BIVENS BASICS: AN INTRODUCTORY GUIDE FOR IMMIGRATION ATTORNEYS

Practice Advisory[1]
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Introduction

Under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), individuals—including noncitizens or those whom the government perceives to be noncitizens—may have access to a judicial damages remedy for conduct by federal agents that violates the U.S. Constitution. Although litigating *Bivens* claims in the immigration context has become increasingly challenging in recent years, a successful claim could result in compensatory and/or punitive damages as well as injunctive relief.

This practice advisory provides an overview of the Supreme Court's decision in *Bivens*, the benefits and risks of bringing a *Bivens* claim, and practical and legal information about filing a *Bivens* claim in federal court. Lastly, the advisory discusses issues and arguments arising in *Bivens* litigation in the immigration context.

Overview

1. What did the Supreme Court hold in *Bivens*?

In *Bivens*, the Supreme Court held that where a federal officer "acting under color of [federal] authority" commits a constitutional tort, a cause of action for money damages arises directly under the Constitution. *Bivens*, 403 U.S. at 389. Mr. Bivens filed suit after agents of the Federal Bureau of Narcotics entered his apartment and arrested him for narcotics violations without a warrant or probable cause in violation of the Fourth Amendment. *Id.* Mr. Bivens sought $15,000 from each of the federal agents. *Id.* at 390. The Supreme Court recognized that neither

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the Constitution nor a statute provided a federal cause of action and damages remedy in this situation. The Court reasoned that "where legal rights have been invaded . . . federal courts may use any available remedy to make good the wrong done." *Id.* at 396 (quotation and citation omitted). In addition, the Court found "no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* Accordingly, the Court held that Mr. Bivens pled a cause of action under the Fourth Amendment and therefore could recover monetary damages for the agents' violations thereof. *Id.* at 397. The Court also recognized that federal courts had the power to award equitable relief—such as injunctive relief—directly under the Constitution. *Id*.; *see also id*. at 400 (Harlan, J., concurring).

2. What types of constitutional violations has the Supreme Court recognized as giving rise to a *Bivens* action?

Following *Bivens*, the Supreme Court has endorsed damages remedies for constitutional violations by federal officers in only two cases, which involved Fifth and Eighth Amendment violations. In *Davis v. Passman*, the Court recognized a *Bivens* claim for violation of the Equal Protection Clause of the Fifth Amendment when a Congressman fired an administrative assistant based on her gender. 442 U.S. 228, 248–49 (1979). In *Carlson v. Green*, the Court recognized a *Bivens* claim where prison officials failed to provide an inmate with proper medical care in violation of his Eighth Amendment right to be free from cruel and unusual punishment. 446 U.S. 14, 16–18 (1980).

Aside from *Bivens*, *Davis*, and *Carlson*, the Court has declined to provide a *Bivens* remedy in other cases.[2]

3. What are the threshold requirements of a *Bivens* claim?

To plead a *Bivens* cause of action, the plaintiff must allege that:

(1) she has a constitutionally protected right;
(2) a federal officer acting under color of federal authority violated that right;

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[2] *See, e.g.*, *Hernandez v. Mesa*, 140 S. Ct. 735 (2020) (Fourth and Fifth Amendment suit against border patrol agent in a cross-border shooting); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1863 (2017) (Fourth and Fifth Amendment suit over prison mistreatment against high-ranking officials); *Minneci v. Pollard*, 565 U.S. 118, 131 (2012) (Eighth Amendment suit against prison guards at private prison); *Wilkie v. Robbins*, 551 U.S. 537, 561 (2007) (Fifth Amendment due process suit against Bureau of Land Management officials); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (Eighth Amendment suit against private prison operator); *Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988) (Fifth Amendment due process suit against Social Security officials); *United States v. Stanley*, 483 U.S. 669, 685-86 (1987) (Fifth Amendment suit against military officers for violation of due process); *FDIC v. Meyer*, 510 U.S. 471, 486 (1984) (Fifth Amendment due process suit for wrongful termination from federal employment); *Bush v. Lucas*, 462 U.S. 367, 390 (1983) (First Amendment suit against federal employer for defamation and retaliatory demotion); *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (Fifth Amendment race discrimination suit against military officers).

(3) she lacks a statutory cause of action, or an available statutory cause of action does not provide a meaningful remedy; and
(4) an appropriate remedy, namely damages, can be imposed.

In addition, when drafting a complaint, practitioners should consider the issues discussed below.

4. Is there a statute of limitations for filing *Bivens* claims?

Yes. *Bivens* actions are subject to the same statute of limitations as claims brought under 42 U.S.C. § 1983:[3] the personal injury statute of limitations of the state where the constitutional tort occurred.[4]

5. Are there any administrative remedies to exhaust before filing a *Bivens* action?

No. Unlike a Federal Tort Claims Act (FTCA) claim, there are no administrative remedies to exhaust before filing a *Bivens* action in district court.[5]

6. Who is the defendant to a *Bivens* claim?

Bivens claims are brought against federal officers in their individual capacity, *see Bivens*, 403 U.S. at 394–96, and generally the claim must result from said individual's own action or omission.[6] If the identity of an officer is unknown, a plaintiff may bring suit against "Jane Doe" or "John Doe" and pursue early discovery to ascertain the identity of such Doe defendants to ensure that the *Bivens* statute of limitations does not run before the plaintiff can perfect the complaint. Practitioners are advised to research applicable case law regarding standards for amending a complaint and the relation back doctrine, including when seeking to amend the complaint after the statute of limitations has run.

The Supreme Court has strictly limited the types of persons who can be sued under *Bivens.* Thus, for example, a plaintiff may not bring a *Bivens* suit against (1) federal agencies;[7] (2)

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[3] *Van Strum v. Lawn*, 940 F.2d 406, 410 (9th Cir. 1991); *Bieneman v. City of Chicago*, 864 F.2d 463, 469 (7th Cir. 1988); *Chin v. Bowen*, 833 F.2d 21, 23–24 (2d Cir. 1987); *McSurely v. Hutchison*, 823 F.2d 1002, 1004–05 (6th Cir. 1987).

[4] *Wilson v. Garcia*, 471 U.S. 261, 280 (1985) (holding that "§ 1983 claims are best characterized as personal injury actions").

[5] If, however, a plaintiff is incarcerated in criminal confinement at the time the plaintiff files a *Bivens* suit involving prison conditions, the claim is governed by the Prison Litigation Reform Act's (PLRA) exhaustion provisions. *See Porter v. Nussle*, 534 U.S. 516, 524 (2002); *see*, *e.g.*, *Nyhuis v. Reno*, 204 F.3d 65, 68–69 (3d Cir. 2000). If the plaintiff is incarcerated in immigration detention, however, the PLRA does not apply. *See Agyeman v. INS*, 296 F.3d 871, 885–86 (9th Cir. 2002); *LaFontant v. INS*, 135 F.3d 158 (D.C. Cir. 1998).

[6] *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) ("[A] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."); *see also Chavez v. United States*, 683 F.3d 1102, 1110 (9th Cir. 2013).

[7] *See FDIC v. Myer*, 510 U.S. 471, 486 (1994).

private correctional facilities under contract with federal agencies,[8] as well as prison officers at private prisons[9]; and (3) Public Health Service officers or employees for harms arising out of medical or related acts within the scope of their employment.[10]

7. Where is venue proper?

A *Bivens* action may be filed in a district court (1) where any defendant resides as long as all defendants are residents of the state in which the court is located, or (2) where a significant portion of the actions or omissions giving rise to the claim occurred.[11] If neither of these first two options is available, then the plaintiff may bring the claim in a district court that has personal jurisdiction over any defendant regarding the action.[12]

8. What is the stated basis for jurisdiction?

District courts have jurisdiction over *Bivens* causes of action under 28 U.S.C. § 1331 because they are "civil actions arising under the Constitution."

9. Are attorneys' fees available in *Bivens* actions?

Yes, like personal injury claims, *Bivens* claims are brought on a contingency fee basis and any financial recovery is subject to the relevant law of the state where the action is brought and any limits on contingency percentages. Notably, plaintiffs who are "prevailing parties" in *Bivens* cases are *not* entitled to fee shifting; i.e., they may not recover attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412.[13]

Filing Considerations

10. What are the pros and/or cons of filing a *Bivens* action?

A *Bivens* action serves a dual purpose. First, it provides victims with a remedy for the injuries they suffered by enabling them to recover compensatory and punitive damages from *individual* federal officers for their constitutional violations.[14] Notably, injunctive relief is also available in

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8 *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001).

9 *See Minneci v. Pollard*, 565 U.S. 118, 131 (2012).

10 *See Hui v. Castaneda*, 559 U.S. 799, 802 (2010).

11 28 U.S.C. § 1391(b)(1)-(2).

12 28 U.S.C. § 1391(b)(3).

13 *Kreines v. United States*, 33 F.3d 1105, 1109 (9th Cir. 1994); *Saxner v. Benson*, 727 F.2d 669, 673 (7th Cir. 1984), *aff'd sub nom on other grounds*, *Cleavinger v. Saxner*, 474 U.S. 193 (1985); *Lauritzen v. Lehman*, 736 F.2d 550, 558 n.10 (9th Cir. 1984).

14 *Carlson*, 446 U.S. at 21-22 ("[O]ur decisions, although not expressly addressing and deciding the question, indicate that punitive damages may be awarded in a Bivens suit."); *Sanchez v. Rowe*, 651 F. Supp. 571, 574 (N.D. Tex. 1986) ("[P]unitive damages may be awarded against an individual defendant in a *Bivens* suit") (citing *Carlson*, 446 U.S. at 22).

conjunction with a *Bivens* claim for damages.[15] Second, the Supreme Court has reasoned that a *Bivens* action deters future constitutional violations of individual officers by providing a mechanism by which they can be held accountable for their unlawful actions.[16]

In the immigration context, *Bivens* actions are an important tool to address misconduct by immigration agents for, *inter alia*, excessive force, physical and sexual abuse, unlawful searches and seizures (raids), and deliberate indifference detention claims. Moreover, a noncitizen's *Bivens* suit may serve as leverage to obtain immigration relief.[17]

As with any lawsuit, plaintiffs who file suit may be required to respond to discovery requests, sit for a deposition, make court appearances, and testify. If the plaintiff is undocumented, or has family members who are undocumented, these risks may be amplified; the government may retaliate against noncitizens seeking to vindicate their constitutional rights. Attorneys must explain these risks to potential plaintiffs and take appropriate steps to minimize them, for example, by moving to seal the docket, seeking a protective order, and/or, in settlement discussions, negotiating for immigration relief for the plaintiff.

11. How does a *Bivens* claim compare to a Federal Tort Claims Act claim?

The Federal Tort Claims Act (FTCA) waives the United States' sovereign immunity and authorizes suits for money damages to be brought against the United States based on some types

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15 As the Supreme Court has made clear, "[t]he broad power of federal courts to grant equitable relief for constitutional violations has long been established." *Carlson*, 446 U.S. at 42 (Rehnquist, J., dissenting); *see also Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995) ("We assume that the power of the federal courts to award legal and equitable relief in actions under 28 U.S.C. § 1331 stems from the same source."). Importantly, at least one court has held that the Supreme Court's cases placing limitations on the availability of *Bivens* damages actions do not apply to claims for equitable relief. *See*, *e.g.*, *Mitchum*, 73 F.3d at 36.

Injunctive actions must be brought against officers who, in their official capacities, have the authority to carry out the requested injunctive relief. *See*, *e.g.*, *Hubbard v. EPA Adm'r*, 809 F.2d 1, 11 (D.C. Cir. 1986) (recognizing claim against the agency for equitable relief to remedy constitutional violations but affirming dismissal of *Bivens* claim against individual officers); *Solida v. McKelvey*, 820 F.3d 1090 (9th Cir. 2016) (holding that *Bivens* suits are individual capacity suits and thus cannot enjoin official government action). Thus, in case in which claims for both damages under *Bivens* and injunctive relief are brought, the defendants must be sued in both their individual capacity (for the *Bivens* claim) and their official capacity (for the injunctive relief claim).

16 *See Malesko*, 534 U.S. at 70 ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.").

17 *See* Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Officers, All Special Agents in Charge and All Chief Counsel, p.1 (Jun. 17, 2011), *available at* https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (last visited July 6, 2021) (instructing officers, special agents, and attorneys to exercise prosecutorial discretion to minimize any effect of immigration enforcement on plaintiffs pursuing litigation to protect their civil rights and civil liberties).

of negligent acts or omissions of federal employees, and, in some instances, the intentional misconduct of such employees.[18] Unlike a *Bivens* challenge, which arises directly under the Constitution, the FTCA is a statutory cause of action for tort claims. Importantly, whereas *Bivens* cases are brought against federal officers in their individual capacities, the defendant in an FTCA claim is always the United States.

In addition, the process for initiating a *Bivens* and FTCA claim differ. While an FTCA claimant must first file and exhaust administrative remedies with the appropriate federal agency before filing in federal district court, a *Bivens* plaintiff may file directly in federal court. Available relief and defenses also vary. Claimants under the FTCA may obtain only compensatory damages while those bringing a *Bivens* cause of action are entitled to compensatory and punitive damages and may seek injunctive relief in conjunction with the *Bivens* claim. *See* Q10, *supra*. Furthermore, the United States can defend against FTCA claims by raising the discretionary function or intentional tort exceptions to liability, 28 U.S.C. §§ 2680(a) & (h), while defendants in *Bivens* suits rely on the affirmative defenses of absolute or qualified immunity.

	Bivens	**Federal Tort Claims Act**
Jurisdictional Basis	28 U.S.C. § 1331	28 U.S.C. § 1346(b)
Basis for Cause of Action	Constitution	State tort law
Defendants	Individual federal officers	United States
Relief Available[19]	Compensatory and punitive damages; injunctive relief	Compensatory damages
Defenses	Absolute or qualified immunity	Various statutory exceptions

12. If an individual has a viable claim under *Bivens* and the FTCA, is one preferable over another or should both claims be raised?

Attorneys often bring *Bivens* and FTCA claims in the same suit, but doing so is not required. A variety of factors may influence the decision to raise one or both types of claims. For instance, given that the United States—not an individual federal officer—pays damages in an FTCA suit, plaintiffs are more likely to recover on an FTCA claim, although the government has the authority to indemnify an employee in a *Bivens* action after a verdict, judgment, or damages

[18] *See* 28 U.S.C. §§ 1346(b); 2671 *et seq.*; 28 C.F.R. §§ 14.1-14.11. For more information about FTCA actions, please see NILA and the National Immigration Project's Practice Advisory, Federal Tort Claims Act: Frequently Asked Questions for Immigration Attorneys (Feb. 17, 2021), available at: https://immigrationlitigation.org/practice-advisories/.

[19] In both *Bivens* and FTCA actions, the government can settle claims in exchange for an immigration benefit. In addition, district court judges have the ability to sign U visa certifications based on certain government misconduct.

award.[20] In addition, as a matter of policy, the United States refuses to settle *Bivens* actions on behalf of its employees unless there are "exceptional circumstances."[21] Recovery under the FTCA, however, is limited to compensatory damages—excluding punitive damages and injunctive relief—which are available to *Bivens* litigants. Additionally, while a district court judge renders judgment on an FTCA claim, jury trial is available in a *Bivens* action.[22]

The applicable statute of limitations and relevant circuit case law also may influence the decision. While claimants may bring FTCA and *Bivens* claims concurrently, FTCA claims may not be brought in federal court until administrative exhaustion is complete. Thus, if the statute of limitations for filing a *Bivens* action is of concern, practitioners may wish to timely file the *Bivens* action and, subsequently, either move to amend the complaint to add the then-ripe FTCA claim or bring a separate action asserting the FTCA claim and move to consolidate the actions.

An additional important consideration is the FTCA's judgment bar provision. Under 28 U.S.C. § 2676, an FTCA judgment "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." The judgment bar does not prevent individuals from bringing both FTCA and *Bivens* claims against the government and individual federal employees; instead, it impacts the ability to pursue both claims to judgment. Several courts have interpreted this provision to provide that a judgment in an FTCA action bars recovery in a *Bivens* action where the FTCA and *Bivens* claims "aris[e] out of the same actions, transactions, or occurrences."[23] The weight of authority provides that, no matter the nature of the judgment (favorable or unfavorable), the judgment bar applies.[24] The judgment bar may even apply where the court enters the FTCA judgment after its decision on the *Bivens* action.[25]

In some limited circumstances, an FTCA judgment may not preclude a *Bivens* action. For instance, in *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1849–50 (2016), the Supreme Court held that dismissal of an FTCA claim for falling within one of the FTCA's statutory exceptions to

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20 28 C.F.R. § 50.15(c)(1).

21 28 C.F.R. § 50.15(c)(3).

22 *Carlson*, 446 U.S. at 22.

23 *See, e.g.*, *Unus v. Kane*, 565 F.3d 103, 122 (4th Cir. 2009); *Manning v. United States*, 546 F.3d 430, 433 (7th Cir. 2008); *Harris v. United States*, 422 F.3d 322, 333-34 (6th Cir. 2005); *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 858-59 (10th Cir. 2005); *Rodriguez v. Handy*, 873 F.2d 814, 816 (5th Cir. 1989); *Arevalo v. Woods*, 811 F.2d 487, 490 (9th Cir. 1987).

24 *See Gasho*, 39 F.3d at 1437 ("The statute speaks of 'judgment' and suggests no distinction between judgments favorable and judgments unfavorable to the government."); *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180, 185 (7th Cir. 1996) ("There is no indication that Congress intended Section 2676 to apply only to favorable FTCA judgments."); *Harris*, 422 F.3d at 335 ("no distinction between favorable and unfavorable judgments").

25 *Manning*, 546 F.3d at 431-32 (invoking judgment bar to vacate plaintiff's $6.5 million *Bivens* judgment when court later denied his claim under the FTCA); *Aguilar*, 397 F.3d at 867 (vacating *Bivens* judgment after subsequent FTCA judgment); *Arevalo*, 811 F.2d at 488 (reversing *Bivens* judgment after later ruling on FTCA claim).

liability (e.g., the discretionary functions exception) may not bar a plaintiff from pursuing a *Bivens* action. Additionally, an appeals court's reversal of an adverse FTCA judgment removed the judgment bar as to a *Bivens* claim.[26]

When deciding what claims to pursue in a case, practitioners should take special care to avoid the entry of an FTCA judgment unless they are satisfied that they do not wish to pursue their *Bivens* claims further.

Responding to Dispositive Motions After Filing a *Bivens* Claim

13. After a complaint is filed, how long does the defendant(s) have to respond and what type of response can one expect?

Under Federal Rule of Civil Procedure 12(a)(3), a federal officer or employee who is sued in his or her individual capacity for an act or omission in connection with federal employment duties, must file an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the local U.S. attorney, whichever is later.

Pursuant to Federal Rule of Civil Procedure 12(b), *Bivens* defendants often file motions to dismiss *Bivens* claim(s) in lieu of an answer. Most commonly, defendants seek dismissal based on an alleged lack of jurisdiction under Rule 12(b)(1) or for failure to state a claim under Rule 12(b)(6), including based on assertions of immunity from suit or that special factors counsel hesitation against recognizing a *Bivens* remedy. These arguments also may be made in a motion for summary judgment. In addition, a court could raise these arguments sua sponte.

14. How does *Ziglar v. Abbasi* affect arguments to dismiss *Bivens* claims in the immigration context?

Historically, courts allowed *Bivens* claims to proceed in cases involving noncitizens whose constitutional rights were violated by immigration agents in a variety of settings.[27] In more

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[26] *See Gasho*, 39 F.3d at 1438 (holding that reversal of judgment on FTCA claim removes bar against subsequently-filed *Bivens* suit arising out of same conduct since it eliminated the "judgment" on the FTCA claim).

[27] *See*, *e.g.*, *Franco-de Jerez v. Burgos*, 876 F.2d 1038, 1044 (1st Cir. 1989) (allowing case to proceed to discovery against immigration officer on *Bivens* claim where noncitizen held incommunicado for ten days); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 627 (5th Cir. 2006) (denying qualified immunity defense to immigration officer where noncitizen alleged that immigration officer physically assaulted and arrested her without provocation); *Humphries v. Various Fed. USINS Emp.*, 164 F.3d 939, 944 (5th Cir. 1999) (reversing dismissal of claim for involuntary servitude and mistreatment while in immigration custody); *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) (reversing dismissal of *Bivens* claims against immigration agents on behalf of noncitizen killed in detention); *Guerra v. Sutton*, 783 F.2d 1371, 1375 (9th Cir. 1986) (finding *Bivens* available where immigration officers assisted in searches and arrests "without knowledge of the details of the warrant under which [they] presume[d] to act"); *Jasinski v. Adams*, 781 F.2d 843, 850 (11th Cir. 1986) (affirming denial of summary judgment to

recent years, following the Supreme Court's placement of significant limitations on *Bivens* causes of action, courts have been more reluctant to recognize the availability of a *Bivens* remedy.[28]

The Supreme Court's decision in *Ziglar v. Abbasi,* 137 S. Ct. 1843 (2017) is a key case in a long line of cases placing substantial limits on the *Bivens* cause of action. Practitioners bringing *Bivens* claims should be prepared to litigate this threshold question in every case.

The *Abbasi* case involved noncitizens of Arab descent, or of perceived Arab descent, who were arrested in the aftermath of September 11, 2011 and detained pursuant to a "hold-until-cleared" policy at the Metropolitan Detention Center (MDC) in Brooklyn, New York. 137 S. Ct. at 1852–53. During the plaintiffs' detention, MDC employees subjected them to harsh and oppressive conditions and physical abuse. *Id.* at 1853. At issue before the Court was the plaintiffs' ability to seek redress against high-ranking officials (Attorney General, FBI Director, INS Commissioner), the MDC warden, and the associate warden for Fourth and Fifth Amendment constitutional violations resulting from policies they had adopted and overseen. *Id.* at 1853–54. The Court ruled that the *Bivens* claims could not be brought against the high-ranking officials. *Id*. at 1860–63.

At the outset, the Court discussed its precedent addressing *Bivens* remedies—both the cases which recognized a *Bivens* remedy and those which rejected it. The Court determined that these cases demonstrated a general reluctance to imply a damages remedy. *Id.* at 1854-57. In particular, the Court admonished courts not to create a *Bivens* remedy where there may be reason to believe that Congress did not want to create one. *Id.* at 1858. In addition, the Court cautioned that the existence of an "alternative remedial structure" through which the person could vindicate the harm could limit the court's ability to recognize a *Bivens* remedy. *Id.*

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defendants in *Bivens* challenge to detention and search by immigration officers at checkpoint); *accord Ballesteros v. Ashcroft*, 452 F.3d 1153, 1160 (10th Cir. 2006) ("No remedy for the alleged constitutional violations would affect the BIA's final order of removal. Any remedy available to Mr. Ballesteros would lie in a *Bivens* action."); *Matter of Sandoval*, 17 I. & N. Dec. 70, 82 (BIA 1979) (citing *Bivens* for the proposition that "civil or criminal actions against the individual officer may be available").

[28] *Compare, e.g.*, *Morales v. Chadborne*, 793 F.3d 208, 211–12 (1st Cir. 2015) (recognizing availability of *Bivens* and affirming district court's denial of qualified immunity to immigration officer and his supervisors based on Fourth Amendment claim that agency lacked probable cause to hold U.S. citizen plaintiff in immigration detention), *with De la Paz v. Coy*, 786 F.3d 367, 374 (5th Cir. 2015), *cert. denied De La Paz v. Coy*, 137 S. Ct. 2289 (June 26, 2017) (refusing to recognize *Bivens* remedies in consolidated appeals for alleged Fourth Amendment violations, holding that "civil immigration proceedings" constitute a new context for *Bivens'* claims); *Mirmedhi v. United States*, 689 F.3d 975, 981 (9th Cir. 2012) (declining to recognize a *Bivens* remedy against immigration officers for "unlawful detention [of noncitizens] during deportation proceedings."); *Alvarez v. U.S. ICE*, 818 F.3d 1194, 1208 & n.6 (11th Cir. 2016) (holding that the Immigration and Nationality Act was an "elaborate remedial system" precluding a *Bivens* claim but noting that *Bivens* claims might be available for claims regarding physical abuse or punitive conditions) (internal citations omitted).

The Court next considered whether a *Bivens* remedy was appropriate in the case before it under a two-step analysis. First, it considered whether the claim involved a "new context." *Id.* at 1859. The Court concluded that "[i]f the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new." *Abbasi*, 137 S. Ct. at 1859. In so reasoning, the Court adopted an exceptionally broad definition of a "new context"—one which essentially incorporates *any* claim that is unlike those in *Bivens*, *Davis*, and *Carlson*. *Id.* at 1859–60. Applying this rationale, the Court found that the claims presented in *Ziglar* presented a new context. *Id.* at 1860. It also provided a non-exhaustive list of examples of "meaningful" differences from the three types of *Bivens* claims the Court previously recognized, including:

- Defendant officers are of a different rank
- Different constitutional claims
- Generality or specificity of official action
- Extent of judicial guidance as to how an officer should respond
- Statutory or other legal mandate under which the officer was operating
- Risk of disruptive intrusion into functioning of legislative or executive branches.

Abbasi, 137 S. Ct. at 1859-60.

Second, after finding that the case presented a new context for a *Bivens* claim, the Court addressed whether "special factors" counseled hesitation in implying a *Bivens* remedy. *Id.* at 1860-63. The Court reasoned that numerous special factors counseled against recognizing Plaintiffs' *Bivens* claims in this new context, including that Plaintiffs' detention policy claims implicated important governmental policy making decisions, the policy involved important national security concerns, Congress had been silent on the availability of a damages remedy despite intense legislative interest in responding to the September 11th attacks, and plaintiffs could have pursued habeas petitions or other forms of relief. *Id.*

With respect to Plaintiffs' Fifth Amendment deliberate indifference claims against the warden and associate warden, the Court also found that the claims presented a new context. *Id.* at 1863-65. However, the Court remanded these claims to the Second Circuit to conduct the "special factors" analysis due to insufficient briefing on the distinction between Fifth Amendment and Eighth Amendment deliberate indifference claims. *Id.* at 1865.

Subsequently, though not in a *Bivens* case, the Supreme Court referenced the continued availability of *Bivens*. In *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), the Court addressed the legality of immigration detention. In addressing whether 8 U.S.C. § 1252(b)(9) barred jurisdiction over the case, the Court concluded that an overly broad construction of that provision would lead to an absurd result because it could be construed to make many claims "effectively unreviewable." *Id*. at 840. As an illustration of such a claim, the Court cited to a *Bivens* claim "based on allegedly inhumane conditions of confinement." *Id*.

In 2020, however, the Supreme Court issued another decision finding a *Bivens* remedy unavailable. In *Hernandez v. Mesa*, 140 S. Ct. 735 (2020), the parents of a deceased fifteen-year-

old Mexican boy raised a *Bivens* claim asserting that a U.S. Border Patrol Agent violated their son's Fourth and Fifth Amendment rights when he shot and killed their son while he was playing with friends on the Mexican side of the U.S. border. The Court held that this cross-border shooting constituted a new context and that special factors, including the risk of interfering in foreign relations, national security concerns, and Congress' history of declining to authorize a damages remedy for injuries incurred outside the United States, weighed against allowing a *Bivens* remedy. *Id.* at 743-749.

Post-*Abbasi*, noncitizen plaintiffs who raise *Bivens* claims should expect defendants to argue that their claim presents a new context (if the fact pattern is not similar to the facts in *Bivens*, *Davis*, or *Carlson*) and that special factors counsel hesitation against recognizing the claim and/or that the Immigration and Nationality Act presents an adequate alternative remedial scheme to seek redress for harm suffered. For that reason, as discussed in Q15, *infra*, practitioners should frame *Bivens* claims to align with *Bivens*, *Davis*, or *Carlson*, if possible, and be prepared to distinguish any factual or legal differences on the grounds that any distinction is not meaningful.

Practitioners also must be prepared to:

- Explain why no other adequate remedy is available to provide redress for the harms suffered;
- Explain why the court should not infer that Congress deliberately chose to withhold a remedy;
- Argue that the special factors articulated in *Abbasi* and *Hernandez*, including national security concerns and a challenge to post 9/11 detention policy, do not apply; and/or
- Argue that there will not be a "deluge" of potential claimants seeking to avail themselves of this particular *Bivens* action.[29]

Finally, practitioners must research post-*Abbasi* developments in the federal courts.

15. How have the circuit courts ruled on *Bivens* claims post-*Abbasi*?

In 2018, the Ninth Circuit affirmed the availability of a *Bivens* remedy "where a federal official willfully submitted false evidence and the submission of this evidence resulted in a complete bar to relief to which the individual was otherwise entitled under congressionally enacted laws." *Lanuza v. Love*, 899 F.3d 1019, 1028 (9th Cir. 2018). In that case, a DHS trial attorney forged and submitted evidence in removal proceedings that rendered the noncitizen ineligible for immigration relief. In distinguishing the case from its prior decision in *Mirmehdi v. United States*, 689 F.3d 975 (9th Cir. 2012), the court found that *Abbasi* "makes clear" that the case does not bar *Bivens* remedies categorically in the context of immigration proceedings; rather, courts "must look to the specific facts of the case and claims presented." *Id*. at 1027.

The court then determined that the special factors articulated and relied on by the *Abbasi* Court did not counsel hesitation against recognizing a remedy. Specifically, the court found that it was

[29] *See, e.g.*, *Lanuza v. Love*, 899 F.3d 1019, 1033 (9th Cir. 2017); *Maria S. v. Garza*, 912 F.3d 778, 785 (5th Cir. 2019).

"well suited" to consider the claim because, unlike in *Abbasi*, the claim involved a low-level officer being sued for his own actions (not a policy) and in "run-of-the-mill immigration proceedings," not in the context of the "biggest terrorist attack in our nation's history." *Id.* at 1030. The court also found that the litigation would not burden executive officials to "an unacceptable degree" because the facts were "undisputed" and "discovery would likely not involve the disclosure of any sensitive government information at all." *Id*. at 1029-30. Finally, the court recognized that the Immigration and Nationality Act "suggests that Congress intended federal criminal and civil laws outside of the Act itself to provide remedies for the misconduct at issue." *Id*. at 1030–31 (citing 8 U.S.C. §§ 1357(b) (addressing punishment for submitting false evidence) and 1357(g)(8) (indicating the Congress contemplated the availability of civil actions for statutory or constitutional violations by federal officers and state officers authorized to act in a federal capacity)).

In 2019, two circuit courts declined to recognize *Bivens* remedies in immigration cases. In *Tun-Cos v. Perrotte*, 922 F.3d 514 (4th Cir. 2019), the Fourth Circuit rejected *Bivens* claims for Fourth and Fifth Amendment violations by ICE officers who arrested individuals, including a U.S. citizen, without warrants. The court held that the claims raised a new context, because it was a search and seizure pursuant to enforcement of the INA, rather than traditional criminal law enforcement. *Id*. at 523–25. The court also found special factors counselling against a *Bivens* remedy, including the fact that immigration often impacts diplomacy, foreign policy, and national security; given Congress' design of the immigration enforcement system, it was unlikely that Congress would want the Judiciary to interfere; and there was an alternative remedial structure. *Id*. at 525–28.

The Fifth Circuit also declined to recognize a *Bivens* remedy in *Maria S. v. Garza*, 912 F.3d 778 (5th Cir. 2019). That case involved a noncitizen who was killed after in Mexico after she was allegedly coerced into signing a voluntary departure form. The court determined that a *Bivens* claim for a Fifth Amendment due process violation raised a new context. The court reasoned that the Supreme Court had not recognized a claim for the death of a noncitizen in another country and found that special factors counseled against a *Bivens* remedy, noting Congress's silence on a damages remedy against individual agents involved in civil immigration enforcement, the INA's other remedial measures, and the risk of a "tidal wave" of litigation. *Id.* at 785.

In 2021, the Ninth Circuit recognized a *Bivens* remedy against a border patrol agent for First and Fourth Amendment violations. In *Boule v. Egbert*, the agent entered the plaintiff's private property and physically injured him. 998 F.3d 370 (9th Cir. 2021). The Court first found that the plaintiff's Fourth Amendment claim of excessive force constituted an extension of *Bivens* because it involved a Border Patrol agent rather that an FBI agent. *Id*. at 387–89. Next, noting that the plaintiff was a U.S. citizen "bringing a conventional Fourth Amendment excessive force claim," the court concluded that it was a "far cry" from either *Abassi* or *Hernandez* and that no special factors counseled hesitation. *Id.* Carrying out the same two-step analysis with respect to plaintiff's First Amendment claim, the court also held that, although this too presented a new context, no special factors precluded the claim. *Id.* at 389–91. Finally, the court held that the FTCA was not an alternative remedy which would preclude the *Bivens* claims. *Id*. at 391–92.

In addition, some district courts have issued decisions addressing *Abbasi*.[30] It is advisable to research these cases in advance of raising a *Bivens* claim.

16. Does the Immigration and Nationality Act bar jurisdiction over a *Bivens* claim?

Defendants often will move to dismiss *Bivens* actions that challenge agent misconduct related to immigration law enforcement, arguing that the district court lacks jurisdiction under 8 U.S.C. § 1252(g). This section purports to bar jurisdiction over any case "arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any [noncitizen]."

As an initial matter, any such argument conflicts with Congress' contemplation of the availability of civil actions for constitutional violations. *See Lanuza*, 899 F.3d at 1031 (citing 8 U.S.C. § 1357(g)(8)).

Moreover, there are strong arguments that § 1252(g) does not bar review of immigration enforcement *Bivens* actions. First, § 1252(g) does not apply "to all claims arising from deportation proceedings." *Reno v. Am.-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471, 482 (1999). Instead, it must be read narrowly as applying only to the three discrete events itemized in the statute. *Id.* (rejecting the "unexamined assumption that § 1252(g) covers the universe of deportation claims"). Moreover, the Court emphasized the discretionary nature of the three itemized events. "Section 1252(g) seems clearly designed to give some measure of protection to 'no deferred action' decisions and similar *discretionary* determinations." *Id.* at 485 (emphasis added); *see also id.* at 485 n.9 ("Section 1252(g) was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion."); *id.* at 487 ("It is entirely understandable, however, why Congress would want only the discretion-protecting provision of § 1252(g) applied even to pending cases: because that provision is specifically directed at the deconstruction, fragmentation, and hence prolongation of removal proceedings.").

In accord with *AADC*, numerous courts have construed § 1252(g) narrowly.[31] Similarly, courts have concluded that the challenged action is too attenuated from the commencement or adjudication of removal proceedings or the execution of a removal order to "arise" from such an event.[32] Still, other courts have distinguished between challenges to an agency's authority to act

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30 *See, e.g.*, *Kidd v. Mayorkas*, No. 2:20-cv-03512-ODW (JPRx), 2021 U.S. Dist. LEXIS 79667, at *31–33 (C.D. Cal. Apr. 26, 2021) (denying motion to dismiss *Bivens* claims based on violations of the Fourth Amendment's protection against unreasonable searches and seizures).

31 *See, e.g.*, *Jama v. INS*, 329 F.3d 630, 632–33 (8th Cir. 2003) (finding that § 1252(g) does not preclude review of the Attorney General's interpretation of the removal statute), *aff'd on other grounds*, 543 U.S. 335 (2005).

32 *See, e.g.*, *Alvarez v. U.S. Immigration and Customs Enforcement*, 818 F.3d 1194, 1205 (11th Cir. 2016) ("Quite simply, a claim that arises from the decision to indefinitely detain an alien—and thus, by definition, never to remove him—cannot arise from the decision to execute removal."); *Artiga Carrero v. Farrelly*, 270 F. Supp. 3d 851, 877-78 (D. Md. 2017) (finding § 1252(g) barred review of arrest of plaintiff with a final removal order but did not bar review of claim related to agent's entry of the final order into national crime database); *Khorrami v.*

and discretionary decisions made pursuant to uncontested authority, concluding that § 1252(g) barred review of only the latter.[33] Thus, some courts have held that, because agents have no authority to violate the law, the unlawful commencement of proceedings or execution of a removal order remains subject to judicial review.[34]

While these cases arise in a variety of procedural postures—habeas petitions, petitions for review, and claims for injunctive and monetary relief—the interpretation of § 1252(g) does not depend upon the nature of the case. *United States v. Hovsepian*, 359 F.3d at 1155 (noting that "the same [statutory construction] principle applies" for the interpretation of § 1252(g) whether a case arises in the context of a habeas petition or a district court action for injunctive relief).

Notwithstanding *AADC*'s instruction to read § 1252(g) narrowly, courts have found that it barred review in a number of cases.[35]

Rolince, 493 F. Supp. 2d 1061, 1068–69 (N.D. Ill. 2007) (finding § 1252(g) barred review of arrest and detention which were "direct outgrowth of decision to commence proceedings but did not bar review of the 12 hour pre-arrest interrogation which preceded decision to commence proceedings).

[33] *See, e.g.*, *Arce v. United States*, 899 F.3d 796, 799–801 (9th Cir. 2018) (finding that § 1252(g) does not bar review over deportation in violation of a stay order, explaining that the claim arises not from the execution of the removal order, but from its violation of the stay order); *Garcia v. Att'y Gen.*, 553 F.3d 724, 726 (3d Cir. 2009) (explaining that § 1252(g) is "not implicated" where the petitioner was "challenging the government's very authority to commence [removal proceedings]"); *United States v. Hovsepian*, 359 F.3d 1144, 1155–56 (9th Cir. 2004) (en banc) (same); *Madu v. Att'y Gen.*, 470 F.3d 1362, 1368 (11th Cir. 2006) (finding court had jurisdiction over a constitutional challenge to detention and impending removal because § 1252(g) "does not proscribe substantive review of the underlying legal bases for [ ] discretionary decisions and actions"); *see also Mustata v. Jennifer*, 179 F.3d 1017, 1022 (6th Cir. 1999) (holding § 1252(g) does not bar review of ineffective assistance of counsel claim and noting that petitioners "are not claiming that the Attorney General should grant them discretionary, deferred-action-type relief"); *Flores-Ledezma v. Gonzales*, 415 F.3d 375, 380 (5th Cir. 2005) (finding that § 1252(g) does not bar jurisdiction over a challenge to the constitutionality of the statutory scheme allowing Attorney General the discretion to choose between regular and expedited removal proceedings).

[34] *See*, *e.g.*, *Avalos-Palma v. United States*, No. 13-5481, 2014 U.S. Dist. LEXIS 96499, *18-26 (D.N.J. July 16, 2014) (holding that § 1252 does not bar review of government's removal of plaintiff in violation of a mandatory stay); *Lanuza v. Love*, No. C-14-1641, 2015 U.S. Dist. LEXIS 137634, *13 (W.D. Wash. Oct, 2, 2015) (holding that § 1252(g) did not bar review where a DHS official allegedly falsified an immigration form that resulted in a removal order because, inter alia, such action was not "discretionary").

[35] *See, e.g.*, *Gupta v, McGahey*, 709 F. 3d 1062, 1065 (11th Cir. 2013) (per curiam) (concluding that the arrest of plaintiff and related actions by ICE agents arose from an action to commence removal proceedings); *Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir. 2007) (finding § 1252(g) applied where plaintiff's detention arose from a decision to commence expedited removal proceedings); *Silva v. United States*, 866 F.3d 938, 940-42 (8th Cir. 2017) (affirming § 1252(g)'s applicability to review of deportation in violation of an automatic stay regulation

17. What types of immunity defenses can a *Bivens* defendant raise?

Either through a motion to dismiss for failure to state a claim or on a motion for summary judgement, defendants may argue that they have immunity from being sued. In general, immunity defenses are intended to protect government actors from unnecessary expenses related to discovery and trial. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (noting in discussion of immunity defenses that even discovery in civil rights suits "can be peculiarly disruptive of effective government"). Judges and prosecutors are entitled to *absolute immunity* from suit except when they act outside their judicial or prosecutorial function.[36]

In most cases involving executive branch officers, however, defendants will argue that they are entitled to qualified immunity. Qualified immunity is a "good faith" immunity that protects government officials from civil liability insofar as their conduct does not violate "clearly established" statutory or constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 818 (1982). Whether a defendant is entitled to qualified immunity requires the court to consider (1) whether the alleged facts show a violation of a statutory or constitutional right, and (2) whether that right was clearly established. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). A court may conduct the second step of the analysis before the first step. *Pearson v. Callahan*, 555 U.S. 223, 242 (2009).

To preserve immunity from suit, a defendant may file an immediate, interlocutory appeal of a denial of qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985). The law surrounding qualified immunity is extensive. Practitioners facing these arguments are advised to research applicable law and to consult secondary resources; they should be sure to do so before filing, as successful litigation of qualified immunity issues may depend on the careful pleading of appropriate facts in a complaint.[37]

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because the claim was "'connected directly and immediately' to a decision to execute a removal order" and thus arose from that decision) (citations omitted); *but see id.* at 942 (Kelly, Cir. J., dissenting) (concluding that § 1252(g) was inapplicable because automatic stay divested the immigration agency of authority to execute the removal order) and *Arce*, 899 F.3d at 800–01 (rejecting majority's analysis in *Silva*).

[36] *See generally*, *Pierson v. Ray*, 386 U.S. 547 (1967) (judicial immunity); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutorial immunity); *Kalina v. Fletcher*, 522 U.S. 118 (1997) (absolute immunity for preparation and filing of charging documents, but not for signing probable cause affidavit); *but see Van de Kamp v. Goldstein*, 555 U.S. 335 (2009) (absolute immunity for supervising prosecutors on claim concerning failure to train line prosecutors to share information about informants).

[37] *See, e.g.*, Michael Avery, David Rudovsky, Karen Blum & Jennifer Laurin, *Police Misconduct: Law and Litigation*, §§ 3:1—3:24 (West, 3d ed. 2017-18).