No. 19-661

In the Supreme Court of the United States

MYNOR ABDIEL TUN-COS, ET AL., PETITIONERS

v.

B. PERROTTE, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
BARBARA L. HERWIG
H. THOMAS BYRON III
ANNE MURPHY
Attorneys

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

QUESTION PRESENTED

Whether the court of appeals correctly declined to extend the damages remedy recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to a claim involving U.S. Immigration and Customs Enforcement agents' actions to enforce the immigration laws.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Va.):

Tun-Cos v. *Perrotte*, No. 17-cv-943 (Apr. 5, 2018)

United States Court of Appeals (4th Cir.):

Tun-Cos v. *Perrotte*, No. 18-1451 (Apr. 26, 2019)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statute, and regulations: Page

In the Supreme Court of the United States

No. 19-661

MYNOR ABDIEL TUN-COS, ET AL., PETITIONERS

v.

B. PERROTTE, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 922 F.3d 514. The opinion of the district court (Pet. App. 27a-53a) is not published in the Federal Supplement but is available at 2018 WL 3616863.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2019. The court of appeals denied rehearing on August 22, 2019 (Pet. App. 54a). The petition for a writ of certiorari was filed on November 20, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are "[n]ine Latino men" who live in an area "home to many residents of Latino ethnicity." Pet. App. 3a. In 2017, they sued respondents, U.S. Immigra-

tion and Customs Enforcement (ICE) agents in their individual capacities, seeking damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for two separate incidents involving stops and searches of petitioners. Pet. App. 3a, 28a. The district court denied respondents' motion to dismiss, *id.* at 53a, but the court of appeals reversed and remanded, *id.* at 26a.

1. Petitioners' complaint alleges that, in February 2017, ICE agents approached one of petitioners as he was leaving his house. Pet. App. 5a. They showed that petitioner a photograph of another individual they were looking for and, when he denied knowing the person in the photograph, asked him to allow the agents into his home. *Ibid.* The agents entered and searched the house, gathered the residents together, and arrested six men. *Ibid.* The six men were taken to an immigration processing facility, where they were released several hours later on bond. *Ibid.*

In a second alleged incident later that month, ICE agents stopped a car carrying four Latino men in the parking lot of the apartment building where two of the men lived. Pet. App. 5a. The agents asked the four men to produce identification. *Ibid.* The agents then showed the men a photograph of two individuals, and one of the men recognized the individuals shown in the photograph. *Ibid.* The agents directed the men to return to their apartment, frisked and arrested two of them (among petitioners here), and took those two to an immigration facility. *Ibid.* Those two petitioners were released, but removal proceedings were subsequently instituted against them. *Id.* at 5a-6a.

2. a. The two petitioners arrested during the second incident sued under *Bivens*, alleging that ICE agents

had violated their rights under the Fourth and Fifth Amendments. Pet. App. 6a. Their complaint further alleged that the arrests had been carried out pursuant to a policy of widespread enforcement of the immigration laws under President Trump, which allegedly differed from immigration-enforcement policies in place under President Obama. *Id.* at 6a-7a. In particular, the complaint alleged that, under the prior administration, ICE agents searching for specific aliens had been authorized to arrest only those targeted individuals, whereas the current administration permitted ICE agents looking for specific aliens to make "collateral arrests" as well. *Id.* at 7a.

After the agents moved to dismiss, petitioners amended their complaint to add allegations about the incident that had occurred earlier in February 2017, and to add as additional plaintiffs seven people who had been involved in that incident. Pet. App. 7a. The amended complaint also removed the allegations that the agents had been carrying out administration policy. *Ibid.*

b. Respondents moved to dismiss the amended complaint, contending both that *Bivens* should not be extended to this new context and that, in any event, they were entitled to qualified immunity. Pet. App. 30a.

The district court denied the motion. Pet. App. 27a-53a. On the *Bivens* question, the court "assume[d]" that, under the analysis in *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017), this case presents a "new context" for the application of *Bivens*. Pet. App. 46a. But the court concluded that no "special factors" counseled hesitation before extending an action for damages to that new context. *Id.* at 46a-48a. It rejected respondents' arguments that the case raised questions of immigration policy, posed distinct separation-of-powers concerns, and contravened

congressional intent to preclude a damages remedy in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq*. Pet. App. 47a-48a.

The district court also rejected respondents' argument that they were entitled to qualified immunity. Pet. App. 48a-52a. It concluded that the complaint sufficiently alleged that two of the agents had engaged in an investigatory stop without reasonable suspicion. *Id.* at 49a-50a. The court also concluded that, even if petitioners did not describe with specificity what role the remaining agents had played, it was enough that petitioners alleged "that all Defendants participated in" one of the two incidents alleged in the complaint. *Id.* at 51a.

3. The court of appeals reversed and remanded with instructions to dismiss the complaint. Pet. App. 1a-26a.

The court of appeals explained that, under *Abbasi*, a court addressing a *Bivens* claim must first determine whether the plaintiff's claim arises in a new context—meaning that it is "'different in any meaningful way' from the three cases in which the Court has recognized a *Bivens* remedy." Pet. App. 15a (quoting *Abbasi*, 137 S. Ct. at 1859) (brackets omitted). The court further explained that, "if the context is new, then courts must, before extending *Bivens* liability, evaluate whether there are 'special factors *counselling hesitation* in the absence of affirmative action by Congress.'" *Ibid.* (quoting *Abbasi*, 137 S. Ct. at 1857). The court observed that, "[i]f any such 'special factors' do exist, a *Bivens* action is not available." *Ibid.*

The court of appeals first determined that this case presents a new context for *Bivens* purposes. Pet. App. 17a-20a. It identified several meaningful differences between this case and *Bivens*, including that respondents had been enforcing immigration law rather than criminal

law; that immigration law is "by its nature addressed toward noncitizens, which raises a host of considerations and concerns that are simply absent in the majority of traditional law enforcement contexts"; that "enforcement of the immigration laws implicates broad policy concerns distinct from the enforcement of criminal law"; that this case involves a new category of defendants; and that petitioners' Fifth Amendment claims "have no analogue in the Supreme Court's prior *Bivens* cases." *Id.* at 18a-20a.

Next, the court of appeals determined that special factors suggest that "Congress *might doubt* the need for an implied damages remedy" in that new context. Pet. App. 20a; see *id.* at 20a-26a. The court offered four reasons why Congress might harbor such doubt. *Id.* at 21a-25a. First, because immigration enforcement is directed toward ensuring "that only those foreign nationals who are legally authorized to be in the United States remain present here," it has a tendency to implicate diplomatic, foreign-policy, and national-security concerns. *Id.* at 21a. Second, Congress "'designed its regulatory authority in a guarded way,'" by "t[aking] steps to ensure that the protections it provided in the INA would be exclusive of any additional judicial remedy." *Id.* at 22a (quoting *Abbasi*, 137 S. Ct. at 1858). The court noted that the INA both limits judicial review of immigration determinations and provides a separate "remedial structure" for violations of standards established for immigration-enforcement activities. *Id.* at 23a; see *id.* at 22a-23a. Third, "Congress's legislative actions in this area," including "its repeated refusal to provide a damages remedy," suggest that Congress does not want such a remedy. *Id.* at 24a. Fourth, "*Bivens* actions 'have never

[been] considered a proper vehicle for altering an entity's policy.'" *Id.* at 25a (quoting *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001) (brackets in original)). The court noted that petitioners' initial complaint specifically targeted the current administration's enforcement policies, and petitioners' "purpose was undoubtedly not abandoned" when they amended the complaint to remove those allegations but relied on the same facts as before. *Ibid.*

ARGUMENT

The court of appeals correctly declined to extend the damages remedy recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to petitioners' claims. Petitioners do not seek plenary review of that decision, but instead request (Pet. 7-10) that this Court hold their petition for its decision in *Hernández* v. *Mesa*, No. 17-1678 (argued Nov. 12, 2019). That request is unsound. This case requires a different *Bivens* analysis, and the Court's decision in *Hernández* is not reasonably likely to affect the outcome here.

1. Although petitioner does not seek plenary review of the court of appeals' decision, that decision is correct and does not conflict with any decision of this Court or of any other court of appeals. The court of appeals correctly followed this Court's decision in *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017), in declining to extend *Bivens* to the new context presented here.

The court of appeals first correctly concluded that this case presents a "new context" under *Abbasi*. 137 S. Ct. at 1859; see Pet. App. 17a-20a. *Abbasi* makes clear that a context is new if "the case is different in a meaningful way from previous *Bivens* cases decided by this Court." 137 S. Ct. at 1859. And as the Court's nonexhaustive list of differences illustrates, the degree of

difference may be small and yet "meaningful." *Id.* at 1860. Multiple meaningful differences exist here. As the court of appeals explained, the claim here relates to immigration rather than criminal law enforcement, which implicates both a different legal mandate and different policy concerns. Pet. App. 18a-19a. Petitioners also seek to extend *Bivens* liability to a new category of defendants and to impose Fifth Amendment liability in a way that has "no analogue in the Supreme Court's prior *Bivens* cases." *Id.* at 20a; see *id.* at 19a-20a.

The court of appeals next correctly concluded that several "special factors counsel[ed] hesitation" before extending a damages remedy to that new context "in the absence of affirmative action by Congress." *Abbasi*, 137 S. Ct. at 1857 (citation omitted); see Pet. App. 20a-26a. Most notably, despite Congress's comprehensive regulation of immigration matters, it "has designed its regulatory authority in a guarded way," *Abbasi*, 137 S. Ct. at 1858, and has declined to authorize damages remedies against individual agents involved in immigration enforcement. Indeed, Congress has "t[aken] steps to ensure that the protections it provided in the INA would be exclusive of any additional judicial remedy." Pet. App. 22a. And, despite "its frequent amendment of the INA," it has "repeated[ly] refus[ed] to provide a damages remedy." *Id.* at 24a. Instead, regulations establish the standards for enforcement actions and prescribe an internal review process for alleged violations of such standards. See 8 C.F.R. 287.8, 287.10. The combination of Congress's extensive and ongoing regulation of immigration matters and its repeated omission of the damages remedy that petitioners seek makes clear that such omission was not a "mere oversight." *Abbasi*,

137 S. Ct. at 1862; see *ibid.* (explaining that, given Congress's "'frequent and intense'" attention to a subject, its "silence [about a damages remedy] is telling") (citation omitted).

In addition, the immigration context presents particular separation-of-powers concerns. The Constitution gives the political branches "broad, undoubted power over the subject of immigration." *Arizona* v. *United States*, 567 U.S. 387, 394 (2012). As a result, claims like petitioners'—which have "the natural tendency to affect diplomacy, foreign policy, and the security of the nation"—risk enmeshing courts in decisions best left to the political branches. Pet. App. 22a (citation omitted). The risk of judicial intrusion on policy questions is particularly acute in this case, where petitioners originally designed their suit to "target[] the Trump Administration's immigration enforcement policy with the purpose of altering it." *Id.* at 25a. Although the amended complaint omitted the express allegations about the current administration's immigration-enforcement policies, see *id.* at 6a-7a, a damages suit premised on the same facts still presents a serious risk of judicial interference with such policies, see *id.* at 25a.

The court of appeals properly determined that all of those considerations, in combination, raised a "substantial question of whether Congress would want the plaintiffs to have a money damages remedy against ICE agents for their allegedly wrongful conduct when enforcing the INA." Pet. App. 26a. And petitioners do not identify any court that has found otherwise in similar circumstances. See *Garcia de la Paz* v. *Coy*, 786 F.3d 367, 380 (5th Cir. 2015) (no *Bivens* claim for allegedly unconstitutional stop and arrest of unlawfully present aliens), cert. denied, 137 S. Ct. 2289 (2017); see also *Alvarez* v.

U.S. Immigration & Customs Enforcement, 818 F.3d 1194, 1208 (11th Cir. 2016) (no *Bivens* claim for allegedly unconstitutional immigration detention), cert. denied, 137 S. Ct. 2321 (2017); *Mirmehdi* v. *United States*, 689 F.3d 975, 983 (9th Cir. 2012) (same), cert. denied, 569 U.S. 972 (2013). Plenary review is therefore not warranted.

2. Instead, petitioners contend (Pet. 7-10) that this Court should hold their petition for its decision in *Hernández* because that decision will "likely affect the proper outcome in this case," Pet. 8. A hold is likewise not warranted.

In *Hernández*, this Court is considering the question whether a *Bivens* remedy should be extended to Fourth and Fifth Amendment claims arising from a cross-border shooting that resulted in an injury to a foreign citizen in a foreign country. See *Hernández*, *supra* (No. 17-1678). Both steps of the *Abbasi* analysis are different here.

First, this case plainly arises in a different context from *Hernández*. This case involves ICE agents' enforcement of the immigration laws and the alleged violation of the rights of aliens present in the United States. Meanwhile, *Hernández* involves U.S. Custom and Border Patrol agents' border-enforcement activity and the alleged violation of the rights of an alien located in another sovereign nation. Because *Abbasi* requires a context-specific analysis, see 137 S. Ct. at 1859-1860, the holding in *Hernández* is unlikely to extend to this case.

Second, the relevant special factors are different. The special factors that the government relied on in *Hernández* include the foreign-affairs and national-security implications of claims by aliens injured abroad, Congress's consistent decisions not to provide a judicial

damages remedy for injuries to aliens abroad, and the presumption against extraterritoriality. See U.S. Br. at 15-29, *Hernández*, *supra* (No. 17-1678). By contrast, the special factors that the court of appeals articulated here include the foreign-policy and national-security implications of immigration enforcement, Congress's limitation on judicial review of immigration claims in the INA, Congress's repeated legislation on immigration matters and omission of a damages remedy, and the likelihood that petitioners' claims require judicial scrutiny of high-level policies. Pet. App. 21a-26a. The adoption or rejection of any one of the special factors discussed in *Hernández* is thus unlikely to disturb the court of appeals' determination that other special factors counsel hesitation in this case.

Petitioners contend (Pet. 8-10) that because both this case and *Hernández* involve "immigration officers" and because *Hernández* has a "transnational aspect," a reversal in *Hernández* would require a reversal here and an affirmance could well require the same. But that contention frames the issue at too high a level of generality. This Court's *Abbasi* framework requires consideration of special factors applicable to the particular "new context" in question. See *Abbasi*, 137 S. Ct. at 1860. As a result, no realistic possibility exists that, as petitioner suggests (Pet. 10), this Court in *Hernández* will extend a *Bivens* remedy to any "immigration officer [who] violates clearly established constitutional rights of an individual who is on U.S. soil," without requiring the context-specific analysis that the court of appeals performed here. Indeed, even the Ninth Circuit, which did not find any special factors counseling hesitation in a case similar to *Hernández*, see *Rodriguez* v. *Swartz*, 899 F.3d 719 (9th Cir. 2018), petition for cert. pending,

No. 18-309 (filed Sept. 7, 2018), has elsewhere determined that the INA's comprehensive remedial scheme is a "special factor" that forecloses extension of a *Bivens* remedy to certain claims in the immigration setting, see *Mirmehdi*, 689 F.3d at 982-983.

This Court recently considered another petition raising the question whether a *Bivens* remedy should be extended to an alleged violation of constitutional rights in the context of immigration enforcement—there, involving a claim of an alleged deprivation of procedural due process during an alien's removal from the United States. See *Maria S.* v. *Garza*, 140 S. Ct. 81 (2019) (No. 18-1350). The court of appeals in *Maria S.*, as here, declined to extend a *Bivens* remedy because it concluded that special factors, including "[t]he comprehensive federal regulations governing immigration and the removal process," counseled hesitation. *Maria S.* v. *Garza*, 912 F.3d 778, 784 (5th Cir.), cert. denied, 140 S. Ct. 81 (2019). This Court did not hold *Maria S.* for *Hernández*, and the same result is warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
BARBARA L. HERWIG
H. THOMAS BYRON III
ANNE MURPHY
Attorneys

FEBRUARY 2020