No. 15-1461

In the Supreme Court of the United States

AMIR MESHAL, PETITIONER

v.

CHRIS HIGGENBOTHAM, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Petitioner seeks damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), from four United States officials in their personal capacity for unconstitutional actions allegedly taken in connection with petitioner's detention during counterterrorism operations in war-torn East Africa. The question presented is as follows:

Whether special factors counsel hesitation before recognizing a common-law damages action under *Bivens* by an individual challenging the extraterritorial conduct of federal officials in a national-security and criminal investigation arising from the individual's detention by foreign governments.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-67a) is reported at 804 F.3d 417. The opinion of the district court (Pet. App. 68a-100a) is reported at 47 F. Supp. 3d 115.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2015. A petition for rehearing was denied on February 2, 2016 (Pet. App. 1a-2a). On April 18, 2016, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 1, 2016, and the petition was filed on May 31, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Because this case arises from a motion to dismiss, the Court will assume as true the plausible fac-

tual allegations in petitioner's operative pleading, the Second Amended Complaint. See *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 734 (2011); C.A. App. 15-77 (reprinting the complaint). Petitioner alleges that, since 2002, the United States has engaged in counterterrorism operations in the Horn of Africa region, in part based on the government's belief that Somalia, a war-torn country on the East Coast of Africa, was a potential haven for al Qaeda members fleeing Afghanistan. C.A. App. 24. In October 2002, the United States established the Combined Joint Task Force-Horn of Africa, which operates in that region and consists of uniformed members of each branch of the Armed Forces, civilian employees, and representatives from coalition countries. *Ibid.*

In November 2006, petitioner, a U.S. citizen from New Jersey, traveled to Somalia to study Islam in a country governed by Islamic law. C.A. App. 15, 23, 26. The next month, heavy fighting broke out between the Supreme Council of Islamic Courts (an Islamist entity that had seized control of much of Somalia) and the Ethiopian-backed Transitional Federal Government of Somalia. *Id.* at 22, 26.

In early January 2007, petitioner attempted to flee the fighting by heading toward Kenya. C.A. App. 27. After petitioner wandered for three weeks in a forest near the Somalia–Kenya border, Kenyan forces apprehended him and four other men, allegedly as part of a joint U.S.–Kenyan military operation designed to capture suspected al Qaeda members fleeing from Somalia to Kenya. *Id.* at 15, 26-30. The Kenyans took petitioner to a local jail and then transferred him to another Kenyan jail in Nairobi, where he was questioned by Kenyan authorities. *Id.* at 29-31.

The Federal Bureau of Investigation (FBI) participates in the Combined Joint Task Force's counterterrorism efforts in Africa. C.A. App. 24-25. Petitioner alleges that respondents Higgenbotham and Hersem were members of an FBI counterterrorism unit sent to Kenya in January 2007. *Id.* at 28, 33-34.

During petitioner's detention in Nairobi, on at least four occasions between February 3 and 10, 2007, petitioner was questioned by Hersem, Higgenbotham, and respondent John Doe 1 (another FBI agent). C.A. App. 34, 36. Those interviews were conducted under guidelines issued by the Attorney General for the FBI's overseas national-security investigations and pursuant to authorization from the Attorney General and the Director of Central Intelligence. *Id.* at 25, 31-32. The questioning explored petitioner's suspected involvement in terrorist activities, including weapons training in an al Qaeda training camp. *Id.* at 40.

At the beginning of each interview session, the FBI agents presented petitioner with a document notifying him that he had the right not to answer questions without a lawyer present, and each time petitioner waived his rights. C.A. App. 37, 40. While in Kenyan custody, petitioner was visited several times by members of a Kenyan human-rights organization, who filed a habeas corpus petition on petitioner's behalf in the Kenyan courts under Kenyan law. *Id.* at 43-45. Petitioner was also visited by a consular-affairs officer from the U.S. Embassy in Nairobi, who indicated that he was trying to coordinate petitioner's return to the United States and to contact petitioner's family. *Id.* at 46-48.

During the interrogations, Hersem allegedly threatened to send petitioner to Israel and Egypt, where he

would be made to "disappear" or would otherwise be mistreated. C.A. App. 41, 42. Hersem also allegedly offered to return petitioner to the United States if petitioner admitted that he was involved in terrorist activities. *Id.* at 41. Hersem allegedly asked petitioner about someone petitioner knew, who had been seized and detained by Kenyan authorities under similar circumstances and later pleaded guilty to involvement in terrorist activities. *Id.* at 35-36; see *United States* v. *Maldonado*, No. 07-mj-125 (S.D. Tex. Feb. 13, 2007). Petitioner alleges two instances of physical contact: at one point, Higgenbotham "grabbed [petitioner] and forced him to the window of the hotel room," C.A. App. 41; at another, Hersem removed his own sunglasses after approaching petitioner and "proceeded to yell at [petitioner] merely inches from his face while vigorously poking him in the chest," *ibid.*[1]

On February 9, 2007, Kenyan officials transported petitioner from Nairobi to a location that petitioner believed to be in Somalia. C.A. App. 48-49. There, petitioner was kept handcuffed in a dark underground cell for two days. *Id.* at 49. During this period, the U.S. consular official in Kenya told petitioner's father that he did not know where petitioner was and that he could not help him. *Ibid.* On February 12, Somali military personnel ordered petitioner (and others) out of the cell and handed them over to Ethiopian soldiers, who took them to Ethiopia on February 16. *Id.* at 50.

When he arrived in Ethiopia, petitioner was held in an Ethiopian prison facility and questioned by Ethio-

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[1] Petitioner alleges that John Doe 1 violated his rights by "actively and substantially participat[ing]" in the interviews, C.A. App. 69, but he does not allege that John Doe 1 made any specific threats to him.

pian officials. C.A. App. 55. After petitioner had been in the prison for about a week, respondents John Doe 1 and John Doe 2 (another FBI agent and member of the Combined Joint Task Force) began to interview him about his suspected involvement in terrorist activity, including weapons training, training in counter-interrogation techniques, and service to al Qaeda as a translator. *Id.* at 57-60. Those interviews were conducted regularly over the course of three months under guidelines issued by the Attorney General for the FBI's overseas national-security investigations and pursuant to authorization from the Attorney General and the Director of Central Intelligence. *Id.* at 57-58.

As he had done in Kenya, before each interview, petitioner signed a document waiving any right to refuse to answer questions without counsel. C.A. App. 60. John Doe 1 told petitioner that whether he could go home depended on whether petitioner told the truth about his involvement in terrorist activities. *Id.* at 60-61. Between March and May 2007, petitioner appeared three times before an Ethiopian military tribunal, which conducted proceedings to determine whether petitioner would be classified as innocent, an enemy combatant, or an unlawful enemy combatant. *Id.* at 62, 63-64. During March and April, petitioner was also taken on three occasions to meet with a U.S. consular officer, each time in the presence of at least one Ethiopian official. *Id.* at 63.

In late May 2007, an Ethiopian guard informed petitioner that he would be released. C.A. App. 65. He was taken to the U.S. Embassy in Addis Ababa and then flown to the United States. *Ibid.*

2. In November 2009, petitioner brought this damages action under *Bivens* v. *Six Unknown Named*

Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (28 U.S.C. 1350 note), against respondents—four FBI agents—for allegedly violating petitioner's clearly established U.S. constitutional rights while he was detained abroad. C.A. App. 67-68.

Petitioner alleges that respondents Hersem and Higgenbotham violated his Fifth Amendment right to substantive due process by threatening him during interviews, and that respondent John Doe 1 violated the same right by "actively and substantially" participating in those interviews. C.A. App. 68-69. Petitioner further claims that all four respondents violated his Fifth Amendment right to procedural due process and his Fourth Amendment right not to be detained for a prolonged period without judicial process, by directing, authorizing, or participating in his detentions by and transfers among Kenyan, Somali, and Ethiopian officials. *Id.* at 69-73.

The district court dismissed petitioner's suit. Pet. App. 68a-100a. Although the court concluded that petitioner had stated plausible claims of Fourth and Fifth Amendment violations, *id.* at 77a-81a, it held that the judicially inferred *Bivens* remedy is not available in the sensitive context of this case, which implicates national security, intelligence, and foreign affairs, *id.* at 88a-99a.[2]

3. The court of appeals affirmed. Pet. App. 3a-67a.

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[2] The district court also dismissed petitioner's TVPA claim because respondents are not among the individuals subject to the cause of action that the statute establishes. Pet. App. 82a n.5. That claim is not at issue in this Court.

a. The court of appeals recognized that several federal circuits had previously "refrained from recognizing *Bivens* causes of action in the national security context." Pet. App. 12a. Although the court declined to construe petitioner's allegations as involving "only a national security investigation," *id.* at 14a, it recognized that "a criminal investigation into potential terrorism implicates some of the same special factor concerns as national security policy," *id.* at 15a.

The court of appeals concluded that "[t]he context of this case is a potential damages remedy for alleged actions occurring in a terrorism investigation conducted overseas by federal law enforcement officers." Pet. App. 17a. The court found that to be a "novel" context for a *Bivens* claim, explaining that "no court has previously extended *Bivens* to cases involving either the extraterritorial application of constitutional protections or in the national security domain, let alone [to] a case implicating both" of those considerations. *Id.* at 17a-18a (footnotes omitted). The court considered "the extraterritorial aspect of the case" to be "critical" because a general tort cause of action—"a statutory *Bivens*, so to speak"—would not be applied to "torts committed by federal officers abroad absent sufficient indication that Congress meant the statute to apply extraterritorially." *Id.* at 18a.

The court of appeals held that two special factors taken together—the national-security aspects of a terrorism investigation and the extraterritorial nature of the alleged constitutional violations—preclude a *Bivens* remedy under the circumstances of this case. Pet. App. 20a; see *id.* at 5a. The court recognized "that tort remedies in cases involving matters of national security and foreign policy are generally left to

the political branches." *Id.* at 22a. It further noted that "practical factors" counsel hesitation in extending the *Bivens* remedy here because petitioner's suit raises questions about "the extent to which [respondents] orchestrated his detention in foreign countries," even though "[t]he Judiciary is generally not suited to 'second-guess' executive officials operating in 'foreign justice systems.'" *Ibid.* (quoting *Munaf* v. *Geren*, 553 U.S. 674, 702 (2008)).[3]

b. Judge Kavanaugh joined the court of appeals' opinion and filed a concurring opinion. Pet. App. 28a-33a. He emphasized that this case involves "U.S. officials" who "were attempting to seize and interrogate suspected al Qaeda terrorists in a foreign country during wartime." *Id.* at 32a. He explained that "Congress has enacted a number of related tort causes of action" for alleged mistreatment that occurs abroad, but that none of those statutes is applicable here. *Id.* at 29a-30a. In his view, the presence of those statutes, especially when conjoined with the presumption against extraterritorial application of federal damages actions, indicates that "Congress has deliberately decided not to fashion a cause of action for tort cases like [petitioner's]." *Id.* at 31a. In finding that this case presents "a

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[3] The court of appeals held that petitioner had forfeited his Fifth Amendment claims "related to his prolonged extrajudicial detention and his forcible rendition to two dangerous situations" by raising those claims only in a footnote in his opening brief. Pet. App. 8a n.3 (citation and internal quotation marks omitted). Petitioner does not challenge that conclusion. And because it held that petitioner is not entitled to a *Bivens* remedy, the court of appeals did not discuss respondents' alternative contention that they are entitled to qualified immunity because the complaint does not allege their personal participation in the violation of any clearly established constitutional right. See Gov't C.A. Br. 47-65.

new context" for a *Bivens* claim, he deemed it "[m]ost important[]" that "the alleged conduct in this case occurred *abroad*." *Ibid.* He further concluded that "[t]he confluence of * * * extraterritoriality and national security" makes this "an especially inappropriate case for a court to supplant Congress and the President" by "approving new tort causes of action." *Id.* at 32a.

c. Judge Pillard dissented. Pet. App. 34a-67a. She was "unpersuaded" that the adjudication of petitioner's claims "would necessarily pose unacceptable risks to the national security and foreign policy of the United States." *Id.* at 35a.

ARGUMENT

Petitioner contends (Pet. 17-34) that the judicially inferred damages remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should be available in this suit alleging violations of his Fourth and Fifth Amendment rights by FBI officials, even though his claims arise from the extraterritorial conduct of U.S. officials (in concert with officials of three foreign governments) in the context of a national-security investigation into his potential terrorist activities in East Africa. The court of appeals correctly held that the confluence in this case of considerations of extraterritoriality, national security, and foreign policy presents a novel context to which the *Bivens* remedy should not be extended. The decision below does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The court of appeals correctly held that Congress, and not the Judiciary, is in the best position to decide whether to establish damages remedies in tort

cases arising from federal officials' extraterritorial conduct directly implicating national security and foreign policy. Pet. App. 17a-23a.

a. In its 1971 decision in *Bivens*, this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009) (citation omitted). The Court held that federal officials acting under color of federal law could be sued for money damages for violating the plaintiff's Fourth Amendment rights by conducting a warrantless search of his New York City apartment. *Bivens*, 403 U.S. at 389, 397. In creating that common-law action, the Court noted that there were "no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396-397.

The Court in *Bivens* "rel[ied] largely on earlier decisions implying private damages actions into federal statutes"—decisions from which the Court has since "retreated" and that reflect an approach to recognizing private rights of action that the Court has since "abandoned." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 & n.3 (2001) (citation omitted). This Court's "more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988). "The Court has therefore on multiple occasions declined to extend *Bivens* because Congress is in a better position to decide whether or not the public interest would be served by the creation of new substantive legal liability." *Holly* v. *Scott*, 434 F.3d 287, 290 (4th Cir.) (citation and internal quotation marks omitted), cert. denied, 547 U.S. 1168 (2006); see *Iqbal*,

556 U.S. at 675 (noting that *Bivens* liability has not been extended to new contexts "[b]ecause implied causes of action are disfavored"). In the 45 years since *Bivens* was decided, the Court "has extended it twice only: in the context of an employment discrimination claim in violation of the Due Process Clause, and in the context of an Eighth Amendment violation by prison officials." *Arar* v. *Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc) (citation omitted), cert. denied, 560 U.S. 978 (2010). Since 1980, the Court "ha[s] consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68; see *Minneci* v. *Pollard*, 132 S. Ct. 617, 622-623 (2012) (listing cases).

A two-step analysis governs the decision whether to extend *Bivens* to a new context. First, a court should consider "whether any alternative, existing process for protecting the [plaintiff's] interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007). Second, "even in the absence of [such] an alternative" remedial mechanism, the court must make an assessment "appropriate for a common-law tribunal" about whether judicially created relief is warranted, "paying particular heed * * * to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Ibid.* (quoting *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983)). That inquiry involves a "case-by-case," rather than categorical, "approach in determining whether to recognize a *Bivens* cause of action." Pet. App. 13a.

b. The court of appeals correctly applied that framework in declining to extend the judicially inferred damages remedy to "alleged actions occurring in a

terrorism investigation conducted overseas by federal law enforcement officers." Pet. App. 17a. Courts are "reluctant to intrude upon the authority of the Executive in military and national security affairs," "unless Congress specifically has provided otherwise." *Department of Navy* v. *Egan*, 484 U.S. 518, 530 (1988). Such reluctance is appropriate because "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981). Thus, even in the habeas context (where the judiciary need not infer the existence of a remedy), courts should not "second-guess" determinations about "sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally," because those are determinations that "the political branches are well situated to consider." *Munaf* v. *Geren*, 553 U.S. 674, 702 (2008).

Petitioner's claims squarely implicate national-security and foreign-policy sensitivities. Petitioner seeks to hold liable in damages U.S. officials who were conducting a terrorism investigation in cooperation with foreign governments. "One of the questions raised by [petitioner's] suit is the extent to which [respondents] orchestrated his detention in foreign countries." Pet. App. 22a. Litigating about such questions could have serious "diplomatic consequences" and could "affect the enthusiasm of foreign states to cooperate in joint actions or the government's ability to keep foreign policy commitments or protect intelligence." *Id.* at 22a-23a.

This case, moreover, involves "U.S. officials" who "were attempting to seize and interrogate suspected al Qaeda terrorists in a foreign country." Pet. App. 32a

(Kavanaugh, J., concurring). As the district court correctly found, *id.* at 95a, petitioner's suit, which turns in part on whether the conduct of U.S. officials was unreasonable, would require inquiry into other sensitive issues, including national-security threats in the unstable Horn of Africa region (and petitioner's own potential contribution to those threats); the substance and sources of intelligence information; the government's policies for conducting counterterrorism investigations, see C.A. App. 24-25, 32, 57; the consistency of petitioner's detention and treatment with Kenyan, Somali, and Ethiopian law and policy and the supposed cooperation of foreign governments and their officials with U.S. investigative efforts, see *id.* at 25, 45; and evidence concerning the conditions of detention in Ethiopia, Somalia, and Kenya. Answering such questions could require discovery of national-security information from foreign counterterrorism officials and from U.S. officials up and down the chain of command. See, *e.g.*, *id.* at 57 (petitioner's allegation that his treatment was conducted with full awareness of other U.S. officials "including officials designated by the Attorney General and the Director of Central Intelligence"). The sensitivities associated with litigating this case are not, as petitioner suggests (Pet. 17), merely "conjectural."

c. The fact that petitioner's claims arise from respondents' *extraterritorial* conduct provides a particularly compelling reason to reject extension of the *Bivens* remedy. This Court "has never created or even favorably mentioned a non-statutory right of action for damages on account of conduct that occurred outside the borders of the United States." *Vance* v. *Rumsfeld*, 701 F.3d 193, 198-199 (7th Cir. 2012) (en banc), cert.

denied, 133 S. Ct. 2796 (2013). The decision below correctly recognized that the extraterritorial nature of the conduct petitioner challenges is "critical." Pet. App. 18a.

This Court presumes that judge-elaborated causes of action do not apply to conduct occurring abroad even where a statute has already authorized the courts to recognize new causes of action. See *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664-1665 (2013). The Court has applied that presumption when, as here, the question is whether Congress has implicitly delegated the authority to recognize a cause of action. See *ibid.* "If Congress had enacted a general tort cause of action applicable to Fourth Amendment violations committed by federal officers (a statutory *Bivens*, so to speak), that cause of action would not apply to torts committed" outside the United States unless Congress had sufficiently indicated its intention to overcome the presumption against extraterritorial application. Pet. App. 18a. "There is no persuasive reason to adopt a laxer extraterritoriality rule in *Bivens* cases." *Id.* at 31a (Kavanaugh, J., concurring). In fact, it would be "grossly anomalous * * * to apply *Bivens* extraterritorially when [the Court] would not apply an identical statutory cause of action for constitutional torts extraterritorially." *Ibid.*

Petitioner contends that the extraterritorial locus of the constitutional violations he alleges "has no relevance" to the decision whether to extend the *Bivens* remedy because he seeks "to enforce constitutional provisions that all agree apply abroad." Pet. 30 (quoting Pet. App. 54a (Pillard, J., dissenting)). Just last Term, this Court rejected a comparable argument concerning the reach of federal statutory remedies,

explaining that "[i]t is not enough to say that a private right of action must reach abroad because the underlying law governs conduct in foreign countries." *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090, 2108 (2016). And while petitioner asserts that Fourth and Fifth Amendment suits against FBI agents "fall within *Bivens'* heartland whether the misconduct occurs in Kansas or Kenya," Pet. 19-20, he cannot dispute that "no court has previously extended *Bivens* to cases involving either the extraterritorial application of constitutional protections or in the national security domain, let alone [to] a case implicating both," Pet. App. 17a-18a (footnotes omitted).

2. Petitioner's various counterarguments do not overcome this Court's repeated caution about extending the judicially inferred *Bivens* remedy into such a new context. See pp. 10-11, *supra*.

a. Petitioner suggests (Pet. 25) that national-security and foreign-policy concerns should be treated as special factors counseling against an extension of *Bivens* only when they arise in "suits against the military for wartime activity and suits by foreign nationals." But the constitutional authority and expertise to address such matters rest with the political branches even when the U.S. military is not directly involved and the plaintiff is a U.S. citizen. See Pet. App. 20a-22a; see also *Vance*, 701 F.3d at 200; *Lebron* v. *Rumsfeld*, 670 F.3d 540, 554 (4th Cir.), cert. denied, 132 S. Ct. 2751 (2012). "Just as the special needs of the military require[] courts to leave the creation of damages remedies against military officers to Congress," so too "the special needs of foreign affairs combined with national security 'must stay [the Judiciary's] hand in the creation of damage remedies.'" Pet. App. 23a

(quoting *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 208-209 (D.C. Cir. 1985) (Scalia, J.)).

b. For similar reasons, petitioner is wrong to suggest (Pet. 27-28) that his U.S. citizenship obviates the sensitivities raised by his damages action. The court of appeals correctly followed the Fourth and Seventh Circuits in recognizing that the "source of hesitation" in extending the *Bivens* remedy is "the nature of the suit and the consequences flowing from it, not just the identity of the plaintiff." Pet. App. 24a (quoting *Lebron*, 670 F.3d at 554, and citing *Vance*, 701 F.3d at 203).

c. Petitioner further contends (Pet. 20-24) that Congress has generally endorsed the *Bivens* remedy and has implicitly condoned a nonstatutory damages remedy for persons in his circumstances. The provisions that purportedly endorse *Bivens*, however, were enacted in 1974 and 1988. See Pet. 21-22 (discussing the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, and the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. 2679). Those provisions have not dissuaded this Court from continuing to exercise "caution toward extending *Bivens* remedies into any new context." *Malesko*, 534 U.S. at 74; see *Iqbal*, 556 U.S. at 675; *Wilkie*, 551 U.S. at 550; see also *Hui* v. *Castaneda*, 559 U.S. 799, 809 (2010) (declining to read the Westfall Act's *Bivens* exception, 28 U.S.C. 2679(b)(2)(A), as doing more than creating an exception to a specific immunity from suit that the Westfall Act otherwise would have conferred).

Nor do other statutes imply that Congress wanted a remedy to be available for petitioner. To the contrary, "Congress has enacted a number of related tort causes of action" without creating any damages remedy that

would be available under the circumstances presented here. Pet. App. 29a (Kavanaugh, J., concurring); see *id.* at 8a-9a (majority opinion); *Vance*, 701 F.3d at 201-202. The Detainee Treatment Act of 2005, for example, governs interrogation practices by U.S. officials, 42 U.S.C. 2000dd(a), but it does not create a damages action "for detainees to sue federal military and government officials in federal court for their treatment while in detention."[4] *Doe* v. *Rumsfeld*, 683 F.3d 390, 397 (D.C. Cir. 2012). In the TVPA, Congress created a civil damages action for abusive treatment committed under color of foreign law, 28 U.S.C. 1350 note, § 2(a), but it did not include U.S. officials acting under color of U.S. law as possible defendants, see Pet. App. 29a-30a (Kavanaugh, J., concurring); *Vance*, 701 F.3d at 202; *Doe*, 683 F.3d at 396. Petitioner invoked that damages remedy, but he did not challenge the district court's dismissal of his TVPA claim. See Pet. App. 82a n.5. And in granting jurisdiction for federal criminal prosecutions of U.S. nationals who commit torture, 18 U.S.C. 2340A(b)(1), Congress specified that it was not providing a basis for "any civil proceeding," 18 U.S.C. 2340B.

In the few instances where Congress has provided a remedy for injuries occurring abroad, it has created an

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[4] Petitioner contends (Pet. 22 n.6) that an immunity provision in the Detainee Treatment Act "signaled [Congress's] approval of *Bivens* claims." That provision states, however, that "[n]othing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil, or criminal liability." 42 U.S.C. 2000dd–1(a). Thus, if respondents' special-factors defense would otherwise provide a sound basis for dismissing petitioner's *Bivens* suit, Congress specifically directed that Section 2000dd–1(a) should *not* be read to abrogate that defense.

administrative claims process, not a damages remedy in an Article III court. See *Vance*, 701 F.3d at 201 (citing Military Claims Act, 10 U.S.C. 2733(a)(3), which authorizes military officials to pay damages claims for deaths and injuries caused by military employees), and Foreign Claims Act, 10 U.S.C. 2734(a)(3) (authorizing military officials to pay damages claims for deaths and injuries to foreign nationals that occur outside the United States). "It would be inappropriate * * * to presume to supplant Congress's judgment in a field so decidedly entrusted to its purview." *Doe*, 683 F.3d at 397.

d. Contrary to petitioner's characterizations (Pet. 14-17, 31-34), the decision below does not establish a categorical rule granting absolute immunity to counterterrorism agents acting abroad. Whether a federal court should extend *Bivens* to a new, sensitive context "is analytically distinct from the question of official immunity from *Bivens* liability." *United States* v. *Stanley*, 483 U.S. 669, 684 (1987). The relevant question therefore is not whether respondents are immune from suit, but whether the creation of any remedy is best left to Congress rather than the courts. Pet. App. 20a-23a; see *id.* at 30a-31a (Kavanagh, J., concurring).

Rather than issue a "categorical" (Pet. 14, 31) ruling, moreover, the court of appeals followed this Court's "case-by-case" approach and was careful to make its holding "context specific." Pet. App. 13a-14a (citing *Wilkie*, 551 U.S. at 550, 554). It therefore refused to decide "whether a *Bivens* action can lie against federal law enforcement officials conducting non-terrorism criminal investigations against American citizens abroad." *Id.* at 13a. And it refused to decide "whether a *Bivens* action is available for plaintiffs

claiming wrongdoing committed by federal law enforcement officers during a terrorism investigation occurring within the United States." *Ibid.* Instead, it appropriately based its holding on the confluence of multiple factors, including the terrorism-related nature of respondents' investigation, the extraterritorial locus of the allegedly wrongful conduct, and the alleged involvement of foreign governments and officials in petitioner's detention. *Id.* at 22a-23a.

e. Finally, petitioner emphasizes (Pet. 20) that he has no alternative mechanism to obtain damages for his asserted claims. As the court of appeals explained, however, this Court "has repeatedly held that 'even in the absence of an alternative' remedy, courts should not afford *Bivens* remedies if 'any special factors counsel[] hesitation.'" Pet. App. 19a (quoting *Wilkie*, 551 U.S. at 550, and citing *Schweiker*, 487 U.S. at 421-422).[5]

If Congress chooses to create a civil money-damages remedy for claims like petitioner's, which relate to detention and interrogation that occurred in the course of counterterrorism operations undertaken abroad in alleged cooperation with foreign governments, Congress in crafting such legislation can take steps to reduce the potentially harmful effects of private suits on national security and foreign policy. In such contexts, "Congress is in a far better position than a court

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[5] Petitioner correctly notes (Pet. 19-20) that the Court in *Minneci* relied on the presence of an alternative tort remedy as a basis for declining to infer a *Bivens* remedy. But the *Minneci* Court reiterated that, "even in the absence of an alternative" remedy, courts still must "pay[] particular heed" to "any special factors counselling hesitation before authorizing a new kind of federal litigation." 132 S. Ct. at 621 (citations omitted).

to evaluate the impact of a new species of litigation" and may "tailor any remedy to the problem perceived." *Wilkie*, 551 U.S. at 562 (citation omitted). "[W]hen Congress deems it necessary for the courts to become involved in sensitive matters, * * * it enacts careful statutory guidelines to ensure that litigation does not come at the expense of national security concerns." *Lebron*, 670 F.3d at 555. Thus, Congress has "created the special Foreign Intelligence Surveillance Court to consider wiretap requests in the highly sensitive area of" foreign-intelligence investigations. *Ibid.* Congress enacted the Classified Information Procedures Act, 18 U.S.C. App. at 860, to regulate the use and disclosure of sensitive information in criminal cases. See generally *United States* v. *Yunis*, 867 F.2d 617 (D.C. Cir. 1989). In the absence of such statutory safeguards, however, the court of appeals correctly declined to recognize an extrastatutory, and extraterritorial, damages action in the sensitive context presented by petitioner's claims.[6]

3. Petitioner contends (Pet. 9-14) that the Court should grant review in this case to address confusion in the courts of appeals about "the status of national security as a bar to *Bivens* relief." Pet. 13. The decision below, however, comports with the great weight of authority in the courts of appeals, which have repeatedly held that "special factors counseling hesitation

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[6] Even if petitioner's *Bivens* claims were allowed to proceed, he would not be entitled to relief, because dismissal is independently supported by alternative grounds that respondents advanced below. Petitioner has not plausibly alleged that respondents were personally responsible for his detention by foreign officials, and the mistreatment he alleges did not constitute a violation of clearly established constitutional rights. See Gov't C.A. Br. 47-65.

* * * foreclosed *Bivens* remedies in cases 'involving the military, national security, or intelligence.'" Pet. App. 20a (quoting *Doe*, 683 F.3d at 394); see also *id.* at 11a-12a (citing *Vance*, 701 F.3d at 198-199; *Lebron*, 670 F.3d at 548-549; *Arar*, 585 F.3d at 571; *Wilson* v. *Libby*, 535 F.3d 697, 705-708 (D.C. Cir. 2008), cert. denied, 557 U.S. 919 (2009)). Most closely on point, the Fourth, Seventh, and D.C. Circuits have all rejected *Bivens* actions challenging the conditions under which federal officials have detained persons, including U.S. citizens, suspected of having ties to terrorism. See *Vance*, 701 F.3d at 197-203; *Doe*, 683 F.3d at 395-396; *Lebron*, 670 F.3d at 547-556; *Ali* v. *Rumsfeld*, 649 F.3d 762, 765-768 (D.C. Cir. 2011); *Rasul* v. *Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir.), cert. denied, 558 U.S. 1091 (2009). Petitioner suggests (Pet. 11) that those cases are distinguishable from this one because they involved "suits against military officials" about "the conduct of war." That potential distinction, however, is still consistent with the conclusion of the court below that national-security considerations—when taken *in conjunction with other factors*—may justify a refusal to extend the *Bivens* remedy.

Petitioner contends (Pet. 12) that the decision below is "in conflict with" the decision in *Turkmen* v. *Hasty*, 789 F.3d 218 (2d Cir. 2015), petitions for cert. pending, Nos. 15-1358 and 15-1359 (filed May 9, 2016) and No. 15-1363 (filed May 6, 2016).[7] In *Turkmen*, the Second Circuit held that a *Bivens* remedy was available for individuals who challenged the restrictive conditions of their detention in a facility located in New York City after they had been arrested for immigration viola-

[7] At other places (Pet. 2, 7), petitioner describes the decision below as merely being "in tension with" *Turkmen*.

tions in connection with the investigation of the September 11, 2001, terrorist attacks. See *id.* at 224-225, 233-237. Taking account of "the rights injured (* * * substantive due process and equal protection rights) and the mechanism of injury (punitive conditions without sufficient cause)," the *Turkmen* court found that the plaintiffs' claims arose "within a familiar *Bivens* context." *Id.* at 235 (footnote omitted). As a result, it did not address whether national-security or other sensitivities presented by the case counseled against recognition of a *Bivens* remedy in that context. *Id.* at 234-235. This Office has filed a petition for a writ of certiorari on behalf of two of the *Turkmen* defendants (former Attorney General John D. Ashcroft and former FBI Director Robert Mueller), which contends that "special factors counsel against extending the judicially inferred *Bivens* remedy to [the *Turkmen* plaintiffs'] challenge to high-level executive policymaking at the confluence of national security and immigration." Pet. at 13, *Ashcroft* v. *Turkmen*, No. 15-1359 (filed May 9, 2016) (*Ashcroft* Pet.) (capitalization omitted).

Contrary to petitioner's assertion (Pet. 12), there is no conflict between the decision below and *Turkmen* about "whether national security considerations * * * support dismissing *Bivens* suits against federal law enforcement officials for abuses committed during a federal investigation." It is true that the mode of analysis used in *Turkmen* is "at odds" with the one used in the decision below. *Turkmen* v. *Hasty*, 808 F.3d 197, 200 (2d Cir. 2015) (joint dissent of six judges from denial of rehearing en banc). But *Turkmen* does not show that the Second Circuit would have reached a different result in this case. The *Turkmen* court had

no occasion to consider the propriety of *Bivens* remedies for extraterritorial conduct or the foreign-policy consequences associated with detention by foreign-government officials; and the Second Circuit has already declined to infer a *Bivens* remedy in the context of an "extraordinary rendition" claim that had "the natural tendency to affect diplomacy, foreign policy, and the security of the nation." *Arar*, 585 F.3d at 574. The same considerations counsel against extending *Bivens* extraterritorially in this case.

Nor does the decision below establish that the D.C. Circuit would have reached a different result in *Turkmen*. To the contrary, as the petition in *Ashcroft* notes, the court below expressly "declined to decide whether the national-security context of a terrorism investigation would be sufficient, *in the domestic context*, to preclude a *Bivens* remedy." *Ashcroft* Pet. 20 n.9 (emphasis added); see Pet. App. 20a. Rather than resting only on "national security considerations," Pet. 12, the decision below observes that "the extraterritorial aspect of th[is] case is critical," Pet. App. 18a. And it explains that, due to the direct involvement in petitioner's detention of officials from three foreign countries, this suit implicates relations with foreign governments. *Id.* at 22a-23a. Furthermore, most of petitioner's own discussion of the merits (Pet. 20-34) is about issues that *Turkmen* does not even discuss (*i.e.*, whether, if a case does present a new context for a *Bivens* claim, the judicially implied remedy should nevertheless be made available).

As the *Ashcroft* petition explains, even in the absence of a direct conflict, the "outlier" status of *Turkmen* warrants this Court's review, especially in the context of a claim against high-level policymakers like

the Attorney General and FBI Director. *Ashcroft* Pet. 13. The decision below, however, is in harmony with all of the most analogous court of appeals decisions, which have uniformly declined to recognize a *Bivens* remedy in suits that challenge overseas conduct implicating national security. The D.C. Circuit's ruling therefore does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2016