No. 16-879

In the Supreme Court of the United States

SANTIAGO ALVAREZ, PETITIONER

v.

FELICIA SKINNER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly declined to extend the judicially inferred damages remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to the novel context of this case, in which petitioner seeks to hold individual immigration officials personally liable for the allegedly unconstitutional extension of his immigration detention.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-73a) is reported at 818 F.3d 1194. The order of the district court (Pet. App. 76a-106a) is not published in the *Federal Supplement*.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 2016. A petition for rehearing was denied on September 13, 2016 (Pet. App. 74a-75a). On December 6, 2016, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including January 11, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a Cuban national who was admitted to the United States as a lawful permanent resident in

1959. Pet. App 3a. This case arises out of his attempt to recover damages from individual federal officials under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), based on his claim that those officials violated his constitutional rights by prolonging his immigration detention.

a. In 2006, petitioner pleaded guilty to federal criminal charges, including conspiracy to possess machine guns and a grenade launcher, arising out of his efforts to assist anti-Castro activists operating outside the United States. During plea negotiations, petitioner raised concerns about the immigration consequences of a guilty plea. Prosecutors responded that although the convictions would render petitioner removable and he could be removed, he was unlikely to be removed to Cuba—in part because he was a well-known opponent of the Castro government. Petitioner's plea agreement provided that prosecutors would use their "best efforts" to communicate with U.S. Immigration and Customs Enforcement (ICE) "to reach a definitive understanding of [petitioner's] immigration status and the effect of th[e] case on his immigration status." Pet. App. 3a-4a; see *id.* at 77a-78a.

In 2007, shortly before petitioner was set to be released from prison to serve the remainder of his sentence in a halfway house, ICE lodged an immigration detainer with the Federal Bureau of Prisons that prevented his release. Petitioner filed a motion under 28 U.S.C. 2255 asking the district court that heard his criminal case to lift the detainer, arguing that the government had breached the best-efforts provision of the plea agreement. At a hearing, the government stated that it sought to detain petitioner to initiate removal proceedings and determine whether he could

be removed to a country other than Cuba. The court denied petitioner's motion, noting that he had acknowledged at his plea hearing that his convictions could result in removal. Pet. App. 4a-5a.

In 2008, petitioner pleaded guilty to obstruction of justice in another federal case and was sentenced to an additional ten months of imprisonment. After that sentence ended in November 2008, petitioner was detained by ICE pending removal proceedings. Petitioner was ultimately ordered removed on January 22, 2009. Pet. App. 5a-6a.

b. An alien who is ordered removed generally must be removed "within a period of 90 days" and is subject to mandatory detention during that "removal period." 8 U.S.C. 1231(a)(1)(A) and (2). If removal cannot be accomplished during the 90-day removal period and the alien is removable on specified grounds or is a flight risk or a danger to the community, then the alien "may be detained beyond the removal period." 8 U.S.C. 1231(a)(6). In *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), this Court interpreted Section 1231(a)(6) to authorize post-removal-period detention for a "reasonable" time, with six months being "presumptively reasonable" and detention remaining permissible unless "there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 700-701. Immigration regulations provide for review of an alien's continued detention before the expiration of the initial 90-day removal period, approximately three months after the end of that period, and annually thereafter. 8 C.F.R. 241.4(k)(1) and (2).

After petitioner was ordered removed in January 2009, his attorneys contacted respondent Felicia Skinner, the ICE Field Office Director of the Atlanta Of-

fice of Detention and Removal, and requested that she expedite the removal review process. Skinner declined to do so, and on April 22, 2009—the last day of the 90-day removal period—Skinner issued a "First Decision to Continue Detention." That decision stated that petitioner would continue to be detained because he was a danger to the community and a flight risk, and because there was "no reason to believe that [his] removal will not take place within the reasonably foreseeable future." Pet. App. 6a; see *id.* at 151a-152a.

On July 28, 2009, petitioner filed a habeas petition under 28 U.S.C. 2241 arguing that his continued detention was unconstitutional. On September 17, 2009, the government filed a motion for an extension of time to file its answer. The motion stated that the government was not seeking to remove petitioner to Cuba, but that it was actively pursuing removal to Spain. The motion was accompanied by a declaration from respondent Michael Gladish, an ICE Supervisory Detention and Deportation Officer, which suggested that petitioner was eligible for Spanish citizenship and that he had promised to complete a citizenship application. The district court granted the motion. Pet. App. 7a.

Petitioner moved for reconsideration, arguing that he was not eligible for Spanish citizenship and that ICE officials had given him only a partial citizenship application, omitting pages that allegedly made his ineligibility clear. The district court granted petitioner's motion and set the case for a hearing on October 26, 2009. Pet. App. 7a-8a.

In the meantime, in a letter delivered to petitioner on October 14, 2009, respondent Juan Munoz, the Acting Headquarters Case Management Unit Chief at ICE, issued a Second Decision to Continue Detention.

The decision stated that ICE was working to secure petitioner's removal to Spain and that there was no reason to believe that his removal would not occur in the reasonably foreseeable future. Pet. App. 8a.

On October 21, 2009, ICE officials notified petitioner that he was being released subject to certain conditions. The government then moved to dismiss his habeas petition as moot. The district court denied the motion and retroactively granted habeas relief effective October 21. The court stated that the government's prior justification for petitioner's detention was insufficient and invalidated some of the conditions of his release. Pet. App. 8a-9a.[1]

2. In 2013, petitioner filed this *Bivens* action against respondents Skinner, Gladish, and Munoz in their individual capacities. His complaint alleged that respondents violated his Fourth and Fifth Amendment rights by prolonging his detention even though they allegedly knew that there was no prospect that he would be removed. Pet. App. 107a-148a.[2]

The district court granted respondents' motion to dismiss, holding that petitioner's claims were barred on multiple independent grounds. Pet. App. 76a-106a. First, the court held that it lacked jurisdiction under 8 U.S.C. 1252(g), which eliminates district courts' jurisdiction to hear "any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any

[1] The court of appeals later reinstated the challenged conditions. Pet. App. 9a & n.1.

[2] Petitioner also asserted additional claims, including claims against other federal officials, but he has now abandoned those claims. Pet. 2 n.2, 12.

alien" under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* Pet. App. 84a-88a. Second, the court held that petitioner's claims were barred by Georgia's two-year statute of limitations. *Id.* at 88a-94a. Third, the court held that petitioner's claims were barred by *Heck* v. *Humphrey*, 512 U.S. 477 (1994). Pet. App. 94a-95a. Fourth, the court held that the judicially created *Bivens* remedy should not be extended to this case because the INA and habeas corpus review establish a "comprehensive statutory scheme" of remedies for allegedly unlawful immigration detention. *Id.* at 98a; see *id.* at 95a-101a. Finally, the court held that respondents were entitled to qualified immunity because their alleged actions did not violate any clearly established constitutional right. *Id.* at 101a-104a.

3. The court of appeals affirmed. Pet. App. 1a-73a.

a. The court of appeals first held that, notwithstanding the jurisdictional bar in 8 U.S.C. 1252(g), it had jurisdiction to consider a portion of petitioner's *Bivens* claims. Pet. App. 12a-21a. The court agreed with the district court that Section 1252(g) foreclosed petitioner's claims to the extent that he sought to challenge the manner in which his removal proceedings were commenced and the initial decision to detain him during those proceedings. *Id.* at 16a-18a. But the court held that Section 1252(g) did not bar petitioner's claim that respondents violated his constitutional rights by prolonging his detention *after* he was ordered removed and the initial 90-day removal period expired. *Id.* at 19a-21a.

b. On the merits, the court of appeals upheld the district court's conclusion that the *Bivens* remedy should not be extended to claims like petitioner's. Pet.

App. 21a-36a. The court explained that this Court has instructed that a court asked to extend *Bivens* to a new context must conduct "a two-step inquiry." *Id.* at 23a. First, the presence of an "alternative, existing process for protecting the constitutionally recognized interest" may provide "a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Ibid.* (quoting *Minneci* v. *Pollard*, 565 U.S. 118, 122-123 (2012)). And second, "even in the absence of an adequate alternative," a court must still determine whether a judicially created damages remedy is warranted, "paying particular heed * * * to any special factors counseling hesitation before authorizing a new kind of federal litigation." *Ibid.* (quoting *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983)).

The court of appeals noted that both of the circuits that had previously considered the question had declined to extend *Bivens* to challenges to immigration detention. Pet. App. 24a-26a & n.6 (citing *De La Paz* v. *Coy*, 786 F.3d 367 (5th Cir. 2015), petition for cert. pending, No. 15-888 (filed Jan. 12, 2016); *Mirmehdi* v. *United States*, 689 F.3d 975 (9th Cir. 2012), cert. denied, 133 S. Ct. 2336 (2013)). The court reached the same conclusion here, holding that petitioner's effort to extend *Bivens* to a claim of unconstitutionally prolonged immigration detention was independently foreclosed by both steps of this Court's two-step inquiry. *Id.* at 26a-36a.

First, the court of appeals held that the INA is an elaborate remedial scheme that contains "a host of review procedures" and "numerous avenues for aliens to obtain review of ICE decisions." Pet. App. 27a. The court also highlighted the availability of habeas relief,

which provides "the most speedy, direct, and powerful remedy from wrongful detention." *Id.* at 28a. The court concluded that "the complexity of the [INA], and Congress's frequent amendments to it," counseled against the judicial creation of an additional damages remedy. *Id.* at 30a. And the court also emphasized that petitioner had in fact "availed himself of [available] review mechanisms many different times during his detention." *Ibid.*

Second, the court of appeals stated that "even if" it concluded "that no sufficient alternative remedy exists," it would still hold that "numerous special factors counsel hesitation in this context." Pet. App. 31a. Among other things, the court noted the "breadth and detail" of the INA and "the importance of demonstrating due respect for the Constitution's separation of powers," which gives the political branches primary responsibility for immigration matters. *Ibid.* The court also noted that the type of *Bivens* claim petitioner seeks to raise would be "doctrinally novel and difficult to administer" because it would require courts to "examine ICE's motivations" for the continued detention of aliens ordered removed. *Id.* at 32a.[3]

c. Judge Jill Pryor concurred in part and dissented in part. Pet. App. 37a-73a. She agreed with the court of appeals' partial rejection of petitioner's claims on jurisdictional grounds and with its conclusion that petitioner may not bring *Bivens* claims against Skinner and Gladish. *Id.* at 37a-38a & n.1. But she would have allowed petitioner to proceed with a *Bivens* claim against

[3] Because the court of appeals concluded that petitioner's claims could not be brought under *Bivens*, it did not consider the three non-jurisdictional alternative grounds relied upon by the district court. Pet. App. 22a.

Munoz on the theory that "Munoz violated his Fifth Amendment right to due process by deciding [in October 2009] to continue [petitioner's] detention despite knowing there was no significant likelihood he would be removed in the reasonably foreseeable future." *Id.* at 46a-47a (footnote omitted); see *id.* at 46a-65a.

4. The court of appeals denied rehearing en banc with no judge requesting a vote. Pet. App. 74a-75a.

ARGUMENT

Petitioner contends (Pet. 24-33) that the judicially created damages remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should be extended to the novel context presented in this case. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted, and the petition for a writ of certiorari should be denied. Alternatively, the Court may wish to hold the petition pending its decision in *Ashcroft* v. *Abbasi*, No. 15-1359 (argued Jan. 18, 2017), and the consolidated cases, and then dispose of the petition as appropriate in light of the Court's decision in those cases.

1. The court of appeals correctly declined to extend the judicially created *Bivens* remedy to the novel context of this case.

a. In *Bivens*, this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 66 (2001). The Court held that, despite the absence of such a remedy in the Fourth Amendment itself or in any statute, federal officers could be sued for damages for conducting a warrant-

less search in the United States. *Bivens*, 403 U.S. at 389. In creating that common-law cause of action, however, the Court emphasized that the context of the case presented "no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396.

Since deciding *Bivens* in 1971, this Court has "extended its holding only twice." *Malesko*, 534 U.S. at 70. In *Davis* v. *Passman*, 442 U.S. 228 (1979), the Court allowed a congressional employee to sue for sex discrimination in violation of the Fifth Amendment. *Id.* at 248-249. And in *Carlson* v. *Green*, 446 U.S. 14 (1980), the Court allowed a federal prisoner to sue prison officials for Eighth Amendment violations. *Id.* at 19-23. In each case, the Court reiterated that it found "no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 19; see *Davis*, 442 U.S. at 245.

In the more than 35 years since *Carlson*, this Court "ha[s] consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68. Eight decisions of this Court squarely rejected efforts to expand *Bivens*. See *Minneci* v. *Pollard*, 565 U.S. 118, 130-131 (2012); *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007); *Malesko*, 534 U.S. at 74; *FDIC* v. *Meyer*, 510 U.S. 471, 484-486 (1994); *Schweiker* v. *Chilicky*, 487 U.S. 412, 429 (1988); *United States* v. *Stanley*, 483 U.S. 669, 683-684 (1987); *Bush* v. *Lucas*, 462 U.S. 367, 390 (1983); *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983). On three other occasions, the Court sua sponte questioned the existence of a *Bivens* remedy even though the parties had not raised the issue. See *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009);

see also *Wood* v. *Moss*, 134 S. Ct. 2056, 2066 (2014); *Reichle* v. *Howards*, 566 U.S. 658, 663 n.4 (2012).

This Court's steadfast refusal to extend *Bivens* reflects its changed understanding of the scope of judicial authority to create private rights of action. *Bivens* "rel[ied] largely on earlier decisions implying private damages actions into federal statutes." *Malesko*, 534 U.S. at 67. But in the decades since *Bivens*, the Court has made clear that the creation of damages remedies is a legislative function, and it has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one." *Id.* at 67 n.3. The Court has "repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004). And it has "declined to 'revert' to 'the understanding of private causes of action that held sway'" when *Bivens* was decided. *Malesko*, 534 U.S. at 67 n.3 (citation omitted). The Court has thus explained that its "reluctan[ce] to extend *Bivens*" rests on its more recent decisions clarifying that "implied causes of action are disfavored." *Iqbal*, 556 U.S. at 675.

This Court has set forth a two-part analysis to determine whether to extend *Bivens* to a new context. First, a court should ask whether there is "any alternative, existing process for protecting" the relevant constitutional interest; if so, such an established process implies that Congress "expected the Judiciary to stay its *Bivens* hand" and "refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550, 554. Second, "even in the absence of [such] an alternative" process, inferring a remedy under *Bivens* is still disfavored, and a court must de-

termine whether judicially created relief is warranted, "paying particular heed * * * to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Id.* at 550 (citation and internal quotation marks omitted). Hesitation is especially warranted when it appears that Congress's "inaction" with respect to providing an express damages remedy "has not been inadvertent." *Chilicky*, 487 U.S. at 423.

b. The court of appeals correctly applied this Court's two-step framework in declining to extend *Bivens* to the context of petitioner's claim of unlawfully prolonged detention pending removal. As the court explained with respect to that framework's first step, the INA and related laws establish a comprehensive remedial system protecting against unlawful detention, and petitioner "availed himself of the [INA's] review mechanisms many different times during his detention." Pet. App. 30a.

Like other statutes that have been found to preclude the creation of a *Bivens* remedy, the INA is a "comprehensive statutory scheme[]" that has received "frequent and intense" attention from Congress. *Chilicky*, 487 U.S. at 425, 428. As the court of appeals explained, "Congress has provided for a host of review procedures tailored to the differently situated groups of aliens that may be present in the United States" and has established "numerous avenues" for aliens to seek discretionary relief. Pet. App. 27a (citing 8 U.S.C. 1225, 1228, 1229a, 1229b). Where, as here, an alien is detained after being ordered removed, the regulations implementing 8 U.S.C. 1231(a)(6) provide for regular administrative reviews of the alien's continued detention. See 8 C.F.R. 241.4(k)(1) and (2). And, as this case illustrates, "a detained alien can seek a petition

for a writ of habeas corpus to challenge his detention in the event that the statute's review procedures are insufficiently protective." Pet. App. 28a (citing *Zadvydas* v. *Davis*, 533 U.S. 678, 688 (2001)).

Petitioner contends (Pet. 29-30) that those alternative remedies were insufficient because a writ of habeas corpus "provides prospective and not retrospective relief." See Pet. App. 49a-59a (Pryor, J., concurring in part and dissenting in part). But this Court has made clear that an alternative remedial process can foreclose a *Bivens* remedy even though it may not provide "complete relief" for the plaintiff. *Bush*, 462 U.S. at 388. "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," it is inappropriate for a court to create "additional *Bivens* remedies." *Chilicky*, 487 U.S. at 423. Under *Bush* and *Chilicky*, "it is the comprehensiveness of the [alternative] statutory scheme involved, not the 'adequacy' of specific remedies extended thereunder, that counsels judicial abstention." *Spagnola* v. *Mathis*, 859 F.2d 223, 227 (D.C. Cir. 1988) (en banc) (citation omitted).

Here, the INA, implementing regulations, and related laws constitute a comprehensive regulatory and remedial scheme. And particularly given "the frequent attention that the legislature has given to the complex scheme governing removal and its review procedures over many years," the court of appeals correctly concluded "that the congressional decision not to provide a private action for damages was deliberate." Pet. App. 29a. Under those circumstances, a judicially created *Bivens* remedy is not appropriate.

c. Even if the INA, implementing regulations, and habeas corpus were not an adequate alternative remedial scheme, the court of appeals also correctly held that, under the second step of this Court's *Bivens* framework, there are "special factors counselling hesitation before authorizing a new kind of federal litigation" in the form of a damages action for allegedly unlawful immigration detention. *Wilkie*, 551 U.S. at 550 (quoting *Bush*, 462 U.S. at 378). "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). In the context of detention pending removal, for example, *Bivens* claims would often directly implicate negotiations with the foreign nations to which the aliens are to be removed—as well as post hoc review of the reasonableness of officials' difficult predictive judgments about the likely success of such negotiations and about the detained aliens' risk of flight and danger to the community. And the fact that "Congress has established a substantial, comprehensive, and intricate remedial scheme in the context of immigration" further counsels against judicial creation of an extra-statutory damages remedy. *Mirmehdi* v. *United States*, 689 F.3d 975, 982 (9th Cir. 2012) (citation omitted), cert. denied, 133 S. Ct. 2336 (2013).

Petitioner contends (Pet. 30-31) that these special factors do not counsel hesitation because the political branches' authority over matters of immigration is subject to constitutional limits. But that misunderstands the nature of the special-factors inquiry and the consequences of declining to create a *Bivens* remedy. The very premise of the special-factors inquiry is that a judicially created damages remedy is *not* appropriate

for every constitutional violation—indeed, "in most instances [this Court] ha[s] found a *Bivens* remedy unjustified." *Wilkie*, 551 U.S. at 550. The question in every new context is whether Congress, rather than the Judiciary, is the appropriate body to "prescribe the scope of relief that is made available." *Bush*, 462 U.S. at 380. The political branches' primacy in matters of immigration—and the sensitivity and foreign-affairs implications of immigration-related judgments—establish that Congress, rather than the judiciary, is the appropriate body to decide whether and under what circumstances to provide a damages remedy to aliens who claim to have suffered prolonged immigration detention in violation of the Constitution. That is especially true given the number of such claims that could potentially be raised. See Pet. App. 32a (explaining that *Bivens* claims in this context would be "doctrinally novel and difficult to administer").

2. The court of appeals' decision does not conflict with any decision of another court of appeals.

a. Petitioner principally contends (Pet. 3, 24, 27-28) that the court of appeals' refusal to recognize a *Bivens* remedy conflicts with the Second Circuit's decision in *Turkmen* v. *Hasty*, 789 F.3d 218 (2015), cert. granted, Nos. 15-1358, 15-1359, and 15-1363 (argued Jan 18, 2017). That is incorrect. *Turkmen* held that the plaintiffs in that case could bring *Bivens* claims challenging their "conditions of confinement" during immigration detention. *Id.* at 235-237. For two reasons, that holding does not conflict with the court of appeals' decision that a *Bivens* remedy is not warranted in the distinct context presented here.

First, the Second Circuit was careful to limit its holding to *Bivens* claims based on allegedly unconsti-

tutional "conditions of confinement." *Turkmen*, 789 F.3d at 236. The court specifically distinguished such claims from the claim at issue in *Mirmehdi*, where the Ninth Circuit declined to provide a *Bivens* remedy "for *unlawful detention* during deportation proceedings." *Id.* at 236 n.16. The court concluded that *Mirmehdi* was "plainly inapposite" because the plaintiffs in *Turkmen* "d[id] not challenge the fact that they were detained, but rather the conditions in which they were detained." *Ibid.* The decision below drew the same distinction, specifically citing *Turkmen* and emphasizing that it "need not, and d[id] not, decide whether a *Bivens* remedy would be available in cases of physical abuse or punitive confinement conditions." Pet. App. 26a n.6 (citation omitted). There is thus no reason to believe that petitioner's *Bivens* claim would have been allowed to proceed in the Second Circuit.

Second, the Second Circuit's decision in *Turkmen* did not conduct a special-factors inquiry or otherwise apply this Court's two-step test for extending *Bivens* to new contexts. Instead, the court's decision to allow the plaintiffs' conditions-of-confinement claims to proceed rested exclusively on its conclusion that such claims arose "within a familiar *Bivens* context." *Turkmen*, 789 F.3d at 235. As the government explained in its petition for a writ of certiorari in *Turkmen*, the Second Circuit's conclusion that the claims at issue arose in a familiar context was erroneous and "at odds" with the decisions of other courts of appeals, including the Eleventh Circuit's decision in this case. Pet. at 19-20, *Turkmen*, *supra* (No. 15-1359). But that tension between the two decisions does not warrant this Court's review, because petitioner does not appear to challenge the court of appeals' unanimous conclu-

sion in this case that he seeks to extend *Bivens* to a novel context. Pet. App. 24a-25a; see *id.* at 47a n.12 (Pryor, J., concurring in part and dissenting in part) ("I agree with the majority that [petitioner] asks us to recognize a *Bivens* remedy in a new context.").

b. Petitioner also contends (Pet. 29-33) that aspects of the court of appeals' analysis conflict with decisions by other circuits. Again, he is mistaken.

First, petitioner observes (Pet. 29-30) that the Seventh Circuit has stated that the availability of habeas relief does not preclude the recognition of a *Bivens* remedy. See *Engel* v. *Buchan*, 710 F.3d 698, 706 (2013). But the Seventh Circuit was addressing a very different context—there, the plaintiff sought to bring a *Bivens* claim for an asserted violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), in his criminal prosecution. See *Engel*, 710 F.3d at 702-708. And although the Seventh Circuit concluded that the availability of habeas relief was not sufficient to foreclose a *Bivens* remedy there, it specifically distinguished the immigration context. Citing *Mirmehdi*, the Seventh Circuit agreed that "in some contexts the availability of habeas corpus weighs against authorizing a *Bivens* remedy," particularly where, as here, "habeas is one element of a broader, integrated remedial scheme." *Id.* at 706.

Second, petitioner contends (Pet. 30-32) that the court of appeals' decision conflicts with the decisions of other circuits recognizing *Bivens* remedies for intentional constitutional violations. But, as this Court has emphasized, the appropriateness of implying a cause of action under *Bivens* depends on context, and none of the decisions on which petitioner relies involved a claim that an alien's immigration detention had been impermissibly prolonged. See *Morales* v. *Chadbourne*,

793 F.3d 208, 220-222 (1st Cir. 2015) (considering a U.S. citizen's claim that ICE detainers issued without probable cause violated the citizen's Fourth and Fifth Amendment rights); *Martinez-Aguero* v. *Gonzalez*, 459 F.3d 618, 625 (5th Cir.) (claim that alien seeking to enter the United States was physically abused by a border patrol agent), cert. denied, 549 U.S. 1096 (2006); see also Pet. App. 26a (specifically distinguishing "cases of physical abuse"). Furthermore, the First Circuit's decision in *Morales* addressed only the question of qualified immunity; it did not consider whether the *Bivens* remedy should have been extended to the claim at issue there. 793 F.3d at 214-223.

Third, petitioner contends (Pet. 32-33) that the court of appeals' decision conflicts with decisions of this Court and other courts of appeals allowing *Bivens* claims based on asserted violations of the Fifth Amendment's Due Process Clause. But the availability of a *Bivens* remedy is not determined on an amendment-by-amendment or clause-by-clause basis. For example, although this Court allowed a Fifth Amendment *Bivens* claim in *Davis*, it later rejected the extension of *Bivens* to a different Fifth Amendment claim in *Chilicky*. Compare *Davis*, 442 U.S. at 248-249, with *Chilicky*, 487 U.S. at 429. And whereas the Court's decision in *Carlson* recognized a *Bivens* remedy for certain Eighth Amendment claims, its later decisions in *Minneci* and *Malesko* declined to extend *Bivens* to other Eighth Amendment claims. Compare *Carlson*, 446 U.S. at 19-23, with *Minneci*, 565 U.S. at 130-131; *Malesko*, 534 U.S. at 74. Thus, the fact that courts have allowed other Fifth Amendment claims to proceed under *Bivens* does not mean that they would allow the very different Fifth Amendment claim at

issue here. See *De La Paz* v. *Coy*, 786 F.3d 367, 372 (5th Cir. 2015) ("Instead of an amendment-by-amendment ratification of *Bivens* actions, courts must examine each new context."), petition for cert. pending, No. 15-888 (filed Jan. 12, 2016).[4]

3. As an alternative to plenary review, petitioner contends (Pet. 34) that this Court should hold the petition for a writ of certiorari pending the Court's decision in *Abbasi* and the consolidated cases, and then remand to the court of appeals for further consideration in light of the Court's decision. In the government's view, there is no need for a hold because the Court's decision in *Abbasi* is not likely to call into question the correctness of the court of appeals' decision in this case. The respondents in *Abbasi* have principally argued that a *Bivens* remedy is appropriate there because their conditions-of-confinement claims "are at the core of *Bivens*" and should not be regarded as arising in a new context at all. Br. for Resps. at 25, *Abbasi*, *supra* (No. 15-1359). Even if this Court accepted that argument, it would not assist petitioner because his claim arises in a new context.

Abbasi also presents questions about the application of this Court's two-step inquiry for extending *Bivens* to new contexts. But both the available alternative remedies and the special factors at issue in that

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[4] Petitioner cites (Pet. 32-33) three court of appeals decisions addressing *Bivens* claims based on asserted violations of the Fifth Amendment, but none of those cases arose in the context of immigration detention; instead, all of them involved former criminal defendants. Furthermore, none of those decisions conducted a special-factors inquiry or otherwise considered whether an extension of *Bivens* was appropriate. See *Limone* v. *Condon*, 372 F.3d 39, 52 (1st Cir. 2004); *Zahrey* v. *Coffey*, 221 F.3d 342, 345 (2d Cir. 2000); *Hammond* v. *Kunard*, 148 F.3d 692, 698 (7th Cir. 1998).

case differ significantly from those at issue here. Most notably, there is no argument in *Abbasi* that the plaintiffs had "availed [themselves] of [available] review mechanisms many different times" in order to protect their asserted constitutional interests. Pet. App. 30a. Here, in contrast, the court of appeals placed great weight on the fact that petitioner's invocation of habeas and other available remedies left him in "no position to argue that the elaborate scheme that Congress designed afforded him no opportunity for a meaningful remedy." *Ibid.*

Although the government does not believe that the petition should be held pending this Court's decision in *Abbasi*, the Court has taken no action on another petition raising related questions and seeking review of a decision on which the court of appeals relied in this case. See *De La Paz* v. *Coy*, No. 15-888 (petition for cert. filed Jan. 12, 2016). Accordingly, the Court may wish to hold the petition in this case.

CONCLUSION

The petition for a writ of certiorari should be denied. Alternatively, the Court may wish to hold the petition pending its decision in *Abbasi* and the consolidated cases, and then dispose of the petition as appropriate in light of its decision those cases.

Respectfully submitted.

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APRIL 2017