No. 12-522

In the Supreme Court of the United States

MOHAMMED MIRMEHDI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the United States is not liable under the Federal Tort Claims Act in this case in light of the discretionary-function exception in 28 U.S.C. 2680(a) and, in the alternative, in light of a litigation privilege under California law.

2. Whether, despite existing statutory remedies under both the Immigration and Nationality Act and habeas corpus, petitioners are nevertheless entitled to judicial recognition of a new damages remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for detention pending their removal, when that detention was allegedly unlawful because it was based on fabricated evidence.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-20b) is reported at 689 F.3d 975. The superseded opinion of the court of appeals (Pet. App. 21a-39a) is reported at 662 F.3d 1073. The judgment of the district court (Pet. App. 40a-42a) and the order dismissing petitioners' complaint in relevant part (Pet. App. 43a-54a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2012, and a petition for rehearing was also denied on that date (Pet. App. 2a-3a). On August 28, 2012, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 22, 2012, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This dispute arises out of immigration proceedings against petitioners, four Iranian brothers who entered the United States between 1978 and the early 1990s. In 1998, petitioners applied for political asylum. The next year, their former immigration attorney was charged with immigration fraud and began to cooperate with a federal investigation. He told federal authorities that petitioners were supporters of the Mujahedin-e Khalq (MEK), a group that the Secretary of State had designated as a foreign terrorist organization in 1997. Pet. App. 3a-5a.[1]

a. In March 1999, the Immigration and Naturalization Service (INS) initiated removal proceedings against petitioners on charges that they were in the United States illegally. C.A. E.R. 59, 75, 104. Petitioners were arrested and detained in light of a Joint Terrorism Task Force's determination that they had committed immigration fraud in connection with their asylum applications. *Id.* at 37-38, 77. An immigration judge (IJ), however, granted their release on bond. *Id.* at 86-87; Pet. App. 4a.

In February 2001, a federal search of an MEK safehouse located a cache of documents, including one that was known as the "L.A. Cell Form." Pet. App. 5a; C.A. E.R. 90. That document included petitioners' names on a list of what the government contends were members, affiliates, and supporters of MEK. Pet. App. 5a. In October 2001, the INS revoked petitioners' bond and detained them pursuant to the original 1999 warrant. *Ibid.*; see 8 U.S.C. 1226(b).

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[1] The designation of MEK as a foreign terrorist organization was revoked in September 2012. 77 Fed. Reg. 60,741 (Oct. 4, 2012).

Petitioners then sought redetermination of their bond pursuant to 8 C.F.R. 1003.19(a)-(b). C.A. E.R. 87. During a December 2001 hearing before an IJ, FBI Special Agent Christopher Castillo testified about the L.A. Cell Form, stating that he had shown the document to a confidential informant who claimed to know petitioners and who stated that they were affiliated with MEK. *Id.* at 91. Petitioners proffered rebuttal testimony, in which they denied being affiliated with MEK and contended that the L.A. Cell Form was merely a list of individuals who had been invited to participate in a 1997 demonstration protesting the Iranian government that was (unbeknownst to them) organized by MEK. *Id.* at 95-97. The IJ found that petitioners' bond should be revoked based on "the totality of the circumstances," specifically noting that the L.A. Cell Form alone would have been insufficient to establish changed circumstances warranting bond revocation. *Id.* at 99. The IJ discussed, *inter alia*, other testimony from Castillo about petitioners' ties to MEK; evidence about the extensive overlap between MEK supporters and attendees at the 1997 demonstration; letters between one of petitioners and a known MEK supporter; an allegation by petitioners' former attorney that petitioners "had been involved in forming an MEK Cell in Oklahoma"; and the fact that petitioners admitted they had filed "[f]raudulent asylum applications and obtain[ed] fraudulent identifications, which indicate[d] a desire to obviate the legal process governing immigration" and made them a significant flight risk. *Id.* at 99-101.

Petitioners appealed the bond revocation to the Board of Immigration Appeals (Board) pursuant to 8 C.F.R. 1003.1(b)(7), which affirmed on the ground that petitioners posed a danger to persons or property as a

result of their association with MEK. C.A. E.R. 107-108; C.A. Defendants-Appellees' Addendum (C.A. Addendum) 34, 38, 43.

b. Meanwhile, IJs conducted removal proceedings against petitioners, who conceded that they were removable as charged but requested asylum. C.A. E.R. 37, 59-60; C.A. E.R. Supp. 54, 74. The IJs denied asylum and ordered that petitioners be removed but also held that they were entitled to withholding of removal to Iran, because their MEK connections would make them likely to be subject to torture. C.A. Addendum 47.

Both sides appealed to the Board, which affirmed in all respects. *E.g.*, C.A. E.R. 75-84. Two of petitioners sought review in the court of appeals pursuant to 8 U.S.C. 1252. In denying their petitions, the Ninth Circuit held that the Board did not err in denying asylum, because substantial evidence supported the Board's conclusion that one petitioner "was engaged in immigration fraud" and because the Board properly relied on evidence that the other petitioner "knew his own [asylum] claim was fraudulent." *Mirmehdi* v. *Mukasey*, Nos. 04-74743, 04-74744, 2009 WL 247903, at *1 (9th Cir. Feb. 2, 2009).

c. After the Board affirmed the revocation of petitioners' bond, and while removal proceedings against petitioners were ongoing, petitioners filed a petition for habeas corpus seeking release from detention. The district court denied their petition. C.A. Addendum 45-63. The court of appeals affirmed with respect to two of petitioners, but remanded with respect to the other two, to allow the government to reconcile a potential inconsistency about their connections with terrorist activities between the Board's decisions in the bond-revocation proceeding and the removal proceedings. *Mirmehdi* v.

INS, 113 Fed. Appx. 739, 741 (9th Cir. 2004). On remand, the government never had an opportunity to reconcile that potential inconsistency because petitioners were released from detention in March 2005. Pet. App. 6a.

2. In August 2006, petitioners filed this action seeking damages, in relevant part, under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, and *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). They alleged, among other things, that Agent Castillo and Immigration and Customs Enforcement Agent James MacDowell fabricated evidence against them, resulting in their unlawful detention. Pet. App. 55a-158a. The district court dismissed most of petitioners' claims, and the others were settled. *Id.* at 6a.

As relevant here, the district court dismissed the *Bivens* claims against Castillo and MacDowell for unlawful detention on the ground that "[petitioners] did not possess the right to be free from arrest and detention under the circumstances alleged in the amended complaint." Pet. App. 46a. The court also dismissed the FTCA claim against the United States for false imprisonment on the ground that "[petitioners'] initial bond determination and subsequent bond revocation and rearrest were proper exercises of the Attorney General's discretion." *Id.* at 50a.

3. The court of appeals affirmed. Pet. App. 21a-39a (initial opinion), 1a-20b (amended opinion).[2]

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[2] At the same time that it denied petitioners' rehearing petition, the court of appeals issued an amended opinion. Pet. App. 3a. The amended opinion contained two principal additions to the court's discussion of petitioners' FTCA claim: a sentence about having to consider whether the policy-making defendants had promulgated uncon-

a. With respect to petitioners' *Bivens* claim, the court of appeals did not reach the question of whether petitioners had a "constitutional right not to be detained pending deportation proceedings." Pet. App. 7a n.1. Instead, the court concluded that it would not "extend *Bivens*" to allow a damages remedy "for illegal immigrants to recover for unlawful detention during deportation proceedings." *Id.* at 9a; see *id.* at 10a-13a.

Applying this Court's two-part analysis in *Wilkie* v. *Robbins*, 551 U.S. 537 (2007), the court of appeals concluded that no *Bivens* remedy should lie because petitioners were able to pursue alternative remedies and special factors counseled hesitation in recognizing an implied damages remedy in this context. Pet. App. 11a. The court explained that petitioners "could—and did—challenge their detention through not one but two different remedial systems": the "substantial, comprehensive, and intricate remedial scheme in the context of immigration" and the remedial framework provided by habeas corpus. *Id.* at 11a-12a (citation omitted). The court acknowledged that neither of those systems provides for "monetary compensation for unlawful detention," but it concluded that it was required to defer to Congress's judgment and that Congress's failure to provide for that particular remedy "can hardly be said to be inadvertent," given the frequency with which it has amended the INA. *Id.* at 12a. The court further concluded that hesitation in recognizing a damages remedy was justified by "[t]he complexity and comprehensiveness of the existing remedial system" and by the fact

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stitutional policies outside their discretion (*id.* at 16a) and two paragraphs about whether an individual tortfeasor would be immune from suit under state law (*id.* at 17a-19a & nn.9-10). The following discussion tracks the amended opinion.

that "immigration issues have the natural tendency to affect diplomacy, foreign policy, and the security of the nation." *Id.* at 13a (citation and internal quotation marks omitted).[3]

b. With respect to petitioners' FTCA claim, the court of appeals rejected that claim on the basis of two different statutory exceptions from liability. Pet. App. 15a-19a.

First, the court of appeals relied on the discretionary-function exception, under which the United States cannot be sued "based upon the exercise or performance or the failure to exercise or perform a discretionary function * * *, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). The court explained that it needed to determine whether the challenged conduct involves an element of judgment or choice and implements social, economic, or political policy considerations, and also whether the complaint alleges that the policy-making defendants promulgated unconstitutional policies that they had no discretion to create. Pet. App. 16a. The court held that petitioners' detention fell within the scope of the discretionary-function exception "[b]ecause the decision to detain an alien pending resolution of immigration proceedings is explicitly committed to the discretion of the Attorney General and implicates issues of foreign policy, and because [petitioners] do not allege that this decision itself violated the Constitution." *Id.* at 16a-17a.

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[3] In a concurring opinion, Judge Silverman agreed that petitioners "lack an implied right of action under *Bivens*," but wrote "separately to emphasize that this case does not present the issue of whether illegal immigrants could ever bring a *Bivens* action." Pet. App. 20a-20b.

Second, focusing on petitioners' allegation that Castillo's "knowingly false testimony" about the L.A. Cell Form "constituted false imprisonment under California law" (Pet. App. 17a), the court of appeals determined (*id.* at 17a-19a) that the United States would not be liable because it could "assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim," 28 U.S.C. 2674 (third paragraph). Even assuming that petitioners' allegations would state a claim of false imprisonment under California law—a question the court did not resolve, Pet. App. 17a n.9—the court held that "California law would not permit recovery against an individual defendant for testimony given to an IJ in a bond revocation proceeding" in light of California's "very broad litigation privilege" for statements made in official proceedings authorized by law. *Id.* at 18a (internal quotation marks omitted). The court noted that the litigation privilege does not apply in a suit for malicious prosecution, but petitioners "have not brought a claim for malicious prosecution." *Id.* at 18a, 19a. Having found immunity under California law, the court of appeals declined to address whether Castillo's testimony "would also be immune under federal law." *Id.* at 19a n.10.[4]

4. Petitioners sought rehearing, but the court of appeals denied their petition. Pet. App. 3a.

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[4] The court of appeals also affirmed the district court's dismissal of petitioners' witness-intimidation and conspiracy claims against Castillo and MacDowell, Pet. App. 14a-15a, and affirmed the denial of their motion to amend their complaint, *id.* at 19a-20a. Those holdings are outside the scope of the questions presented to this Court.

ARGUMENT

Petitioners contend (Pet. 13-21) that the court of appeals erred in two ways when applying the discretionary-function exception to liability under the FTCA. The court of appeals, however, did not even address the first aspect of petitioners' argument and it did not disagree with petitioners' legal rule with respect to the second aspect. Moreover, the court's rejection of petitioners' FTCA claim rested on an independent state-law ground that does not warrant this Court's review and is bolstered by additional federal- and state-law grounds that defeat petitioners' underlying tort claim. Petitioners also contend (Pet. 25-35) that the court of appeals erred in declining to extend a damages remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to a claim by aliens that they were unlawfully detained pending removal from the United States. That decision was correct and does not conflict with any decisions of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 13-21) that the court of appeals' reliance on the FTCA's discretionary-function exception implicates two different circuit conflicts: one pertaining to the relationship between the discretionary-function exception in 28 U.S.C. 2680(a) and the so-called "law-enforcement proviso" to the intentional-tort exception in 28 U.S.C. 2680(h), and one pertaining to whether the discretionary-function exception applies to allegedly unconstitutional conduct.[5] Even if petitioners are cor-

[5] This Court recently concluded that the waiver of sovereign immunity "effected by the law enforcement proviso extends to acts or omissions of law enforcement officers that arise within the scope of their employment, regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search,

rect about the merits of either of those two arguments (neither of which was addressed by the government in the court of appeals), this would be an especially poor vehicle for resolving them.

a. While there is indeed some disagreement in the courts of appeals about both of the issues that petitioners discuss (Pet. 14-21), petitioners tellingly fail to describe what the court of appeals actually held in this case. With respect to the first issue, the court did not even mention or cite the law-enforcement proviso. There is accordingly not even an implicit holding in the decision below about what petitioners describe (Pet. 18) as "the relationship between" that proviso and the FTCA's discretionary-function exception.

With respect to the second issue—whether the discretionary-function exception can prevent the United States from being liable for unconstitutional acts—the court of appeals' decision did not express disagreement with petitioners' proposed rule of law. Indeed, the court found the discretionary-function exception applicable here "because [petitioners] do not allege that th[e] decision [to detain them pending resolution of their removal proceeding] violated the Constitution." Pet. App. 17a. Petitioners presumably believe that the court of appeals should not have focused on the decision to detain them made by the IJ and the Board (*i.e.*, the Attorney General's agents), as opposed to the allegedly false testimony provided to the IJ. This Court, however, generally does not grant review "when the asserted error consists

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seizing evidence, or making an arrest." *Millbrook* v. *United States*, No. 11-10362 (Mar. 27, 2013), slip op. 7. The decision in *Millbrook* has no salient bearing on the scope of the discretionary-function exception or its relationship with the law-enforcement proviso.

of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10.[6]

b. Moreover, the court of appeals' rejection of petitioners' FTCA claim rested on an independent ground: that California's litigation privilege would immunize Castillo from liability for his testimony before the IJ, and thus prevent the United States from being held liable under 28 U.S.C. 2674 (third paragraph). Pet. App. 17a-19a. Petitioners contest the correctness of the court of appeals' application of state law (Pet. 21-24), but they do not suggest that the state-law question itself warrants this Court's review. It does not. See Sup. Ct. R. 10(a)-(c) (referring to "important" questions of "federal" law).[7]

c. In any event, even if petitioners are correct about the scope of California's litigation privilege, they do not explain why Castillo's live testimony to the IJ would not

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[6] As the court of appeals noted (Pet. App. 16a n.7), the parties did not address the discretionary-function exception in their court of appeals briefs. Petitioners first discussed it in their rehearing petition (at 10-14). The government's response to the rehearing petition disputed (at 16) petitioners' "premise that there was a constitutional violation here," but that response did not otherwise address the discretionary-function exception because it explained (at 17) that, "whatever [the] merit" of the panel's rationale, petitioners' FTCA claim would fail under California law.

[7] To the extent that petitioners' criticism of the court of appeals' analysis rests on a contention that California law affords immunity for "private parties" but not for "law enforcement officers" (Pet. 23), that asserted basis for this suit under the FTCA is foreclosed by 28 U.S.C. 1346(b)(1), which waives sovereign immunity only "under circumstances where * * * a private person[] would be liable." Cf. *United States* v. *Olson*, 546 U.S. 43, 45-47 (2005) (requiring a comparison with the liability of private persons even when state law would hold a state or municipal entity liable for performing governmental functions).

be entitled to immunity under federal law. See Pet. App. 19a n.10 (not resolving the question but noting that "[t]he Supreme Court has stated that both lay and law enforcement witnesses are absolutely immune for live testimony given either at a trial or before a grand jury") (citing *Rehberg* v. *Paulk*, 132 S. Ct. 1497, 1507 & n.1 (2012), and *Malley* v. *Briggs*, 475 U.S. 335 (1986)); see also *Briscoe* v. *LaHue*, 460 U.S. 325 (1983) (refusing, in light of absolute immunity for witnesses at common law, to permit a damages suit under 42 U.S.C. 1983 against law-enforcement officers for allegedly perjured trial testimony).

d. Nor do petitioners address another argument that the government made in its response to their rehearing petition (at 16-17), which would provide yet another independent ground for rejecting their FTCA claim. False imprisonment under California law requires that an arrest be "without lawful privilege." *Molko* v. *Holy Spirit Ass'n*, 46 Cal. 3d 1092, 1123 (1988), cert. denied, 490 U.S. 1084 (1989). Under California law, lawful privilege exists when an arrest is made pursuant to a warrant "which is regular in form and which reasonably appears to have been issued by a court with jurisdiction." *Arnsberg* v. *United States*, 757 F.2d 971, 979 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986); see Cal. Civ. Code § 43.55 (West 2007) (arrest under warrant regular on its face is not actionable). Here, the warrants applicable to petitioners were issued in 1999. See p. 2, *supra*. Those warrants, which petitioners have not challenged, could not have been tainted by the allegedly false testimony subsequently presented in 2001. They did, however, provide authority for petitioners' detention upon revocation of their bond. See 8 U.S.C. 1226(b) (authorizing the Attorney General to "revoke a bond

* * * , rearrest the alien under *the original warrant*, and detain the alien") (emphasis added).

Accordingly, further review of the dismissal of petitioners' FTCA claim is unwarranted.

2. Petitioners also contend (Pet. 25-35) that the court of appeals erred in declining to extend a *Bivens* damages remedy to aliens' claims of unlawful detention pending removal. That contention lacks merit, and the decision below does not conflict with decisions of this Court or of other courts of appeals.

a. In its 1971 decision 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). The Court held that federal officials acting under color of federal law could be sued for money damages for violating the plaintiff's Fourth Amendment rights by conducting a warrantless search of his home. In creating that common-law action, the Court noted that there were "no special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396-397.

Bivens "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. 412, 421 (1988). "The Court has therefore on multiple occasions declined to extend *Bivens* because Congress is in a better position to decide whether or not

the public interest would be served by the creation of new substantive legal liability." *Holly* v. *Scott*, 434 F.3d 287, 290 (4th Cir.) (internal quotation marks and citation omitted), cert. denied, 547 U.S. 1168 (2006); see *Iqbal*, 556 U.S. at 675 (*Bivens* liability has not been extended to new contexts "[b]ecause implied causes of action are disfavored").

Indeed, in the 40 years since *Bivens* itself, the Court "has extended it twice only: in the context of an employment discrimination claim in violation of the Due Process Clause; and in the context of an Eighth Amendment violation by prison officials." *Arar* v. *Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc) (citations omitted), cert. denied, 130 S. Ct. 3409 (2010). 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 describing how to decide whether to extend *Bivens* to a new context, the Court has described a two-step process. First, a court should ask 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 a 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 liti-

gation." *Id.* at 550 (quoting *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983)).

b. The court of appeals correctly applied that framework in declining to extend *Bivens* to the context of petitioners' claims of unlawful detention pending removal. As the court explained with respect to the framework's first step, petitioners "could—and did—challenge their detention through not one but two different remedial systems." Pet. App. 11a-12a.

The first system was provided by the INA, which, like other statutes that have been found to preclude creation of a *Bivens* remedy, is a "comprehensive statutory scheme[]" that has received "frequent and intense" attention from Congress. *Chilicky*, 487 U.S. at 425, 428. As the court of appeals explained, although Congress has made "multiple changes to the structure of appellate review in the [INA]," it has "never created [a damages] remedy." Pet. App. 12a; see generally *INS* v. *St. Cyr*, 533 U.S. 289, 292 (2001) (noting that Congress made "comprehensive amendments" to the INA in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546).

Instead of damages, the INA offers quasi-judicial hearings and appeals, as well as judicial review, of many significant government decisions. For example, an alien who is detained pending a removal decision—as petitioners were—under 8 U.S.C. 1226(a) is entitled to submit an application for release to an IJ, 8 C.F.R. 1236.1(d), and may appeal the IJ's decision to the Board, 8 C.F.R. 1003.38. If a bond is revoked under 8 U.S.C. 1226(b)—as it was here—the alien may seek review from an IJ and may appeal the IJ's decision to the Board.

8 C.F.R. 1003.19(f). If action is taken to remove an alien and he requests asylum, he is entitled to an IJ decision on that question as well. 8 C.F.R. 1208.2(b). During proceedings before an IJ, the alien is entitled to cross-examine government witnesses, to attempt to discredit evidence relied on by the government, to present his own evidence and witnesses, and to be represented by an attorney or other representative. 8 C.F.R. 1003, Subpart C. Judicial review of removal orders is available under 8 U.S.C. 1252.

In addition, an alien who is detained is entitled to use a second remedial system by filing a petition for habeas corpus—a remedy that has long been available in the immigration context. See *St. Cyr*, 533 U.S. at 305-310. Petitioners "took full advantage" of that system, too. Pet. App. 12a.

In short, both the INA and habeas corpus provided petitioners with "the means to be heard" in challenging their allegedly unlawful detention. *Wilkie*, 551 U.S. at 552.

c. Petitioners contend (Pet. 28) that the INA's remedies were not an adequate alternative, because the INA provides "no damages, jury trial, or right to recover against individuals." But this Court has already recognized that an alternative remedial scheme may bar *Bivens* claims even when it fails to "provide complete relief for the plaintiff." *Bush*, 462 U.S. at 388; see *Malesko*, 534 U.S. at 68 (noting that the *Bivens* claim in *Bush* was foreclosed even though "the plaintiff had no opportunity to fully remedy the constitutional violation"). As the Court has explained, "[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 create "additional *Bivens* remedies." *Chilicky*, 487 U.S. at 423; see also *Western Radio Servs. Co.* v. *U.S. Forest Serv.*, 578 F.3d 1116, 1120 (9th Cir. 2009) ("[s]o long as Congress' failure to provide money damages, or other significant relief, has not been inadvertent, courts should defer to its judgment") (citation omitted), cert. denied, 130 S. Ct. 2402 (2010); *Spagnola* v. *Mathis*, 859 F.2d 223, 227 (D.C. Cir. 1988) (en banc) ("[I]t is the comprehensiveness of the statutory scheme involved, not the 'adequacy' of specific remedies extended thereunder, that counsels judicial abstention.").[8]

d. Even assuming that the INA and habeas corpus were not adequate alternative remedial schemes, the court of appeals also correctly noted that, under the second step in *Wilkie*'s framework, there are "special factors counselling hesitation before authorizing a new kind of federal litigation." 551 U.S. at 550 (quoting *Bush*, 462 U.S. at 378). Petitioners contend (Pet. 32) that "the context of immigration does not in and of itself constitute a special factor counseling hesitation." But the court of appeals spoke more specifically of the "con-

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[8] In *Minneci*—which was cited by the court of appeals (Pet. App. 9a) but is not discussed in the petition—this Court declined to recognize a *Bivens* remedy for alleged Eighth Amendment violations by the employees of a privately operated federal prison. 132 S. Ct. at 625. The Court noted that the claim at issue focused upon the kind of conduct that typically falls within the scope of state tort law and it found that state tort law provided an adequate alternative remedy in part because it would permit compensation that was "roughly similar" to what would be available under *Bivens*. *Ibid.* The Court did not, however, cast doubt on *Bush* or *Chilicky*. To the contrary, it discussed both cases and specifically noted the Court's conclusion in *Bush* that the administrative remedies there did "not provide complete relief." *Id.* at 622, 625.

text" of "[d]eportation proceedings," which, unlike domestic law-enforcement practices, "'have the natural tendency to affect diplomacy, foreign policy, and the security of the nation.'" Pet. App. 10a, 13a (quoting *Arar*, 585 F.3d at 574). That tendency is clearly manifested in petitioners' own case, which involved a federal investigation into a designated foreign terrorist organization and questions about whether petitioners would be removed to Iran. Although it is true, as petitioners contend, that the courts are competent to determine "whether * * * detention is proper," Pet. 35, that does not justify judicial creation of a private cause of action for damages outside the comprehensive framework of the INA by aliens who have been detained under that framework—especially when petitioners were able to pursue a decision about the lawfulness of their detention through the INA and habeas corpus.

e. Petitioners contend (Pet. 25-27) that there is a conflict in the courts of appeals about whether a *Bivens* remedy exists in an immigration case. But there is no conflict, in part because the cases petitioners invoke did not actually address the question, and in part because the court of appeals' decision here did not purport to address all claims that might arise in the immigration context, and instead addressed only claims of "wrongful detention pending deportation." Pet. App. 13a; see *id.* at 20a (Silverman, J., concurring) ("[T]his case does not present the issue of whether illegal immigrants could ever bring a *Bivens* action.").

Petitioners assert (Pet. 26) that the decision below conflicts with *Martinez-Aguero* v. *Gonzalez*, 459 F.3d 618 (5th Cir.), cert. denied, 549 U.S. 1096 (2006), and *Franco-de Jerez* v. *Burgos*, 876 F.2d 1038 (1st Cir. 1989). But both of those courts applied *Bivens*, without ad-

dressing the two-step framework later set forth in *Wilkie* or suggesting that they were consciously extending *Bivens* to a new context. See *Martinez-Aguero*, 459 F.3d at 621-622 & n.1; *Franco-de Jerez*, 876 F.2d at 1039.

While petitioners also allege a conflict with prior decisions from the Ninth Circuit (Pet. 27) and with the decisions of several district courts (Pet. 29-31), this Court does not typically resolve intra-circuit conflicts or conflicts with district court opinions. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam); Sup. Ct. R. 10(a).[9]

Petitioners do not claim that there is any conflict with respect to the court of appeals' reliance on habeas corpus as an alternative remedy. Instead, they merely contend (Pet. 31) that "[n]o other circuit court has found that habeas proceedings bar a *Bivens* remedy in any remotely similar context." As petitioners' phrasing

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[9] In any event, there is no intra-circuit conflict. *Papa* v. *United States*, 281 F.3d 1004 (9th Cir. 2002), involved a different constitutional question (treatment in detention), and it did not actually decide whether a *Bivens* remedy is available in the face of the comprehensive alternative remedial scheme of the INA. *Id.* at 1009-1011; see Pet. App. 7a n.2 (noting "*Papa* did not squarely present the issue"). Petitioners also cite (Pet. 27) *Harris* v. *Roderick*, 126 F.3d 1189 (9th Cir. 1997), cert. denied, 522 U.S. 1115 (1998), which held in the non-immigration context that agents who provided false testimony did not have absolute immunity. *Id.* at 1198-1199. That, too, is inapposite, for the relevant question is not whether immunity is appropriate, but whether it is proper for the courts to create a *Bivens* action for damages in this specific immigration context when Congress has provided other remedies (but not damages).

indicates, other courts of appeals have indeed found that the availability of habeas relief barred *Bivens* relief.[10]

In the absence of any conflict, this Court should not review the court of appeals' decision declining to extend *Bivens* to petitioners' claim of unlawful detention pending removal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] See, *e.g.*, *Lebron* v. *Rumsfeld*, 670 F.3d 540, 556 (4th Cir.) ("Padilla had extensive opportunities to challenge the legal basis for his detention * * * in habeas corpus proceedings before five different courts."), cert. denied, 132 S. Ct. 2751 (2012); *Wilson* v. *Rackmill*, 878 F.2d 772, 775 (3d Cir. 1989) ("There may be special factors counselling hesitation in finding a *Bivens* claim here if appellant has an effective remedy available through habeas corpus."); *Rauschenberg* v. *Williamson*, 785 F.2d 985, 987 (11th Cir. 1986); see also *Engel* v. *Buchan*, No. 11-1734, 2013 WL 819375, at *8 (7th Cir. Mar. 5, 2013) (finding habeas to be an inadequate alternative to *Bivens* for an alleged violation, outside the immigration context, of *Brady* v. *Maryland*, 373 U.S. 83 (1963), but distinguishing this case and others as ones where "habeas is one element of a broader, integrated remedial scheme").