No. 18-1451

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MYNOR ABDIEL TUN-COS; JOSÉ PAJARITO SAPUT; LUIS VELASQUEZ PERDOMO; EDER AGUILAR ARITAS; EDUARDO MONTANO FERNÁNDEZ; PEDRO VELASQUEZ PERDOMO; JOSÉ CÁRCAMO; NELSON CALLEJAS PEÑA; GERMÁN VELASQUEZ PERDOMO,

Plaintiffs–Appellees,

v.

B. PERROTTE, ICE Agent; T. OSBORNE, ICE Agent; D. HUN YIM, ICE Agent; P. MANNEH, ICE Agent; A. NICHOLS, ICE Agent,

Defendants–Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, CATO INSTITUTE, AND THE RUTHERFORD INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR REHEARING EN BANC

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(name of party/amicus)

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who is amici, makes the following disclosure:
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1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

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If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

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I certify that on July 1, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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STATEMENTS OF INTEREST OF AMICI CURIAE[1]

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The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to the principles of liberty and equality embodied in the U.S. Constitution. The ACLU of Virginia is a state affiliate of the ACLU. Government accountability and the protection of individual liberty against unwarranted government intrusion are issues of special concern to the ACLU and its affiliates, which have been at the forefront of state and federal cases addressing individual rights and liberties since the ACLU was founded in 1920.

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The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement. Toward these ends, Cato publishes books and studies, conducts conferences, issues the annual Cato Supreme Court Review, and files amicus curiae briefs with courts across the nation.

The Rutherford Institute

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties and filed numerous amicus curiae briefs in the federal Courts of Appeals and Supreme Court. The Institute works to protect

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and no person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

citizens against the abuse of authority by the government and its agents and to ensure that the courts are open to citizens to obtain redress for such abuse.

INTRODUCTION

In *Tun-Cos v. Perrotte*, 922 F.3d 514 (4th Cir. 2019), a panel of this Court refused to recognize a *Bivens* remedy in an action against Immigration and Customs Enforcement ("ICE") agents for unreasonable searches and seizures. While the panel misapplied the Supreme Court's guidance in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), to both prongs of the *Bivens* inquiry—whether the case involves a "new context" and, if so, whether "special factors" foreclose a remedy—amici curiae submit this brief to explain why the conclusion that this case presents a "new context" is in error. That conclusion rests on the flawed premise that ICE agents, unlike other federal law enforcement officers, operate under a "distinct" statutory mandate—the Immigration and Nationality Act ("INA"). This distinction does not withstand scrutiny. Numerous other federal law enforcement agencies operate pursuant to "distinct" statutory mandates. Moreover, the INA is not a "substantively distinct" mandate; the concerns it invokes are shared by other agencies and, like many other federal regimes, it authorizes a blend of criminal and civil enforcement. Accordingly, courts have consistently recognized a *Bivens* remedy in search and seizure cases involving federal law enforcement officers across a diverse array of agencies, demonstrating that such cases fall within the core *Bivens* context.

The panel's decision will have far-reaching consequences. It threatens to

insulate every ICE agent from a *Bivens* action for unreasonable searches and seizures, no matter how egregious, and it could place other federal law enforcement officers acting pursuant to the INA, such as Customs and Border Protection ("CBP") officers, beyond accountability for similar constitutional violations. In addition, because other federal law enforcement agencies operate pursuant to "distinct" statutory mandates, the decision could extend to those agencies, thereby upending the "settled law of *Bivens*" in the "search-and-seizure context." *Abbasi*, 137 S. Ct. at 1856-57.

ARGUMENT

I. THE PANEL ERRED IN CONCLUDING THAT THIS CASE PRESENTS A NEW *BIVENS* CONTEXT.

Where a *Bivens* case does not present a new context, a damages remedy is available. *See Abbasi*, 137 S. Ct. at 1857. In *Abbasi*, the Supreme Court concluded that a challenge "to a high-level executive policy created in the wake of a major terrorist attack on American soil" constituted a new *Bivens* context. *Id*. at 1860. But the Court was emphatic that

> this opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose. *Bivens* does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward. The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.

Id. at 1856-57. *Abbasi* therefore reinforced the availability of *Bivens* relief where federal law enforcement officers conduct unconstitutional searches and seizures, the precise factual scenario giving rise to this case and to *Bivens* itself.

A. ICE's Statutory Mandate Does Not Meaningfully Distinguish This Case From *Bivens*.

Abbasi articulated numerous examples of how a case might present a new context, but none apply here. The "rank of the officers involved" is not a factor; this case involves line law enforcement officers, like the *Bivens* defendants. *Abbasi*, 137 S. Ct. at 1860. The "constitutional right at issue" is likewise the same as in *Bivens* – the Fourth Amendment's prohibition against unreasonable searches and seizures. *Id*. Similarly, the "generality or specificity of the official action" is not a factor; like *Bivens*, the official action involves unconstitutional searches and seizures as part of an ordinary law enforcement operation. *Id*. Nor does the "extent of judicial guidance as to how an officer should respond" set this case apart; the relevant Fourth Amendment search-and-seizure doctrine is well-settled. *Id*. There is no "risk of disruptive intrusion by the Judiciary into the functioning of other branches;" holding ICE agents accountable for their individual actions is no more intrusive than holding the agents accountable in *Bivens*. *Id*.

The panel's determination that this case presents a new context rests on a single factor that *Abbasi* identified as potentially distinguishing a case from *Bivens*: namely, that ICE agents operate under a "distinct" statutory mandate, *i.e.* the INA.

See Abbasi, 137 S. Ct. at 1860 ("A case *might* differ in a meaningful way because of . . . the statutory or other legal mandate under which the officer was operating." (emphasis added)).[2] But that ICE agents operate pursuant to the INA cannot meaningfully distinguish them from federal law enforcement officers from other agencies, *each and every one of which* operate under "distinct" statutory mandates. *See, e.g.*, Brian A. Reaves, U.S. Dep't of Justice, Bureau of Justice Stats., NCJ 238250, *Federal Law Enforcement Officers, 2008* app. tbl. 4 (June 2012) (describing disparate "primary duties" of officers from 40 agencies, including ICE); U.S. Gen. Acct. Off., GAO/GGD-97-93, *Federal Law Enforcement: Investigative Authority and Personnel at 32 Organizations* app. III (July 1997) (outlining disparate "primary legal authorities" cited by 32 law enforcement entities); U.S. Gen. Acct. Off., GAO/GGD-96-154, *Federal Law Enforcement: Investigative Authority and Personnel at 13 Agencies* app. II (Sept. 1996) (same, for 13 largest federal law enforcement agencies, including the then-Immigration and Nationality Service ("INS")). The panel's theory of distinction in fact identifies a common attribute, rather than a differentiating factor, among federal

[2] *Abbasi* provides that a case may also present a new context due to "special factors that previous *Bivens* cases did not consider." 137 S. Ct. at 1860. As part of the new context inquiry, the panel alluded to a single "special factor" — the immigration context. But as the panel's treatment indicates, that "factor" just reiterates the same point on which it principally relies, namely a purportedly "distinct" statutory mandate. *See* 922 F.3d at 524 ("[E]nforcement of the immigration laws implicates broad policy concerns distinct from the enforcement of criminal law.").

law enforcement agencies.

Indeed, the *Bivens* defendants were agents from the Federal Bureau of Narcotics ("FBN"), the predecessor to the Drug and Enforcement Agency ("DEA"), which similarly operated under a "distinct" statutory mandate. The FBN was established in 1930 to enforce federal narcotics laws, specifically the Harrison Narcotics Act and the Narcotic Drugs Import and Export Act. *See* DEA, *History: The Early Years* 16, https://www.dea.gov/sites/default/files/2018-05/Early%20Years%20p%2012-29.pdf; Lisa N. Sacco, Cong. Research Serv., R43749, *Drug Enforcement in the United States: History, Policy, and Trends* 3 (Oct. 2, 2014). The FBN later became responsible for enforcing additional drug control legislation passed by Congress. *See* Sacco, *supra*, at 3-4. The DEA was established in 1973 to consolidate under a single agency the enforcement of the Controlled Substances Act, comprehensive drug control legislation replacing prior legislation in this area. *Id*. at 5-6.

The panel nonetheless asserted that the INA's statutory mandate is "substantively distinct" because "[i]mmigration enforcement 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." *Tun-Cos*, 922 F.3d at 524. But the panel did not explain what these "considerations and concerns" might be. To the extent that the panel hangs its "substantively

distinct" point on the fact that immigration enforcement invokes unique concerns about foreign policy or national security because it is "addressed toward noncitizens," that distinction is untenable. *See id.* at 526 (stating in special factors analysis that immigration "enforcement has the natural tendency to affect diplomacy, foreign policy, and the security of the nation" because it is directed at "foreign nationals" (internal quotation marks omitted)). The FBN/DEA example in *Bivens* is again instructive. From the outset, the FBN viewed its "main enforcement problem" as residing "outside the U.S.," and prioritized "the apprehension of major international and interstate traffickers." *History: The Early Years*, *supra*, at 16-17. The DEA continues to devote significant attention and resources to addressing international drug trafficking. *See* DEA, *DEA Mission Statement*, https://www.dea.gov/mission. Thus, the FBN/DEA's enforcement orientation touches no less upon the same generalized concerns invoked by immigration enforcement, and yet *Bivens* relief remains available for the DEA.

Similarly, the panel's conclusion that the INA's "approach to enforcement . . . is distinct" because it "favor[s] arrest and detention *for the purpose of removal* from the United States, while the criminal law imposes incarceration *for the distinct purposes stated in 18 U.S.C. § 3553(a)*" is unsustainable. 922 F.3d at 524. To begin, 18 U.S.C. § 3553(a) does not state any "distinct purposes"; rather, it lists the factors a court must consider when imposing sentence. In any event, the INA

itself provides for criminal penalties under 18 U.S.C. § 3553. *See* 8 U.S.C. §§ 1325-28. And among the "powers" the INA grants to "immigration officers and employees" is the authority to make arrests for other criminal offenses. *Id.* § 1357. In fact, ICE publicly represents itself as undertaking criminal, as opposed to immigration, law enforcement activities.[3] Its Homeland Security Investigations component touts itself as "hav[ing] broad legal authority to enforce a diverse array of federal statutes" and being responsible for investigating many types of crimes, including "[f]inancial crimes, money laundering and bulk cash smuggling," "[c]ybercrimes," and "[n]arcotics and weapons smuggling/trafficking." ICE, Homeland Sec. Investigations, *Overview*, https://www.ice.gov/hsi (last updated May 31, 2019). Thus, the panel offers no basis to distinguish the INA from other statutory mandates.

B. Courts Have Consistently Recognized That Search and Seizure Cases Against Federal Law Enforcement Officers Operating Under "Distinct" Statutory Mandates Fall Within the Heartland of *Bivens*.

A number of appellate courts have explicitly held that a *Bivens* remedy is

[3] To the extent that the panel sought to emphasize that ICE is a civil, rather than criminal, enforcement statute, it is worth noting that many federal law enforcement agencies also have civil enforcement authority. *See, e.g.*, Money Laundering & Asset Recovery Sec., U.S. Dep't of Justice, *Asset Forfeiture Policy Manual* (2019), https://www.justice.gov/criminal-afmls/file/839521/download (describing civil forfeiture authority for various law enforcement agencies within the Justice Department and Treasury Department); U.S. Marshals Serv., *Service of Process*, https://www.usmarshals.gov/process/body-attachment.htm (describing U.S. Marshals' authority to make civil contempt arrests).

available in search and seizure actions against federal law enforcement officers from an array of agencies and accepted such actions as falling within the core *Bivens* context. *See, e.g.*, *Jacobs v. Alam*, 915 F.3d 1029, 1038-39 (6th Cir. 2019) (Fourth Amendment claims against U.S. Marshals "are run-of-the-mill challenges to 'standard law enforcement operations' that fall well within *Bivens* itself" and "garden-variety *Bivens* claims . . . viable post-*Ziglar*"); *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 864 (10th Cir. 2016) (*Bivens* action against U.S. Department of Agriculture inspectors for unreasonable searches and seizures asserts "a garden-variety constitutional violation (hardly a new context)"); *see also Nat'l Commodity & Barter Ass'n v. Archer*, 886 F.2d 1240 (10th Cir. 1989) (*Bivens* remedy available in challenge to searches and seizures by IRS agents). The Supreme Court has also repeatedly allowed such cases against federal law enforcement agents from a range of agencies to proceed without questioning *Bivens*' availability. *See Groh v. Ramirez*, 540 U.S. 551 (2004) (finding search unreasonable in *Bivens* action against ATF agents); *Hanlon v. Berger*, 526 U.S. 808 (1999) (plaintiffs stated *Bivens* claim against U.S. Fish and Wildlife Service agents for unreasonable search); *Wilson v. Layne*, 526 U.S. 603 (1999) (same, against U.S. Marshals). In each of the above cases, the defendant officers came from agencies operating under "distinct" statutory mandates.

Appellate courts have also permitted cases alleging unconstitutional searches

and seizures against ICE agents to proceed, without doubting that a *Bivens* remedy is available. *See, e.g.*, *Morales v. Chadbourne*, 793 F.3d 208 (1st Cir. 2015) (affirming denial of qualified immunity on *Bivens* claim against ICE agent for unreasonable seizure); *Garcia v. United States*, 550 Fed. App'x 506 (9th Cir. 2013) (same); *Lawal v. McDonald*, 546 Fed. App'x 107 (3d Cir. 2014) (granting plaintiffs leave to amend complaint on *Bivens* claim against ICE agents for unreasonable seizure). Similarly, appellate courts have permitted such cases to proceed against Border Patrol agents, who also operate pursuant to the INA. *See, e.g.*, *Chavez v. United States*, 683 F.3d 1102 (9th Cir. 2012) (affirming denial of qualified immunity on *Bivens* claim against Border Patrol agent for unreasonable stops and searches); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006) (same, for unreasonable seizure and excessive force); *Ysasi v. Rivkind*, 856 F.2d 1520 (Fed. Cir. 1988) (reversing dismissal of *Bivens* claim against Border Patrol agent for unreasonable seizure). And district courts across numerous circuits have held that a *Bivens* remedy is available against ICE agents for unconstitutional searches and seizures, accepting such claims as core to *Bivens*. *See, e.g.*, *Mendia v. Garcia*, 165 F. Supp. 3d 861 (N.D. Cal. 2016) (rejecting arguments against availability of *Bivens* remedy); *Escobar v. Gaines*, No. 3-11-0994, 2014 WL 4384389 (M.D. Tenn. Sept. 4, 2014) (recognizing *Bivens* remedy in action against ICE agents for unreasonable search and seizure); *Mendoza v. Osterberg*, No.

8:13CV65, 2014 WL 3784141 (D. Neb. July 31, 2014) (finding *Bivens* claim against ICE agents for unreasonable seizure does not constitute new context); *Lyttle v. United States*, 867 F. Supp. 2d 1256 (M.D. Ga. 2012) (rejecting arguments against availability of *Bivens* remedy); *Diaz-Bernal v. Myers*, 758 F. Supp. 2d 106 (D. Conn. 2010) (same); *Khorrami v. Rolincei*, 493 F. Supp. 2d 1061 (N.D. Ill. 2007) (same).

These cases underscore that defendants fall squarely within the same context presented by *Bivens*. *Abbasi* does not disturb this conclusion. Rather, *Abbasi* bolsters it by expressly reaffirming *Bivens*' "continued force . . . in the search-and-seizure context in which it arose" and that it remains "settled law . . . in this common and recurrent sphere of law enforcement." 137 S. Ct. at 1856-57.

II. EN BANC REVIEW IS NECESSARY BECAUSE OF THE FAR-REACHING CONSEQUENCES OF THE PANEL'S DECISION.

The panel's errors threaten to deprive many individuals—non-citizens and citizens alike—of a damages remedy for unconstitutional searches and seizures by federal law enforcement officers. The decision could place every ICE agent beyond *Bivens*' reach. *See* Brief of Amicus Curiae Nat'l Police Accountability Project in Support of Appellees, *Tun-Cos v. Perrotte*, No. 18-1451, at *6-7 (discussing breadth of ICE enforcement activities). The panel's reasoning—that the INA constitutes a "distinct" statutory mandate—threatens also to effectively insulate from a *Bivens* action other federal law enforcement officers, such as CBP

agents, acting pursuant to the INA. While the people most vulnerable to ICE misconduct are immigrants, citizens are invariably caught up as well. *See id*. at *3-5 (discussing ICE's wrongful detention of U.S. citizens). Similarly, because CBP has broad authority to stop and search at the border, the potential for its officers' misconduct and abuse to impact citizens is also great. *See* 8 U.S.C. § 1357(c).

The panel's decision, moreover, has potentially profound implications for *Bivens*' availability to remedy search and seizure violations by federal law enforcement officers generally. The panel's conclusion that a "distinct" statutory mandate is sufficient to constitute a new context could be extended to cases involving officers from many different agencies, sowing confusion and chaos in *Bivens*' most clearly and well-established realm. The result would be to upend the "settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law." *Abbasi*, 137 S. Ct. at 1857.

CONCLUSION

Amici respectfully urge this Court to grant the petition for rehearing en banc.

Dated: July 1, 2019

Respectfully submitted,

s/ Jonathan Hafetz

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This brief complies with type-volume limits of Federal Rules of Appellate Procedure 32(a)(7) and 29(b)(4) because it contains 2,559 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 10 in 14-point font Times New Roman.

Dated: July 1, 2019 s/ Jonathan Hafetz

Jonathan Hafetz

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2019, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit using the CM/ECF system. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system.

Dated: July 1, 2019

s/ Jonathan Hafetz

Jonathan Hafetz