No. 13-1095

In the Supreme Court of the United States

ANESH GUPTA, PETITIONER

v.

RICHARD T. MCGAHEY, 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

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
BARBARA L. HERWIG
HOWARD S. SCHER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether an action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), seeking damages for the arrest and detention of an alien believed to pose a potential security threat and the search of his property to minimize that security threat arises out of a "decision or action" to "commence [removal] proceedings" against the alien and is therefore beyond a court's jurisdiction in light of 8 U.S.C. 1252(g).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a-18a) is reported at 709 F.3d 1062. The opinions accompanying the court of appeals' denial of rehearing (Pet. App. 1a-11a) are reported at 737 F.3d 694. The order of the district court (Pet. App. 19a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2013. A petition for rehearing was denied on November 7, 2013 (Pet. App. 1a). On January 9, 2014, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 7, 2014, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has generally provided for judicial review of final orders directing the removal of an alien from the United States in 8 U.S.C. 1252. As relevant here, however, it has specified that, except as provided in that section, "no court shall have 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 alien under [the Immigration and Nationality Act]." 8 U.S.C. 1252(g).[1] In *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (*AADC*), this Court explained that the jurisdictional bar in Section 1252(g) applies to "three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Id.* at 482.

2. Petitioner is a citizen of India who entered the United States as a tourist on a B-2 visitor visa in December 2001. Pet. App. 13a. In June 2002, shortly before that visa expired, petitioner married an American citizen in Illinois, who then filed forms seeking to adjust petitioner's immigration status as her immediate relative and as a permanent resident. *Ibid.* By May 2003, petitioner had moved to Florida (without his

[1] Although Section 1252(g) refers to the Attorney General, who previously supervised the Immigration and Naturalization Service, Congress transferred those functions from the Department of Justice to the Department of Homeland Security in 2002, and the reference to the Attorney General is now construed as a reference to the Secretary of Homeland Security. 6 U.S.C. 202, 251, 557; see *Elgharib* v. *Napolitano*, 600 F.3d 597, 606-607 (6th Cir. 2010) (citing cases).

wife) and begun working at the Walt Disney World resort in Orlando. *Ibid.* Over the next several years, while he served as an intern and then a paid employee, petitioner filed multiple complaints and lawsuits against Disney World for alleged discrimination and immigration-law violations, all of which were dismissed or found to be without merit. *Id.* at 13a-14a; Exs. to Defs.' Mot. to Dismiss, D. Ct. Doc. 76-2, at 13-15 (June 2, 2011). Meanwhile, the requests to adjust petitioner's status were denied on July 23, 2009, after it was determined that his marriage had been a sham. Pet. App. 14a; D. Ct. Doc. 76-1, at 26-29.

Two weeks later, on August 6, 2009, respondent McGahey, an agent of United States Immigration and Customs Enforcement (ICE), prepared a record of petitioner's status as a "Deportable/Inadmissible Alien," which detailed petitioner's history of complaints against Disney World, including a then-recent letter to the President of the United States, which demonstrated "an increase[d] exaggeration of issues, bordering on delusion." Pet. App. 14a; D. Ct. Doc. 76-1, at 32-38, 40-42; see also Second Am. Compl., D. Ct. Doc. 31, at 4 (Sept. 14, 2010). In light of the escalating nature of petitioner's allegations and the potential risk he posed to Disney World—which ICE had designated as a "Critical Infrastructure asset"—Agent McGahey recommended that petitioner be arrested and held without bond. Pet. App. 14a. He therefore prepared a notice to appear for removal proceedings and a warrant for petitioner's arrest, both of which were approved by Agent McGahey's supervisor at ICE, respondent Wargo. *Ibid.*; D. Ct. Doc. 76-1, at 44, 46-49.

The next day, August 7, 2009, all three respondents (each an ICE agent) arrested petitioner at his apart-

ment. Pet. App. 14a. In conjunction with the arrest, the agents searched petitioner's apartment and his car to locate his "Disney work ID, name tag, and complimentary employee annual pass" (which were later returned to Disney World). D. Ct. Doc. 31, at 4-5, 7; see Pet. App. 15a. Respondents also took the keys to petitioner's apartment, mailbox, and car. *Ibid.* Petitioner was then taken to Miami to await removal proceedings and was subsequently released on bond by an immigration judge. *Ibid.*

3. a. In February 2010, petitioner filed this action, pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1999), against the three ICE agents who had arrested him, seeking $10 million in compensatory damages as well as punitive damages and attorney's fees, alleging that respondents violated petitioner's Fourth and Fifth Amendment rights by seeking "to arrest, detain and keep [him] in detention without lawful justification." D. Ct. Doc. 31, at 7, 9-10; see Pet. App. 15a.

Respondents filed a motion to dismiss or, in the alternative, for summary judgment, contending that the damages remedy under *Bivens* should not extend to actions taken by immigration officials to remove an alien from the United States; that jurisdiction over petitioner's suit is barred by 8 U.S.C. 1252(g); and that respondents are entitled to qualified immunity. Defs.' Mot. to Dismiss, or, In the Alternative, for Summ. J., D. Ct. Doc. 76, at 9-18 (June 2, 2011).

b. The district court granted the motion to dismiss. Pet. App. 19a-25a. The court held that, under 8 U.S.C. 1252(g), it lacked subject-matter jurisdiction to entertain petitioner's challenge to his arrest, search, and detention. Pet. App. 20-24a. It explained that, "[e]ven

under the Supreme Court's narrow construction of § 1252(g) [in *AADC*], all of [petitioner's] claims are barred by the plain text of the statute," because "[e]very act about which [petitioner] complains flowed directly from the ICE agents' discretionary decision to commence removal proceedings and the actions those agents took to effectuate that decision." *Id.* at 21a.

The district court also noted that entertaining petitioner's *Bivens* claims "would inject th[e] Court into matters that are the province of immigration officials" and that, "[e]ven if it were not expressly constrained" by Section 1252(g), the court would "be hesitant to entertain a suit that might impede, disrupt or delay an ongoing immigration proceeding." Pet. App. 24a.

4. a. The court of appeals affirmed the district court's judgment. Pet. App. 12a-18a.[2] The court held that, in light of Section 1252(g), it lacked subject-matter jurisdiction over petitioner's action. *Id.* at 16a-18a. It concluded that the actions of arresting petitioner, searching and seizing his property, and detaining him, all "ar[o]se from an action taken to commence removal proceedings" and simultaneously to "secure [petitioner] and prevent potential danger to Disney World while he awaited a determination of his removal." *Id.* at 17a-18a. Because the court found that it lacked jurisdiction under Section 1252(g), it declined to "reach the question of whether to recognize a *Bivens* action under these circumstances." *Id.* at 16a.

b. The court of appeals subsequently denied petitioner's request for rehearing en banc. Pet. App. 2a.

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[2] Petitioner originally appeared *pro se*, but the court of appeals determined that the case presented "a novel question of law" and appointed counsel "for purposes of oral argument and any subsequent proceedings." Pet. App. 26a-27a.

Judge Martin dissented from that denial, contending that the "case presents such important and novel issues that en banc rehearing is necessary and appropriate." *Id.* at 6a. Judge Martin found it "hard to understand how the decisions to arrest [petitioner], to detain him, and to search his home and automobile were related in any way to the commencement of removal proceedings against him," and she noted that "the commencement of proceedings did not *require* the actions taken by law enforcement against [petitioner]." *Id.* at 6a-7a. She further observed that "the problem presented by [petitioner's] case does not lend itself to an easy or self-evident result," and that, because the statute has the "potential for conflicting interpretations, an en banc rehearing would have been helpful to produce an opinion that more fully explains itself, thus giving meaningful guidance to courts and future litigants, even if it arrived at the same result." *Id.* at 9a, 10a. Finally, Judge Martin expressed "concern[] about the potential implications of the panel opinion," because "it could be read to bar federal courts from considering any tort or constitutional claims arising during a search or arrest, so long as the government claims it is tangentially related to the decision to commence removal proceedings." *Id.* at 10a-11a.

c. Judge Wilson, who had been on the panel that decided the case, filed an opinion concurring in the denial of rehearing. Pet. App. 2a-5a. Although he agreed with the dissent's suggestion "that *Bivens* relief should not be categorically denied whenever the government can tangentially relate the alleged violation to removal proceedings," he disagreed with the dissent's characterization of the breadth of the panel's decision. *Id.* at 2a-3a; see *id.* at 5a ("Nothing in our

opinion states that it should be read as broadly as Judge Martin suggests."). Judge Wilson explained that the "panel opinion merely affirmed the district court's determination that it lacked subject matter jurisdiction 'to allow a *Bivens* action in this context'"—a context that "involved arrest, detention, searches, and seizures directly related to removal proceedings and the offense that prompted officials to deem removal proceedings necessary." *Id.* at 3a. While that context had not provided "an opportunity to establish limiting principles," Judge Wilson noted that such principles could be established "[i]f a future case arises where removal proceedings are used as pretext to shield law enforcement abuses from federal judicial oversight, or where the conduct is more egregious, or where it is less related to the commencement of removal proceedings." *Id.* at 4a. Finally, to the extent that the dissent "fears that [the] panel's opinion will be erroneously extended * * * beyond the factual scenario at issue in this case," Judge Wilson concluded that, "[i]f and when that error is made, we will have occasion to correct the error." *Id.* at 5a.

ARGUMENT

Petitioner contends (Pet. 6-11) that his challenge is not barred by 8 U.S.C. 1252(g) because his arrest and detention, and the search of his apartment and car, did not arise from the decision to commence removal proceedings against him. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or with that of any other court of appeals. Moreover, even if this Court were to reverse the court of appeals' jurisdictional holding, petitioner's action would be independently barred because the damages remedy under

Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should not be extended to the actions associated with the initiation of removal proceedings. Further review is not warranted.

1. Petitioner contends (Pet. 7, 9) that the court of appeals "drew a broad, expansive interpretation of the phrase 'commence proceedings'" in Section 1252(g) that was inconsistent with this Court's decision in *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (*AADC*), because, in petitioner's view, the actions of arresting and detaining him, and of searching and seizing his property, "d[id] not arise from the decision to commence removal proceedings." As the court of appeals concluded, however, in the particular context of this case, those actions were inherently intertwined with the decision to commence removal proceedings against petitioner in light of the potential threat he posed to a critical infrastructure asset. Pet. App. 17a-18a. They are therefore insulated from judicial review by Section 1252(g).

a. In *AADC*, this Court rejected the proposition that Section 1252(g)'s bar applies to "the universe of deportation claims," explaining that it is limited "to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" 525 U.S. at 482. The Court noted that "many other decisions or actions that may be a part of the deportation process" would not be encompassed by Section 1252(g), "such as the decisions [1] to open an investigation, [2] to surveil the suspected violator, [3] to reschedule the deportation hearing, [4] to include various provisions in the final order that is the product of the

adjudication, and [5] to refuse reconsideration of the order." *Ibid.* Those decisions fall outside the scope of Section 1252(g) because they either occur before the commencement of any proceedings (as with the first and second items on the Court's list), occur after the commencement but are separate from the adjudication (as with the third and fourth items), or occur after the removal order is issued (as with the fifth item).

Unlike each of the other actions identified in *AADC*, the actions at issue in this case—arresting and taking into custody an alien believed to pose a security threat, and simultaneously searching for and seizing property to mitigate that threat—were an integral part of the commencement of removal proceedings against petitioner. Congress has provided that the "[i]nitiation of removal proceedings" occurs when "written notice (in this section referred to as a 'notice to appear')" is "given in person to the alien" or served by mail. 8 U.S.C. 1229(a)(1). Here, the warrant for petitioner's arrest was prepared at the same time as the notice to appear that would initiate removal proceedings. Pet. App. 17a; see p. 3, *supra*. Not only were the relevant decisions made at the same time, the actions to make them effective were also implemented simultaneously. When agents served petitioner with the notice to appear (thus initiating proceedings under Section 1229(a)(1)), they also arrested him and conducted a search to locate and seize his Disney World ID, nametag, and pass, in order to mitigate the potential threat posed by his access to Disney World—the very threat that provided the basis for the decision to initiate proceedings against him. Pet. App. 17a-18a; see p. 4, *supra*.

Moreover, although petitioner correctly points out (Pet. 9) that the government is not required to arrest and detain an alien when initiating removal proceedings, it indisputably has the discretion to do so. See 8 C.F.R. 236.1(b)(1) ("At the time of issuance of the notice to appear, * * * the respondent may be arrested and taken into custody."). When discretion is exercised to initiate proceedings and simultaneously to arrest the alien, and when both halves of that decision are based on the same security consideration (here, the potential threat petitioner posed to a "Critical Infrastructure asset," Pet. App. 17a), treating both halves as insulated from judicial review is consistent with the statutory purpose identified by *AADC*: "giv[ing] some measure of protection" to certain "discretionary determinations," which, if reviewable at all, "will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed." 525 U.S. at 485.[3] There is therefore no conflict between the decision below and *AADC*.[4]

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[3] Here, petitioner received streamlined review of the decision to detain him and was released from custody after a bond determination. Pet. App. 15a.

[4] Petitioner suggests (Pet. 4-5, 7) that the decision below is inconsistent with *AADC* because the court of appeals failed to discuss *AADC* in its decision. But there can be no doubt that the court was aware of *AADC*, because it was squarely addressed in the district court's opinion. Pet. App. 21a. And, of course, what matters is whether the decisions actually conflict. Cf. *Early* v. *Packer*, 537 U.S. 3, 8 (2002) (per curiam) (holding that a state-court decision that fails to discuss controlling cases from this Court is not contrary to them "so long as neither the reasoning nor the result of the state-court decision contradicts them").

b. Similarly, in light of the inherent and direct connections between the actions that petitioner challenges and the commencement of removal proceedings against him, there is no basis for his suggestion that the court of appeals' reasoning would allow Section 1252(g) to bar suits arising from a search or arrest that is only "tangentially related to the decision to commence removal proceedings." Pet. 16 (quoting Pet. App. 11a (Martin, J., dissenting from the denial of rehearing en banc)). Petitioner speculates about what the decision below "likely means * * * by extension," Pet. 15, and he expresses concern that the decision "could be read" in certain ways because it "lacks limiting principles," Pet. 16 (internal quotation marks omitted). But this Court "reviews only judgments, not statements in opinions." *Camreta* v. *Greene*, 131 S. Ct. 2020, 2039 (2011) And much less does it review the *absence* of cautionary statements about different cases that might arise in the future. The court of appeals itself will be able to correct any errors in applying its fact-specific decision to other contexts. Pet. App. 5a (Wilson, J., concurring in the denial of rehearing en banc). And this Court should not grant review in this case to correct potential mistakes in such future applications to factually different contexts.

2. Petitioner also contends (Pet. 12) that the decision below conflicts with *Parra* v. *Perryman*, 172 F.3d 954 (7th Cir. 1999). There is, however, no conflict, because the two decisions did not address the same question nor similar circumstances. In *Parra*, the Seventh Circuit considered whether an alien could seek habeas-corpus relief from continued detention during the period after an immigration judge had concluded that he was removable but before the re-

moval order had become final. *Id.* at 956. Although the government did not invoke Section 1252(g), the Seventh Circuit noted briefly that it did not bar the alien's habeas claim because the alien did not seek to challenge the underlying administrative adjudication and removal order and the question concerned only "detention while the administrative process lasts." *Id.* at 957. But that period of detention was not even arguably tied to the commencement of removal proceedings, much less as closely tied as it is here. And the only risk the government sought to mitigate by detaining the alien in *Parra* was that he would "go into hiding," *id.* at 956—not that he would, like petitioner, pose the same threat that precipitated the decision to initiate proceedings against him. There is therefore no conflict between the decision below and *Parra*.

Moreover, to the extent that other courts of appeals have addressed questions similar to the one decided in this case, their analysis is consistent with the decision below. See *Sissoko* v. *Rocha*, 509 F.3d 947, 950 (9th Cir. 2007) (holding that Section 1252(g)'s "jurisdiction-stripping language covers the [aliens'] false arrest claim" because it "directly challenges [the immigration inspector's] decision to commence expedited removal proceedings"); see also *Adegbuji* v. *United States*, 223 Fed. Appx. 194, 194-195 (3d Cir. 2007) (finding Section 1252(g) barred an alien's claims for malicious prosecution, false imprisonment, and abuse of process arising from "his removal proceedings as well as his detention during them"). Given the lack of any clear disagreement in the courts of appeals, the question does not warrant further review.[5]

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[5] Although petitioner identifies (Pet. 12-14) a handful of district-court decisions that he believes are contrary to the decision below,

3. Even assuming that the question of Section 1252(g)'s applicability to claims arising from the arrest, detention, and search of an alien in petitioner's situation otherwise warranted this Court's review, this case would be a poor vehicle for such review, because petitioner's claim should falter on an alternative threshold ground. As respondents have contended, and as the district court concluded (Pet. App. 24a), the *Bivens* damages remedy that this Court has inferred in limited contexts should not be extended to claims involving arrests, seizures, and detentions in the immigration context. And the existence of that independent ground for the district court's judgment—which the court of appeals did not address (*id.* at 16a)—counsels against further review.

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." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009) (citation omitted). In doing so, it specifically noted that there were "no special factors counselling hesitation in the absence of affirmative action by Congress," *Bivens*, 403 U.S. at 396-397, and it "rel[ied] largely on earlier decisions implying private damages actions into federal statutes"—decisions from which the Court has since "retreated" and that reflect an approach to recognizing private rights of action that the Court has since "abandoned." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 & n.3 (2001). This Court's "more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker* v. *Chilicky*, 487 U.S.

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this Court typically does not resolve conflicts between district-court opinions. See Sup. Ct. R. 10(a).

412, 421 (1988). Indeed, since 1980, the Court "ha[s] consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68; see also *Minneci* v. *Pollard*, 132 S. Ct. 617, 622-623 (2012) (listing cases).

In deciding whether to extend *Bivens* to a new context, a court must follow a two-step process. First, it asks whether there is "any alternative, existing process for protecting" the plaintiff's interests; 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* v. *Robbins*, 551 U.S. 537, 550, 554 (2007). Second, "even in the absence of [such] an alternative" process, inferring a remedy under *Bivens* is still disfavored, and the court must make an assessment "appropriate for a common-law tribunal" of 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 (quoting *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983)).

b. Petitioner's *Bivens* claim fails at both steps. With respect to the first step, Congress has provided a "comprehensive federal statutory scheme for regulation of immigration and naturalization." *DeCanas* v. *Bica*, 424 U.S. 351, 353 (1976). That scheme provides "alternative, existing process[es]," *Wilkie*, 551 U.S. at 550, to challenge allegedly unlawful detention or other constitutional violations, and allows for judicial review of such challenges. See 8 U.S.C. 1252(a)(2)(D) and (b)(9). An alien being detained during the removal proceedings is entitled to submit an application for release to an immigration judge, 8 C.F.R. 1236.1(d),

whose decision is subject to review, 8 C.F.R. 1003.38. Thus, petitioner himself was released on bond. Pet. App. 15a. An alien can also challenge prolonged detention by bringing a habeas claim. See, *e.g.*, *Zadyvdas* v. *Davis*, 533 U.S. 678, 688 (2001).

With respect to the second step, Congress's unusually broad authority over immigration matters, see, *e.g.*, *Graham* v. *Richardson*, 403 U.S. 365, 377 (1971), is a "special factor[] counselling hesitation before authorizing a new kind of federal litigation." *Wilkie*, 551 U.S. at 550 (quoting *Bush*, 462 U.S. at 378). Even if *Bivens* claims for unlawful arrest or detention are cognizable for citizens in other contexts, "Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Demore* v. *Kim*, 538 U.S. 510, 522 (2003). The Ninth Circuit has applied the two-step framework and "decline[d] to extend *Bivens* to * * * wrongful detention pending deportation * * * in the immigration context." *Mirmehdi* v. *United States*, 689 F.3d 975, 983 (2011), cert. denied, 133 S. Ct. 2336 (2013).

Because petitioner's claim would be independently barred unless this Court were to extend *Bivens* to this new context, further review of the question presented is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Assistant Attorney General
BARBARA L. HERWIG
HOWARD S. SCHER
Attorneys

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