No. 17-1678

IN THE
Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,
Petitioners,
v.

JESUS MESA, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF IMMIGRANT AND CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The **American Immigration Council** (the Council) is a national 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. The Council frequently appears in federal courts on issues relating to available remedies when immigration officers engage in unlawful and unconstitutional conduct, and undertakes research and advocacy related to the accountability of immigration enforcement agencies and personnel.

Muslim Advocates is a national legal advocacy and educational organization that works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. Muslim Advocates advances these objectives through litigation and other legal advocacy, policy engagement, and civic education. As part of its work, Muslim Advocates has filed lawsuits, amicus briefs, and public comments on a broad range of immigrants' rights issues, including the rights of immigrants to be free from unconstitutional arrest and detention and their right to be free from targeting and discrimination on the basis of race, religion, or ethnicity. The issues at stake in this case directly implicate the work of the organization to hold government officials

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[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no person other than amici contributed money that was intended to fund preparing or submitting this brief.

accountable for such constitutional violations.

The **National Immigrant Justice Center** (NIJC) is a program of Heartland Alliance, which provides resettlement services to refugees and mental health services for immigrants and refugees. NIJC, through its staff of attorneys, paralegals and a network of over 1,500 pro bono attorneys, provides free or low-cost legal services to thousands of immigrants each year. Through its direct representation, NIJC has identified a consistent need for holding immigration officers accountable for violations of our clients' constitutional rights. NIJC has represented many clients in damages cases for violations of their constitutional rights, including: *Gonzalez Goodman v. Maricopa County*, Case No. 16-4388 (D. Ariz.); *Ocampo v. Harrington*, Case No. 13-3134 (C.D. Ill.); and *Watson v. Estrada*, Case No. 14-6459 (E.D.N.Y.).

The **National Immigration Law Center** (NILC) is a leading national organization exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families in the United States. In the last 40 years, NILC has won landmark legal decisions protecting fundamental rights that reinforce our nation's values of equality, opportunity, and justice. NILC's expertise includes advocacy and litigation related to the constitutional and statutory rights of immigrants, including challenging the unlawful conduct of federal immigration officials.

The **National Immigration Project of the National Lawyers Guild** (NIPNLG) 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. NIPNLG provides legal training to the bar and the bench on immigration-related matters and is the author of four immigration law treatises published by Thomson Reuters. NIPNLG has engaged in federal litigation on behalf of immigrants seeking damages for violations of their constitutional rights.

The **Northwest Immigrant Rights Project** (NWIRP) is a Washington State nonprofit organization that promotes justice by defending and advancing the rights of immigrants through direct legal services, systemic advocacy, and community education. NWIRP strives for justice and equity for all persons, regardless of where they were born. With over 35 attorneys and legal workers, NWIRP provides direct representation to low-income immigrants who are placed in removal proceedings and to those who face abuse and mistreatment by immigration officers. NWIRP has represented numerous victims of unconstitutional acts by border patrol agents and has a direct interest in the outcome of this case.

The **National Police Accountability Project** (NPAP) was founded in 1999 by members of the National Lawyers Guild to address allegations of misconduct by law enforcement and corrections officers by coordinating and assisting civil rights lawyers. The project presently has more than 550 attorney members throughout the United States. NPAP provides training and support for attorneys and other legal workers, public education and information on issues related to misconduct and accountability, and resources for non-

profit organizations and community groups involved with victims of law enforcement misconduct. NPAP also supports legislative efforts aimed at increasing accountability, and appears as amicus curiae in cases, such as this one, that present issues of particular importance for the clients of its lawyers, *i.e.*, clients injured by law enforcement use of force.

The **Southern Poverty Law Center** (SPLC) is a nonprofit organization founded in 1971 that throughout its history has worked to make the nation's constitutional ideals a reality for everyone. The SPLC's legal department fights all forms of discrimination and works to protect society's most vulnerable members. SPLC has litigated numerous cases to ensure that immigrants and refugees are treated with dignity and fairness and can access judicial remedies for violations of their constitutional rights. SPLC has a strong interest in opposing governmental action that undermines the promise of civil rights for all.

SUMMARY OF ARGUMENT

This Court's grant of certiorari asked the parties to address whether *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), provides a cause of action for the cross-border shooting by a federal immigration officer alleged in this case. As Amici concerned with a broad range of immigration issues, including holding immigration officers accountable for misconduct, we write to express our view that, in deciding this case, the Court should not call into question the general applicability of *Bivens* to cases arising from immigration enforcement. While the Court has "urged 'caution' before 'extending *Bivens* remedies

into any new context,'" *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)), the vast majority of claims arising from immigration enforcement fall squarely within the traditional *Bivens* context.[2]

First, many of the activities involved in immigration enforcement are indistinguishable from the activities involved in other law enforcement actions by federal agents to whom *Bivens* has long applied. Immigration enforcement revolves around searches and seizures, and there is nothing about the operational realities of the searches and seizures conducted in relation to general immigration enforcement that differentiates them from searches and seizures carried out in other law enforcement contexts. Unlawful searches and seizures are clearly subject to *Bivens* liability—indeed, *Bivens* itself arose from allegations that federal agents violated the Fourth Amendment by conducting illegal searches and seizures. *Bivens*, 403 U.S. at 389. It would be anomalous to withhold a *Bivens* remedy for unlawful searches and seizures conducted in the course of enforcing immigration laws, when those searches and seizures are substantively identical to the activities carried out in the course of enforcing other types of federal laws.

Second, in the vast majority of immigration cases, there are no "special factors counselling hesitation" about providing a *Bivens* remedy for illegal searches and seizures, or other unconstitutional actions, conducted in

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[2] This case presents a *Bivens* claim under both the Fourth and Fifth Amendments. This brief, however, focuses on Fourth Amendment *Bivens* claims.

the course of enforcing immigration laws. *Abbasi*, 137 S. Ct. at 1857 (quoting *Carlson v. Green*, 446 U.S. 14, 18 (1980)). Congress itself contemplated the availability of a *Bivens* remedy in the Immigration and Nationality Act (INA) for unconstitutional actions taken during immigration enforcement, so there is no reason "to think Congress might doubt the efficacy or necessity of a damages remedy." *Id.* at 1858. There is also no concern that allowing a *Bivens* remedy would disrupt governmental operations. Most *Bivens* cases involve low-level law-enforcement officers, and federal courts long have recognized *Bivens* suits against such officers without disrupting governmental operations. And while Congress has plenary power over the admission and exclusion of noncitizens, allowing *Bivens* liability for constitutional violations will not affect federal immigration policy; it will only deter rogue officers from violating the Constitution as they carry out that policy.

Third, creating a rule to categorically disallow *Bivens* actions whenever officers are enforcing the immigration laws would create serious judicial anomalies. Immigration enforcement is highly entangled with other forms of law enforcement. The modern reality is that federal immigration officers routinely enforce non-immigration laws, while other federal law enforcement officers routinely conduct joint raids with federal immigration officers. Moreover, the INA provides limited authority for state and local law enforcement officers to carry out immigration enforcement. As a result, there is no judicially workable way to disentangle immigration enforcement from other law enforcement or to carve out an immigration

enforcement exception to *Bivens*.

Finally, regardless of the Court's decision in this case, *Bivens* plays a particularly important deterrent role with respect to immigration enforcement. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations."). Immigration enforcement represents a major portion of all federal law enforcement—U.S. Customs and Border Protection (CBP), which includes the U.S. Border Patrol, "is one of the world's largest law enforcement organizations," arresting more than 1,100 individuals on a "typical day," About CBP, https://www.cbp.gov/about (last visited Aug. 5, 2019), while Immigration and Customs Enforcement (ICE) makes more than 100,000 arrests a year. U.S. Immigr. & Customs Enf't, *Fiscal Year 2018 Enforcement and Removal Operations Report*, 2, https://tinyurl.com/y92bd6rt (last visited Aug. 5, 2019). However, there is no alternative remedial scheme for either citizens or noncitizens who suffer constitutional injuries at the hands of immigration officers. Instead, *Bivens* provides the only mechanism for deterring unconstitutional conduct in a large share of American law enforcement. Thus, for victims of Fourth Amendment violations committed in the course of immigration enforcement, as for Bivens himself, "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment).

ARGUMENT

"*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court

despite the absence of any statute conferring such a right." *Carlson v. Green*, 446 U.S. 14, 18 (1980). To determine whether a *Bivens* remedy is available in a particular case, this Court first asks whether the case involves a "new context" for *Bivens*. *Abbasi*, 137 S. Ct. at 1857 (quoting *Malesko*, 534 U.S. at 68). If the case does not involve a new context, a *Bivens* cause of action is available. *See id.* at 1857-58. If the case does involve a new context, the Court performs "a special factors analysis." *Id.* at 1860. "[A] *Bivens* remedy will not be available if there are 'special factors counselling hesitation in the absence of affirmative action by Congress.'" *Id.* at 1857 (quoting *Carlson*, 446 U.S. at 18).

Under this test, a *Bivens* remedy should generally be available to victims of Fourth Amendment violations committed in the course of immigration enforcement. Searches and seizures conducted by low-level immigration officers to enforce the immigration laws do not represent a new context for *Bivens*. And even if they did, there are sound reasons for recognizing a *Bivens* remedy with regard to such immigration enforcement actions, and no special factors counselling against such recognition.

I. Most Immigration Enforcement Activities Do Not Present a "New Context" for *Bivens* Because They Are Substantially Similar to Other Forms of Law Enforcement that Are Subject to *Bivens*.

A case "presents a new *Bivens* context" if it "is different in a meaningful way from previous *Bivens* cases decided by this Court . . . ." *Abbasi*, 137 S. Ct. at 1859. But the vast majority of *Bivens* claims arising

from immigration enforcement do not differ in any "meaningful way," *id.*, from *Bivens*. Accordingly, federal courts have recognized *Bivens* claims against immigration officers for decades. *E.g.*, *Tripati v. U.S. INS*, 784 F.2d 345, 346 n.1 (10th Cir. 1986) (finding civil rights action against immigration officer was properly brought under *Bivens*); *Jasinski v. Adams*, 781 F.2d 843, 845-46 (11th Cir. 1986) (affirming denial of summary judgment in *Bivens* challenge to detention and search by immigration officer). In particular, many immigration enforcement claims involve exactly the same kinds of searches and seizures, subject to exactly the same Fourth Amendment limitations, as claims arising from criminal law enforcement, for which a *Bivens* remedy is available.

In *Bivens*, the petitioner alleged that federal agents, "acting under claim of federal authority," entered and searched his apartment without a warrant and arrested him without probable cause. 403 U.S. at 389. This Court held that the petitioner could sue those officials for damages for violations of his Fourth Amendment "right to be free from unreasonable searches and seizures carried out by virtue of federal authority." *Id.* at 392. This Court has recently reaffirmed "the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose" and has explained that "[t]he settled law of *Bivens* in this common and recurrent sphere of law enforcement" is a "powerful reason[] to retain it . . .." *Abbasi*, 137 S. Ct. at 1856-57. Unlawful searches and seizures conducted by low-level federal law enforcement officers in violation of the Fourth Amendment are thus

the quintessential context for *Bivens*.

As in *Bivens*, legal mandate governing immigration officers' conduct in arrests, searches, and seizures is the Fourth Amendment, not the INA. The Fourth Amendment "applies to all seizures of the person" regardless of an officer's specific area of concern. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (citation omitted). As the Department of Justice instructs in its guidance to U.S. Attorneys, "[t]he general rules concerning arrest, search and seizure applicable to other federal officers are, of course, applicable to immigration officers." U.S. Dep't of Justice, Justice Manual: Criminal Resource Manual § 1917, *Arrest, Search and Seizure by Immigration Officers* (2018), https://tinyurl.com/y44463dn.

The daily process of immigration enforcement involves the same kinds of searches and seizures by line federal officers, subject to the same Fourth Amendment limitations, as are involved in other federal law enforcement actions. Stops by immigration officers, for example, require reasonable suspicion—just like any other investigative stop. *See Terry v. Ohio*, 392 U.S. 1 (1968) (requiring reasonable suspicion for investigative stops); *Brignoni-Ponce*, 422 U.S. at 881 (extending *Terry* to require reasonable suspicion for stops by Border Patrol agents seeking "aliens who are illegally in the country"); *United States v. De La Cruz*, 703 F.3d 1193, 1194-96 (10th Cir. 2013) (requiring "reasonable suspicion" in order to pass Fourth Amendment muster for an investigative stop by ICE agents looking for someone "thought to be unlawfully in the United States"); *id.* at 1196 ("This case [regarding ICE agents]

involves an investigative, or *Terry*, stop, which is a seizure for Fourth Amendment purposes." (footnote omitted)); *United States v. Soto*, 649 F.3d 406, 409 (5th Cir. 2011) ("'A border patrol agent conducting a roving patrol may make a temporary investigative stop of a vehicle only if the agent is aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicle's occupant is engaged in criminal activity.'" (quoting *United States v. Jacquinot*, 258 F.3d 423, 427 (5th Cir. 2001))). In fact, the general Fourth Amendment test for the reasonableness of detaining an individual in order to conduct an interrogation comes from a case involving Immigration and Naturalization Service agents searching for "illegal aliens," *INS v. Delgado*, 466 U.S. 210, 211-12 (1984), demonstrating that the Fourth Amendment applies equally regardless of whether immigration law or other laws are being enforced, and regardless of whether an immigration officer or another law enforcement officer is involved.

Similarly, searches by immigration officers require warrants. *E.g.*, *Cotzojay v. Holder*, 725 F.3d 172, 174, 181 (2d Cir. 2013) (requiring a warrant or consent for a search of a home by ICE agents); *United States v. Castellanos*, 518 F.3d 965, 967-69 (8th Cir. 2008) (same). The warrant requirement for searches by immigration officers is likewise the same as the Fourth Amendment requirement for searches by other law enforcement officers enforcing other laws. *See Katz v. United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth

Amendment . . . ."); *Castellanos*, 518 F.3d at 969 (quoting same and applying it to a search of a home by ICE agents).

The daily operational reality of immigration enforcement—line federal law enforcement officers conducting searches and seizures subject to standard Fourth Amendment limitations—is thus indistinguishable in substance from the operational process of routine policing by other law enforcement officers. ICE in fact characterizes itself as a "powerful and sophisticated federal law enforcement agency," U.S. Immigr. & Customs Enf't, *Celebrating the History of ICE*, https://tinyurl.com/y4lphubd (last visited Aug. 5, 2019), and its agents identify themselves to suspects as "police," *see* Joel Rubin, *It's Legal for an Immigration Agent To Pretend To Be a Police Officer Outside Someone's Door, But Should it Be?*, L.A. Times (Feb. 20, 2017), https://tinyurl.com/y57psrgd. In practice, there is nothing meaningful to differentiate this type of standard, every-day immigration enforcement from other law enforcement.

Finally, some immigration violations are themselves criminal offenses. *E.g.*, 8 U.S.C. § 1325 (criminal penalties for improper entry); *id.* § 1326 (criminal penalties for attempting to reenter after prior removal); *id.* § 1327 (criminal penalties for aiding or assisting the entry of inadmissible aliens). As a result, CBP and ICE frequently transfer cases to U.S. Attorneys' Offices for prosecution. Indeed, in FY2016, prosecutions for immigration-related criminal offenses totaled 69,636, and CBP and ICE were the lead investigative agencies for 97% of those cases. *See* TRAC

Reports, *Immigration Now 52 Percent of All Federal Criminal Prosecutions*, https://trac.syr.edu/trac reports/crim/446/ (last visited Aug. 5, 2019); s*ee also* Mark Motivans, Bureau of Justice Statistics, U.S. Dep't of Justice, *Federal Justice Statistics, 2015-2016*, at 6 tbl. 3 (Jan. 2019), https://tinyurl.com/y2pm378m (Homeland Security was the referring agency for 52.6% of all matters opened by U.S. Attorneys in FY2016). Indeed, in April 2017, then-Attorney General Jeff Sessions directed federal prosecutors to make the prosecution of criminal "immigration offenses higher priorities." Office of the Attorney General, *Memorandum for All Federal Prosecutors* (Apr. 11, 2017), https://tinyurl.com/y293 m3jv. Immigration enforcement is thus not only substantially similar to other federal law enforcement activity—it often, literally, *is* routine criminal law enforcement.

As a result, garden-variety immigration enforcement simply does not constitute a "new *Bivens* context." *Abbasi*, 137 S. Ct. at 1859. Applying the test articulated in *Abbasi*, allegations that an immigration officer committed an unlawful search or seizure involve the same "rank" of officers (line officers) and the same "constitutional right" (the Fourth Amendment) as *Bivens* itself did. *Id.* at 1859-60. Such allegations also involve the same "specificity of the official action" (an unlawful search or seizure), the same degree of "judicial guidance" (Fourth Amendment jurisprudence), the same "legal mandate" for the officer (Fourth Amendment limitations), and the same risk of "intrusion by the Judiciary" (no more than in applying *Bivens* to other rogue officers) as *Bivens* itself. *Id.* at 1860. "The

settled law of *Bivens*" in "the search-and-seizure context" should thus apply equally to searches and seizures during immigration enforcement. *Id.* at 1856-57. The Court should take care not to suggest otherwise.

II. Most *Bivens* Claims Seeking a Remedy for Constitutional Violations by ICE and CBP Officers Will Not Involve Special Factors.

There are no "special factors counselling hesitation," *Abbasi*, 137 S. Ct. at 1857 (quotation marks omitted), about providing a *Bivens* remedy for constitutional violations committed in the course of general immigration enforcement. The special factors analysis "concentrate[s] on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed," and a special factor is one that would "cause a court to hesitate before answering that question in the affirmative." *Id.* at 1857-58. Special factors might include facts suggesting that "Congress has designed its regulatory authority in a guarded way, making it less likely that Congress would want the Judiciary to interfere," or the presence of "an alternative remedial structure." *Id.* at 1858. In the vast majority of *Bivens* cases arising from immigration enforcement, such special factors are not present. To the contrary, the text of the INA, the need for deterrence, and the lack of an alternative remedial scheme all point strongly in favor of a *Bivens* remedy.

A. Congress Contemplated the Availability of a *Bivens* Remedy in the Immigration and Nationality Act Itself.

The statutory language of the INA dispels any "sound reason[] to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong," *Abbasi*, 137 S. Ct. at 1858, by expressly taking the availability of *Bivens* into account. In a set of provisions that establish certain limited authority for state and local officials to enforce the immigration laws, Congress specified that any such officer or employee "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 (FTCA)] (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). The reference to a suit against an "*officer or employee* in a civil action brought under Federal … law," *id.* (emphasis added), is plainly a reference to *Bivens*. A suit under the FTCA is a suit against the United States, not against an "officer or employee." *Id.* Moreover, in enacting Section 1357,

Congress was legislating against the backdrop of *Carlson*, which held that the availability of a remedy under the FTCA does not preclude a *Bivens* action for the same injury. *See Carlson*, 446 U.S. at 19-23. Indeed, this provision of the INA "demonstrates Congress contemplated that civil actions would be maintained against both federal immigration officers and state employees acting in the capacity of federal immigration officers when their actions allegedly violate the Constitution or other laws." *Lanuza v. Love*, 899 F.3d 1019, 1031 (9th Cir. 2018). Thus, rather than displacing a *Bivens* cause of action, Congress intended the INA to co-exist with *Bivens*.

B. Allowing a *Bivens* Remedy Does Not Disrupt Governmental Operations.

Lower courts, including several Courts of Appeals, have long recognized *Bivens* remedies for constitutional violations by ICE and CBP officers without any resulting disruption. *E.g.*, *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006) (involving false arrest and excessive force against Mexican woman near U.S. port of entry); *Franco-de Jerez v. Burgos*, 876 F.2d 1038, 1039, 1042-43 (1st Cir. 1989) (allowing case to proceed to discovery against immigration officer where noncitizen was held incommunicado for over ten days); *Ysasi v. Rivkind*, 856 F.2d 1520, 1528 (Fed. Cir. 1988) (vacating grant of summary judgment in favor of Border Patrol agents based, in part, on lack of showing that alternative remedies were available and equally effective); *Jasinski*, 781 F.2d at 845-46 (affirming denial of summary judgment for the defendant in challenge to detention and

search by immigration officer); *Guerra v. Sutton*, 783 F.2d 1371, 1375-76 (9th Cir. 1986) (vacating and remanding dismissal against border patrol agents on qualified immunity grounds); *Tripati*, 784 F.2d at 346 n.1 (finding civil rights action against immigration officer properly brought under *Bivens*); *accord 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."), *adhered to in part on reh'g*, 482 F.3d 1205 (10th Cir. 2007); *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"). In the more than thirty years since the first of these decisions, there has been no resulting deluge of meritless cases or interference with the government's ability to enforce the immigration laws.

Furthermore, the government's plenary power over the admission and exclusion of noncitizens, *see Galvan v. Press*, 347 U.S. 522, 530 (1954), does not support a categorical rule disallowing *Bivens* liability for constitutional claims related to immigration enforcement, as such claims, generally, do not relate to the government's power to remove or exclude, but instead relate to the conduct of officers in exercising that power. Even if plenary power affects the scope of constitutional rights, it does not affect the remedy if those rights are violated. Consequently, in other contexts in which Congress exercises plenary power, Courts of Appeals have not hesitated to allow *Bivens* claims. For example, the Eighth Circuit allowed a

Bivens claim against a Bureau of Indian Affairs officer to proceed, *Wilkinson v. United States*, 440 F.3d 970, 971 (8th Cir. 2006), even though Congress exercises plenary power over the affairs of Native Americans, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343-44 (1998). Similarly, a *Bivens* suit against patent officers withstood a claim of absolute immunity in the Fourth Circuit, *Goldstein v. Moatz*, 364 F.3d 205, 211-19 (4th Cir. 2004), even though Congress has plenary power to "legislate on the subject of patents," *Eldred v. Ashcroft*, 537 U.S. 186, 239 (2003).

Moreover, because regular policing activities can and do routinely affect noncitizens, there is no reason to think that ordinary immigration enforcement has any greater foreign policy implications than other policing activities. *See Lanuza*, 899 F.3d at 1029-30 (providing a *Bivens* remedy against an ICE official who "knowingly forged evidence" and noting that "the facts of this case show that immigration cases often do not implicate high-level policy decisions related to national security"). *Abbasi* itself contrasted the claim in that case, involving "major elements of the Government's whole response to the September 11 attacks," with *Bivens* claims arising from "standard law enforcement operations," *Abbasi*, 137 S. Ct. at 1861 (internal quotation marks omitted). Finally, to the extent that any individual immigration-related case did raise unique foreign policy or national security concerns, courts could address them the same way this Court did in *Abbasi*: on a case-by-case basis.

C. Immunizing Immigration Officers Would Result in Unworkable Distinctions and Anomalies.

Further, there is no judicially workable way to carve out routine immigration enforcement as an exception to *Bivens*. Immigration enforcement is intertwined with the enforcement of other laws: federal immigration officers enforce other, non-immigration laws, while other federal officers also enforce immigration laws. The INA also allows state and local police officers to exercise some limited authority to enforce federal immigration laws. As a result, there is no practical way to disentangle immigration enforcement from other routine policing.

1. First, immigration officers have authority to search and seize for reasons beyond just the enforcement of immigration law. Pursuant to 8 U.S.C. § 1357(a)(5), immigration officers "make arrests" for "any felony cognizable under the laws of the United States" and "for any offense against the United States, if the offense is committed in the officer's or employee's presence." If, for example, ICE officers discover drugs in the course of a search, they are authorized to make an arrest for violations of federal narcotics laws, regardless of the immigration status of the individual, including arrests of U.S. citizens. *E.g.*, *United States v. Correa-Santos*, 785 F.3d 307 (8th Cir. 2015) (involving an ICE investigation of a methamphetamine distribution ring); *United States v. Matthews*, 181 F. App'x 171 (3d Cir. 2006) (involving an arrest by ICE agents for narcotics possession); *see also* U.S. Immigr. & Customs Enf't, *Narcotics Enforcement*,

https://tinyurl.com/y25zumcw (last visited Aug. 5, 2019) (explaining that "ICE agents enforce a wide range of criminal statutes" to combat narcotics smuggling).

Moreover, as described *supra*, some immigration violations are also criminal offenses, *e.g.*, 8 U.S.C. §§ 1325, 1326, 1327, and ICE routinely transfers criminal cases to U.S. Attorneys' Offices, U.S. Immigr. & Customs Enf't, *Fact Sheet: A Day in the Life of ICE Enforcement and Removal Operations*, https://tinyurl.com/y6ny5o6o (last visited Aug. 5, 2019). Additionally, ICE's Homeland Security Investigations (HSI) agents have "broad legal authority to enforce a diverse array of federal statutes" and use "this authority to investigate all types of cross-border criminal activity," from terrorism to financial crimes, cybercrimes, human rights violations, human trafficking, narcotics, and art theft. U.S. Immigr. & Customs Enf't, *Homeland Security Investigations*, https://tinyurl.com/y4auvog6 (last visited Aug. 5, 2019).

If immigration enforcement were treated as a context in which *Bivens* did not apply, courts would be forced to make complex determinations regarding whether a particular action taken by an ICE or CBP officer fell within or outside that context to assess whether a remedy was available. But, as a practical reality, such an inquiry is inherently nebulous because immigration enforcement is often inextricably intertwined with criminal enforcement. For example, if an ICE officer conducts an unlawful stop to probe an individual's immigration status but arrests the person for a criminal offense unrelated to immigration, would *Bivens* liability turn on the officer's initial motivation for

the stop, the reason for the arrest, or something else? Or what if ICE officers illegally seize an individual on an initial suspicion of *both* a civil immigration violation and a criminal immigration violation?

The only alternative to these difficult line-drawing problems would be to immunize ICE and CBP officers from *Bivens* liability across the board. That, however, would create an illogical regime in which immigration officers would be immune for committing constitutional violations in the course of routine criminal law enforcement, but other federal officers, such as Federal Bureau of Investigation (FBI) agents, would be subject to liability for the exact same actions. Not only does such a distinction make little practical sense, it would also create perverse incentives for the government: an agency that wanted to conduct an unconstitutional law enforcement action could simply have ICE or CBP carry it out.

2. The arbitrariness of giving ICE and CBP officers special immunity from *Bivens* is underscored by the reality that these officers routinely participate in interagency task forces with other federal agencies aimed at a range of criminal activity, from terrorism to human trafficking, gang violence, and narcotics. For example, the Joint Terrorism Task Force (JTTF), for example, involves members of, *inter alia*, the FBI and ICE. U.S. Immigr. & Customs Enf't, *Joint Terrorism Task Force*, https://tinyurl.com/y5be4kv4 (last visited Aug. 5, 2019). The Border Enhancement Security Task Force (BEST) involves personnel from, *inter alia*, ICE, CBP, the U.S. Coast Guard, the U.S. Secret Service, the Drug Enforcement Administration (DEA), and the

Bureau of Alcohol, Tobacco, and Firearms (ATF). U.S. Immigr. & Customs Enf't, *Border Enforcement Security Task Force (BEST)*, https://tinyurl.com/y4txo63n (last visited Aug. 5, 2019).

If a *Bivens* remedy were not available for constitutional violations committed in the course of immigration enforcement, action by joint federal task forces would create difficult questions for courts about whether a particular search or seizure occurred in a *Bivens*-free "immigration" context or in a routine criminal law enforcement context to which *Bivens* applies. Courts would have to develop rules about searches and seizures that occur in the course of enforcement actions with multiple purposes. Courts would either have to draw arbitrary distinctions between officers from different federal agencies participating in the same raid—*e.g.*, immunizing ICE officers but not FBI officers for the same actions on the same task force—or craft rules to try to parse whether a particular action by a federal officer during a joint raid was driven by an 'immigration law' or a 'criminal law' goal. The latter option would then force courts to inquire into officers' primary motives for a given search or seizure, which would require discovery into information that federal law enforcement agencies would surely view as highly sensitive.

All of these issues, moreover, would require extensive fact-bound litigation requiring additional discovery in any case involving a *Bivens* claim and potential immigration enforcement, because courts would first have to determine whether *Bivens* applied to each facet of the law enforcement conduct in question.

This Court should not adopt a rule that would routinely generate such litigation. *Cf. Whren v. United States*, 517 U.S. 806 (1996) (rejecting inquiry into officers' subjective intent with regard to alleged Fourth Amendment violations); *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982) (warning against any unnecessary "burdens of broad-reaching discovery" in *Bivens* actions).

Finally, if a *Bivens* remedy were not available in the general area of immigration enforcement, joint federal task forces would create significant opportunities for manipulation by the government. For instance, as noted *supra*, an agency that wanted to carry out an unconstitutional search could simply avoid *Bivens* liability by having ICE perform the search or by having ICE participate along with other agencies in the search. Alternatively, the government could retroactively shield law enforcement officers who violated constitutional rights by later bringing immigration charges that might otherwise not have been brought.

This Court should avoid opening this Pandora's Box by continuing to apply "[t]he settled law of *Bivens*," *Abbasi*, 137 S. Ct. at 1856-57, to searches and seizures, regardless of the subject matter of the law being enforced and regardless of which federal agency issued the officer's badge.

3. Treating immigration enforcement as a *Bivens*-free context may create the further anomaly of immunizing state and local police officers for constitutional violations committed in the course of routine local policing. Under 8 U.S.C. § 1357(g), the Attorney General "may enter into a written agreement

with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is . . . qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States . . . may carry out such function . . . ." ICE uses this authority to run the "287(g) program," in which local and state police departments are deputized to enforce certain immigration laws. Press Release, U.S. Immigr. & Customs Enf't, *Q&A: DHS Implementation of the Executive Order on Enhancing Public Safety in the Interior of the United States*, A21 (Feb. 21, 2017), https://tinyurl.com/gt3svwc ("ICE officers and agents as well as state and local 287(g) officers are trained to enforce immigration laws both in civil and criminal environments."). The number of 287(g) agreements has expanded significantly in recent years. Christopher N. Lasch et al., *Understanding "Sanctuary Cities"*, 59 B.C. L. Rev. 1703, 1727 (2018).

State and local officers in 287(g) agreements step into the shoes of federal officers for the purposes of liability and defenses. 8 U.S.C. § 1357(g)(8) ("An 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."). Consequently, if a *Bivens* remedy were not available with regard to immigration enforcement, state and local officers in 287(g) agreements would be immune when

acting in their immigration enforcement capacity.

Such a result would be judicially unworkable. State and local officers in 287(g) agreements blend ordinary policing with immigration enforcement, for instance by conducting routine traffic stops in part to determine drivers' immigration status. Such ordinary policing activity by state and local officers is subject to damages liability under 42 U.S.C. § 1983. But because state and local officers in 287(g) agreements step into the shoes of federal officers for purposes of liability, if immigration enforcement were a *Bivens*-free context, these state and local officers could be immunized for a wide swath of their ordinary law enforcement work. Imagine, for example, that a local police officer makes an unconstitutional stop or arrest but then discovers that the suspect is also in violation of immigration law. Would the officer suddenly become immune from suit as soon as the immigration law violation appears? Or would the court have to parse the officer's motivation—criminal enforcement or immigration enforcement—at each step in the interaction with the suspect? Courts already sometimes must wrestle with determining whether complaints against local officers whose departments are involved in 287(g) agreements are properly brought under *Bivens* or Section 1983. *E.g.*, *Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 463 (4th Cir. 2013) (avoiding question because deputies did not themselves participate in Sheriff's Office's 287(g) program). The stakes would be much higher if liability were determined by the answer. Additionally, even where a Section 287(g) agreement does not exist, ICE officers sometimes join local and state police on raids in

which potential suspects may be noncitizens. *See*, *e.g.*, *Muehler v. Mena*, 544 U.S. 93 (2005) (immigration officer participated in local police raid aimed at suspected gang members). The Court should not create incentives for state and local officers to circumvent liability under Section 1983 by relying on federal immigration officers to commit constitutional violations.

D. The Deterrent Effects of *Bivens* Are Especially Important in Immigration-Related Cases.

In addition to compensating victims for constitutional wrongs, "[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations." *Malesko*, 534 U.S. at 70; *FDIC v. Meyer*, 510 U.S. 471, 485 (1994) ("It must be remembered that the purpose of *Bivens* is to deter the officer." (emphasis omitted)). The litany of cases involving unconstitutional behavior by CBP and ICE officials indicates the need for the deterrent effect of a *Bivens* action. *See*, *e.g.*, *Lanuza*, 899 F.3d at 1033 (applying *Bivens* to an ICE attorney who forged evidence and explaining that "[r]ecognizing a *Bivens* action here will produce widespread litigation only if ICE attorneys routinely submit false evidence … if this problem is indeed widespread, it demonstrates a dire need for deterrence, validating *Bivens*' purpose"); *Martinez-Aguero*, 459 F.3d at 620-21 (holding that border patrol agent was not entitled to qualified immunity for yelling profanities while repeatedly kicking a handcuffed woman in the back and pushing her against a concrete wall, triggering epileptic seizures); *Perez v. United States*, 103 F. Supp. 3d 1180, 1191 (S.D.

Cal. 2015) (describing "the Rocking Policy," whereby border patrol agents deem rock-throwing a sufficient threat to justify lethal use of force by gunfire); *Estate of Hernandez-Rojas ex rel. Hernandez v. United States*, 62 F. Supp. 3d 1169, 1172-73, 1188 (S.D. Cal. 2014) (denying summary judgment motion where plaintiffs presented sufficient evidence that border patrol agents' physical abuse of detained Mexican national—including evidence that the detainee was repeatedly punched, kicked, and stepped on—"[was] a substantial factor in causing [the detainee's] injuries and death"); *see also* Bob Ortega & Rob O'Dell, *Deadly Border Agents Incidents Cloaked in Silence*, AZ Republic, Dec. 16, 2013 (reporting border patrol agent's fatal shooting, from the United States' side of the Rio Grande, of Juan Pablo Perez Santillan, who was on the Mexican bank of the river); Jason Buch, *Mexican Girl Clutched Her Dying Father*, San Antonio Express-News, Sept. 8, 2012 (reporting border patrol agent's fatal shooting, from a boat in the Rio Grande, of Guillermo Arevalo Pedraza, who was celebrating a birthday with his wife and two young daughters on the Mexican bank of the river); *More Accounts Emerge Following Deadly Border Shooting*, Nogales Int., Jan. 6, 2011 (reporting border patrol agent's fatal shooting, by aiming through the border fence, of 17-year-old Ramses Barron Torres); Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 Wis. L. Rev. 1109, 1124–40 (documenting "the widespread occurrence of constitutional violations" during immigration enforcement). Furthermore, noncitizens are not the only group affected. U.S. citizens are also injured when

ICE and CBP officials can act with impunity. *See*, *e.g.*, *Castillo v. Skwarski*, Case No. C 08-5683, 2009 U.S. Dist. LEXIS 115169 at *2-11, *15-16 (W.D. Wash. Dec. 10, 2009) (U.S. citizen veteran, detained for over seven months and ordered removed, brought *Bivens* suit); Complaint, *Riley v. United States*, No. 00-cv-06225 ILG/CLP (E.D.N.Y. Oct. 17, 2000), ECF No. 1 (*Bivens* and FTCA claims for unlawful detention, shackling, and strip search of lawful permanent resident upon return to U.S., settled for monetary damages).

Finally, while ICE and CBP do have internal disciplinary procedures, their internal discipline consistently has been toothless. A study by the American Immigration Council covering 809 complaints of alleged abuse lodged against border patrol agents between January 2009 and January 2012 revealed that, in an astonishing 97% of cases resulting in a formal decision, no action was taken. Over 75% of these cases involved allegations of physical abuse or excessive force. *See* Daniel E. Martinez, et al., American Immigration Council, *Special Report: No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse* 8-9 (2014), http://tinyurl.com/z9ay4k9; *see also* Guillermo Cantor & Walter Ewing, *Special Report: American Immigration Council, Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered* (2017), https://tinyurl.com/yxahta3k. Moreover, it is likely that the vast majority of cases go unreported: victims and their families—many of whom are without formal education, face language barriers, or lack legal sophistication—are not well-positioned to ensure that these internal processes are effective at guarding the guardians. The absence of a *Bivens* action

in cases involving routine immigration enforcement would effectively immunize CBP and ICE officers from adverse consequences for violations of citizens' and noncitizens' rights. *Bivens* is therefore critical to deterring abuse in the area of immigration enforcement to protect noncitizens and citizens alike.

E. There Is No Alternative Remedial Scheme Available.

Finally, there is no alternative remedial scheme under federal law through which victims of constitutional violations by immigration enforcement officers can seek redress. This distinguishes cases arising out of immigration enforcement actions from those cases where the Court has declined to recognize a *Bivens* action because of the availability of an alternative remedial scheme.

For example, in *Bush v Lucas*, 462 U.S. 367 (1983), the Court found that the "elaborate, comprehensive scheme" of civil-service protections and procedures precluded recognition of a *Bivens* cause of action to redress retaliatory firings in violation of the First Amendment. *Id.* at 385. That system, the Court found, "provide[d] meaningful remedies for employees" who claimed to have suffered retaliatory action in violation of the First Amendment. *Id.* at 386.

Likewise, in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), the Court declined to recognize a *Bivens* action against federal officers who allegedly violated due process in denying claims for Social Security disability benefits. The Court pointed to the "elaborate" administrative structure and procedures, *id.* at 414, that

Congress specifically designed to address problems created by the wrongful termination of disability benefits. In devising that system, Congress "chose specific forms and levels of protection for the rights of persons affected by incorrect eligibility determinations . . . ." *Id.* at 426. Given Congress's careful calibration of this remedial scheme, the Court deferred to Congress's judgment as to how best to "mak[e] the inevitable compromises required in the design of a massive and complex welfare benefits program." *Id.* at 429.

The Court reached a similar conclusion in a case involving military discipline. There, too, "Congress . . . ha[d] established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure. The resulting system provide[d] for the review and remedy of complaints and grievances such as those presented by" the plaintiffs who sought a *Bivens* cause of action. *Chappell v. Wallace*, 462 U.S. 296, 302 (1983).

No such alternative federal remedial scheme exists in this case. The INA certainly does not offer any adequate remedy. The INA is a scheme governing the admission, exclusion, and removal of noncitizens. Claims about constitutional violations have nothing to do with any of these actions. And, in any event, nothing in the INA provides for the redress of injuries suffered as a result of constitutional violations. Nor, as discussed above, do CBP's or ICE's internal disciplinary procedures adequately remedy the unconstitutional abuses of its officers. *See supra* at 28-29. Indeed, as discussed above, the INA itself is evidence that

Congress contemplated the availability of a *Bivens* action. *See supra* at 15-16.

Furthermore, in contrast to cases such as *Malesko* and *Minneci*, there is no alternative remedial scheme under state law either. Under the Westfall Act, 28 U.S.C. § 2679(b)(1), the United States would be substituted as the defendant in any state-law suit against Respondent, and Petitioners would be forced to proceed under the FTCA. 28 U.S.C. §§ 1346(b), 2671 *et seq*. Yet, as noted above, this Court has held that the FTCA is not the kind of alternative remedial scheme that can displace a *Bivens* cause of action. *See Carlson*, 446 U.S. at 20-23. The Court held in *Carlson* that "[p]lainly FTCA is not a sufficient protector of the citizens' constitutional rights, and without a clear congressional mandate we cannot hold that Congress relegated [a plaintiff] exclusively to the FTCA remedy." *Id.* at 23. Consequently, for both noncitizens and citizens who suffer constitutional harms by ICE or CBP officers, "it is [*Bivens*] or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment).

CONCLUSION

For the foregoing reasons, the Court should rule in favor of Petitioners and find that a *Bivens* remedy is appropriate in this case. Should the Court rule to the contrary, the Court should confine its ruling to the narrow circumstances of this case and reaffirm long-standing rules permitting *Bivens* causes of action for Fourth Amendment violations committed in the course of routine, domestic enforcement of immigration law.

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