

No. 08-1043

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**In the Supreme Court of the United States**

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VALERIE PLAME WILSON, ET AL., PETITIONERS

*v.*

I. LEWIS LIBBY, JR., ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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### QUESTION PRESENTED

Whether the Privacy Act's comprehensive statutory scheme governing disclosures of personal information, and the likelihood of judicial intrusion into sensitive intelligence and national security matters, constitute special factors that preclude creation of a cause of action for damages under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for the alleged disclosure of petitioner's identity as an undercover Central Intelligence Agency operative.

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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 535 F.3d 697. The opinion of the district court (Pet. App. 55a-105a) is reported at 498 F. Supp. 2d 74.

## **JURISDICTION**

The judgment of the court of appeals was entered on August 12, 2008. A petition for rehearing was denied on November 17, 2008 (Pet. App. 108a-111a). The petition for a writ of certiorari was filed on February 17, 2009 (Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## **STATEMENT**

Petitioners, Valerie Plame Wilson and her husband Joseph Wilson, allege that federal officials violated their

constitutional rights by causing Ms. Wilson’s status as an undercover Central Intelligence Agency (CIA) agent to be publicly disclosed. Petitioners filed suit against the individual respondents—former Vice President Richard Cheney, former White House senior advisor Karl Rove, former Chief of Staff to the Vice President I. Lewis Libby, and former Deputy Secretary of State Richard Armitage—in their personal capacities, asserting constitutional claims under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The court of appeals affirmed the district court’s dismissal of those claims, holding, *inter alia*, that Congress’s enactment of a comprehensive statutory scheme in the Privacy Act, 5 U.S.C. 552a, to address unlawful disclosures of personal information by government officials precludes judicial creation of a cause of action for damages under *Bivens* for the same conduct. Pet. App. 10a-21a.

1. Congress enacted the Privacy Act based on its understanding that the “right to privacy is a personal and fundamental right protected by the Constitution” and that regulating the federal government’s “collection, maintenance, use, and dissemination of information” regarding individuals was necessary and proper “to protect the privacy of [such] individuals.” Privacy Act of 1974 (the Act), Pub. L. No. 93-579, § 2(a)(4) and (5), 88 Stat. 1896. The Act accordingly sets forth “detailed instructions” governing the government’s “collection, maintenance, use, and dissemination of information” about individuals in agency records. *Doe v. Chao*, 540 U.S. 614, 618 (2004); see 5 U.S.C. 552a(a)(3).

The Privacy Act, *inter alia*, regulates and limits the information that agencies may maintain on individuals in systems of records, including a general prohibition

against maintaining, collecting, using, or disseminating records describing how individuals exercise their First Amendment rights. 5 U.S.C. 552a(a)(3), (e) and (e)(7). It further provides that agencies must normally give individuals access to records pertaining to them, and directs agencies to promulgate rules allowing individuals to obtain access to and request amendment of such records. 5 U.S.C. 552a(d) and (f). Subject to statutory exceptions, the Privacy Act also specifies that:

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains.

5 U.S.C. 552a(b); cf. 5 U.S.C. 552a(j) and (k) (exemptions).

Congress has enacted a carefully calibrated set of judicial remedies for violations of the Privacy Act and its implementing regulations. See 5 U.S.C. 552a(g). In crafting those remedies, Congress considered imposing monetary liability on “any person found to have violated \* \* \* the Act.” S. Rep. No. 1183, 93d Cong., 2d Sess. 83 (1974) (discussing Section 303(c) of S. 3418 as reported by committee). It ultimately determined, however, that imposing such liability on “an individual employee of a Federal agency” would be inappropriate and that “civil liabilities should run only against the agency itself.” 120 Cong. Rec. 36,891 (1974) (explaining amendments to S. 3418). Congress accordingly eliminated personal liability from the Privacy Act, see *id.* at 36,921, 37,085; see also *id.* at 40,406, and enacted a detailed re-



medial provision that authorizes damages actions only against federal agencies. 5 U.S.C. 552a(g).<sup>1</sup>

The Privacy Act authorizes an individual adversely affected by a violation of the Act’s anti-disclosure provision, for instance, to bring a civil action against the responsible agency. 5 U.S.C. 552a(g)(1)(D). If the agency is found to have acted intentionally or willfully in violating that provision and the plaintiff has sustained actual damages as a result of the violation, the United States will be liable to that individual for his or her actual damages (subject to a \$1000 minimum award) and reasonable attorneys’ fees and costs. 5 U.S.C. 552a(g)(4); see *Doe*, 540 U.S. at 616, 625 n.9.

2. Petitioners’ complaint alleges that the disclosure of Ms. Wilson’s status as a CIA employee has its origin in the 2003 State of the Union address in which President George W. Bush stated that “[t]he British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa.” Pet. App. 3a.<sup>2</sup> The *New York Times* subsequently published a column by Nicholas Kristof questioning the accuracy of that statement. Kristof reported that, following a request from the Vice President’s office for an investigation of an allegation that Iraq sought to buy uranium from an African country, an unnamed former ambassador (now known to be Mr. Wilson) was sent to Niger in 2002 to investigate. Kristof claimed that the ambassa-

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<sup>1</sup> Although the Privacy Act does not impose civil liability on individuals, Congress did not ignore culpable federal employees. The Act specifies that “[a]ny officer or employee” of an agency who knowingly and willfully discloses information in violation of the Act may be held criminally liable for a misdemeanor offense. 5 U.S.C. 552a(i)(1).

<sup>2</sup> This brief assumes, as it must at this stage of this litigation, the truth of the allegations in petitioners’ complaint.

dor reported to the CIA and the Department of State that the allegations were wrong and based upon forged documents. *Ibid.*; C.A. App. 20-21.

After several more newspaper articles raised questions about alleged Iraqi efforts to buy uranium and referred to Wilson's trip to Niger, Wilson became personally involved in the controversy. He authored a *New York Times* article entitled "What I Didn't Find in Africa"; gave an interview to the *Washington Post*, which published an article about his trip to Niger; and appeared on *Meet the Press* to discuss the controversy. Pet. App. 4a-5a. He asserted in various public statements that he had taken the trip to Niger at the request of the CIA in February 2002 to investigate the allegations that Iraq had sought or obtained uranium. C.A. App. 24. He also expressed doubts about the claim that Iraq had obtained uranium from Niger and stated his belief that the Vice President's office was advised of the results of his trip. *Ibid.*; Pet. App. 5a.

Petitioners allege, "[u]pon information and belief," that former Vice President Cheney, Libby, and Rove agreed to "discredit, punish and seek revenge" against Mr. Wilson by taking actions that included the disclosure of his wife's classified CIA employment to the press. C.A. App. 28. Libby allegedly discussed Ms. Wilson's CIA employment with reporter Judith Miller and allegedly revealed Ms. Wilson's identity to reporter Matthew Cooper. *Id.* at 23-27. Rove also allegedly spoke with Cooper, informing him that Ms. Wilson worked for "the agency" and was responsible for sending Mr. Wilson to Niger. *Id.* at 29; Pet. App. 5a.

But neither Miller nor Cooper was the alleged source of the initial public disclosure of Ms. Wilson's CIA employment. That disclosure purportedly came from col-

umnist Robert Novak in a syndicated column on July 14, 2003, based on information that Novak obtained from respondent Armitage. C.A. App. 19, 31. Petitioners contend that Novak’s column “destroyed [Ms. Wilson’s] cover as a classified CIA employee.” *Id.* at 19; Pet. App. 5a.

3. Petitioners’ amended complaint (C.A. App. 15-37) asserts five causes of action seeking money damages for injuries allegedly sustained as a result of the public disclosure of Ms. Wilson’s employment as a CIA operative. Three of those claims remain in dispute. First, Mr. Wilson alleges that Libby, Rove, and Cheney (but not Armitage) violated his First Amendment rights by disclosing his wife’s employment status in retaliation for his protected speech (Count 1). C.A. App. 32-33; Pet. 2. Petitioners further allege that all four individual defendants violated the Fifth Amendment by disclosing Ms. Wilson’s covert CIA employment, thereby violating petitioners’ constitutional right to privacy (Count 3) and depriving Ms. Wilson of a property interest in her CIA employment without due process of law (Count 4). C.A. App. 34-35; Pet. 3.<sup>3</sup>

The district court dismissed petitioners’ claims. Pet. App. 55a-105a. As is relevant here, the court held that

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<sup>3</sup> Petitioners abandon (Pet. 2 & n.1) their equal-protection claim based on purportedly “differential treatment \* \* \* motivated by vindictiveness and an illegitimate animus,” C.A. App. 33 (Count 2). They also abandon (Pet. 3 n.2) their common-law tort claim for public disclosure of private facts, C.A. App. 35-36 (Count 5). After the Attorney General substituted the United States as the only defendant for that common-law privacy claim by certifying that each individual defendant acted within the scope of his employment with respect to the alleged conduct, see 28 U.S.C. 2679(b)(1), (d)(1) and (4), the claim was dismissed for failure to exhaust administrative remedies. Pet. App. 23a-28a, 97a-105a.

“special factors” counsel against creating a new damages cause of action against individual government officials under *Bivens* for improper disclosures of personal information. The court found that fashioning a new *Bivens* action would be inappropriate because Congress enacted the Privacy Act as a comprehensive scheme to address such disclosures and because creating a *Bivens* action in this context would likely require inappropriate judicial intrusion into matters of national security and intelligence activities and operations. *Id.* at 68a-87a, 90a-97a. In light of that disposition, the court concluded that it need not determine whether Mr. Wilson had Article III standing to assert his First Amendment retaliation claim. *Id.* at 69a n.2.

4. A divided panel of the court of appeals affirmed. Pet. App. 1a-50a. The court explained that, under this Court’s precedents, “[o]ne ‘special factor’ that precludes creation of a *Bivens* remedy is the existence of a comprehensive remedial scheme,” which “need not provide full relief to the plaintiff.” *Id.* at 11a-13a (discussing *Bush v. Lucas*, 462 U.S. 367 (1983); *Schweiker v. Chilicky*, 487 U.S. 412 (1988); and *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007)). Because “Congress created a comprehensive Privacy Act scheme that did not inadvertently exclude a remedy for the claims brought against the[] defendants,” the court reasoned, it would be inappropriate under the decisions of this Court to “supplement the scheme with *Bivens* remedies.” *Id.* at 21a; see *id.* at 10a-21a.

In addressing petitioners’ assertion that the remedies provided to them by the Privacy Act were insufficient to preclude a *Bivens* action, the court rejected the claim that the Act provided them with no possibility for relief. The court noted petitioners’ own concession that

“Valerie Wilson has a possible [Privacy Act] claim based on the disclosure by [respondent] Armitage because the information disclosed about her and the agency involved in the disclosure are subject to the Privacy Act’s restrictions.” Pet. App. 20a. The court also reasoned that all of petitioners’ constitutional claims are premised “on the publication of Valerie Plame Wilson’s CIA employment in the Novak column,” which resulted from “a disclosure by Deputy Secretary of State Armitage of information about an individual contained in State Department records.” *Id.* at 15a-16a. As a result, “each Constitutional claim, whether pled in terms of privacy, due process, or the First Amendment, is a claim alleging damages from the improper disclosure of information covered by the Privacy Act.” *Id.* at 16a.

The court then rejected petitioners’ argument that a *Bivens* remedy was necessary because the Privacy Act did not allow petitioners to bring all their claims. The court reasoned that “the availability of *Bivens* remedies does not turn on the completeness of the available statutory relief”—or, stated otherwise, that “[t]he special factors analysis does not turn on whether the statute provides a remedy to the particular plaintiff for the particular claim he or she wishes to pursue.” Pet. App. 13a, 20a-21a (discussing *Bush*, *Chilicky*, *Wilkie*). While an “equally effective statutory remedy is a sufficient \* \* \* reason for [courts] to abstain from creating *Bivens* remedies,” *id.* at 18a-19a, the court explained that deference is also owed “to the considered judgment of Congress that certain remedies are not warranted.” *Id.* at 21a. “Indeed, it is where Congress has intentionally withheld a remedy” in enacting a comprehensive statutory scheme, the court continued, “that we must most refrain from providing one.” *Ibid.* The court thus con-

cluded that, while petitioners did not have a Privacy Act claim for disclosures by respondents Cheney, Rove, and Libby because the Act “exempts the Offices of the President and Vice President from its coverage,” it would be inappropriate to provide petitioners with these “additional remedies” under *Bivens* because Congress itself had “intentional[ly] omi[tte]d \* \* \* the Presidential and Vice Presidential offices from the comprehensive coverage of the Privacy Act.” *Id.* at 16a-18a.

The court of appeals further concluded that “special factors” precluded fashioning a *Bivens* cause of action in this context because a *Bivens* action “would inevitably require judicial intrusion into matters of national security and sensitive intelligence information” to litigate “the allegations in the amended complaint.” Pet. App. 21a-22a. In light of petitioners’ allegations that the disclosure of Ms. Wilson’s identity impaired her ability to carry out her duties as a CIA agent and increased the risk of violence to her and her family, the court concluded that “[w]e certainly must hesitate before we allow a judicial inquiry into these allegations that implicate the job risks and responsibilities of covert CIA agents.” *Id.* at 23a.

Judge Rogers dissented. Pet. App. 29a-50a. In her view, the Privacy Act was not a “special factor” precluding implication of *Bivens* remedies in this case because the statute provided only limited relief for Ms. Wilson and no relief at all for Mr. Wilson. *Id.* at 35a-38a, 48a-49a. Judge Rogers found no clear evidence “indicating that Congress considered and decided to deny a *Bivens* remedy in the context at issue.” *Id.* at 40a.

### ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. Petitioners contend that this Court’s review is necessary to resolve whether the existence of “a statute that does not apply and can provide no remedy” can be a special factor counseling hesitation in implying a cause of action under *Bivens*. Pet. 16. Petitioner’s argument rests on an incorrect premise and is flawed on its merits.

a. It is well settled that litigants have no “automatic entitlement” to a judicially devised cause of action for money damages under *Bivens*. *Wilkie v. Robbins*, 127 S. Ct. 2588, 2597 (2007). The creation of such a cause of action must “represent a judgment about the best way to implement a constitutional guarantee,” and, after deciding *Bivens* in 1971, this Court has made this judgment in only limited situations. *Ibid.* “[I]n most instances,” the Court has “found a *Bivens* remedy unjustified,” *ibid.*, and the Court’s decisions “have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts.” *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988); see *Ashcroft v. Iqbal*, No. 07-1015 (May 18, 2009), slip op. 11; cf. *Wilkie*, 127 S. Ct. at 2608 (Thomas, J., concurring) (concluding that *Bivens* and its progeny should not be extended to any new contexts); *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (same).

These decisions make clear that a judicially created cause of action under *Bivens* is inappropriate in two circumstances. First, if Congress provides an alternative remedy and indicates its intent (either by statutory language, legislative history, or “the statutory remedy itself”) that a judicially fashioned cause of action is unde-

sirable or unnecessary, then creating a new *Bivens* action is unwarranted. *Bush v. Lucas*, 462 U.S. 367, 378 (1983). Federal courts will thus follow Congress's lead where Congress has "resolved the question \* \* \* by expressly denying [a litigant] the judicial remedy he seeks or by providing him with an equally effective substitute." *Ibid.*; see *id.* at 377-378 (citing *Carlson v. Green*, 446 U.S. 14, 18-19 (1980)).

Second, if "such a congressional directive" is lacking, courts must make "the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed \* \* \* to any special factors counseling hesitation" before creating a new *Bivens* cause of action. *Bush*, 462 U.S. at 378; accord *Wilkie*, 127 S. Ct. at 2598. Analysis of these "special factors" may include an evaluation of which Branch "is in a better position to decide" whether the "public interest would be served by creating" a cause of action, *Bush*, 462 U.S. at 388-390, and consideration of "the difficulty of defining limits" that would permit government officials to pursue their duties without "invit[ing] an onslaught of *Bivens* actions." *Wilkie*, 127 S. Ct. at 2600, 2604-2605.

The court of appeals in this case correctly concluded that the Privacy Act's comprehensive regulation of governmental disclosures of personal information is a special factor that makes judicial creation of a *Bivens* cause of action inappropriate. Where Congress has enacted a comprehensive statutory scheme like the Privacy Act, "[t]he question is not what remedy the court should provide for a wrong that would otherwise go unaddressed"; it "is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitu-



tional violation.” *Bush*, 462 U.S. at 388; see *Chilicky*, 487 U.S. at 425-427. If the statutory scheme “suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations,” such “indications that congressional inaction has not been inadvertent” deserve “judicial deference.” *Id.* at 423.

As the court of appeals explained, the Privacy Act established a comprehensive statutory scheme to regulate the collection, maintenance, use, and dissemination of information about individuals in agency records. Pet. App. 15a. The Congress that enacted the Privacy Act was well aware of the constitutional privacy and First Amendment implications of collecting and disclosing such information in agency records, and it adopted detailed remedial provisions that authorize monetary relief in suits against agencies while rejecting the alternative of civil actions against individual federal officials. See pp. 2-4, *supra*. Moreover, the court of appeals correctly recognized that petitioners’ claims “are *all* claims alleging harm from the improper disclosure of information subject to the Privacy Act’s protections,” and, for that reason, petitioners have a potential remedy under the Act because they allege that Armitage disclosed to Novak information from agency records. Pet. App. 15a-16a, 20a (emphasis added). Congress’s decision to authorize damages actions only against federal agencies for unlawful disclosures of Privacy Act information balances numerous factors, including the need for a civil remedy and the *in terrorem* effect of civil suits against individual government officials. And, because “Congress is in a far better position than a court to evaluate the impact of a new species of litigation [against] federal employees” and possesses “institutional competence in crafting appropriate relief,” judicial deference is due to

the balance that Congress has struck. *Malesko*, 534 U.S. at 68 (quoting *Bush*, 462 U.S. at 389); see *Wilkie*, 127 S. Ct. at 2605 (same).

b. Petitioners do not appear to dispute that the Privacy Act would preclude a new *Bivens* cause of action in circumstances in which the Act provides a plaintiff with some possibility of relief. They instead argue (Pet. 16-18, 21) that the Act should not preclude a *Bivens* action here because the Act provides petitioners “no remedies at all.” That argument suffers from multiple defects.

First, as the court of appeals explained, petitioners’ underlying premise is incorrect. Petitioners themselves concede that Ms. Wilson has a possible damages claim under the Privacy Act. Pet. App. 20a; cf. C.A. App. 31 (alleging that Armitage acknowledged learning of Ms. Wilson’s CIA employment from a State Department memorandum, which Armitage subsequently disclosed to Novak).

Moreover, petitioners’ argument suffers from what the court of appeals terms a more “significant flaw” (Pet. App. 20a)—namely, the assumption that a statutory scheme must provide each potential plaintiff with relief in order to preclude judicial fashioning of a new *Bivens* action. This Court repeatedly has explained that a comprehensive remedial scheme will preclude the creation of a new *Bivens* action even if the scheme does not offer “complete relief” and fails to offer a remedy in all circumstances. See *Chilicky*, 487 U.S. at 423, 425 (noting that, in *Bush*, the Civil Service Reform Act (CSRA) provided “no remedy whatsoever” in certain contexts); *id.* at 424-425 (finding *Bivens* action precluded when statute made “no provision for remedies in money damages against officials” and provided no remedy for consequential damages from wrongful action); *Bush*, 462

U.S. at 372 & nn.8-9, 385 n.28, 388 (CSRA does not provide remedy for all personnel actions and provided only limited relief for covered actions); cf. *Wilkie*, 127 S. Ct. at 2600-2604 (finding *Bivens* action inappropriate even without comprehensive remedial scheme where most of petitioners' complaints could be raised on an "incident-by-incident" basis under a legal "patchwork" that was "inadequa[te]" to remedy the alleged course of conduct). Under these precedents, not every form of relief need be given to preclude a *Bivens* action. And if a statute does not provide a specific form of relief in a specific context, it will necessarily provide no relief to those plaintiffs who seek only the unavailable remedy.

Further, Congress need not provide a "*separate[]* reme[d]y" for "statutory violations caused by unconstitutional conduct" beyond "the remedies provided generally for such statutory violations." *Chilicky*, 487 U.S. at 427-428. So long as the design of a statutory regime "suggests," as here, that "Congress has provided what it considers adequate remedial mechanisms for constitutional violations," that indication is a special factor that precludes the "creat[ion of] additional *Bivens* remedies." *Id.* at 423; see pp. 12-13, *supra*.<sup>4</sup>

c. Petitioners contend (Pet. 16-17) that the court of appeals erred in refusing to augment the comprehensive system of regulation enacted by Congress with a new *Bivens* cause of action because the Privacy Act does not

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<sup>4</sup> Petitioners' suggestion that statutory remedies must be "equally effective" to preclude a *Bivens* action, Pet. 17 (quoting *Carlson*, 446 U.S. at 19), reflects only one way in which creation of a *Bivens* action may be precluded. The "special factors" analysis reflected in this Court's decisions is an independent basis for denying *Bivens* relief. See pp. 10-11, *supra*.

apply to the Offices of the President and Vice President. That argument is without merit.

Petitioners appear to acknowledge that Congress deliberately excluded the Offices of the President and Vice President from the Privacy Act, see Pet. 16-17, and the dissenting opinion below notes the separation of powers concerns that Congress considered in adopting that exclusion. Pet. App. 39a. Petitioners nevertheless contend (Pet. 18-19) that a new *Bivens* action against individual officials in those offices should be created because the Act's legislative history does not affirmatively reflect an intent to preclude separate damage actions for constitutional violations. While this kind of legislative history would provide an independent reason for declining to create a *Bivens* action, no such expression of intent is needed where, as here, a comprehensive statutory scheme itself indicates that the remedies created by Congress should be deemed exclusive, rather than supplemented by the courts. See pp. 10-13, *supra*. When such a comprehensive scheme exists, the relevant question becomes whether Congress "plainly expressed an intention that the courts preserve *Bivens* remedies." *Spagnola v. Mathis*, 859 F.2d 223, 228, 229 n.10 (D.C. Cir. 1988) (en banc). If Congress failed to express such an intention, as here, the courts should not create a *Bivens* action.<sup>5</sup>

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<sup>5</sup> Nor are petitioners correct in suggesting that the Privacy Act's legislative history reflects an expectation by Congress that courts might add to the Act's comprehensive scheme to include offices intentionally omitted by Congress. Pet. 18-19 (quoting Pet. App. 40a-41a). The relevant history includes no such statement. And although a committee report indicates that the Act was not intended to be the "final statement by Congress on the right to privacy and other related rights as they may be developed or interpreted by the courts," S. Rep.

d. Petitioners similarly argue (Pet. 16) that a new *Bivens* cause of action should be created to allow Mr. Wilson to pursue a First Amendment claim based on the allegedly unlawful disclosure of his wife’s CIA employment because the Privacy Act permits civil actions only by the person whose records have been released. That argument rests on the erroneous premise previously discussed—that the absence of remedies under a comprehensive scheme warrants creation of a new *Bivens* cause of action. Just as Congress’s decision to exclude the Offices of the President and Vice President from the scope of the Privacy Act must be given effect, so too courts owe deference to Congress’s decision not to allow third parties to sue under the Privacy Act based on allegedly unlawful disclosures of other people’s records. “‘Congress is in a far better position than a court to evaluate the impact of [such] a new species of litigation’ against those who act on the public’s behalf.” *Wilkie*, 127 S. Ct. at 2605 (quoting *Bush*, 462 U.S. at 389). That conclusion carries particular force here, where recognizing *Bivens* claims against officials for derivative harms flowing from the disclosure of information concerning a close relative would significantly undermine the very limitations in the Privacy Act that apply when the most directly affected individual—the individual whose information was disclosed—seeks relief.<sup>6</sup>

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No. 1183, *supra*, at 15, that statement merely reflects Congress’s recognition that it could later address privacy-related concerns in different contexts, including in the “private sector,” *id.* at 40. The statement does not speak to the appropriate remedies for the kind of disclosures that Congress considered and regulated under the detailed provisions of the Privacy Act.

<sup>6</sup> Spouses of plaintiffs raising claims like those in *Bush* and *Chilicky*, for instance, almost certainly would suffer adverse effects from re-

Moreover, this case would be a poor vehicle for the Court to address Mr. Wilson’s derivative First Amendment claim because petitioners may not have carried their burden of establishing Mr. Wilson’s Article III standing to assert that claim. Cf. Pet. App. 69a n.2 (declining to reach that question). Petitioners allege that Novak’s July 14, 2003 column publicly disclosed Ms. Wilson’s covert CIA employment and that that disclosure “destroyed her cover as a classified CIA employee.” C.A. App. 19. Petitioners, however, allege that Novak’s source was Armitage, *id.* at 31; Pet. 12, and do not allege that any of the three defendants against whom Mr. Wilson presses his First Amendment claim—Cheney, Rove, and Libby—caused that column to be published.<sup>7</sup> In the absence of factual allegations that Mr. Wilson’s alleged injury from the public disclosure of his wife’s CIA employment is “fairly traceable” to alleged conduct by Cheney, Rove, or Libby, petitioners have failed to establish Article III jurisdiction over Mr. Wilson’s First

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taliatory termination of a government employee for exercising First Amendment rights (*Bush*) and the denial of Social Security benefits without due process of law (*Chilicky*). This Court’s cases provide no basis for reading such a loophole into the Court’s *Bivens* jurisprudence regarding comprehensive statutory schemes.

<sup>7</sup> Petitioners have alleged that they “believe[]” either “Karl Rove or one or more of John Does No. 1 - 10” advised Libby that “Rove or the Does” spoke with Novak about Ms. Wilson’s CIA employment before Novak’s column was published. C.A. App. 26; see Pet. 9. That allegation is tantamount to alleging that Rove either did or did not tell Libby that he disclosed such information to Novak. A plaintiff can always allege, consistent with Fed. R. Civ. P. 11(b), that a defendant either did or did not cause his injury, but such creatively indeterminate pleading fails in this case to make out an allegation that Rove *was* a source of information for Novak’s column.

Amendment claim. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998).

e. Petitioners are incorrect in their suggestion (Pet. 19) that serious constitutional issues arise from declining to create a new *Bivens* cause of action to supplement congressionally sanctioned remedies in a comprehensive statutory scheme. This Court long has recognized in the *Bivens* context that plaintiffs do “not [have] a damages remedy for every legal wrong,” *Nixon v. Fitzgerald*, 457 U.S. 731, 754 n.37 (1982), and, more recently, has confirmed that plaintiffs do not have an “automatic entitlement” to a judicially devised action under *Bivens*. *Wilkie*, 127 S. Ct. at 2597. Petitioners’ inability to garner authority for their position suggests that no serious constitutional questions arise from the court of appeals’ decision not to fashion a *Bivens* cause of action here.<sup>8</sup>

2. Petitioners suggest (Pet. 19) that review is warranted to resolve a conflict in the circuits. No conflict exists. The only two courts of appeals to have addressed whether the Privacy Act is a comprehensive scheme that precludes judicial creation of a *Bivens* cause of action have answered the question affirmatively. *Chung v. Department of Justice*, 333 F.3d 273, 274 (D.C. Cir. 2003); *Downie v. City of Middleburg Heights*, 301 F.3d 688, 698 (6th Cir. 2002). Moreover, petitioners fail to show “tremendous confusion in the lower courts concerning what is a ‘special factor counseling hesitation.’” Pet. 15. The cases that petitioners cite (Pet. 15, 19) do not employ different legal principles; they simply reflect the

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<sup>8</sup> Petitioners’ exclusive reliance (Pet. 19) on Justice Harlan’s concurring opinion in *Oestereich v. Selective Service System*, 393 U.S. 233 (1968), is misplaced. That opinion merely expressed doubt “whether a person may be deprived of his personal liberty without the prior opportunity to be heard.” *Id.* at 243 n.6 (Harlan, J., concurring).

context-specific nature of the “special factors” inquiry, which turns on a careful examination of the applicable statutes and claims. See, e.g., *Wilkie*, 127 S. Ct. at 2599-2601 (assessing the “patchwork” of statutory remedies available to vindicate plaintiff’s claims).

For instance, *Arar v. Ashcroft*, 532 F.3d 157, 176-184 (2d Cir. 2008), reh’g en banc granted (argued Dec. 9, 2008), and *Van Dinh v. Reno*, 197 F.3d 427, 432-435 (10th Cir. 1999), concluded that a new *Bivens* cause of action would be inappropriate where the complained-of conduct was regulated by the Immigration and Nationality Act. Those decisions do not conflict with *Castaneda v. United States*, 546 F.3d 682 (9th Cir. 2008).<sup>9</sup> The Ninth Circuit in *Castaneda* applied this Court’s earlier decision in *Carlson* to conclude that the availability of relief under the Federal Tort Claims Act (FTCA) did not constitute a “special factor[]” that would preclude a *Bivens* cause of action. *Castaneda*, 546 F.3d at 700-701. The court of appeals emphasized that, although this Court has “subsequently found various other remedial schemes” to preclude a *Bivens* cause of action, it has never “overruled *Carlson*’s square holding” in the FTCA context. *Id.* at 700.<sup>10</sup> That decision creates no tension with the holdings in *Arar* and *Van Dinh*, and none of the

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<sup>9</sup> Justice Kennedy has extended the time within which to file a petition for a writ of certiorari in *Castaneda* to May 29, 2009. *Henneford v. Castaneda*, No. 08A877 (Apr. 10, 2009).

<sup>10</sup> *Castaneda*’s separate holding that 42 U.S.C. 233(a) does not “expressly” displace a *Bivens* action does reflect a circuit conflict with respect to the effect of Section 233(a). Compare *Castaneda*, 546 F.3d at 689-700, with *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000). That statute-specific conflict, however, does not relate to the “special factors” analysis conducted in this case.



other decisions cited by petitioners (Pet. 19) conflicts with the decision in this case.<sup>11</sup>

3. Finally, petitioners contend (Pet. 20-21) that further review is warranted because the court of appeals erred in concluding that the adjudication of their claims would require judicial intrusion into matters of national security and sensitive intelligence information. Because the court concluded that judicial fashioning of a *Bivens* action was inappropriate in light of the Privacy Act's comprehensive scheme for addressing injuries such as the alleged disclosure of Ms. Wilson's CIA employment, Pet. App. 21a, its identification of additional factors counseling against a *Bivens* action was unnecessary to the court's disposition. In any event, the court was correct to recognize that "the litigation of the allegations in the amended complaint would inevitably require judicial intrusion into matters of national security and sensitive intelligence information." *Id.* at 21a-22a. Petitioners themselves do not quarrel with the proposition that the sensitivity of issues raised by certain kinds of claims counsels against a *Bivens* cause of action in certain contexts. See *United States v. Stanley*, 483 U.S. 669, 683 (1987) ("congressionally uninvited intrusion into military affairs by the judiciary is inappropriate" and constitutes such a special factor); *Benzman v. Whitman*, 523 F.3d

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<sup>11</sup> *Krueger v. Lyng*, 927 F.2d 1050, 1055 (8th Cir. 1991), concluded only that limited administrative remedies created by regulation did not foreclose *Bivens* remedies in the absence of other congressional action. *Bagola v. Kindt*, 131 F.3d 632, 642-645 (7th Cir. 1997), held that a workers' compensation scheme did not foreclose *Bivens* remedies where that scheme provided no opportunity to expose the allegedly unconstitutional conduct and Congress's failure to provide remedies had been "inadvertent." Neither decision reflects a division of authority relevant to this case.

119, 126 (2d Cir. 2008) (holding that “a suit against a federal official for decisions made as part of federal disaster response and cleanup efforts implicate[s] the sort of ‘special factors’ that counsel against creation of a *Bivens* remedy”); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985); see also *Wilkie*, 127 S. Ct. at 2604 (considering various factors, including the “difficulty of devising a workable cause of action”).

Petitioners contend (Pet. 20) that “it is purely speculative whether this case would risk disclosure of secret or sensitive information.” But both the court of appeals and the district court concluded that the adjudication of petitioners’ claims would require judicial inquiry into highly sensitive areas such as “the job risks and responsibilities of covert CIA agents.” Pet. App. 23a; see *id.* at 95a. That context-specific appraisal of the risks and potential intrusions associated with litigating petitioners’ claims does not warrant further review by this Court.

#### CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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