No. 16-879

IN THE

Supreme Court of the United States

SANTIAGO ALVAREZ,
Petitioner,
v.
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FELICIA SKINNER, MICHAEL GLADISH, JUAN C. MUNOZ, ROBERT EMERY, AND SHEETUL S. WALL,
Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES — Page(s)

REPLY BRIEF

Despite the Government's contention, there are vital issues here that the Court should address, issues that are not directly implicated by the Court's other pending decisions this term. Specifically, the issue decided by the Eleventh Circuit Court of Appeals that the remedial scheme Congress provided for Petitioner, Santiago Alvarez, was adequate, despite the fact that its agents did everything in their power to subvert the proper working of that process. Additionally, the panel's decision is categorically far-reaching and creates conflicts with other precedents of this Court and other circuits. Finally, the Court may wish to hold this Petition, pending its decision in *Ashcroft v. Abbasi*, No. 15-1359, because this Court may decide issues in *Abbasi* that could impact the decision of the Eleventh Circuit.

I. The Government Cannot Rely on the Adequateness of the Alternative Remedy When Government Agents Purposefully Thwarted That Remedy

The Government's main contention in its opposition brief is that the Immigration and Nationality Act (INA), provides an adequate alternative remedy and that there are "special factors counseling hesitation" in extending a remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). However, the Government's reliance on the adequateness of the remedy ignores Petitioner's "well-pled allegation that [Respondent, Juan C. Munoz ("Munoz")] purposefully denied him meaningful review under the existing regulations and procedures." Pet. App. at 73a (Pryor, J. *concurring in part and dissenting in part*). The Government thus wishes to set up a Catch-22 in which Government agents are free

to thwart the carefully crafted remedies Congress has created to safeguard the rights of individuals in Petitioner's position and then hide behind the very processes they actively undermined to shield themselves from liability. The Due Process Clause of the Fifth Amendment demands more.

The Government repeatedly points to the various remedial schemes that the INA provides to allow aliens to challenge their illegal detention and indeed seek to differentiate this case from *Ashcroft v. Abbasi*, 789 F.3d 218 (2015) *cert granted* Oct. 11, 2016, and its companion cases by arguing that Petitioner availed himself of these remedies on numerous occasions. *See, e.g.*, *Respondent's Brief in Opposition* at 12. Yet the Government ignores the fundamental fact that the Respondents in this case took actions that made Petitioner's use of these remedies meaningless. Specifically, Munoz's extension of Petitioner's detention, notwithstanding the evidence he had demonstrating that there was no reasonable likelihood of Petitioner being deported to Spain, completely vitiated the protection that was supposed to be accomplished by Munoz's 180-day post removal review of whether to release Petitioner or continue his detention. Additionally, the Government's disingenuous motion to extend the time to respond to Petitioner's *habeas corpus* request was only granted based on Respondent, Michael Gladish's ("Gladish") false affidavit, wherein, after he presented an incomplete application for Spanish citizenship to Petitioner omitting the pages that indicated that Petitioner was not eligible for Spanish citizenship, he represented that Petitioner was eligible and removable to Spain.

The Government also contends that the availability of a *habeas* remedy, which Petitioner exercised,

foreclosed a *Bivens* remedy. This position ignores that Petitioner's *habeas* remedy was also undermined and purposefully delayed by the actions of Gladish and other Government agents. Moreover, as Dissenting Judge Jill Pryor correctly observed, "the existence of a *habeas* remedy alone—which gives aliens prospective, as opposed to retrospective relief—is insufficient to support a conclusion that alternative remedies 'amount to a convincing reason to refrain from' recognizing a *Bivens* remedy." Pet. App. 58a (citing *Engel v. Buchan,* 710 F.3d 698, 705–06 (7th Cir.2013)). And had Petitioner not had the good fortune of uncovering the ruse of Spanish citizenship in short order, there is no telling how much longer he would have been deprived of his freedom. This highlights that the prospective nature of the *habeus* remedy always leaves a remedial void where the loss of freedom, the extent of which can be unpredictable and far-ranging, is never redressed. Thus, *habeus* relief on its own should not bar a *Bivens* remedy. This undeniable reality most likely accounts for the fact that "no court has held that a federal court can infer that Congress intended to foreclose a *Bivens* remedy solely from the fact that the plaintiff was able to challenge his unlawful detention or incarceration by petitioning for a writ of *habeas corpus*." Pet. App. 58a.

While the ultimate question of Respondents' liability is a matter for a jury to decide, to allow them to deny that a remedy is even available because of the existence of processes they took affirmative steps to frustrate makes a mockery of the "'comprehensive statutory scheme[]' that has received 'frequent and intense' attention from Congress" that they now attempt to rely upon. *Brief in Opposition* at 12. When it enacted the remedial scheme in the INA, Congress had an expectation that it would be implemented as designed.

Thus, while when allowed to be implemented as designed, the INA may serve as a justification for denying a *Bivens* remedy, it should not categorically bar, as two of the three judges of the panel of the Eleventh Circuit held, a *Bivens* remedy in all cases where an immigrant claims to have suffered an unconstitutionally prolonged detention. In cases as egregious as this one, when Government agents obstruct the proper operation of that remedial scheme, they should stand to account in their personal capacities.[1]

For the same reasons, there are no "special factors counseling hesitation" in this case. The remedy that Petitioner seeks is quite narrow. It would apply only in cases, such as this, where Government agents take intentional actions to undercut the effectiveness of the congressionally prescribed remedies. Thus, it would not interfere with the separation of powers. As this Court made clear in *Zadvydas v. Davis*, 533 U.S. 678 (2001), there is no threat to the separation of powers in holding that there are constitutional limits to the detention of immigrants for whom there is no reasonable expectation of deportation. If federal agents were allowed to lie to prolong detention and to dissemble to courts examining *habeas* petitions, then *Zadvydas* would provide only a hollow hope to those being illegally detained. For the same reasons discussed above, the INA does not serve as a special factor counseling hesitation.

Furthermore, the other "special factors" identified by the Government do not apply here. In cases such as Petitioner's, where we have no repatriation agreement with the nation at issue, there are no concerns

[1] Purposefully thwarting the statutory scheme is action outside the scope of their duties, which justifies personal liability.

about impacting negotiations with foreign nations.[2] "[I]f this case—in which [Petitioner] alleges that Munoz knew that the government had no country that would accept him—implicates the Executive's power to control and conduct foreign relations, then special factors would counsel hesitation in virtually all immigration cases." Pet. App. at 61a (Pryor, J., *concurring in part and dissenting in part*). And given the narrowness of the facts that would lead to a remedy here, namely intentional undermining of the statutory scheme, there would not be any concerns about creating a large number of new cases.[3]

II. The Eleventh Circuit's Decision Should Be Reviewed Because it is Categorically Far Reaching and Conflicts or is in Tension with Precedents of this Court and Other Circuit Courts

The Government's other main contention is that there is no circuit split caused by the Eleventh Circuit's decision in this case. But the opinion is written so broadly as to foreclose any *Bivens* remedy in a case involving immigration.[4] This categorical bar conflicts or is in tension with the *Bivens* and the post-*Bivens* decisions of this Court and other circuit courts, including the Second Circuit's holding in *Abbasi*, which the

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[2] These same concerns would have been implicated by this Court's ruling in *Zadvydas*, yet the Court had no issue holding that the Constitution prohibited extended detention.

[3] Judge Jill Pryor in her dissent pointed out why allowing a *Bivens* remedy under these or similar circumstances would not open the floodgate to *Bivens* claims. Pet. App. 64a, n. 27.

[4] As Dissenting Judge Jill Pryor poignantly noted, the majority panel's opinion "taken to its logical end, [] would seem to foreclose a *Bivens* remedy in any case arising in the immigration context." Pet. App. 61a.

Court is currently considering as well as *De La Paz v. Coy*, 786 F.3d 367 (5th Cir. 2015), which the Court appears to be holding pending its decision in *Abbasi*. Indeed, despite the majority's statement that it was not deciding the question raised in *Abbasi*—whether a *Bivens* remedy would be available in cases of punitive confinement conditions—the decision is already being applied broadly.[5]

As Dissenting Judge Jill Pryor warned, the majority panel's opinion could foreclose any damages remedy by any immigrant, filed against an immigration agent, because the broad holding of the decision is susceptible to being interpreted as holding that a *Bivens* remedy is unavailable in the immigration context. Pet. App. at 26a, n. 6, 55a, n. 20, 61a. Additionally, based on its holding that the INA is a comprehensive remedial scheme, any time the INA is implicated, the Eleventh Circuit's decision below would foreclose a *Bivens* remedy.[6] Quite simply, this is not a precedent that should be left to the split decision of a circuit court. Assuming, *arguendo*, that all immigrants are to be categorically denied a *Bivens* remedy for claims arising from an unconstitutionally prolonged detention, that decision should be made by this Court.

Contrary to the Government's argument, the decision below creates a conflict with other circuits, including

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[5] *See, e.g., Reva v. Ymer*, 2016 U.S. Dist. LEXIS 137686, Civ. No. 15-CV-124S (WDNY 2016) (questioning whether a plaintiff can seek damages for prolonged detention) (dismissed on other grounds); *Allen v. Holder*, 2016 U.S. Dist. LEXIS 109069, Civ. No. 13-5736 (JBS-JS) (D. New Jersey, 2016) (noting that under the Eleventh Circuit's decision below, it is unclear if an immigrant can make a *Bivens* claim).

[6] *See e.g. Khorammi v. Rolince*, 2016 U.S. Dist. LEXIS 97847, at *18 (N.D. Ill. 2016).

Abbasi and *De La Paz*, which are pending before this Court. Although the panel attempted to cabin its decision to avoid a conflict with *Abbasi* and *De La Paz*, its reasoning cannot be so narrowed. Pet. App. 26a-27a. The majority's explicit holding is that the INA creates an elaborate remedial scheme which would prevent extending *Bivens* to the immigration context. *Id*. at 27a-28a. This holding runs afoul of both *Abbasi* and *De La Paz*, which would allow a *Bivens* remedy based on conditions of confinement when being detained, or physical abuse at the hands of immigration agents, despite the existence of the INA's remedial measures.

Furthermore, the majority below found numerous factors which counseled hesitation, all of which would apply to the same extent to the sorts of claims raised in *Abbasi* and *De La Paz*. For example, the majority relied again on the complexity of the INA's remedial scheme and respecting the separation of powers. Pet. App. 31a. Both of these factors, although disputed by Petitioner, would apply with equal force to any claims arising in the immigration context. Thus, they would foreclose not only the type of Fourth and Fifth Amendment claims recognized by the Second and Fifth Circuits in *Abbasi* and *De La Paz*, but also other Fourth and Fifth Amendment claims recognized by this Court and other circuit courts.

But perhaps the most compelling evidence of a circuit split is the Government's own arguments in the *Abbasi* litigation before this Court. The Government pointed to the panel's decision below as part of its justification for this Court's review in *Ashcroft v. Abbasi*, No. 15-1359. In its Petition for Writ of Certiorari, the Solicitor General's Office argued, relying on the dissent in the Second Circuit's *en banc* review, that the decision below was "at odds" with *Abbasi*.

Petition for Certiorari, *Ashcroft v. Abbasi*, at 20 and n.9. *See also Id.* at 19 (citing the Eleventh Circuit's decision below for the proposition that, contrary to the Second Circuit's holding "when a constitutional claim implicates either national security or immigration, that consideration both alters the relevant context of the claim and counsels against an extension of *Bivens*."). The Government should be taken at its word that this case presents a conflict or is in tension with *Abbasi*.

Because of the panel majority's broad categorical holding, its far-reaching implications beyond this case, and its conflicting or being in tension with other precedents of this Court and other circuit courts, certiorari review is necessary.

III. The Legal Issues this Court May Decide in *Abbasi* Could Affect or Otherwise Impact the Resolution of the Issues Decided by the Eleventh Circuit, Which, at a Minimum, Warrants Holding this Case in Abeyance

Finally, the legal issues this Court may decide in *Abbasi* could affect or otherwise impact the resolution of the issues in this case. The Government seems to implicitly acknowledge this possibility. *See* Brief in Opposition at 20 (recognizing that the Court has held a similar petition in *De La Paz* and "may wish to hold the petition in this case"). Therefore, this Court may find it prudent to hold the Petition in this case in abeyance pending its decision in *Abbasi*.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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