No. _____

IN THE

Supreme Court of the United States

CARLOS LOUMIET, ESQUIRE,
Petitioner,

v.

UNITED STATES OF AMERICA, MICHAEL RARDIN, LEE STRAUS, GERARD SEXTON, AND RONALD SCHNECK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITION FOR A WRIT OF CERTIORARI

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April 27, 2020

QUESTIONS PRESENTED

This Court has stated that individual unconstitutional acts "are difficult to address except by way of damages actions after the fact,"[1] and that "forums of defense," together with fee-shifting provisions, are an insufficient "patchwork" to cause "the Judiciary to stay its *Bivens* hand."[2] Here, did the Court of Appeals correctly conclude that a forum of defense and an unrelated fee-shifting statute preclude a *Bivens* remedy?

[1] *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1862 (2017).

[2] *Wilkie v. Robbins*, 551 U.S. 537, 556 (2007).

PARTIES TO THE PROCEEDING

Petitioner, Carlos Loumiet, Esq., was plaintiff in the district court and appellee in the Court of Appeals. Respondents Michael Rardin, Lee Straus, Gerard Sexton, and Ronald Schneck, were individual defendants in the district court and appellants in the Court of Appeals.[3] The Office of Comptroller of the Currency was a defendant in the district court but was not a party to the appeal that is the subject of this case and is not a respondent here.

[3] For purposes of this petition, Respondents only include Rardin, Sexton, and Schneck.

RELATED PROCEEDINGS

United States District Court (D.C.):

Loumiet v. United States, No. 12-cv-1130 (June 13, 2017)

Loumiet v. United States, No. 12-cv-1130 (Nov. 28, 2017)

United States Court of Appeals (D.C. Cir.):

Loumiet v. United States, No. 18-5020 (Jan. 28, 2020)

Loumiet v. United States, No. 15-5208 (July 12, 2016)

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INTRODUCTION

While the Respondents are federal bank regulators, this case has little to do with bank regulation. It is a classic case of retaliation against a whistleblower for exercising the right to criticize the Government freely. The Petitioner exercised that right by blowing the whistle and exposing the Respondents' improper behavior to their Inspector General. The Respondents retaliated by inducing a sham, *ultra vires*, retaliatory prosecution under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), which they doggedly pursued to the bitter end, seeking to destroy Petitioner's reputation and career.

"[T]he law is settled that . . . the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006). "When the vengeful officer is federal, he is subject to an action for damages under the authority of *Bivens*," *id.*, a claim backed by "a tailwind of support from our longstanding recognition that the Government may not retaliate for exercising First Amendment speech rights." *Wilkie v. Robbins*, 551 U.S. 537, 556 (2007). Petitioner plausibly alleged "a retaliatory motive" and "an absence of probable cause," which creates "reasonable grounds to suspend the presumption of regularity behind the charging decision . . . and enough for a prima facie inference that the unconstitutionally motivated inducement infected the prosecutor's decision to bring the charge." *Hartman*, 547 U.S. at 265.

The district court twice concluded that Petitioner's allegations pled a valid and actionable *Bivens* First Amendment claim. The Court of Appeals reversed, finding the claim precluded by a patchwork of purported "remedies" that amounted to a "remedial structure." The patchwork consisted of mundane, garden-variety, due process procedures available to any accused to defend themselves in any federal administrative enforcement proceeding that is

subject to the Administrative Procedure Act, sewn together with the equally-common ability to recoup attorneys' fees from the United States (not the individuals) under the Equal Access to Justice Act ("EAJA").

This patchwork is inconsistent with this Court's rich *Bivens* precedent. In every case where alternative remedies have precluded a *Bivens* claim, at least one of the following three requirements was evident: (1) that Congress considered the kind of claim at issue and indicated a preference about how to handle it, (2) the alternative remedies deterred the unconstitutional acts at issue, rendering a *Bivens* claim unnecessary, or (3) the alternative remedies adequately addressed the harm caused to the *Bivens* plaintiff.

Here, there is no evidence of congressional intent, the patchwork does not deter unconstitutional acts, and, without a *Bivens* claim, Petitioner gets nothing. Mere inducement of the prosecution caused irreparable harm. The "forum[] of defense" provided Petitioner with no power to stop the inducement. The ability to defend himself and collect out-of-pocket attorneys' fees are not adequate remedies. This case, therefore, is precisely one concerning individual acts that "are difficult to address except by way of damages actions after the fact." *Abbasi*, 137 S. Ct. at 1862. For Petitioner, it is "damages or nothing." *Id.*

This Court has never precluded a *Bivens* claim under these circumstances. And this Court has expressly rejected that a virtually identical remedial patchwork should cause "the Judiciary to stay its *Bivens* hand." *Wilkie,* 551 U.S. at 554. Because the Court of Appeals "decided an important federal question in a way that conflicts with relevant decisions of this Court," review is warranted. S. Ct. R. 10(c).

Moreover, because of the very low bar it sets, if left intact the Court of Appeals' analysis would shut the door to any and all *Bivens* suits arising from retaliatory prosecutions. If *Abbasi* allows such a low bar for claims against retaliatory

federal officers, respectfully, this Court—and not the D.C. Circuit—should be the one to say so. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) (lower courts should "leav[e] to this Court the prerogative of overruling its own decisions").

OPINIONS BELOW

The Court of Appeals' decision is reported at 948 F.3d 376 (D.C. Cir. 2020), and is reprinted in the Petition Appendix at 1a. The opinion of the district court is reported at 255 F. Supp. 3d 75 (D.D.C. June 13, 2017), and is reprinted in the Petition Appendix at 17a. The opinion of the district court denying the Respondent's motion for reconsideration is reported at 292 F. Supp. 3d 222 (D.D.C. Nov. 28, 2017), and is reprinted in the Petition Appendix at 56a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 28, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

I. Factual Background

Because the district court resolved Petitioner's *Bivens* claim on a motion to dismiss, his allegations must be accepted as true. Those allegations are as follows.

A. The Greenberg Reports

Hamilton Bank, N.A ("Hamilton" or the "bank") was a now-defunct, minority-owned, South Florida national bank that the Office of the Comptroller of the Currency (the "OCC") regulated. (Append. D ¶¶ 22-24). Hamilton's audit committee hired Greenberg Traurig, LLP ("Greenberg") (its then-securities counsel) to investigate whether certain alleged "adjusted price trades" had occurred, and whether three bank officers (the "Officers") had misrepresented the transactions to the bank's board, outside auditors (Deloitte & Touche LLP), regulatory counsel (Arnold & Porter LLP), and the OCC. (Append. D ¶ 26).

Petitioner was peripherally involved in a two-month investigation, in which he only billed a total of approximately ten (10) hours. (Append. D ¶ 28). After the investigation ended and based on its results, a November 2000 Greenberg report, which Petitioner led in preparing, could not conclude whether the three Officers had lied about their knowledge of the transactions. (Append. D ¶ 30). Hamilton's regulatory counsel and outside auditor agreed, the OCC did not initially object, and Hamilton proceeded to restate its financials to account for the transactions. (Append. D ¶ 35).

A month-and-a-half later (mid-January 2001) the OCC informed Greenberg (for the first time) that it had obtained a sworn statement from one of the counterparties in the transactions, which contradicted one of the three Officers' testimony to Greenberg. (Append. D ¶ 36). The OCC refused to let Greenberg see the statement. (Append. D ¶ 37). Instead, the OCC read select excerpts of the statement aloud to Petitioner and a colleague, then described six alleged "red flags" derived from its ongoing, two-year investigation (headed by Respondent Ronald Schneck), whose results the OCC had refused to divulge despite Greenberg's express requests. *Id.*

The OCC asked Greenberg to reconsider its November report's non-conclusion, taking into account what the OCC had read aloud and these six red flags. *Id.* Petitioner involuntarily assumed leadership of this stage because Greenberg's previous lead lawyer was occupied with the restatement of public filings and preparation of the bank's annual report. (Append. D ¶¶ 38-40).

This second stage focused on the bank Officer whose testimony had been contradicted by the counterparty. (Append. D ¶ 41). For unknown reasons, the counterparty (and his counsel) refused to talk to anyone but the OCC, and the OCC refused to show Greenberg the counterparty's testimony, or to pressure the counterparty to speak to Greenberg. *Id.* Petitioner deployed two Greenberg lawyers, one a former federal prosecutor and the other a senior securities lawyer, along with a highly experienced Arnold & Porter banking regulatory lawyer (with some 70 years of experience between all three), to grill the bank Officer. *Id.* Despite hours of intensive questioning—and without being assisted by counsel—the Officer convincingly stuck to his prior testimony. *Id.*

After accounting for the counterparty's statement, and reconciling the "red flags" with the prior report's findings, ***everyone***—including the Greenberg lawyers, Arnold & Porter lawyer, and Deloitte, who reviewed the report—agreed that the new evidence did not change the first report's non-conclusion regarding the three Officers' knowledge. (Append. D ¶ 42). *Even the OCC* in its 2001 report of examination for Hamilton issued months after the second Greenberg report, found no evidence of the Officers' wrongdoing. In other words, ***everyone*** concluded that there was insufficient evidence to definitively conclude that the Officers had lied.

B. The Protected Speech

Free speech is "the matrix, the indispensable condition, of nearly every form of freedom."[4] The speech here involved criticism of misbehavior by federal bank regulators, including ethnic and racial animus, the touchstone for protection from retaliation under the Civil Rights Amendments and all ensuing legislation.

Specifically, during Petitioner's participation in the investigations he became aware of improper conduct by OCC examiners, including Hamilton's Examiner-in-Charge (EIC), Michael Rardin. Petitioner learned of their blatant lying to the bank, making anti-Hispanic statements and disregarding their own agency's regulations and precedents. Particularly disturbing were the Respondents' threats to the bank's then-regulatory counsel that if he did too good a job representing the bank, he had better "watch his back" every time he set foot in the OCC's offices in Washington, D.C. (Append. D ¶ 45).

Acting as a whistleblower, Petitioner wrote a letter to the Officer of Inspector General ("OIG") calling attention to this misbehavior. In two letters in early 2001, meetings that same summer with the OIG, and a subsequent civil rights complaint, Petitioner publicly criticized the staff involved, which prominently included three of the Respondents. The OCC then closed Hamilton and placed it into receivership, leading to a fire sale of the bank's assets. Having killed off Hamilton, Respondents turned their attention to settling their score with Petitioner.

C. The Pretext

Whether embarrassed and angered by the criticisms or imperiously outraged that they were criticized at all, Respondents Rardin (former Hamilton EIC), Schneck and Sexton (both also having deeply involved senior roles with

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[4] *Palko v. State of Connecticut*, 302 U.S. 319, 327 (1937) (Cardozo, J.).

Hamilton's regulation) were motivated to retaliate against Petitioner. All they needed was a pretext, which came in the form of a 2005 indictment by the United States Attorney's Office against the three bank Officers who had been the subjects of Greenberg's investigation.

Before trial near the end of 2005, two of the Officers recanted their prior sworn testimony and subsequently testified they had lied to everyone, including the OCC, Deloitte, Arnold & Porter, and the lawyers involved at Greenberg, including Petitioner. The two recanting Officers testified against the lone remaining Officer, who, after a mistrial, was retried, convicted, and sentenced to 30 years in prison. The recanting Officers were sentenced to 28 months. In the subsequent, retaliatory prosecution, the ALJ observed that, given the number of different people and entities that had been misled, it was implausible to argue that anyone could have detected the deceit. *See* Recommended Decision, *In the Matter of Carlos L*oumiet, OCC–AA–EC–06–102 (June 17, 2008) (the "ALJ Decision").

D. The "Substantially Unjustified" Retaliation

Respondents used the conviction as a pretext for retaliation. They claimed that Greenberg, and by implication Petitioner, had intentionally or recklessly failed to uncover the now-convicted bank Officer's fraud, and that Petitioner should be banned *for life* **from banking law** (the most severe punishment possible, and a professional death sentence to a banking lawyer like Petitioner) and fined the extraordinary amount of $250,000.[5] In an attempt to legally clothe this retaliation, Respondents claimed authority under 12 U.S.C. § 1813(u), which applies to "institution-affiliated

[5] Comparable sanctions had previously been imposed only for outright fraud on a financial institution by the penalized individual, such as a situation where a loan officer set up a shell company as a borrower, made loans to those companies and pocketed the money himself. (Append. D ¶ 80).

parties" ("IAPs") that "knowingly or recklessly" violate laws, duties of loyalty, or cause damage to the bank.

The retaliatory animus was obvious. Respondents had no authority to sue Petitioner under § 1813(u). Section 1813(u) defines IAPs as persons "participating" in a "banking practice."[6] The D.C. Circuit held, as a matter of sound policy, that "an external auditor [like an investigator] whose sole role is to verify a bank's books cannot be said to be engaging in a 'banking practice,'" no matter how "incompetently or recklessly the audit [investigation] may have been performed."[7] Moreover, a Congressional mandate forbids the OCC from using § 1813(u) against attorneys acting in good faith, as it was used here, and was never disputed.

If the invocation of § 1813(u), standing alone, was not frivolous, the proffered bases for Petitioner's supposed violations of § 1813(u) were. To invoke their demanded lifetime ban, the statute required Respondents to prove three things: (1) intent—knowing or reckless participation; (2) misconduct—a violation of law or regulation, breach of fiduciary duty, or unsafe or unsound practice; and (3) damage—more than minimal financial loss or other significant adverse effect on the bank. 12 U.S.C. § 1813(u).

Most patently frivolous was the allegation of more than a minimal financial loss to, or a significant adverse effect on, the bank—a threshold requirement to invoke § 1813(u)—for which the D.C. Circuit readily found the record was "noticeably devoid of . . . evidence."[8] More than four and a half years after the OCC closed Hamilton, and even after all related OCC, FDIC, and Justice Department investigations had long concluded, Respondents induced a prosecution

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[6] *Grant Thornton, LLP v. OCC*, 514 F.3d 1328, 1332 (D.C. Cir. 2008).

[7] *Id.* at 1332-33.

[8] *Loumiet v. Office of Comptroller of Currency*, 650 F.3d 796, 800 (D.C. Cir. 2011) (also rejecting the defendants' argument that proving damages was a "novel" concept, citing to *Palsgraf v. Long Island R. Co.,* 248 N.Y. 339 (1928)).

without *any* evidence that the bank had done *anything* in reliance on the reports, or incurred any damage, except to agree that the transactions had happened and to restate its financials. Even worse, the Respondents concealed exculpatory evidence, including a deposition they had taken of the bank's board's vice chair, in which he swore that even if Greenberg had reached a different conclusion—i.e., found the bank Officers had lied—the board would have simply hired another firm to get a second opinion.

With no evidence of harm to the bank, or wrongdoing in general, Respondents made up ad hoc, unprecedented damage theories. Those theories included claims that (a) the reports had somehow "exonerated" the bank's senior officers, thereby causing some unspecified, continuing harm to the bank, and (b) the $210,000 in fees Greenberg charged for the reports constituted "more than a minimal financial loss to" this bank that had *more than a billion dollars in assets*. Respondent Rardin attempted to prop up these theories with testimony as a purported "expert," which even the ALJ found "stretche[d] the truth."[9] The D.C. Circuit later agreed, stating that "a conditional statement from an Agency examiner [Rardin] that some unspecified harm may result—falls short of the necessary quantum of proof."[10]

In sum, Respondents made a mockery of judicial process by inducing and attempting to prop up a sham prosecution where there was no evidence of damage after four and a half years of multiple federal investigations, and there was *contrary* evidence that Respondents actively concealed. By so doing, Respondents successfully induced a prosecution that irreparably damaged Petitioner's banking law reputation and career.

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[9] ALJ Decision at 23.

[10] *Loumiet*, 650 F.3d at 800.

II. Course of Proceedings

In 2012, Petitioner sued the Respondents and the United States asserting *Bivens* claims, claims under the Federal Tort Claims Act ("FTCA"), and state law claims, which were ultimately converted to claims against the United States pursuant to the Westfall Act. *See* (Append. D). The district court initially dismissed the *Bivens* claims as time-barred and found that the FTCA claims were barred by the discretionary function exception. *Loumiet v. United States*, 968 F. Supp. 2d 142, 144 (D.D.C. 2013), *on reconsideration in part,* 65 F. Supp. 3d 19 (D.D.C. 2014).

Petitioner appealed that decision and the D.C. Circuit reversed it, remanding the case to the district court to decide whether to allow the *Bivens* claims to go forward, and to decide whether Petitioner had adequately pled that the Respondents violated the Constitution, so as to bring his FTCA claims outside of the "discretionary function" exception. *Loumiet v. United States*, 828 F.3d 935, 946 (D.C. Cir. 2016). The district court concluded that Petitioner had adequately pled a violation of his rights under the First Amendment, and that there was no qualified immunity because it had been clearly established since as early as 1988 that the government could not initiate a retaliatory prosecution against someone who had exercised freedom of speech. (Append. B at 43a-44a).

As to the *Bivens* claim for First Amendment retaliatory prosecution, the district court found nothing precluding those claims. *Id*. at 24a. In doing so, the court expressly applied the test set forth in *Wilkie*, 551 U.S. at 550, which first asks whether the case presents a "new context." (Append. at 22a). If so, the district court is required to ask and answer two follow-up questions. *Id.* at 23a. First, did Congress provide an alternative remedy? *Id*. Second, are there any special factors counseling hesitation? *Id*. The district court expressly assumed that Petitioner's claim

presented a "new context" and proceeded to answer both questions in Petitioner's favor. *Id.* at 26a-36a.

After the district court's ruling, this Court rendered its decision in *Abassi*, 137 S. Ct. 1843—a recent expression and application of 30 years of precedent rejecting judicial intrusion into matters of national security and intelligence. *Haig v. Agee,* 453 U.S. 280, 292 (1981) ("[M]atters intimately related to . . . national security are rarely proper subjects for judicial intervention."). Respondents sought reconsideration of the district court's *Bivens* decision based on *Abbasi*, even though *Abbasi* did nothing to alter the *Wilkie* test that the district court had faithfully applied. The district court denied the reconsideration motion and Respondents appealed, asserting jurisdiction under the collateral-order doctrine.

Following appeal, Respondents sought a stay of the proceedings in the district court even as to claims against the United States, which are not the subject of the appeal. The district court granted that motion and stayed the case, including staying the United States' discovery obligations pending the appeal. *Loumiet v. United States*, 315 F. Supp. 3d 349, 355 (D.D.C. 2018). As a result, Petitioner as of this filing has not been able to discover a single document in the nearly eight years that this case has been pending.

More than 13 months after hearing oral argument the D.C. Circuit reversed the district court, because under the "enforcement scheme" set forth in FIRREA, those who are prosecuted—even those who are subject to sham, *ultra vires* prosecutions—have a "sword as well as a shield." The "shield" amounts to due process procedural rules that allow the prosecuted to put forth a defense (i.e., the "forum[] of defense" discussed in *Wilkie*, 551 U.S. at 554). The "shield" is the ability to obtain attorneys' fees under the EAJA if a prosecution is not substantially justified (a standard identical to the fee shifting statute at issue in *Wilkie*, 551

U.S. at 551). From that decision, Petitioner timely petitioned for certiorari.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted for at least two reasons. First, the alternative remedy standard that the Court of Appeals adopted and applied is inconsistent with *Abbasi* and this Court's other precedent. Second, that standard is so low it would swallow *Bivens* whole and eliminate a claim for anyone that angered a federal officer who has the power to induce a retaliatory prosecution. Again, respectfully, decisions of such far-reaching impact are the province of this Court, not the Court of Appeals. Certiorari therefore is warranted to answer whether the "alternative remedy" found by the Court of Appeals forecloses a *Bivens* claim, even though the it is inadequate, fails to deter unconstitutional acts, and there is no evidence that Congress considered the kind of claim at issue and indicated a preference about how to handle it.

I. Petitioner's *Bivens* Claim Is the Quintessential Claim

As an initial matter, this Court's most recent *Bivens* decision, *Hernandez v. Mesa*, 140 S. Ct. 734 (2020), removed any doubt as to the continuing viability of *Bivens*. In contrast to *Abbasi*, where five members of the Court took no part in the decision, all members took part in the *Hernandez* decision. The Court rejected Justice Thomas' plea (which was only joined by Justice Gorsuch) to "abandon the doctrine altogether," a position Justice Thomas had been advocating for nearly two decades. Four members of the Court (Justices Ginsburg, Breyer, Sotomayor, and Kagan) believed that a *Bivens* claims should be available to Hernandez, and three did not (Chief Justice Roberts and Justices Alito and

Kavanaugh). Accordingly, seven members of this Court continue to believe in the importance of a *Bivens* remedy.

Both *Abbasi* and *Hernandez* reaffirm that *Bivens* cases can apply in "new contexts" outside of those already recognized by the Court. To that end, *Abbasi* itself refused to foreclose the plaintiffs' prisoner abuse claim against their prison warden—even though, with respect to that claim, "the new-context inquiry is easily satisfied." *Abbasi*, 137 S. Ct. at 1865. Instead, this Court returned that claim to the lower courts (over Justice Thomas's express objection) to conduct a proper analysis of whether, given the properly identified new context, "special factors" counseled hesitation against recognition of a *Bivens* remedy. *See id.* at 1870 (Thomas, J., concurring in part and concurring in the judgment).

Here, the context giving rise to Petitioner's claim is hardly unfamiliar. This Court repeatedly has expressed the need to protect First Amendment rights. *Hartman*, 547 U.S. at 256; *Wilkie*, 551 U.S. at 556. Moreover, unlike the situation in *Abbasi*, Petitioner's *Bivens* claim has nothing to do with national security, nor does it challenge urgent, historic, emergency presidential foreign-affairs decisions during a national crisis. Similarly, it also does not ask any court to second-guess congressional policy-making in response to a major terrorist attack of unprecedented proportions on U.S. soil.

Petitioner simply seeks to prove that the Respondents unlawfully retaliated against him and severely damaged his career. This effort follows well-established precedent and requires answers to four simple questions: (1) was there a retaliation based on speech? (2) did it lack probable cause? (3) did it cause harm? and (4) how much harm? "Questions like these have definite answers, and [federal courts] have established methods for answering them." *Wilkie*, 551 U.S. at 556.

Petitioner's claim also does not raise the separation-of-powers concerns that have previously been found to counsel

hesitation. Instead, they present an especially compelling affirmative case for judge-made damages remedies because of both the importance of deterring unconstitutional conduct by individual officers and the absence of meaningful alternatives for harming the damage done. That is why it was "of central importance" for the result in *Abbasi* that the plaintiffs "d[id] *not* challenge individual instances of . . . law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact." 137 S. Ct. at 1862 (emphasis added). Where that is precisely what a plaintiff challenges (as is the case here), the need for a judge-made damages remedy is far clearer.

II. The Court of Appeals' Alternative Remedy Standard Is Inconsistent with this Court's Precedent

Sometimes called "remedial schemes," and at other times called "alternative remedies," this Court has provided clear guidance for what must exist to preclude a *Bivens* claim. Where a congressionally-designed remedial scheme is at issue, the analysis focuses on whether Congress designed the scheme with consideration as to the kind of claim and indicated a preference about how to handle it. Where there is no such remedial scheme, the analysis focuses on prudential limitations, such as whether a *Bivens* remedy is unnecessary because either: (1) alternative remedies deter the unconstitutional conduct or (2) alternative remedies provide adequate relief. At least one of these three requirements—congressional intent, deterrence, or adequacy—has been present in every case decided by this Court, where either a remedial scheme or alternative remedy precluded a *Bivens* claim.

A. Congressional Intent

The remedial scheme doctrine is founded on Congress creating an "alternative, existing process for protecting the *[injured party's] interest* . . . ." *Abbasi*, 137 S. Ct. at 1858 (alterations in original) (emphasis added) (quoting *Wilkie*,

551 U.S. at 550). The "interest" is the harm caused by the unconstitutional act, *i.e.*, inducing a retaliatory prosecution. If Congress designed a statutory scheme with that "interest" in mind and "provided what it considers adequate remedial mechanisms for" that "constitutional violation," then modifying the scheme with a *Bivens* remedy would implicate separation of powers concerns. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). The essence, then, is that Congress has fashioned a system of remedies that reflected its policy-based determination. In those cases, "Congress" is the answer to the question of "who should decide." *Abbasi*, 137 S. Ct. 1857.

Evidence that Congress intended for a remedial scheme to expressly exclude a *Bivens* remedy dates back to the *Bivens* case itself. In creating the remedy, the Court noted that there was "no explicit congressional declaration" against the recovery of "money damages," nor any sort of congressional intent that the claimant "must instead be remitted to another remedy, equally effective in the view of Congress." *Bivens*, 403 U.S. at 397; *accord Davis v. Passman*, 442 U.S. 228, 248 (1979) ("[W]ere Congress to create equally effective alternative remedies, the need for damages relief might be obviated.").

Congressional intent over the injured party's interest also was evident in *Carlson v. Green*, where the Court stated with unequivocal clarity that a *Bivens* claim could only be replaced by an alternative remedy "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." 446 U.S. 14, 18 (1980) (emphasis in original). The Court expressly rejected that the Federal Tort Claims Act was such an alternative, because no evidence could be mustered "to show that Congress meant to preempt a *Bivens* remedy or to create an equally effective remedy for constitutional violations." *Id.* at 19.

The same is true for *Bush v. Lucas*, 462 U.S. 367 (1983), where the injured party's interest was compensation for an arbitrary demotion. Congress had that precise interest in mind when it designed the Civil Service Reform Act and put in specific substantive provisions for an arbitrary demotion, along with procedures—administrative and judicial—by which an arbitrary demotion could be redressed. With Congress legislating over the precise interest that formed the *Bivens* claim—arbitrary demotion—the Court rightly declined to disturb the scheme.

Two other cases demonstrate congressional intent over the injured party's interest. In *Schweiker*, the injured party's interest was compensation for an unlawful termination of disability benefits. Congress had this interest in mind when it designed and enacted the Social Security Act. The congressional record demonstrated members of Congress expressing "that the bill eventually enacted . . . did not provide additional relief for persons improperly terminated." 487 U.S. at 426. Again, Congress had thought about the problem and designed a scheme to address it.

Abbasi introduced the new concept of inaction as tantamount to congressional intent. Inaction mattered in *Abbasi* because there had been "frequent and intense" congressional legislation on the precise interest at issue—conditions of confinement. Congress' inaction therefore was more likely intentional, rather than inadvertent, because the interest at issue was likely to "attract the attention of Congress." 137 S. Ct. at 1843.

B. Deterrence and Adequacy

When there is no remedial scheme, or no evidence that Congress intended for a scheme to supplant a *Bivens* claim, this Court has looked to whether a *Bivens* claim is necessary when other alternative remedies either: (1) deter the unconstitutional acts or (2) adequately address the harm.

"'The purpose of *Bivens* is to deter the *officer*.'" *Abbasi*, 137 S. Ct. at 1860 (quoting *F.D.I.C. v. Meyer*, 510 U.S. 471, 485 (1994)) (internal quotation marks omitted). Deterrence (and, to some extent, adequacy) was the driving factor in both *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) and *Minneci v. Pollard*, 565 U.S. 118, 125 (2012), which involved similar facts. While both involved *Bivens* claims by inmates, the defendant in *Malesko* was a private prison owner and the defendants in *Minneci* were private employees of a privately-owned prison. Because the defendants in both cases were not federal officers, the Court declined to extend *Bivens* because "[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations" and "the threat of suit against an individual's employer was not the kind of deterrence contemplated by *Bivens*." *Malesko*, 534 U.S. at 70.

Alternative remedies also were available in *Malesko* and *Minneci* that provided "both significant *deterrence and compensation*." *Minneci*, 565 U.S. at 120 (citing *Wilkie*, 551 U.S. at 550) (emphasis added). For example, in *Malesko*, "[i]t was conceded at oral argument that alternative remedies are at least as great, and in many respects greater, than anything that could be had under *Bivens*." 534 U.S. at 517. And in *Minneci*, "[s]tate tort law . . . can help to deter constitutional violations *as well as to provide compensation* to a violation's victim." 565 U.S. at 127 (emphasis added).

This Court also has looked to the adequacy of the remedy when Congress has not legislated as to the interest in question. For example, in *Abbasi*, the interest in question was the conditions of confinement. The Court noted that there were remedies to address that conduct that were better suited than a *Bivens* damages claim. *Abbasi*, 137 S. Ct. at 1863. ("Indeed, the habeas remedy, if necessity required its use, would have provided a faster and more direct route to relief than a suit for money damages."). Similarly, in both *Minneci*, 565 U.S. at 127, and *Malesko*, 534 U.S. at 517, the

Court pointed out that the alternative remedies were at least as great, if not greater, than a *Bivens* claim.

III. This Court Has Rejected the Court of Appeals' Patchwork Remedial Structure

The Court of Appeals discussed none of the above-mentioned requirements. Instead, it simply concluded that the mere existence of standard due-process procedural rights for the prosecuted, combined with the ability obtain attorneys' fees, is sufficient to foreclose a *Bivens* remedy, even if this patchwork provides no deterrence effect, is inadequate to remedy the harm, and where there is no evidence that Congress—either through action or inaction—intended for the patchwork to preclude a *Bivens* claim.

A. There Is No Evidence that Congress Intended for FIRREA's Procedures and Attorneys' Fees Under the EAJA to Preclude a *Bivens* Claim

Neither Respondents nor the Court of Appeals could point to any evidence that Congress intended for FIRREA and the EAJA to be combined to replace a *Bivens* claim for retaliatory prosecutions. No legislative history, no intrinsic relationship between the two statutes, and no compelling policy reason why these two statutes can, or should, be combined.

It also would have been illogical for Congress to focus on the misconduct at issue here, that is, inducing a sham prosecution to ruin someone's career because he exercised his right to criticize their behavior. "Congress presumes that, as a general matter, federal employees faithfully execute federal law, and when they do not, Congress requires those employees be punished for such transgressions." *Lanuza v. Love*, 899 F.3d 1019, 1031 (9th Cir. 2018).

Congressional intent also cannot be contextually gleaned from FIRREA because the "shield" that the Court of Appeals called a "remedy" is nothing more than the "forum[] of

defense" at issue in *Wilkie*. It is a mere collection of garden-variety procedures that form part of our general federal legislative and judicial due process. They are hardly unique to FIRREA, and the Court of Appeals describes nothing that is special about them. Similar procedures exist for other federal statutes and regulations that authorize enforcement actions by other administrative agencies. If fundamental procedural due process by itself is enough to foreclose a *Bivens* claim, then *Bivens* would be eliminated as it applies to any retaliatory action by any government agency under any statute, regardless how reprehensible and unfounded that action may be.

Congressional intent also cannot be inferred from inaction, as it was in *Abbasi*, because, again, there is no evidence that Congress ever thought that federal agents would be misusing their enforcement powers to retaliate. There also is no comparison between *Abbasi* and this case, where the plaintiffs in *Abbasi* directed their claim at "high-level policies" that "will attract," and did attract, "the attention of Congress," such that silence was "telling" as to Congress' intent. *Abbasi*, 137 S. Ct. at 1862.

As for the Court of Appeals' discussion of appellate review as evidence of congressional intent, that reasoning does not withstand scrutiny. The legislation in question must speak to the injured party's interest. The Court of Appeals cites to *Spagnola v. Mathis*, where specific provisions of the CSRA provided remedies for the injured party's interest, which was to be compensated for getting passed over due to his whistleblowing. 859 F.2d 229 (D.C. Cir. 1988) (citing *Bush*, 462 U.S. at 383 (same)). The Court of Appeals also cited to *Wilson v. Libby*, 535 F.3d 697, 707 (D.C. Cir. 2008), where specific provisions of the Privacy Act provided remedies for the injured party's interest, which was to be compensated for the allegedly unconstitutional disclosure of information. The same was true in *Schweiker*, 487 U.S. at 428 (also relied on by the Court of Appeals), where the plaintiff's disability due-process *Bivens* claim

already had been remedied by a statutorily-required, retroactive award of the benefits the government wrongfully withheld.

Each of these cases demonstrates that Congress considered the injured party's interest and provided a meaningful remedy for it. In stark contrast to the Civil Service Reform Act, Social Security Act, Privacy Act, and Contract Disputes Act, *nothing* in FIRREA speaks to, let alone provides for, any substantive rights that Petitioner could invoke to address his harm, *i.e.* rights he could invoke to stop a regulator from inducing a sham, *ultra vires*, prosecution. It therefore cannot be said that anything in FIRREA, including judicial review, has any unusual significance. The absence of any substantive right governing the interest in question makes it impossible to conclude Congress intended for FIRREA to preclude a *Bivens* claim for an *ultra vires* unconstitutional retaliatory prosecution.[11]

The Court need only look to its *Hartman* decision, where this Court acknowledged the viability of a *Bivens* claim for retaliatory prosecution even though the plaintiff used all the procedural protections afforded to him by criminal law. *See* 547 U.S. at 253. As in *Hartman*, FIRREA's procedures could not have protected Petitioner from the harm the retaliation caused, since the mere bringing of the prosecution under that statute is what caused the harm.

It is irrelevant that Petitioner won by using procedures under the FIRREA-defined "forum of defense." Respondents never could have expected to win. Their goal was to induce the prosecution, because the inducement is what punished and damaged the Petitioner. And the threat of similar

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[11] The Court of Appeals compares this "judicial review" provision as coming "close to foreclosing a *Bivens* action expressly, just as the exclusive review provision at issue in" *Hui v. Castaneda*, 559 U.S. 799, 805–07 (2010). (Append. A at 14a). But the provision at issue in *Castaneda* was an "exclusive *remedy*" provision, not a "review" provision. There is nothing in FIRREA that comes close to setting forth any sort of "exclusive remedy" that would be available to Petitioner.

unconstitutional inducements sent an ominous message to other lawyers like Petitioner who, in the future, might consider reporting federal regulatory misbehavior. At bottom, FIRREA's procedures did not, could not, and will not prevent First Amendment violations arising from a retaliatory prosecution under that statute.

The same is true with respect to the EAJA. There is no evidence that Congress intended for the EAJA to replace a *Bivens* claim. Moreover, this Court conclusively ruled in *Wilkie* that the opportunity to pursue fees and costs under the Hyde Amendment was insufficient to foreclose a *Bivens* remedy. *Wilkie*, 551 U.S. at 554. The facts of *Wilkie* are similar to those here, where the plaintiff had available to him a "patchwork" of purported "remedies," including procedures and the ability to recoup attorneys' fees. Nevertheless, this Court concluded that it would be "hard to infer that Congress" intended for this patchwork to replace a *Bivens* claim. *Id.*

Nowhere does the Court of Appeals say why this case and the EAJA should be different. Accordingly, the standard it created and applied to reverse the district court is untethered from the rationale applied by this Court in numerous cases and is expressly at odds with the Court's holding in *Wilkie*.

B. Nothing in FIRREA or the EAJA Provides Any Deterrence Against First Amendment Retaliatory Prosecutions

Deterrence is one of the core functions of a *Bivens* claim. Putting aside the lack of any evidence that Congress intended for a patchwork of unrelated statutes to supplant a *Bivens* claim, nothing in FIRREA or the EAJA will deter federal agents from retaliating against someone else that criticizes them. FIRREA's procedural safeguards are meaningless to federal agents that retaliate, because in a regulatory arena the mere act of inducing the prosecution results in the desired outcome, as it did for Petitioner, whose

career was irreparably damaged. As for the EAJA, any award of attorneys' fees is paid by the government, not the individual defendants.[12]

Moreover, unlike the state law remedies available in *Malesko* and *Minneci*, which were available against the individual officers, there is no corollary remedy available here. Petitioner's state law claims under the FTCA have been—and would always be—converted to state law claims against the OCC, pursuant to the Westfall Act. Because that Act operates to relieve federal agents from liability for state law claims arising from unconstitutional acts, it does not fulfill the same deterrence role as the claims at issue in those cases. Accordingly, the Court of Appeals' ruling fails to satisfy the deterrence rationale and fails to recognize that the only thing that would deter the officers in cases like this one is a *Bivens* claim.

The closest the Court of Appeals comes to addressing deterrence is the glancing mention that FIRREA's procedures "do help constrain the unconstitutional exercise of government power." (Append. A at 15a). Respectfully, it is naïve to think that bank regulators will view FIRREA's procedures, its reference to the APA, or even the possibility of an accused recovering attorneys' fees from the agency, as deterring individual officers from the type of mercenary retaliatory conduct undertaken by the Respondents in this case. As the district court aptly put it: "[w]ithout damages recovery against the OCC officers themselves, provided that Plaintiff can prove his claims, it is not clear that officers similarly positioned in the future would find the personal risks of pursuing a retaliatory prosecution to caution adequately against it." *Loumiet v. United States*, 292 F.

[12] 5 U.S.C. § 504(d) (2016) ("Fees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.").

Supp. 3d 222, 237 (D.D.C. 2017), *rev'd and remanded,* 948 F.3d 376 (D.C. Cir. 2020) (Append. C at 80a).[13]

C. Procedures and Attorneys' Fees Are Inadequate

Petitioner is cognizant of the fact that the adequacy of the remedy is irrelevant where congressional intent is apparent, *e.g., Bush*, 462 U.S. at 367; *Schweiker*, 487 U.S. at 412, but there is such no intent here. In circumstances like these, this Court has looked to whether it is "damages or nothing," which was a "central concern[]" in *Abbasi*. 137 S. Ct. at 1862. The *Abbasi* Court resolved that concern by noting that the complained-of conduct concerned "large-scale policy decisions" and "these kinds of decisions" could be addressed through "injunctive relief" or a "petition for a writ of habeas corpus." *Id*. Thus, there were real alternative forms of relief available that would directly target—and potentially stop—the harm.

The harder cases, like this one, are where the conduct in question involves "individual instances of discrimination or law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact." *Id*. While Respondents fervently argued that Petitioner was compensated because he was able to recoup some portion of what he had paid to counsel to defend himself, Respondents could not cite a single case that found attorneys' fees to be adequate compensation for damages. The closest case is from this Court's *Wilkie* decision, which like this case, held inadequate a patchwork of procedural

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[13] Despite the skepticism of new *Bivens* remedies reflected in this Court's jurisprudence, a recent empirical study found that, "*Bivens* cases are much more successful than has been assumed by the legal community, and . . . in some respects they are nearly as successful as other kinds of challenges to governmental misconduct." Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 813 (2010).

safeguards sewn together to a provision that allowed for attorneys' fees. *Wilkie*, 551 U.S. at 553.

Moreover, the EAJA is a *legal fees and costs* recovery statute, whereas *Bivens* involves a *damages* claim. For over 200 years the so-called "American Rule" (cited by the Court of Appeals itself) has distinguished between damages and legal fees and costs, with the former, but not the latter, being generally recoverable in civil actions. In this case, the Court of Appeals, without explanation or discussion, ignored this historic distinction in concluding that the EAJA, and the legal fees and costs that Petitioner was able to recover under that statute, was an "alternative" to a *Bivens* damages remedy.

In holding for the first time that the EAJA supplants a *Bivens* claim, the Court of Appeals, also for the first time, created a wealth-based difference in the ability to exercise Constitutional rights. Eligibility for fees under the EAJA depends on an individual's net worth. 28 U.S.C. § 2412(d)(2)(B). Any individual whose net worth exceeds $2 million is ineligible. *Id.* This means that the EAJA could not logically serve as part of an "alternative remedy" for wealthy individuals with a net worth over that amount, with the result that wealthy individuals in our society—including a Jeff Bezos, Warren Buffett, or Bill Gates—could pursue *Bivens* Constitutional claims not available to the vast majority of our nation's community. Again, the Court of Appeals did not elaborate on this unprecedented Constitutional distinction based on a floor in a person's net worth.

However, harkening back to the importance of congressional intent, one would expect that if Congress in enacting the EAJA intended to create a unique, unprecedented wealth-based distinction in our citizenry's Constitutional *Bivens* rights, particularly in favor of the wealthy—on the assumption that Congress even has the Constitutional power to do so—it would have said *something*

about it: it did not. In short, not only is the EAJA inadequate, enforcement of the Court of Appeals' test leads to unprecedented wealth-based distinctions in Constitutional rights.[14]

In sum, as the district court correctly put it, this Court never has gone so far as to say that "an allegedly *inadequate* alternative that Congress does *not* clearly intend to supplant a *Bivens* remedy and that does *not* act as an adequate deterrent to the activity of individual officers is nevertheless a remedy sufficient to preclude *Bivens*." (Append. C at 81a). (emphasis in original). That is precisely what the D.C. Circuit has concluded. Review by this Court is therefore warranted.

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[14] The fact that the EAJA follows a procedural scheme that does not involve the district courts at all would create all sorts of confusion and illogic were *Bivens* and EAJA to be combined as the Court of Appeals held. As an example, assume that a *Bivens* plaintiff who, unlike Petitioner, has not pursued a possible EAJA action and files a *Bivens* claim in district court. That court, following the Court of Appeals' holding, in order to determine if an "alternative remedy" exists, would have to find whether the individual qualified for the EAJA or not. However, Congress expressly excluded the district courts from that determination, leaving it to the applicable administrative law tribunal, followed directly by appeal to the courts of appeal. This would result in the district courts making a finding Congress did not intend for them to make.

Moreover, what would happen if the administrative tribunal before whom an EAJA action was subsequently brought, disagreed with the district court's finding? How would that disagreement be resolved? Or does the Court of Appeals intend that citizens must choose between their Congressionally-given EAJA rights and their *Bivens* rights, and if so, on what basis are the courts penalizing individuals for exercising an express statutory right by taking away a Constitutional right? And if the Court of Appeals intends that the "alternative remedy" only exist for those who have had a "significant" recovery for legal fees and costs they paid to their defense counsel, like Petitioner, what amount of recovery is enough, and on what Constitutional basis is this line being drawn, other than a judicial "we think you've recovered enough"?

IV. The Court of Appeals' Decision Would Have Alarming Consequences

If the Court of Appeals' *Bivens* standard stands, it would authorize regulators, purporting to apply FIRREA or any other federal statute, to retaliate against individuals, even those to whom the statute purportedly being enforced does not apply. Carried further, any federal officer with the power to induce a civil prosecution would be free to retaliate against someone who had criticized them. "[I]t would be . . . anomalous to conclude that the federal judiciary . . . is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will." *Bivens*, 403 U.S. at 403-04 (Harlan, J., concurring in the judgment).

Whistleblowing by members of the public against federal government officials over time predictably would be deterred, as it became apparent that meritless retaliatory litigation could be inflicted against anyone who criticized, without negative consequence for the inducer. Moreover, the federal administrative tribunals and courts would ineluctably be unwilling co-participants in this reprehensible behavior, since that is where the retaliatory litigation would be pursued, and over time the public perception of them could be affected.

If lower courts are to block a *Bivens* remedy by the mere existence of *any* remedy or remedial scheme, even ones that do not satisfy any of the three criteria this Court's precedents have required, then it should be the province of this Court to say so.

Also alarming is the Court of Appeals' refusal to credit the fact that there was no authority to prosecute Petitioner. Congress could not have intended for FIRREA to preempt a *Bivens* claim in a case such as this one, where FIRREA, despite being inapplicable, was knowingly misused as a pretext for retaliation. Absent *any* evidence to the contrary,

it must be accepted as true that Congress did not consider (and, accordingly, did not indicate a preference about to how to handle) claims brought against individuals who do not fall within the scope of FIRREA. Moreover, Petitioner's claim is unlike the one at issue in *Abbasi*, which would have served as a "'vehicle for altering an entity's policy.'" *Abbasi*, 137 S. Ct. at 1860 (quoting *Malesko*, 534 U.S. at 74). In contrast, Petitioner challenges nothing more than the *ultra vires* actions of individual officers, where the separation-of-powers concerns that otherwise animate skepticism of judge-made remedies are necessarily at their nadir.[15]

FIRREA's inapplicability to Petitioner's *Bivens* claims is evidenced by the following hypothetical—suppose Petitioner had only drafted an employment contract for a teller that worked at Hamilton Bank, but voiced the same criticisms of the OCC and the Respondents, who then induced a retaliatory prosecution. Could it be said that FIRREA in such a scenario would preempt a *Bivens* claim? Of course not. Were it otherwise, the "special factors" analysis would end up swallowing all *Bivens* remedies, because *Bivens* defendants as a bar could point to any statute that was peripherally relevant, without regard for whether the statute actually applied to the situation. That is precisely why this Court carefully has articulated clear guidelines that alternative remedies or remedial structures must satisfy. The remedial structure adopted by the Court of Appeals satisfies none. Review is therefore warranted.

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[15] As was true in *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (a case challenging the constitutionality of a federal statute), in considering a damages claim against an individual officer acting *ultra vires*, "[t]he federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy . . . should be."

V. This Case Is a Proper Vehicle for Reaffirming *Bivens* Claims Against Federal Officers Who Induce Retaliatory Prosecutions

The Court of Appeals' repeated errors in its interpretation and application of this Court's precedent are problematic not only in their own right, but because of the impact they would have, if left intact, on future proceedings. Taking the Court of Appeals' decision at face value:

- *Bivens* remedies will never be available for unconstitutional retaliatory prosecutions if there are standard federal due-process procedures that govern those prosecutions and the accused may be able to recoup attorneys' fees through the EAJA;
- Alternative remedies will supplant *Bivens* remedies, regardless as to whether the remedies provide deterrence, are adequate, provide compensation, or Congress intended them to supplant the harm in question;
- *Bivens* remedies will not be available for unconstitutional retaliatory prosecutions, even if those prosecutions are *ultra vires*;
- Recoupment of attorneys' fees will be considered part of a *Bivens* "alternative remedy" even though it provides no deterrence to individual regulators, ignores the historic legal distinction between those recoveries and damages, is inadequate, lacks the requisite congressional intent, and would be impossible to apply in practice; and
- For the first time that Petitioner knows of, a wealth-based distinction will exist in our citizens' individual Constitutional rights, allowing the rich to exercise Constitutional *Bivens* rights that the immense

> majority of our population will not be allowed to enjoy.

As noted above, these results are flatly inconsistent with *Abbasi* and other cases of this Court, and, if left intact, would effectively preclude recognition of *Bivens* claims for all retaliatory prosecution cases. In *Abbasi*, the plaintiff had meaningful alternative remedies, including "an injunction . . . or some other form of equitable relief," which, the Court explained, ordinarily "precludes a court from authorizing a *Bivens* action." 137 S. Ct. at 1865. Those remedies at least had the potential to stop the wrongful imprisonment and the constitutional interests at stake. But here, Petitioner could not have sought any injunction or other equitable relief prohibiting Respondents from inducing and pursuing a retaliatory prosecution.

Precluding a *Bivens* claim based on standard federal due-process procedures and the generalized ability under the EAJA to recoup attorneys' fees is an entirely new Bivens "alternative remedy" standard that goes way beyond any case ever decided by this Court. Moreover, the distinction created by the Court of Appeals as to *Bivens* Constitutional rights between the wealthy in this country and the rest of our citizenry is class-based, philosophically problematic and completely inconsistent with the concept of a Constitution which applies equally to all Americans.

CONCLUSION

For these reasons, Petitioner respectfully requests that the Court grant certiorari.