No. 09-772

# In the Supreme Court of the United States

WESTERN RADIO SERVICES COMPANY, ET AL.,
PETITIONERS

*v.*

UNITED STATES FOREST SERVICE, ET AL.

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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## QUESTION PRESENTED

Petitioners, who operate communications facilities on land managed by the United States Forest Service, brought suit alleging that the Forest Service withheld action on a special use application for "side-hill" antennae and failed to respond to complaints lodged against other lessees, in violation of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq*. Petitioners also sued six former and present Forest Service employees under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Petitioners alleged that the employees conspired to delay action on the application and failed to enforce the applicable Site Plan against other lessees in retaliation for petitioners' previous litigation against the Forest Service, in violation of the First Amendment. They also alleged that the employees treated them less favorably than other lessees, in violation of the Fifth Amendment. The question presented is:

Whether the court of appeals erred in declining to extend *Bivens* remedies in this case on the ground that the APA provides an adequate, alternative remedy for the agency's alleged delays and inaction.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 578 F.3d 1116. The opinion of the district court (Pet. App. 23-36) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on August 21, 2009. A petition for rehearing was denied on October 5, 2009 (Pet. App. 37). The petition for a writ of certiorari was filed on December 29, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner Western Radio Services Company is an Oregon corporation solely owned by petitioner Richard L. Oberdorfer (collectively, Western Radio). Gray Butte

is an 80-acre area within the Ochoco National Forest in Oregon. The United States Forest Service manages that area and leases various sites to electronic communications companies, including Western Radio, Slater Communications and Electronics, and Day Wireless Systems. Each lease agreement incorporates the terms of the Gray Butte Electronic Site Management Plan (Site Plan), which "establish[es] a guide for the land manager to base decisions concerning the development of the site in conformance with" stated environmental objectives. Pet. App. 3, 24-25 (brackets in original).

Western Radio first constructed radio towers on Gray Butte in 1978 and, in later years, has filed special use applications with the Forest Service to expand its capacity. In 1991, the company requested authorization to install two antennae "to the side-hill" of their leased property. The Forest Service did not respond to the application and, in October 1998, Western Radio submitted another request, again seeking approval for two side-hill antennae. In December 1998, the Forest Service denied the application. Western Radio appealed and the Forest Service withdrew its decision. Over the next eight years, the Forest Service requested additional documents and clarifications but did not take action on the application. In January 2006 (while this case was pending in the district court), Western Radio submitted a revised application seeking permission to construct four antennae and, after preparing an environmental assessment, the Forest Service issued a decision allowing the company to build two of the four proposed antennae. Pet. App. 3-6, 24-26. None of the individual respondents were involved in Western Radio's requests prior to 2002. *Id.* at 32 n.4.

Over the years, Western Radio also complained to the Forest Service about other Gray Butte lessees' failure to comply with the Site Plan and requested that the Forest Service enforce strict compliance. In August 2000, for example, Western Radio informed a Forest Service employee that Slater Communications was not in compliance with the Site Plan and that it suspected other lessees were also noncompliant, but that absent inspection (which the lessees would not permit) it could not specify the nature of the violations. Western Radio requested permission to participate in the agency's site inspection. In 2002, the Forest Service inspected the sites on its own and concluded that only minor deficiencies existed at the other lessee sites. Pet. App. 4-5. Again, none of the individual respondents were involved prior to 2002. *Id.* at 32 n.4.

Beginning in 1986, Western Radio pursued several administrative appeals challenging other Forest Service decisions. And, in 1993, petitioners filed several lawsuits contesting the agency's permitting and leasing decisions. Pet. App. 3; C.A. E.R. 161.

2. In 2004, petitioners filed this suit under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against the Forest Service and six of its current and former employees. Pet. App. 2, 24. Petitioners' APA claims alleged that the Forest Service unlawfully withheld and unreasonably delayed action on the side-hill antennae application and on the complaints lodged against other Gray Butte lessees, and that such actions were arbitrary, capricious and contrary to law. C.A. E.R. 32-34. The *Bivens* claims alleged that from 2002 until the present, the individual Forest Service employee-respondents

conspired to intentionally delay action on the side-hill antennae application, failed to stop other lessees' non-compliance with the Site Plan, and refused to allow Western Radio to conduct site inspections of the other facilities—and that those actions were undertaken in retaliation for petitioners' previous litigation against the Forest Service, in violation of the First Amendment. *Id.* at 31-32. They also alleged that respondents violated the Fifth Amendment because they treated Western Radio less favorably than other lessees without a rational basis. *Id.* at 34-35.

Respondents moved for summary judgment. The district court granted summary judgment on the APA claims. Pet. App. 35-36. As noted above, while the litigation was pending in the district court, the Forest Service approved, in part, Western Radio's side-hill antennae application. The court explained that if petitioners wished to challenge that decision, they would need to exhaust their administrative remedies consistent with the Forest Service regulations, and it dismissed the APA claims as moot. *Id.* at 36.

On the constitutional claims, the court concluded that "the APA provides an alternative and comprehensive remedy" and because petitioners' complaints "of delay and inaction on the part of [respondents] in processing Western Radio's application for sidehill antennas, [are] complaints that the APA was specifically crafted to redress," no implied *Bivens* remedy was available. Pet. App. 32-33. Moreover, the court found that, on the merits, petitioners presented no evidence actually suggesting retaliation on the part of the individual respondents, or suggesting that the respondents treated Western Radio any differently than its competitors or did so without a rational basis. *Id.* at 34.

3. Petitioners appealed only with respect to the *Bivens* claims. Pet. App. 6. At the outset, the court of appeals observed that no *Bivens* remedy was available against the Forest Service. *Ibid.* (citing *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994) (declining to extend *Bivens* to claims against federal agencies)). As to the individual Forest Service employees, the court applied the two-step analysis set forth in *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007), and found the first step dispositive. As the court explained, the first question is "whether the existence of 'any alternative, existing process' available to [petitioners], or other indication of Congressional intent, raises the inference that Congress 'expected the Judiciary to stay its *Bivens* hand.'" Pet. App. 13-14 (quoting *Wilkie*, 551 U.S. at 550, 554). The court observed that "*Wilkie* itself" strongly suggested that the APA constitutes such a process; just as the ranch owner in *Wilkie* "had an adequate remedy for the 'unfavorable agency actions,' because, '[f]or each [such] claim, administrative review was available, subject to ultimate judicial review under the APA,'" *id.* at 14 (brackets in original) (quoting *Wilkie*, 551 U.S. at 551-552), so too for petitioners' claims "based on agency actions and inactions." *Ibid.* This Court moved on to step two in *Wilkie*, explained the court, only because of the "patchwork" of remedies available for the variety of non-administrative claims alleged in that case. *Ibid.*

The court of appeals then independently concluded that the APA is, in fact, an adequate alternative remedy: it is a comprehensive remedial scheme for review of final agency action, authorizing a court to, *inter alia*, "compel agency action unlawfully withheld or unreasonably delayed" and "hold unlawful and set aside agency action * * * found to be * * * contrary to constitutional

right, power, privilege, or immunity." Pet. App. 15 (quoting 5 U.S.C. 706(1)-(2)). The court also considered and rejected each of petitioners' arguments to the contrary. *Id.* at 16-22. In the end, the court held that because petitioners' "claims against the individual [respondents] are based on Forest Service actions or inactions, * * * the remedies available to [petitioners] under the APA constitute an 'alternative, existing process' that 'amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.'" *Id.* at 22 (quoting *Wilkie*, 551 U.S. at 550). The court declined to decide "whether a *Bivens* right of action is applicable to a claim alleging a violation of the First Amendment" in any case. *Ibid.*

**ARGUMENT**

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

1. In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court recognized a cause of action for damages against federal law-enforcement agents who allegedly violated the plaintiff's Fourth Amendment rights. The Court's more recent decisions, however, "have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68-69 (2001) (quoting *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988)); see *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007) ("[I]n most instances [this Court] has found a *Bivens* remedy unjustified."). This Court has emphasized that "any freestanding damages remedy for a claimed constitutional violation" is "not an automatic entitlement." *Wilkie*, 551 U.S. at 550. To the contrary,

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," this Court has not created additional remedies under *Bivens*. *Schweiker*, 487 U.S. at 423.

In *Wilkie*, the Court set forth a two-step inquiry to decide whether to extend a *Bivens* remedy to new constitutional interests and contexts. 551 U.S. at 550. The first question is "whether any alternative, existing process for protecting the [plaintiff's] interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Ibid.* If so, the court should "stay its *Bivens* hand." *Id.* at 554. If there is no such adequate, alternative remedy, however, a *Bivens* action may still be inappropriate if "special factors counsel[] hesitation." *Id.* at 550.

a. The court of appeals correctly determined, at step one of the inquiry, that petitioners have an alternative, adequate remedy for relief under the APA that forecloses an independent *Bivens* remedy in this case. Pet. App. 13-22. As the court explained (*id.* at 14-15), the APA expressly declares itself to be a comprehensive remedial scheme for claims of agency action or inaction. See 5 U.S.C. 702. Congress has provided through the APA the means of raising challenges, including constitutional challenges, to the type of agency actions at issue here. Section 706 expressly authorizes a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed" and to "hold unlawful and set aside agency action, findings, and conclusions found to be * * * (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] (B) con-

trary to constitutional right, power, privilege, or immunity." 5 U.S.C. 706(1)-(2).

The court of appeals' decision is consistent with this Court's decision in *Wilkie*. In that case, the constitutional allegations were premised on actions allegedly taken by employees of the Bureau of Land Management (BLM) to extract an easement from the landowner plaintiff. 551 U.S. at 542-547. As alleged by the plaintiff, the offensive actions taken by the BLM employees were myriad; some were prosecutorial in nature, some sounded in tort, some were conventional agency actions, and some difficult to categorize. *Id.* at 551-553. With respect to those properly categorized as conventional administrative actions, the Court recognized that for each claim "administrative review was available, subject to ultimate judicial review under the APA." *Id.* at 552. It was only because of the "patchwork" of other remedies that the plaintiff would have to pursue in a variety of forums that the Court had difficulty inferring congressional intent to preclude a *Bivens* action, requiring it to proceed to the second step of the analysis. Even on those facts, however, the Court still found "no intuitively meritorious case for recognizing a new constitutional cause of action." *Id.* at 554. A fair reading of the Court's analysis supports what the court of appeals here held: where the only allegations can all be characterized as instances of "conventional agency action," *id.* at 552, administrative review subject to judicial review under the APA provides an adequate, alternative remedy foreclosing recognition of an independent *Bivens* remedy.

In this case all of petitioners' claims may be adequately adjudicated under the APA. As the court of appeals recognized, petitioners did "not dispute that it has alternative remedies under the APA; it did, after all,

bring APA claims against the Forest Service in this case." Pet. App. 18. Accordingly, the court of appeals correctly held that a *Bivens* remedy was foreclosed.

b. Petitioners rehash arguments made and properly rejected by the court of appeals below. Pet. 9-15. Those arguments lack merit and do not warrant this Court's review.

First, petitioners contend (Pet. 9-12) that the APA alternative is not an adequate substitute because it does not provide for monetary (or punitive) damages, it does not permit claims against individuals, and it does not provide a right to a jury trial. But, as the court of appeals held, alternative "remedial schemes lacking such features may be adequate alternatives, provided that the absence of such procedural protections was not inadvertent on the part of Congress." Pet. App. 16 (citing *Chilicky*, 487 U.S. at 424-425). In *Chilicky*, the Court declined to imply a *Bivens* remedy for alleged due process violations by Social Security officials, even though the review scheme provided by the Social Security Act offered no possibility of damages. 487 U.S. at 423-425. The Court explained that "[w]hen 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 afford "additional *Bivens* remedies." *Ibid.* Petitioners make no attempt to suggest that Congress "inadvertent[ly]" neglected to provide for monetary damages for alleged constitutional violations arising from reviewable agency action.

Second, petitioners contend (Pet. 12-13) that the APA cannot be read as expressing Congress's intent to preclude a *Bivens* remedy because the APA predated

the *Bivens* decision and when Congress amended the APA post-*Bivens* it did not address that decision. For this argument, petitioners rely on *Carlson* v. *Green*, 446 U.S. 14 (1980), but as the court of appeals explained, the "congressional comments accompanying" the amendment to the Federal Tort Claims Act (FTCA) at issue in that case "made it *crystal clear* that Congress views FTCA and *Bivens* as parallel, complementary causes of action." Pet. App. 20 (quoting *Green*, 446 U.S. at 19-20). Whereas the legislative history there "expressly stat[ed] that the FTCA 'should be viewed as a counterpart to the *Bivens* case,'" *ibid.* (quoting *Green*, 446 U.S. at 20), petitioners can point to no such evidence of congressional intent with respect to the APA. This Court has previously declined to create a *Bivens* remedy where, as here, Congress has given no affirmative indication that it intended the statutory cause of action only as a complement to *Bivens*. See *Chilicky*, 487 U.S. at 425-426; *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983).

Finally, petitioners argue (Pet. 14-15) that, like the plaintiff in *Wilkie*, they have been subject to a "pattern" of retaliation and, unlike the plaintiff in *Wilkie*, that retaliation was premised on an improper and unconstitutional motive. Petitioners confuse the "patchwork" of claims in *Wilkie* that prompted the Court to look beyond the APA alternative remedy to the special factors at issue, with the "pattern" of retaliation they allege in this case. The *Wilkie* Court did not proceed to the second step of the inquiry because there was a "pattern" of administrative actions that needed redress; it did so because the actions were both administrative and non-administrative and, as a result, the Court could not infer that Congress intended the "patchwork" of remedies in different forums to substitute for a *Bivens* remedy.

Where the APA is an adequate, alternative remedy for all of petitioners' claims (whether or not they constitute a "pattern"), there is "no need to 'weigh[] reasons for and against the creation of a new cause of action.'" Pet. App. 21-22 (brackets in original) (quoting *Wilkie*, 551 U.S. at 554).

2. Petitioners have not attempted to demonstrate any circuit conflict on this issue, and we are aware of none. Indeed, several courts of appeals have held, in accord with the decision below, that a plaintiff's right to judicial review under the APA precluded a *Bivens* remedy. See, *e.g.*, *Nebraska Beef, Ltd.* v. *Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005) (holding that "the existence of a right to judicial review under the APA is sufficient to preclude a *Bivens* action"), cert. denied, 547 U.S. 1110 (2006); *Miller* v. *United States Dep't of Agric. Farm Servs. Agency*, 143 F.3d 1413, 1416 (11th Cir. 1998) ("[T]he existence of a right to judicial review under the APA is, alone, sufficient to preclude * * * a *Bivens* action."); cf. *Munsell* v. *Department of Agric.*, 509 F.3d 572, 589-591 (D.C. Cir. 2007) (suggesting it might be appropriate to recognize a *Bivens* remedy where the alleged unconstitutional conduct drove the plaintiff from the regulated industry rendering APA relief unavailable, but declining to decide the issue).

This case is also a poor vehicle for review of the question presented because the district court has already determined that petitioners failed to present sufficient evidence on their *Bivens* claims to survive summary judgment. See Pet. App. 34 (concluding that petitioners "present no evidence to suggest retaliation, malice, or conspiratorial acts on the part of individual [respondents]," and that petitioners "present no specific evidence to suggest that [respondents] * * * treated

Western Radio differently from its competitors without rational basis"). Thus, regardless of whether a *Bivens* remedy exists for petitioners' claims, respondents would still be entitled to summary judgment on the merits. In these circumstances, further review is not warranted.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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