No. 15-118

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 THE AMERICAN IMMIGRATION COUNCIL, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NATIONAL POLICE ACCOUNTABILITY PROJECT, AND NORTHWEST IMMIGRANT RIGHTS PROJECT 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.

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 immigrant rights. Over the last several years, through litigation and advocacy, NIPNLG has worked to promote government accountability for abuse and misconduct by immigration officials against noncitizens and individuals perceived to be noncitizens. To address these issues, NIPNLG represents select victims of immigration abuse and misconduct, appears as amicus curiae before federal courts, provides technical assistance, issues practice advisories, and conducts continuing legal education seminars. NIPNLG has a

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[1]All parties have consented to the filing of all amicus briefs. No counsel for a party authored this brief in whole or in part, and no person, other than amici or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

direct interest in ensuring that noncitizens are not unduly prevented from pursuing remedial suits in response to unconstitutional action by federal immigration officers.

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 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.

SUMMARY OF ARGUMENT

This Court's grant of *certiorari* asked the parties to address an additional issue not presented in the petition for *certiorari*: whether *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), provides a cause of action for the claim asserted in this case.

This Court should not hesitate to find a cause of action. Since first doing so in *Bivens* itself, this Court has recognized a cause of action to seek damages for a federal agent's violation of the Fourth Amendment because, as the Court explained, "'[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'" *Id.* at 397 (quoting *Marbury v. Madison*, 1 (Cranch 137), 163 (1803)). To be sure, the Court has declined to recognize the availability of a *Bivens* cause of action where the plaintiff can avail him- or herself of an alternative remedial scheme established by Congress, or in the presence of "special factors" that point against the recognition of a cause of action. *See, e.g.*, *Chappell v. Wallace*, 462 U.S. 296, 303-04 (1983). But neither of those caveats are present in this case.

Plainly, Petitioners have no recourse to any alternative remedial scheme. In contrast to other cases in which this Court has declined to find a *Bivens* cause of action, here Congress has not enacted any "elaborate, comprehensive scheme … by which improper action may

be redressed." *Bush v. Lucas*, 462 U.S. 367, 385 (1983). The Immigration and Nationality Act (INA) is not a substitute because it provides no mechanism to deter constitutional violations or compensate victims. To the contrary, the INA confirms that Congress intended to preserve a *Bivens* action in these circumstances. The statute setting forth the powers of immigration officers, 8 U.S.C. § 1357(g)(8), contemplates the availability of such a remedy. Nor can Petitioners find any redress in state court, due to the Westfall Act. *See* 28 U.S.C. § 2679(b)(1); *cf. Minneci v. Pollard*, 565 U.S. 118, 129-30 (2012) (declining to find a *Bivens* cause of action where state-law remedies are available). And this Court previously held that the Federal Tort Claims Act (FTCA) is not a substitute for *Bivens*, either. *Carlson v. Green*, 446 U.S. 14, 20-23 (1980). Thus, absent *Bivens*, Petitioners have no adequate remedy.

Nor are there any "special factors" in this case that counsel against recognizing a *Bivens* cause of action. To the contrary, the context in which this claim arises strongly favors such a cause of action. "The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). The litany of cases involving abusive, unconstitutional conduct by employees of Customs & Border Protection (CBP) and Immigration and Customs Enforcement (ICE) confirm that a *Bivens* remedy is necessary to deter such conduct.

The plenary power that the political branches of government exercise over the admission and exclusion of noncitizens does not compel a different conclusion. In the first place, this case does not involve the admission

or exclusion of noncitizens. It involves an excessive force claim. In any event, where constitutional rights do exist notwithstanding plenary power—as here, for the reasons set forth in Petitioners' brief, *see* Br. 14-27—then the Court should recognize a cause of action that allows a remedy for violation of those rights.

Finally, recognizing a *Bivens* cause of action in this context will not lead to a deluge of new claims. To the contrary, numerous Courts of Appeals have long recognized the availability of a *Bivens* cause of action in the border patrol and immigration enforcement context, and lower courts have not been inundated with litigation as a consequence of this recognition. Nor is there any evidence that legitimate immigration enforcement interests have been unduly constrained as a result. Accordingly, this Court should permit a *Bivens* cause of action in this case.

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*, 446 U.S. at 18. When deciding whether to apply *Bivens* to a new context, the Court applies a well-established two-step test. *See*, *e.g.*, *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). First, the Court determines whether an "alternative, existing process for protecting the [constitutionally recognized] interest amounts to a convincing reason for the Judicial Branch to refrain from providing" a separate *Bivens* remedy. *Minneci*, 565 U.S. at 122-23 (quoting *Wilkie*, 551 U.S. at 550) (alteration in original). When no such alternative

exists, the Court proceeds to the second step, in which it makes "the kind of remedial determination that is appropriate for a common-law tribunal," albeit one that pays "particular heed" to "any special factors counselling hesitation before authorizing a new kind of federal litigation." *Id.* (quoting *Wilkie*, 551 U.S. at 550).

Applying that test, a *Bivens* cause of action should be available to Petitioners in this case. First, there is no alternative remedial scheme that would provide redress for the violation of Sergio Hernández's Fourth Amendment rights. Second, there are sound reasons to recognize a *Bivens* cause of action in this case, and there are no "special factors" weighing against such recognition.

I. There Is No Alternative Remedial Scheme to Redress Agent Mesa's Violation of Sergio Hernández's Fourth Amendment Rights.

Petitioners' Fourth Amendment claim unquestionably satisfies the first condition: there is no alternative remedial scheme through which Petitioners can seek redress for the violation of Sergio Hernández's Fourth Amendment rights. "For [Petitioners], as for Bivens, it is damages or nothing." *Malesko*, 534 U.S. at 72 (quoting *Davis v. Passman*, 442 U.S. 228, 245 (1979)).

A. There Is No Alternative Remedy Under Federal Law.

First, there is no alternative method under federal law through which Petitioners can receive compensation for Agent Mesa's violation of Sergio Hernández's Fourth Amendment rights. That sets this case apart from a series of cases in which this Court has declined to

recognize a *Bivens* remedy because of the availability of an alternative remedial scheme.

For example, in *Bush*, 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. 462 U.S. 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 government 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*, 462 U.S. at 302.

No such alternative federal remedial scheme exists in this case. Certainly the INA does not offer any adequate remedy. The INA is a scheme governing the admission, exclusion, and removal of noncitizens. Petitioners' claims 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, such as the unlawful killing in this case. Nor, as discussed below, do CBP's or ICE's internal disciplinary procedures adequately remedy the unconstitutional abuses of its officers. *See infra* at 16-17.

Indeed, in the INA itself, Congress contemplated the availability of a *Bivens* remedy. In the INA, Congress established a framework for allowing state officers to act as immigration officers, 8 U.S.C. § 1357(g), and sought to give those state officers the same protections from suit that it understood federal immigration officers to enjoy. Thus, it provided that such a state officer "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). 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 § 1357, Congress was legislating against the backdrop of *Carlson*, 446 U.S. at 19-24, which held that the availability of a remedy under the FTCA does not preclude a *Bivens* action for the same injury. Thus, rather than displacing a *Bivens* cause of action, Congress intended the INA to co-exist with *Bivens*.

B. There Is No Alternative Remedy Under State Law.

There is also no alternative remedy available to Petitioners under state law, in contrast to cases such as *Malesko* and *Minneci*. 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.

II. The Context Weighs Strongly in Favor of a *Bivens* Cause of Action.

Because there is no alternative remedy available to Petitioners, this Court should recognize the availability of a *Bivens* cause of action, unless there are "special

factors counselling hesitation." *Minneci*, 565 U.S. at 123 (quoting *Wilkie*, 551 U.S. at 550). There are none here.

A. The "Special Factors" Previously Recognized By This Court Do Not Exist In This Case.

The "special factors" that have led the Court in previous cases to decline to recognize a *Bivens* remedy are not present in this case.

First, the Court has found "special factors" to counsel against a *Bivens* remedy when there is not a judicially manageable standard to adjudicate the alleged constitutional wrong. Thus, in *Wilkie*, the Court declined to recognize a *Bivens* cause of action to seek redress for the government's alleged retaliation against the plaintiff on account of his exercise of his property rights. The Court reasoned that "[a] judicial standard to identify illegitimate pressure going beyond legitimately hard bargaining would be endlessly knotty to work out," and that there would be "serious difficulty [in] devising a workable cause of action." *Wilkie*, 551 U.S. at 562.

That concern does not apply in this case. The standards for adjudicating excessive force claims under the Fourth Amendment are well-understood, and the Court has found no difficulty devising a workable cause of action for suits alleging excessive force. *See, e.g.*, *Graham v. Connor*, 490 U.S. 386, 394-99 (1989).

Second, the Court has found such "special factors" to exist in the context of military discipline. The Court reasoned that the "military establishment" has a "unique disciplinary structure," *Chappell*, 462 U.S. at 304, and the integrity of that disciplinary structure is necessary for the military to perform its function. The "special

nature of military life—the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel—would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command." *Id.* at 304. Accordingly, allowing *Bivens* suits would be "inappropriate." *Id.*; *see also United States v. Stanley*, 483 U.S. 669, 683-84 (1987).

The special factors that informed the Court's holding in *Chappell* and *Stanley* are not present in this case, either. Allowing Petitioners to sue under *Bivens* would not interfere with the chain of command in CBP or ICE or undermine the discipline of personnel in those agencies. To the contrary, allowing *Bivens* actions would provide additional incentives for CBP and ICE personnel to follow the rules and procedures intended to foster respect for the constitutional rights of the individuals with whom CBP and ICE officers interact. *See* 8 C.F.R. § 287.8 (setting forth "standard for enforcement activities," including for the use of deadly force).

B. The Context of Border Patrol Is Not a Special Factor Counseling Against a *Bivens* Remedy.

To the extent that Respondent contends that the context of the border region is a special factor counseling against a remedy for constitutional violations by federal officers, that argument is critically flawed. The logic of that position would apply to actions brought by U.S. citizens as well as noncitizens, and would apply to torts committed on either side of the border fence. This Court should not accept an invitation to carve out the border

region as a zone of official immunity in which judicial remedies are unavailable, even for blatant violations of constitutional rights.[2]

Indeed, Congress has a strong national interest in deterring mistreatment of foreign nationals by allowing *Bivens* suits alleging violations of constitutional rights. In *Arizona v. United States*, 132 S. Ct. 2492 (2012), the Court "reaffirmed that 'one of the most important and delicate of all international relationships … has to do with the protection of the just rights of a country's own nationals when those nationals are in another country.'" *Id.* at 2498-99 (citation omitted). The perceived mistreatment of foreign nationals located in the United States "may lead to harmful reciprocal treatment of American citizens abroad." *Id.* at 2498. The same logic applies with equal force to the actual mistreatment by federal agents of foreign nationals located along international borders. As the Fifth Circuit panel held below, this logic "militates in favor of the availability of some federal remedy for mistreatment at the hands of those who enforce our immigration laws. Where those who allege mistreatment have a right but lack a remedy, as here, the Supreme Court suggests that Congress

[2] Notably, courts have found that Congress has enacted immigration statutes with extraterritorial application. In *United States v. Villanueva*, 408 F.3d 193 (5th Cir. 2005), the court upheld the conviction of defendants who had attempted to smuggle individuals from El Salvador into the United States. Defendants were arrested in Mexico by Mexican police on Mexican territory. In affirming the convictions, the Fifth Circuit found that 8 U.S.C. § 1324(a)'s prohibition on bringing undocumented individuals to the United States applied to extraterritorial conduct, including conduct occurring exclusively within Mexico. 408 F.3d at 198-200.

would want some remedy to be available." *Hernandez v. United States*, 757 F.3d 249, 276 (5th Cir. 2014), *adhered to in part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015).

Moreover, patrolling the border region does not involve any special considerations absent from the ordinary policing context in which *Bivens* actions are well-established. Like police officers, border patrol officers "are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 397. But that reality does not foreclose a *Bivens* remedy. Instead, the law accounts for these circumstances by providing a qualified immunity defense, and potential early dismissal of a civil action, if a reasonable officer could have believed that the officer's conduct was lawful under clearly-established law and reasonable in the totality of the circumstances. The reasonable latitude that law enforcement officers enjoy provides no reason to foreclose a remedy for blatantly illegal conduct.

This Court's recognition that the political branches exercise plenary power over the admission and exclusion of noncitizens, *see Galvan v. Press*, 347 U.S. 522, 530 (1954), also does not counsel against a *Bivens* remedy. This case does not involve the admission or exclusion of noncitizens; it involves an excessive force claim under the Fourth Amendment for the shooting of a teenager.

Moreover, even if plenary power were relevant here, it would only bear on the scope of constitutional rights,[3] and not on the availability of a remedy when 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 (1988). 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 "to legislate upon the subject of patents," *McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843).

Here, for the reasons given by Petitioners, Sergio Hernández had a Fourth Amendment right to not be shot to death, without provocation, by Respondent. *See* Petrs. Br. 14-27. And if that constitutional right is

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[3] While some cases rely on plenary power in shaping the scope of constitutional rights in the immigration context, *see*, *e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 766-70 (1972); *Harisiades v. Shaughnessy*, 342 U.S. 580, 591-92 (1952), this Court has also long recognized that the exercise of plenary power is still "subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 604 (1889) (instructing that plenary power over immigration is restricted in its exercise "by the [C]onstitution itself.").

violated, the victim should have a remedy to obtain both compensation and to deter future unlawful shootings.

C. The Need for Deterrence Supports a *Bivens* Remedy In This Case.

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*."). And the need for deterrence in this context is grave.

Numerous cases catalogue examples of shocking abuse by CBP officers, including not only reckless and fatal shootings like this case, but also cases involving abuses in detention. *See, e.g.*, *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 620-21 (5th Cir. 2006) (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'l., Jan. 6, 2011 (reporting border patrol agent's fatal shooting, by aiming through the border fence, of 17-year-old Ramses Barron Torres).

American citizens also are affected when CBP and ICE officials are permitted to act with impunity. U.S. citizens have been detained and, in some cases, removed, by immigration officials. *See, e.g.*, *Castillo v. Skwarski*, No. 08-5683, 2009 U.S. Dist. LEXIS 115169 at *2-11, *16 (W.D. Wash. Dec. 10, 2009) (U.S. citizen veteran, detained for over seven months and ordered removed, brought *Bivens* suit); Order, *Guzman v. United States*, No. CV 08-01327 GHK (C.D. Cal. May 11, 2010), ECF No. 80 (American citizen with mental disability who was detained and removed, settled damages 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).

Bivens is critical to deterring such abuse. The absence of a *Bivens* remedy would effectively immunize CBP and ICE officers from adverse consequences for violations of noncitizens' rights. Although these agencies do have internal disciplinary procedures, their internal discipline 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* American Immigration Council, *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse* 8 (2014), http://tinyurl.com/z9ay4k9. And 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.

D. Recognizing a *Bivens* Cause of Action Would Not Result in a Deluge of New Litigation.

Finally, recognizing a *Bivens* cause of action in this case would not open the floodgates to a new type of *Bivens* claim. Several Courts of Appeals already have recognized the availability of a *Bivens* cause of action in the border patrol and immigration enforcement context. *See, e.g.*, *Martinez-Aguero*, 459 F.3d at 625 (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 on *Bivens* claim 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 in *Bivens* action based, in part, on lack of showing that alternative remedies were available and equally effective); *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); *Guerra v. Sutton*, 783 F.2d 1371, 1375-76 (9th Cir. 1986) (vacating and remanding dismissal of *Bivens* claims against border patrol agents on qualified immunity grounds); *Tripati v. U.S. INS*, 784 F.2d 345, 346 n.1 (10th Cir. 1986) (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 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.

CONCLUSION

For the foregoing reasons, and those set forth in Petitioners' brief, the Court should hold that a *Bivens* cause of action is available to Petitioners.

December 9, 2016

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