiff's civil rights action for constitutional claims under the Fourth Amendment against Defendants Jason Coy and Mario Vega of the United States Customs and Border Protection agency ("CBP") in their individual capacity, brought pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. § 388 (1971). Jurisdiction in the district court is pursuant to 28 U.S.C. § 1331. The district court entered an order, dated June 21, 2013, that, among other things, denied qualified immunity to Defendants Coy and Vega. That order is appealable under 28 U.S.C. § 1291 as a collateral order. Mitchell v. Forsyth, 472 U.S. 511, 528 n.9 (1985). When an order denying qualified immunity is appealed, the court of appeals also has jurisdiction over the issue whether the district court properly recognized the Bivens action. Wilkie v. Robbins, 551 U.S. 537, 549 & n. 4 (2007).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal presents the following issues:

1. Whether, with regards to the imposition of individual Bivens liability, the unconstitutional conduct of a federal agent purporting to perform immigration enforcement related duties during a stop and arrest should be free from judicial scrutiny solely because of the existence of the Immigration and Nationality Act, regardless of the nature of that conduct, whether it occurred pre- or post-arrest, and whether it was in fact related to actual border enforcement; and

2. Whether, with regards to Mr. Garcia's Bivens claims for an illegal arrest without probable cause, the district court properly denied qualified immunity where the Defendants' illegal arrest of Mr. Garcia took place entirely within, and was a direct product of, an on-going illegal seizure.

STATEMENT OF THE CASE

A. The Procedural Background.

Mr. Garcia brought suit against Mr. Coy and Mr. Vega ("Defendants") individually for violations of the Fourth Amendment pursuant to the decision in Bivens, 403 U.S. at 388. ROA. 1. In sum, Mr. Garcia alleged that was a passenger in a truck when Customs and Border Patrol ["CBP"] Defendants Coy and Vega pulled him and his companions off the freeway far from any border because he is Hispanic, and for no other lawful reason, in order to interrogate him as to his immigration status - an act of blatant racial profiling that has been self-evidently illegal for decades. Then, before having reasonable suspicion or probable cause that Mr. Garcia was violating any law over which they had jurisdiction and without any inquiry into whether Mr. Garcia would flee, Defendants Coy and Vega, working together, made a warrantless arrest of Mr. Garcia. ROA. 9 - 27 (Compl. ¶¶ 1 - 87). Nowhere in his Complaint does Mr. Garcia complain being put in removal proceedings or about any detention or other Fourth Amendment type claims related in any way to the initiation or execution of removal proceedings.

Defendants Coy and Vega, in lieu of answering, initially moved to dismiss the Bivens claims under Rules 12(b)(6) and 56(a), see ROA. 53, arguing that they are entitled to qualified immunity because they did not violate Mr. Garcia's Fourth Amendment rights and because their actions were objectively reasonable. See ROA. 55 – 66. Subsequently, counsel for Mr. Coy and Mr. Vega filed additional briefing in which they argued, in reliance upon Mirmehdi v. United States, 689 F.3d. 975 (9th Cir. 2012), that Mr. Garcia has no Bivens remedy at all because immigration law provides an alternative administrative remedy to vindicate his interests. See ROA. 409 – 466. The district court declined to address summary judgment in advance of any discovery, see ROA. 451 – 452, and rejected each of Defendant Coy's and Vega's arguments on qualified immunity and subject matter jurisdiction. See ROA. 430 – 450. Defendants appealed that denial prior to answering Mr. Garcia's complaint. No discovery has been taken and the district court proceeding has been stayed. ROA. 480.

B. The factual allegations.

All factual allegations relevant to this appeal are derived from Mr. Garcia's Complaint. Mr. Garcia is Hispanic. ROA. 12 (Compl. ¶ 12). On the afternoon of October 11, 2010, Mr. Garcia was a passenger in the front seat of a red Ford F150 truck (hereinafter, "the Truck"). ROA. 13 (Compl. ¶ 17).

The Truck had non-tinted windows and an extended cab. ROA. 13 (Compl. ¶¶ 17, 20). It "was unaltered in any fashion … or for any special purpose." ROA. 13 (Compl. ¶ 19). "Visibility into the cab through the windows was clear and unobscured." ROA. 14 (Compl. ¶ 21). This type of truck is "extremely common" in Texas. ROA. 13 (Compl. ¶ 18). He was with three other Hispanics: Omar Hernandez was driving and Miguel Cortez and a man named Marcos were sitting normal and upright in the rear seat. ROA. 14 (Compl. ¶ 22). The men "had gone to work near Vanderpool, Texas [and i]n the late afternoon, they departed their work site and left to go back to San Antonio, from where they had originated." ROA. 14 (Comp. ¶ 23). The Truck was travelling north on Ranch Road 187 and in accordance with applicable state traffic rules and regulations. ROA. 14 (Compl. ¶¶ 24, 32). It then turned right on Ranch Road 337,[1] heading east towards San Antonio. ROA. 14 (Compl. ¶ 26). At that juncture, the Truck was over 100 miles from the U.S./Mexico border. ROA. 14 (Compl. ¶ 28). "[T]hese roads are travelled by thousands of law-abiding persons daily, a large percentage of whom are Hispanic[,]" ROA. 14 (Comp. ¶ 29), "the overwhelming majority of persons

[1] The Complaint misidentifies this road as Ranch Road 387 in paragraphs 34 and 42. See ROA. 15 – 16. The Complaint should have read "Ranch Road 337" as Defendants and the district court acknowledged. See ROA. 422 (district court order acknowledging that traffic stop occurred at intersection of Ranch Road 187 and Ranch Road 337); ROA 60 (Defendants' argument addressing "Highways 187 and 337").

travelling [Ranch Road 187 and Ranch Road 337] travel them for lawful purposes." ROA. 15 (Comp. ¶ 30).

Mr. Coy and Mr. Vega are CBP patrol agents. ROA. 13 (Comp. ¶ 14). They were on CBP patrol duty and each was driving a separate CBP vehicle. ROA. 15 (Comp. ¶ 33). At the time of the traffic seizure that gives rise to this lawsuit, Defendants were not patrolling the U.S./Mexico border, ROA. 15 (Comp. ¶ 35), and they had no authority to enforce state or local laws that regulate the use of public roads. ROA. 16 (Comp. ¶ 39). Mr. Coy and Mr. Vega saw the Truck turn east on Ranch Road 387. ROA. 15 (Comp. ¶ 34). They saw that the Truck had a Hispanic driver and other Hispanics inside. ROA. 16 (Comp. ¶ 41). On the basis of this perception, they decided to pull the Truck off the highway and interrogate the occupants of the Truck as to their immigration status. ROA. 16 (Comp. ¶ 42). They maneuvered their CBP vehicles behind the Truck. ROA. 16 (Comp. ¶ 43). Mr. Hernandez, the driver of the Truck, continued looking forward as is required to drive safely, ROA. 16 (Comp. ¶ 44), and none of the men made any bodily movements out of the ordinary for persons driving lawfully on the road. ROA. 17 (Comp. ¶ 45). Then, Mr. Coy and Mr. Vega turned on their vehicles' emergency lights. ROA. 17 (Comp. ¶ 46). In response, Mr. Hernandez brought the Truck to an

orderly and prompt stop on the side of the road, as required by law. ROA. 17 (Comp. ¶ 48).

At the time of this seizure, Defendants Coy and Vega had received from their agency or otherwise no prior information or reports relating to the Truck, Mr. Garcia or any of his companions. ROA. 22 (Comp. ¶¶ 57 – 58). There was nothing about the behavior and comportment of Mr. Garcia or his companions that was indicative of unlawful activity. ROA. 22 (Comp. ¶ 59). At no time during this event did Mr. Garcia or his companions attempt to hide themselves from view. ROA. 22 (Comp. ¶ 60). At no time during this event did the Truck make movements out of the ordinary for a vehicle traveling in full accordance with traffic rules. ROA. 22 (Comp. ¶ 61). At no time during this event did the Truck speed up or slow down or change lanes or change its position in response to the appearance of Defendants' vehicles, other than to bring the Truck to an orderly and prompt stop in response to their emergency lights commanding that action. ROA. 22 (Comp. ¶ 62).

Subsequent to bringing the Truck to a stop, Mr. Coy brought his own vehicle to a stop, exited his vehicle, and approached the Truck on the passenger side. Mr. Vega stopped his vehicle and came up on the driver side. ROA. 23 (Comp. ¶¶ 63 – 64). Without explaining the reason for the stop or saying anything else, Mr. Vega asked Mr. Garcia and his companions whether

they were U.S. citizens. Id. Mr. Garcia "answered his question," after which "Mr. Coy opened the passenger door, grabbed Mr. Garcia by the upper arm, pulled him out of the Truck and directed him to his own CBP vehicle." ROA. 23 (Comp. ¶¶ 65 - 66).

"Defendants Coy and Vega had no warrant for the arrest of any person" and they "undert[ook] no investigation specific to Mr. Garcia into whether Mr. Garcia was likely to escape before an arrest warrant could be obtained." ROA. 24 (Comp. ¶¶ 68, 72). At no time did Mr. Coy or Mr. Vega search the Truck for drugs, illegal contraband, or anything else. ROA. 24 (Comp. ¶ 69). "There are no characteristics particular to the portion of road in which this seizure too place that make it more likely than other roads within Texas to be used as a route for illegal activity." ROA. 24 (Comp. ¶ 73).

SUMMARY OF ARGUMENT

The district court's order denying the Defendant's qualified immunity should be upheld because the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq., is irrelevant to Mr. Garcia's claims and does not preclude a Bivens remedy for the Defendants' Fourth Amendment violations and because Mr. Garcia properly pled his Fourth Amendment claims.

Mr. Garcia's Bivens claims are against two federal agents for their unlawful seizure of him resulting in his warrantless arrest without probable cause far from the border. His claims are squarely in keeping with the Bivens decision and break no new ground. Bivens, like this case, involved a plaintiff who had been subjected to an unlawful, warrantless search and seizure by federal officers which resulted in his arrest. Defendants rely on Mirmehdi v. United States, 689 F.3d. 975 (9th Cir. 2012) to argue that no Bivens remedy should be recognized for Mr. Garcia's constitutional claims because the INA is an alternative remedy and provides a comprehensive statutory scheme over matters of immigration. But nowhere in his Complaint does Mr. Garcia complain being put in removal proceedings or about any detention or other Fourth Amendment type claims related in any way to the initiation or execution of removal proceedings. Defendants would have this Court overextend Mirmehdi to hold that, with regards to the imposition of individual Bivens liability, the actions of a federal agent purporting to perform immigration enforcement related duties should be free from judicial scrutiny, regardless of the nature of those actions, whether they occur pre- or post-arrest, and whether they are in fact related to actual border enforcement.

Defendants misread Mirmehdi. There is nothing in Mirmehdi or case law to support that position and for many good reasons, not least of which is the fact that the issue of the Defendants' invidious racial profiling of Mr. Garcia and resulting illegal seizure is all but irrelevant to any proceeding available under the INA. The district court properly determined that Mirmehdi was distinguishable because it addressed claims that arose from allegedly wrongful detention pending deportation and Mr. Garcia's claims are not of that nature. In any case, the purpose of Bivens is to deter federal officers from unconstitutional conduct and any alternative remedy must actually be capable of protecting the constitutional interests at stake. The INA is a compilation of the laws governing the admission and exclusion of foreign citizens into the U.S as well as the naturalization of foreign citizens. Complaints that an immigration agent acted illegally in the course of an arrest are almost totally irrelevant to removal proceedings. Nothing in the INA provides any safeguards or remedies of any meaningful nature whatsoever for a violation of a person's Fourth Amendment rights and absolutely nothing therein provides any incentives to persons like Defendants to comply with the Constitution.

As to the Defendants' challenge to the sufficiency of the pleadings, Mr. Garcia alleged three bases for his Fourth Amendment Bivens claims

against Mr. Coy and Mr. Vega – seizure without reasonable suspicion; arrest without probable cause; and warrantless arrest without any reason to believe that Mr. Garcia would flee prosecution for any alleged violation of the law. See ROA. 10, (Compl. ¶ 10), 30 (Compl. ¶ 14). On appeal, Messrs. Coy and Vega challenge only the sufficiency of the pleadings as to the second of Mr. Garcia's Bivens claims relating to a lack of probable cause for the arrest. On this, Defendants make two arguments. First, they argue that the district court erred in holding that the legality of the arrest turned on the legality of the initial stop. Second they argue that Mr. Garcia's pleadings as to the Bivens claim relating to a lack of probable cause are insufficient. The first argument is wrong and the second has been waived by their failure to present it to the district court. As to the first, Defendants do not challenge on appeal the district court's holding that the entire arrest took place within an ongoing illegal seizure. Nevertheless, according to Defendants, the district court should have reviewed the factual allegations at the moment of arrest in a vacuum ignoring the ongoing illegal seizure. The Defendants' position is nothing but a variant on the idea that "a search [or seizure] unlawful at its inception may be validated by what it turns up," an idea soundly rejected by the Supreme Court. See Wong Sun v. U.S., 371 U.S. 471, 484 (1963) (citing to Byars v. United States, 273 U.S. 28, 29 (1927)

and United States v. Di Re, 332 U.S. 581, 595 (1948)); see also Byars, 273 U.S. at 29 ("Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light…."). The district court opinion should be affirmed in all respects.

STANDARD OF REVIEW

This Court reviews denials of qualified immunity de novo. Price v. Roark, 256 F.3d 364, 368 (5th Cir. 2001). However, when reviewing a denial of qualified immunity on an interlocutory appeal, the scope of the Court's review is restricted to the legal conclusions of the district court. Foley v. University of Houston, 355 F.3d 333, 337 (5th Cir.2003) ("The district court's determination that fact issues are genuine is not appealable. However, his determination that those fact issues are material, that is, that resolution of them might affect the outcome of the case under governing law, is appealable").

ARGUMENT

I. The INA is irrelevant to Mr. Garcia's claims and does not preclude a Bivens remedy for the Defendants' Fourth Amendment violations.

a. Mr. Garcia's claims do not arise within a "new context"; rather, they are squarely in keeping with the Bivens decision and break no new ground.

In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001). The plaintiff in Bivens had been subjected to an unlawful, warrantless search and seizure by federal officers which resulted in his arrest. Bivens, 403 U.S. at 389–90. The Supreme Court allowed him to state a cause of action for money damages directly under the Fourth Amendment, thereby giving rise to a judicially-created remedy stemming directly from the Constitution itself. Id. at 397.[2] The Court explained that the cause of action was implied because no statute or other provision of law provided a meaningful remedy for the constitutional violation. Id.

[2] The government did not argue to the district court and does not argue now that Mr. Garcia is not entitled to the protections of the Fourth Amendment nor has the government ever argued that he does not have standing to challenge a violation thereof.

The two purposes of Bivens actions are (1) to provide just compensation to victims of unconstitutional conduct and (2) to deter future constitutional violations through imposition of individual liability. Alexander A. Reinert, Measuring the Success of Bivens Litigation And Its Consequences For the Individual Liability Model, 62 STAN. L. REV. 809, 814 (2010); see also Malesko, 534 U.S. at 69-71. Adhering to this dual purpose, the Supreme Court has extended a Bivens action only when it was necessary to "provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct." Malesko, 534 U.S. at 70 (emphasis in original).

Two limitations on the reach of Bivens apply. First, Bivens claims are unavailable "when defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress.'" Carlson v. Green, 446 U.S. 14, 18 (1980) (quoting Bivens, 403 U.S. at 396). Second, no Bivens remedy can be had where "defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." Id. at 18–19 (citing Bivens, 403 U.S. at 397) (emphasis in

original). With this in mind, the Supreme Court has devised a two-step approach to determining whether to recognize a Bivens remedy in a new context. See Wilkie v. Robbins, 551 U.S. 537, 550 (2007). First, courts must look to see "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." Id. Second, even if no alternative remedy exists, "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation." Id. (internal citation omitted).

This Court need not apply the "new context" analysis invited by the Defendants because this case is squarely within the reach of Bivens, itself. The plaintiff in Bivens had been subjected to an unlawful, warrantless search and seizure by federal officers which resulted in his arrest. Bivens, 403 U.S. at 389–90. Mr. Garcia has brought a Bivens claims against two federal agents for their unlawful, warrantless seizure of him. Vehicular traffic stops, like pedestrian stops, are seizures within the meaning of the Fourth Amendment. See Delaware v. Prouse, 440 U.S. 648, 653 (1979). The context of this case is an unlawful vehicular traffic stop conducted by federal

agents for the purpose of conducting a custodial interrogation. "[D]etention for custodial interrogation –regardless of its label – intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrests." Dunaway v. New York, 442 U.S. 200, 216 (1979).

This Court has recognized the existence of a Bivens action against federal immigration agents for Fourth Amendment violations even where the victim is not a U.S. citizen. See Martinez-Aguero v. Gonzalez, 459 F.3d 618 (5th Cir. 2006). In Martinez-Aguero, a case unaddressed by Defendants, the Court denied qualified immunity and upheld the right of a Mexican national to bring wrongful arrest and excessive force claims under the Fourth Amendment against a Border Patrol agent for conduct that occurred when she was at the border but on U.S. soil attempting to enter the country. 459 F.3d at 620 – 21.[3] The connection between Mr. Garcia's claims and actual

[3] Similarly, in Ramirez v. U.S., 999 F.2d 1579 (5th Cir. 1993) (unpublished), the Court addressed a Bivens claim for excessive force brought on behalf of an alien who was held overnight and abused at a border patrol checkpoint. Although the Court upheld a grant of summary judgment in the defendants' favor on the issue of qualified immunity, no one challenged the right of the alien to bring the Bivens suit in the first place. In Pelayo v. U.S. Border Patrol Agent No. 1, 82 Fed. Appx. 986 (5th Cir. 2003) (unpublished), the plaintiff brought a Bivens suit against border patrol agents following the death of her mentally disabled son after he died after being wrongfully processed and deported as an illegal alien. No one in that case challenged the right of the plaintiff to bring the Bivens suit in the first place on behalf of her alien son. And in Sanchez v. Rowe, 651 F. Supp. 571 (N.D. Tex. 1986), the district court ruled that a border patrol agent's assault and battery during a border patrol operation were in violation of an alien's Fourth and Fifth Amendment rights for which the alien could maintain a Bivens action.

border enforcement related activities is far more attenuated than that of the plaintiff in Martinez-Aguero. Defendants' seizure of Mr. Garcia occurred "over 100 miles from the Mexican border," ROA. 14 (Compl. ¶ 28), beyond the reach of Defendants' own empowering statutes and regulations.[4] At the time of the traffic seizure, Defendants were not patrolling the U.S./Mexico border, ROA. 15 (Comp. ¶ 35). Nevertheless, in an attempt to push their "new context" theory, Defendants' counsel repeatedly describes the traffic seizure at issue here as an "immigration stop." See e.g., Def's Br., pgs. 2, 9. From there, and in almost exclusive reliance upon the 9th Circuit Mirmehdi decision, they make their sole argument on this subject: no Bivens remedy should be recognized for Mr. Garcia's constitutional claims because the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq., provides a comprehensive statutory scheme over matters of immigration.

According to Defendants, "Mirmehdi demonstrates that the availability of remedies in the deportation process under the comprehensive scheme of the INA is a 'special factor' counseling against the creation of a Bivens remedy for an allegedly unlawful immigration stop and arrest." Defs' Br., pg. 13. This particular formulation collapses the Supreme Court's two-

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[4] INA 287(a)(3) (8 U.S.C. § 1357(a)(3)) purports to authorize warrantless vehicle searches "within a reasonable distance" from the nation's borders, defined by regulation as 100 miles from the border. 8 C.F.R. § 287.1(a)(2).

step approach to determining whether to recognize a Bivens remedy in a new context described in Wilkie, and above. Nevertheless, even if the Court analyzes this case under the complete two-step Wilkie approach, Defendants have it wrong. They misread Mirmehdi; Mr. Garcia's Fourth Amendment interests are almost entirely irrelevant to a removal proceeding; and the mere existence of the INA is not a "special factor" counseling against recognition of Mr. Garcia's Bivens claims.

b. Defendants Coy and Vega would have this Court misapply the Mirmehdi decision.

In Mirmehdi v. United States, the plaintiffs, four members of the Mirmehdi family, were arrested and taken into custody for immigration violations after a lawyer that previously represented them told federal authorities that they supported an Iranian group which was then classified by the U.S. Secretary of State as a terrorist organization. 689 F.3d at 979. The government began deportation proceedings against them. Id. The Mirmehdis utilized every legal avenue available to them to challenge not only their basic deportability but also the terrorism-related immigration charges brought against them and to challenge their continued detention in connection therewith, including appeals to the administrative appellate courts and a federal petition for a writ of habeas corpus. Id.

The Mirmehdis appear to have argued during those legal proceedings and at every stage that two federal agents – one an agent for the Federal Bureau of Investigation ("FBI") and the other an agent for the former Immigration and Naturalization Service ("INS") – committed certain tortious acts during the deportation and bond proceedings including, inter alia, the misrepresentation of evidence and lying to the immigration judge ("IJ") in charge. Id. The Mirmehdis succeeded in avoiding deportation. Id. After the conclusion of the deportation and bond proceedings and related appeals and habeas proceedings, the Mirmehdis sued a number of different persons and entities in federal court. Id. at 979 – 80. Against the two aforementioned agents, they brought Bivens claims for "unlawful detention, [] conspiracy to violate their civil rights," and "intimidation of a witness" based upon the same aforementioned tortious conduct that allegedly occurred during the deportation and bond proceedings. Id.

The district court in Mirmehdi disallowed the Bivens claims, finding that "the Mirmehdis had no constitutional right not to be detained pending deportation proceedings." 689 F.3d at 980, n. 1. The Ninth Circuit also disallowed the Bivens claims against the two agents but on a somewhat different basis. The district court in Mr. Garcia's case interpreted the Mirmehdi opinion as follows:

> The [Ninth Circuit] court observed that, before turning to 'the issue of whether [it] ought to extend Bivens to such a context,' it should address that issue's 'logical predicate': 'whether [it] would need to extend Bivens in order for illegal immigrants to recover for unlawful detention during deportation proceedings.' Id. at 981. Noting that the Mirmehdis challenged their detention during deportation and habeas proceedings, the [Ninth Circuit] court found that there were "alternative, existing process[es] for protecting the plaintiffs' interests." Id. at 982. Accordingly, it "decline[d] to extend Bivens to allow the Mirmehdis to sue federal agents for wrongful detention pending deportation given the extensive remedial procedures available to and invoked by them and the unique foreign policy considerations implicated in the immigration context." Id. at 983.
>
> ….
>
> Mirmehdi is distinguishable. In that case, the Ninth Circuit confronted a very narrowly drawn issue: whether it was necessary to "extend Bivens in order for illegal immigrants to recover for unlawful detention during deportation proceedings." Mirmehdi, 689 F.3d at 981. Having answered that question in the negative, the court declined to extend Bivens only in the context of claims for wrongful detention pending deportation. Plaintiff in the instant case has not brought a claim for unlawful detention. Indeed, unlike a claim for wrongful detention pending deportation, the claims in this case did not stem from the deportation process; the alleged constitutional violations of which Plaintiff complains preceded the initiation of deportation proceedings. Mirmehdi is also distinguishable because in that case the plaintiffs had already invoked the deportation appeals process and sought federal habeas relief. Id. at 982 …. Here, by contrast, no alternative remedial process has been invoked. Plaintiff may be able to challenge the constitutionality of the Agents' seizure through the deportation proceedings the government has initiated, but as far as this Court is aware, Plaintiff has not yet had the opportunity to do so.

ROA. 432 – 33. This caption from the district court opinion twice restates the complete Mirmehdi holding. Nevertheless, Defendants Coy and Vega argue that the district court misapplies or misreads the Mirmehdi holding:

> The district court … erred in thinking that the Ninth Circuit had limited its decision to the narrow "context of claims for wrongful detention pending deportation." ROA. 432 (Op. at 12). That is not the case, and the court cited nothing in the Ninth Circuit's decision that said or implied as much. While it is obviously true that Mirmehdi involved a wrongful detention claim, there is no basis for believing that the Ninth Circuit was limiting its decision to wrongful detention claims.

Def's Br., pg. 25. According to Defendants Coy and Vega, Mirmehdi "applies broadly to preclude Bivens actions brought by aliens challenging all aspects of their removal proceedings." Def's Br., pg. 26. A reading of the Mirmehdi district court's actual holding suggests otherwise:

> Accordingly, we decline to extend Bivens to allow the Mirmehdis to sue federal agents for wrongful detention pending deportation given the extensive remedial procedures available to and invoked by them and the unique foreign policy considerations implicated in the immigration context.

689 F.3d at 983 (emphasis added). There are in fact far more "similar legal and factual components," Mirmehdi, 689 F.3d at 981, between the plaintiff's case in Bivens and that of Mr. Garcia, each of which involved a challenge to an unlawful, warrantless seizure by federal officers resulting in arrest, then there are between Mr. Garcia's case and that of the plaintiffs in Mirmehdi. Simply put, the Mirmehdis challenged their detention pending deportation;

Mr. Garcia does not. In reality, Defendants' argument is not that the district court misapplies or misreads the Mirmehdi decision; Defendants' real argument is that this Court should extend the Mirmehdi decision well beyond its four corners.

Defendants' counsel does not dispute that the factual bases for the Bivens claims brought by the Mirmehdis arose exclusively out of conduct that was alleged to have occurred during the deportation and bond proceedings, yet they invite this Court to recognize the inapplicability of Bivens to "deportation proceedings"[5] in general, whatever that means, "not [just] wrongful detention claims pending deportation." See Def's Br., pg. 26. As noted by the district court, ROA., 13 (Op., pg. 13), this Court has already rejected that position when it allowed an alien subject to deportation proceedings to bring Bivens claims against federal agents for involuntary servitude and mistreatment while he was in detention pending deportation. See Humphries v. Various Fed. USINS Emps., 164 F.3d 936, 944 (5th Cir. 1999). But Defendants go even further with the remarkable claim that this Court should recognize the inapplicability of Bivens to conduct that

[5] Various terms have been used over the years to describe immigration proceedings. "Exclusion" once referred to a denial of entry, while "deportation" referred to the expulsion of an alien already residing within the United States. See Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 159 (1993). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104–208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 U.S.C.), abandoned this dichotomy and now refers jointly to both decisions as "removal." See IIRIRA § 304(a)(7).

occurred even well prior to the commencement of "deportation proceedings":

> [T]here is hardly a significant distinction between wrongful detention during removal proceedings and (as Garcia claims here) wrongful arrest leading to removal proceedings. The district court considered it significant that 'the alleged constitutional violations of which Plaintiff complains preceded the initiation of deportation proceedings,' ROA.432 (Op. at 12), but deportation proceedings are very often commenced with a stop and arrest. 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 Def's Br., pg. 26. Here Defendants finally speak plainly. Their position is that, with regards to any imposition of individual Bivens liability, the actions of a federal agent purporting to perform immigration enforcement related duties (whether from Border Patrol or Immigration and Customs Enforcement or the FBI or any other federal agency) during the entire "stop and arrest" process should be free from judicial scrutiny, regardless of the nature of those actions, whether they occur pre- or post-arrest, and whether they are in fact related to actual border enforcement. There is nothing in the Mirmehdi decision to support that position and for many good reasons, not least of which is the fact that the issue of the Defendants' invidious racial profiling of Mr. Garcia culminating in his illegal seizure is all but irrelevant to any proceeding available under the INA.

c. The INA provides no remedy for Defendants' Fourth Amendment violations.

Mr. Garcia is not complaining via his Bivens claims that he was unlawfully placed in removal proceedings. Removal proceedings begin, i.e., jurisdiction vests with an immigration judge, when the government files a charging document, known as the Notice to Appear (Form I-862), with an immigration court after it is served on the alien. See 8 C.F.R. §§ 1003.13, 1003.14; see also 8 C.F.R. § 1239.1(a) ("Every removal proceeding conducted under section 240 of the Act (8 U.S.C. § 1229a) to determine the deportability or inadmissibility of an alien is commenced by the filing of a notice to appear with the immigration court."). Defendants do not dispute that all the conduct giving rise to Mr. Garcia's claims occurred prior to even the service of any charging document on him much less its filing with an immigration court. Furthermore, if the Defendants' own regulations were followed in Mr. Garcia's case, neither Mr. Coy nor Mr. Vega was likely to even have been involved in the determination to place Mr. Garcia into removal proceedings because neither would have been the "examining officer" who is charged with determining whether there exists "prima facie evidence" that an alien is "present in the United States in violation of the immigration laws" and that a referral to an immigration judge is therefore

warranted.[6] Nor is Mr. Garcia complaining about anything that happened during any such proceedings, including any detention in connection therewith.

He is complaining, rather, that he was illegally seized and arrested by Defendants Coy and Vega in an act of invidious racial profiling, far from the U.S./Mexico border, in blatant violation of the Fourth Amendment. Defendants argue in essence that whatever complaints Mr. Garcia has about his arrest must be raised in a removal proceeding under INA § 240 (8 U.S.C. 1229a) which "offers quasi-judicial hearings and appeals, as well as judicial review, of many significant decisions." Def's Br., pg. 21. Defendants go on to describe various procedures that are available to some persons under some circumstances under the INA, such as bond hearings and motions to suppress evidence. See Def's Br., pgs. 21 – 22. This line of argument reflects a basic misunderstanding of the nature of immigration proceedings and the purpose of the INA.

Step one of the two-step Wilkie approach considers "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new

[6] 8 C.F.R. §§ 287.3(a) and (b), which implement INA § 287(a)(2) (8 U.S.C. § 1357(a)(2)), require that an officer "other than the arresting officer" examine any alien arrested without a warrant to determine whether to refer him to an immigration judge unless no other officer is available or taking the alien before another officer would entail unnecessary delay.

and freestanding remedy in damages." Wilkie, 551 U.S. at 550. Nothing in the INA constitutes an alternative process by which Mr. Garcia can seek protection for his violated Fourth Amendment rights, much less is there anything in there that provides a convincing reason to disallow a Bivens remedy in damages. The INA is a compilation of the laws governing the admission and exclusion of foreign citizens into the U.S as well as the naturalization of foreign citizens. Complaints that an immigration agent acted illegally in the course of an arrest are almost totally irrelevant to removal proceedings. See INS v. Lopez-Mendoza, 468 U.S. 1032, 1040 (1984) ("the mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding" (emphasis added) (internal quotation marks and brackets omitted)). "[A] deportation hearing is intended to provide a streamlined determination of [an alien's] eligibility to remain in this country, nothing more." Lopez-Mendoza, 468 U.S. at 1039.

In removal proceedings, the government has the initial burden of demonstrating alienage by "clear, convincing and unequivocal" evidence when alienage is denied by a respondent. See Woodby v. INS, 385 U.S. 276, 281, 285 (1966). In this context, as an evidentiary and practical matter, "alienage" means the fact of having been born abroad because any evidence of foreign birth gives rise to a rebuttable presumption of alienage. See

Matter of Rodriquez-Tejedor, 23 I&N Dec. 153, 164 (B.I.A. 2001); Matter of Leyva, 16 I&N Dec. 118, 119 (B.I.A. 1977). This means that once the government succeeds in proving up the person's foreign birth by admissible evidence, whether connected to the underlying arrest or not, a presumption arises that the government has established alienage and the burden then shifts to the respondent to prove that he is not an alien or that he is an alien here in lawful status. See INA § 291 (8 U.S.C. § 1361); Matter of Sandoval, 17 I. & N. Dec. 70, 79 (B.I.A. 1979) ("[T]he sole matters necessary for the Government to establish are the respondent's identity and alienage—at which point the burden shifts to the respondent to prove the time, place and manner of entry."). From that moment on, the legality of the underlying arrest becomes irrelevant to any issue remaining before the immigration court.

An allegation of an illegal arrest is relevant only in a very small sliver of cases where all the stars align to allow the respondent to challenge evidence obtained by the government as a result of the arrest and proffered by the government to prove alienage. See generally, David Antón Armendáriz, On the Border Patrol and Its Use of Illegal Roving Patrol Stops, 14 SCHOLAR 553, 554 (2012) (explaining "the factual and procedural circumstances that enable the Border Patrol to abuse its power to conduct

roving patrols with relative impunity"). Even then, the very most the person can hope for is the exclusion of evidence and the termination of proceedings. See Diaz-Bernal v. Myers, 758 F. Supp. 2d 106, 123 (D. Conn. 2010) ("The immigration judge here similarly could not have afforded the plaintiffs substantive relief on their [Bivens] claims. The most the immigration judge could do was suppress the illegally obtained evidence. That is not a compensatory remedy, but instead a way to prevent greater future injury and deter future misconduct.").

The principle basis for the exclusion of evidence in removal proceedings obtained by law enforcement misconduct is an egregious violation of the Fourth Amendment. Nevertheless, neither the Fourth Amendment (and its applicable judicial exclusionary rule), nor strict evidentiary rules ordinarily apply in removal proceedings. See Lopez-Mendoza, 468 U.S. at 1050–51 (holding by a 5 to 4 margin that the exclusionary rule generally does not apply in removal proceedings to evidence obtained in violation of the Fourth Amendment); Matter of Wadud, 19 I&N Dec.182, 188 (BIA 1984) (strict rules of evidence are not applicable in deportation proceedings). But even aliens are entitled to due process of law under the Fifth Amendment. See Reno v. Flores, 507 U.S. 292, 306 (1993). For evidence to be admissible in removal proceedings it must be

probative and "its use fundamentally fair so as to not deprive respondents of due process of law as mandated by the [F]ifth [A]mendment." Matter of Toro, 17 I&N Dec. 340, 343 (BIA 1980). As explained by the Board of Immigration Appeals:

> "Every [F]ourth [A]mendment 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 [F]ifth [A]mendment. [Thus,] . . . cases may arise in which the manner of seizing evidence is so egregious that to rely on it would offend the [F]ifth [A]mendment's due process requirement of fundamental fairness."

Id. (emphasis added).

In other words, when Mr. Coy or Mr. Vega violate the Fourth Amendment, their violation will not necessarily result in the exclusion of any resulting evidence of alienage in a removal case. Their conduct must be something more than merely in violation of the Constitution; it must be particularly "egregious" before the court will even consider excluding resulting evidence. See Almeida-Amaral v. Gonzales, 461 F.3d 231, 235-37 (2d Cir. 2006) (“[T]he egregiousness of a constitutional violation cannot be gauged solely on the basis of the validity (or invalidity) of the stop, but must also be based on the characteristics and severity of the offending conduct.”). This threshold evidentiary requirement of “egregiousness” means that there

will be a whole class of persons, indeed, likely the vast majority of affected persons, who were placed into removal proceedings on account of violations of the Fourth Amendment and who will have no recourse whatsoever to challenge their seizures as a means of removal defense because those seizures will be deemed insufficiently egregious. See e.g., Santos v. Holder, 506 Fed. Appx. 263, 264 (5th Cir. 2013) (unpublished) ("[E]ven assuming both that a Fourth Amendment violation occurred and that an egregious violation would warrant exclusion in civil removal proceedings, the Petitioners have not shown that the BIA and IJ erred in finding that the conduct of the immigration agents was not egregious").

Furthermore, even if a person can pass the heightened threshold evidentiary requirement of "egregiousness," there are many, many other ways that the government can make the legality of the arrest utterly irrelevant to its prosecution of the removal case. The government can, e.g., use alternative evidence of alienage such as preexisting immigration records or the testimony of the person himself. See INS v. Lopez-Mendoza, 468 U.S. 1032, 1043 (1984). ("[R]egardless of how the arrest is effected, deportation will still be possible when evidence not derived directly from the arrest is sufficient to support deportation."); Matter of Cervantes-Torres, 21 I&N Dec. 351, 353 (B.I.A. 1996) (holding that independently obtained evidence

of alienage will suffice to prove alienage regardless of an alien's illegal arrest).

Consider this Kafkian twist: Any voluntary statement made by the respondent in removal proceedings implicating alienage will suffice to carry the government's burden of proving alienage, making the illegality of the underlying arrest irrelevant. See Matter of Carrillo, 17 I&N Dec. 30, 32 – 33 (B.I.A. 1979) (finding that the voluntary statement given at the hearing rendered unnecessary the inadmissible testimony obtained in violation of Fifth Amendment right to remain silent). Yet a person in removal proceedings who seeks to suppress evidence must personally testify about the allegations of illegality, see Matter of Barcenas, 19 I.&N. Dec. 609, 611 (B.I.A. 1988), while that same person is not entitled to a separate suppression hearing in which he can actually freely testify to the circumstances of his arrest, without fear of incriminating himself in an illegal act (e.g., illegal entry, 8 U.S.C. § 1325), as is done in criminal cases dealing with the exclusionary rule. See Matter of Benitez, 19 I&N Dec. 173, 175 (B.I.A. 1984) (stating that there is no statutory or regulatory right to a separate suppression hearing in deportation proceedings).

Consider also the matter of detention and the availability of release on bond. Defendants claim persons "like the plaintiff" can avail themselves of

bond hearings. Def's Br., pg. 21. There are in fact large categories of persons who are statutorily prohibited from seeking any release on bond from an immigration judge. See INA § 236(c)(1)(C) (8 U.S.C. § 1226(c)(1)(C)). In any case, in a bond hearing, the respondent bears the burden to show that he is not a threat to the community or a risk of flight from further proceedings. See Matter of Adeniji, 22 I&N Dec. 1102, 1111-13 (B.I.A. 1999) and the "the nature of [his …] immigration law history" is a relevant consideration in the bond analysis. Matter of Shaw, 17 I. & N. Dec. 177, 178 (B.I.A. 1979). Although bond proceedings are separate from removal proceedings, 8 C.F.R. § 1003.19(d), if the respondent denies alienage in the removal proceeding, government counsel can and will use in the removal case whatever identification or bond documents the respondent provides in the bond case to prove alienage. See Cervantes-Torres, 21 I&N Dec. at 353 (holding that the exclusionary rule does not apply to documents evidence voluntarily submitted by respondent to the government). In other words, the respondent must demonstrate, inter alia, who he is and how he came in to the U.S. in order to get released on bond but the government can and will use that same information against him in the removal case to prove alienage and thereby render irrelevant the illegal conduct that placed him there in the first place. See In re Josue Edgardo Rodriguez-Reyes, A089-

821-103 (B.I.A. 2010) (unpublished) (available at 2010 WL 4971052) ("Proof of the respondent's alienage is relevant to both the bond and merits cases… [N]othing in [8 C.F.R. § 1003.19(d)] provides that evidence in the bond file cannot be retrieved and offered separately during the merits case if admissible in both settings.").

In short, the Defendants' bold statement that "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," Def's Br., pg. 22, is missing so many basic caveats that, standing alone, it is pure fantasy. Pursuing a suppression case in removal proceedings is a legal mine field. If a person actually attempts to pursue that strategy in a removal case, he may rest assured that government counsel will argue the exact opposite position taken by Defendants' counsel today. See e.g., In re Jose Zacaria Quinteros, A088 239 850 (B.I.A. 2011) (unpublished) (available at 2011 WL 5865126) ("The DHS … argues at length that the Supreme Court has held that the exclusionary rule does not apply in removal proceedings and that the conclusion that it may apply in the case of egregious violations is 'mere dicta' in Lopez-Mendoza….").

"It must be remembered that the purpose of Bivens is to deter the officer" from unconstitutional conduct, F.D.I.C. v. Meyer, 510 U.S. 471, 485

(1994), and any alternative remedy must actually be "capable of protecting the constitutional interests at stake." Minneci v. Pollard, 132 S.Ct. 617, 623 (2012). But in the vast overwhelming majority of removal cases that arise from the unlawful conduct of officers like Defendants Coy and Vega, there is no viable mechanism for challenging such conduct at all and, even if successfully challenged, there is absolutely no actual compensatory remedy and no impact whatsoever on the arresting agents. The Supreme Court said just this in Lopez-Mendoza:

> Every INS agent knows … that it is highly unlikely that any particular arrestee will end up challenging the lawfulness of his arrest in a formal deportation proceeding. When an occasional challenge is brought, the consequences from the point of view of the officer's overall arrest and deportation record will be trivial.

468 U.S. at 1044.

"When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, [the Supreme Court has] not created additional Bivens remedies." Schweiker v. Chilicky, 487 U.S. 412, 423 (1988). An alternative remedy is adequate if, in comparison to a potential Bivens action, it "provide[s] roughly similar incentives for potential defendants to comply with the [Constitution] while also providing roughly similar compensation to victims of violations."

Minneci, 132 S.Ct. at 625. In other words, an alternate remedy is adequate if it provides similar compensation and deterrence as a Bivens claim. Id. Congress enacted the INA as a comprehensive scheme to regulate "'immigration and naturalization'" and set "'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" Chamber of Commerce v. Whiting, —— U.S. ——, 131 S.Ct. 1968, 1973 (2011) (quoting De Canas v. Bica, 424 U.S. 351, 353, 359 (1976)). But nothing in the INA provides any safeguards or remedies of any meaningful nature whatsoever for a violation of a person's Fourth Amendment rights and absolutely nothing therein provides any incentives to potential defendants to comply with the Constitution.[7]

[7] A plethora of case law recognizes this:
In Diaz-Bernal v. Myers, 758 F. Supp. 2d 106 (D. Conn. 2010), the court ruled that the Immigration and Nationality Act (INA) did not preclude a Bivens suit by aliens who were the subject of an early-morning immigration raid against Immigration and Customs Enforcement officers who conducted the raid and the officers' supervisors, as the harm alleged by the aliens could not be remedied through any provision in the INA, and although Congress had great control over immigration—including over removal proceedings—the aliens did not question their removal, but instead alleged independent constitutional harms that were committed against them prior to the commencement of removal proceedings.
In Frias v. Torrez, __ F.Supp.2d __ (N.D. Tex. 2013) (unpublished) (available at 2013 WL 460076) in which a claim was brought under Bivens for unlawful seizure under the Fourth Amendment (U.S. Const. Amend. IV), arising from an unlawful stop and arrest by an immigration officer, the court found that nothing in the INA precluded its jurisdiction over the plaintiff's Bivens claims because the plaintiff complained only of alleged constitutional violations and his claims did not involve removal or immigration enforcement actions.
In Khorrami v. Rolince, 493 F. Supp. 2d 1061 (N.D. Ill. 2007), the court held that the INA's thorough coverage of the admission, exclusion, and removal of aliens did not automatically lead to an adequate and meaningful remedy for alleged constitutional

d. The INA is not itself a "special factor" counseling against recognizing a Bivens remedy for Mr. Garcia's Fourth Amendment claims.

The second Wilkie step in the "new context" analysis concerns whether there are any special factors suggesting the courts should decline to

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violations of alien's rights, as would bar —under the "special factor" exception — the alien's Bivens claims against various FBI and INS agents alleging violations of his Fourth and Fifth Amendment rights.

In Turkmen v. Ashcroft, 915 F. Supp. 2d 314 (E.D. N.Y. 2013), the court recognized a Bivens claim to remedy the alleged deprivation of free exercise rights Arab and Muslim aliens held in federal detention on immigration violations in the wake of the 9/11 terrorist attacks. The Court found no "special factors" that "counsel hesitation" in creating the remedy because there was no remedy for violation of the detainees' free exercise rights in the absence of a Bivens claim, national security concerns did not counsel hesitation, and plaintiffs did not complain about their deportation but instead were challenging their treatment that occurred before they were deported. The court explained that although the INA provides a comprehensive regulatory scheme for managing the flow of immigrants in and out of the country, it is not a comprehensive remedial scheme for constitutional violations that occur incident to the administration of that regulatory scheme.

In Francis v. Silva, __ F.Supp. 2d __ (S.D.Fla. 2013) (unpublished) (available at 2013 WL 1334549), a Jamaican immigrant who was held for a year and a half in immigration detention alleged that he was beaten by a detention officer. The court rejected the argument of ICE officers that the plaintiff's state-law tort claims against private contractor defendants who operated the facility provided an adequate alternative remedy for his alleged injuries because an alternative remedy is adequate if, in comparison to a potential Bivens action, it provides roughly similar incentives for potential defendants to comply with the Constitution while also providing roughly similar compensation to victims of violations. The court noted that the plaintiff's state-law tort claims against the private defendants were inadequate because they would not deter the ICE employees as effectively as a Bivens claim would. The court found it almost axiomatic that the threat of damages has a deterrent effect, and particularly so when the individual official faces personal financial liability.

In Turnbull v. U.S., __ F. Supp. 2d __ (N.D. Ohio 2007) (unpublished) (available at 2007 WL 2153279), alien plaintiff brought a Bivens action against several federal employees alleging that they knowingly pursued his unlawful deportation in violation of an order issued by a magistrate judge staying his deportation proceedings. The court recognized the validity of the Bivens claim, ruling that the plaintiff did not challenge the decision to remove him from this country, but rather focused upon the alleged violation of his rights that occurred incident to the administration of the removal process, and since Congress did not intend to preclude review of such a violation, the court found that special factors did not counsel hesitation.

recognize a Bivens remedy. Wilkie, 551 U.S. at 550. The only argument that Defendants make is that "Mirmehdi demonstrates that the availability of remedies in the deportation process under the comprehensive scheme of the INA is a 'special factor' counseling against the creation of a Bivens remedy for an allegedly unlawful immigration stop and arrest." Defs' Br., pg. 13. This is essentially the same argument that Defendants make as regards step one of the Wilkie analysis and it fails for the same reasons. This is not an immigration case. Mr. Garcia's claims do not arise from "wrongful detention pending deportation" nor are there "extensive remedial procedures" in the INA for addressing his claims, as that language is used in Mirmehdi. See 689 F.3d at 983. His claims are, in fact, largely irrelevant to the INA's processes for determining whether he is an alien and, if so, whether he has permission to be here, as previously explained in full.

II. The district court properly denied qualified immunity as to Mr. Garcia's Fourth Amendment unlawful arrest claim.

Mr. Garcia alleged three bases for his Fourth Amendment Bivens claims against Mr. Coy and Mr. Vega. He alleged that they seized him "without reasonable suspicion"; he alleged that they arrested him "without probable cause"; and he alleged that they arrested him "without any warrant … or any reason to believe that Mr. Garcia would flee prosecution for any

alleged violation of the law prior to obtaining a warrant." ROA. 10, (Compl. ¶ 10), 30 (Compl. ¶ 14). On appeal, Messrs. Coy and Vega challenge only the sufficiency of the pleadings as to the second of Mr. Garcia's Bivens claims relating to a lack of probable cause for the arrest. All issues as relate to the other claims have been waived. See Cavallini v. State Farm Mut. Auto Ins. Co., 44 F.3d 256, 260 n. 9 (5th Cir. 1995) (stating that failure to provide any legal or factual analysis of an issue on appeal waives that issue); see also Fed. R. App. P. 28(a)(8)(a) ("The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on."). In any case, Defendants appear to have affirmatively disclaimed any challenge to the district court's ruling that Mr. Garcia's pleadings relating to his Bivens claim based on a lack of reasonable suspicion are adequate. See Def.'s Br., pg. 29, n. 10 ("We do not argue here that Agents Coy and Vega are entitled to qualified immunity on the stop claim at the dismissal stage…."). On the one point they raise, they make only two arguments. First, they argue that the district court erred in "holding that the legality of the arrest turned on the legality of the initial stop." See Def's Br., pg. 29. Second they argue that Mr. Garcia's pleadings as to the Bivens claim relating to a lack of probable

cause are insufficient. The first argument is wrong and the second has been waived by their failure to present it to the district court.[8]

As to the first argument, as previously stated, Defendants do not challenge on appeal the district court's holding that the entire arrest took place within an ongoing illegal seizure. Nevertheless, according to Defendants, the district court should have reviewed the factual allegations at the moment of arrest in a vacuum ignoring the ongoing illegal seizure. Stated otherwise, Defendants argue that their arrest of Mr. Garcia may be validated by what their illegal seizure of him turned up – namely his alleged

[8] In their initial brief before the district court, the only argument made by Defendants as to probable cause for the arrest addressed not the sufficiency of the pleadings but rather whether evidence beyond the pleadings sufficed to warrant summary judgment. See ROA. 65. And even after Mr. Garcia raised this fact to the district court in his reply brief, see ROA. 202 ("[N]owhere in [Defendant's] motion is there any argument whatsoever or citations to Mr. Garcia's pleadings challenging the sufficiency of his allegations under Rule 12(b)(6)."), Defendants still did not address any supposed pleading deficiency in their surreply, which focused exclusively on whether they were entitled to summary judgment. See ROA. 329 – 338. Having utterly failed to give the district court notice of any specific pleading deficiency, they now ask this Court to address in the first instance their arguments directed at Mr. Garcia's pleadings. Their failure to raise their argument to the district court means this Court should review exclusively the basis of the district court's order and nothing more. See LeMaire v. La. Dept. of Trans. & Development, 480 F.3d 383, 387 (5th Cir. 2007) ("[A]rguments not raised before the district court are waived and cannot be raised for the first time on appeal."); Tex. Commercial Energy v. TXU Energy, Inc., 413 F.3d 503, 510 (5th Cir. 2005) (same); XL Specialty Ins. Co. v. Kiewit Offshore Servs. Ltd., 513 F.3d 146, 153 (5th Cir. 2008) ("An argument not raised before the district court cannot be asserted for the first time on appeal." (citing Stokes v. Emerson Elec. Co., 217 F.3d 353, 358 n. 19 (5th Cir. 2000))). In any case, the Defendants "needed to make [their] specific legal arguments clear to the district court. If [they] failed to do so, [this Court sh]ould review for plain error only" at most. United States v. Martinez, 486 F.3d 855, 860 (5th Cir. 2007) (citing United States v. Maldonado, 42 F.3d 906, 909–13 (5th Cir. 1995)).

statements implicating alienage. Defendants' sole rationale for this curious argument is that "the 'fruit of the poisonous tree' doctrine and the exclusionary rule do not apply in a civil damages action like this one." Def's Br., pg. 30. Mr. Garcia respectfully submits that Defendants misunderstand the district court's ruling. The district court did not rule that it was going to apply the exclusionary rule to disregard what transpired between the Defendants and Mr. Garcia around the moment of arrest; the District merely held that the legality of the arrest was not severable from the legality of the traffic seizure under these circumstances because, as Mr. Garcia argued, "'there can be no legal arrest that is subsumed within a continuing illegal seizure.'" ROA. 447 – 448 (Op. at pg. 27) (citing ROA. 217). In short, it was one big Fourth Amendment violation.

The Defendants' position is nothing but a variant on the idea that "a search [or seizure] unlawful at its inception may be validated by what it turns up," an idea soundly rejected by the Supreme Court. See Wong Sun 371 U.S. at 484 (citing to Byars, 273 U.S. at 29 and Di Re, 332 U.S. at 595; see also Byars, 273 U.S. at 29 ("Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light…."). In Hiibel v. Sixth Judicial Dist. Court of Nevada,

Humboldt County, the Supreme Court considered and upheld a Nevada criminal "stop and identify" statute, which required a person to identify himself where he has been detained by a peace officer "under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime." 542 U.S. 177, 181 (2004). The plaintiff therein argued that the Nevada statute "circumvents the probable-cause requirement, in effect allowing an officer to arrest a person for being suspicious." Id. at 188. Rejecting this, the Supreme Court pointed to "the requirement that a Terry stop must be justified at its inception" and that "an officer may not arrest a suspect for failure to identify himself [under the Nevada law] if the request for identification is not reasonably related to the circumstances justifying the stop." Id. (emphasis added). The district court found in Mr. Garcia's case that, at least as far as the pleadings are concerned, the Defendants can point to no circumstances "justifying the stop" or a deficiency in the allegations related thereto, a finding the Defendants do not challenge on appeal. The officers in this case arrested Mr. Garcia after making an unlawful stop so their reliance on an alleged weakness in the pleadings as to what he supposedly did or did not say afterwards is squarely foreclosed by Hiibel. See e.g., Davis v. City of New York, 902 F.Supp.2d 405, 429 (S.D.N.Y., 2012) (holding that where officers arrested plaintiff

after making an unlawful Terry-type stop, their reliance on her subsequent silence as support for probable cause for arrest is foreclosed by Hiibel.).

If the Constitution applied otherwise, than Border Patrol could start going house to house in predominantly Hispanic neighborhoods, knocking down doors, and lining people up to question them about their citizenship. Or they could do exactly what they did in Mr. Garcia's case – pull people off the road far from the border solely for being Hispanic in order to question them about their citizenship. Then their counsel would argue to this Court that, regardless of the legality of the home invasion or vehicular seizure, the Court should consider the legality of the ensuing arrests separately for purposes of civil liability. Defendants are simply asking for permission to circumvent the Fourth Amendment. "[V]igilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods," Byars, 273 U.S. at 32, this Court should reject the Defendants' argument and uphold the district court order.[9]

[9] In the event the Court were to find Mr. Garcia's pleadings lacking in any respect, the proper course of action would be to remand to the district court to allow plaintiff an opportunity to amend his pleadings. This is particularly true given the fact, as explained in note 8, supra, that Defendants never gave the district court any notice of any alleged specific pleading deficiency. The Defendants suggest, without meaningful explanation, that remand would not be appropriate, see Def's Br., pg. 31, but all the cases they cite relate to cases in which full summary judgment was already before the Court, unlike this case which involves only a review of denial of a dismissal motion under F.R.C.P.

CONCLUSION

Based upon the foregoing, Mr. Garcia respectfully requests that the Court uphold the district court order in all respects.

Respectfully,

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February 21, 2014

12(b)(6). Mr. Garcia has had no opportunity to replead subsequent to any notice of any alleged deficiencies in his complaint and remand for such purpose would be appropriate and necessary. See e.g., Loya v. Texas Dept. of Corrections, 878 F.2d 860 (5th Cir. 1989) (granting remand to name new defendants after upholding qualified immunity appeal).

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of February, 2014, I electronically filed the foregoing BRIEF FOR PLAINTIFF-APPELLEE with the Clerk of the Court using the CM/ECF system which caused the same to be served upon counsel for the government by electronic mail.

/s David Antón Armendáriz

David Antón Armendáriz
Attorney for Plaintiff-Appellee

CERTIFICATE OF COMPLIANCE WITH
TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,
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1. This brief complies with the type-volume limitation of Fed.R.App. 32(a)(7)(B) because, based on a word count performed with Microsoft Word 2013, it contains 9,902 words, not excluding the parts of the brief exempted by Fed.R.App. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed.R.App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface, using Microsoft Word 2013, with size 14 Times New Roman Font typestyle with size 12 footnotes.

Dated: February 21, 2014

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