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Immigrant Rights in Jeopardy: A Denial of Constitutional Protection in *De La Paz v. Coy*

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IMMIGRANT RIGHTS IN JEOPARDY: A DENIAL OF CONSTITUTIONAL PROTECTION IN *DE LA PAZ v. COY*

Abstract: On May 14, 2015, in *De La Paz v. Coy*, the U.S. Court of Appeals for the Fifth Circuit held that immigrants cannot bring *Bivens* actions seeking damages against individual federal immigration officials for Fourth Amendment violations. The court reasoned that because the Immigration and Nationality Act of 1952 ("INA") already provides immigrants with an adequate remedy for Fourth Amendment violations, a *Bivens* remedy should not be extended to this immigration enforcement context. The court based its conclusion on its determination that the INA both offers immigrants sufficient remedial mechanisms for constitutional violations and effectively deters federal immigration officers from acting unconstitutionally. This Comment argues that the Fifth Circuit erred in holding that the INA provides an adequate remedial scheme for immigrants who fall victim to unconstitutional stops, arrests, and seizures in violation of the Fourth Amendment. The INA provides no meaningful remedy to such immigrants and has no ability to deter federal immigration officers from engaging in unconstitutional conduct.

INTRODUCTION

On May 14, 2015, in *De La Paz v. Coy*, the U.S. Court of Appeals for the Fifth Circuit held that the implied cause of action established in 1971 by the U.S. Supreme Court in *Bivens v. Six Unknown Named Agents* ("*Bivens*") did not extend to immigrants seeking damages against federal immigration officials for Fourth Amendment violations.[1] The Fifth Circuit relied largely on the U.S. Supreme Court's two-prong framework for analyzing the extension of *Bivens* remedies to new contexts.[2] Under the first prong of this framework, a court should not allow a *Bivens* action if an existing statutory scheme already provides adequate redress to the victims of unconstitutional

[1] De La Paz v. Coy (*De La Paz II*), 786 F.3d 367, 375 (5th Cir. 2015); *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (holding that an individual can bring a private action for damages directly against a federal official who violates his or her constitutional rights); Ann-Marie Woods, Note, *A "More Searching Judicial Inquiry": The Justiciability of Intra-Military Sexual Assault Claims*, 55 B.C. L. REV. 1329, 1366 n.136 (2014) (describing the background of the *Bivens* action). This holding applied to all immigrants subject to deportation, whether or not they at one point had legal status, or originally came to the United States without documentation. *De La Paz II*, 786 F.3d at 378.

[2] *De La Paz II*, 786 F.3d at 375.

conduct.[3] Further, under the second prong, even if an alternative remedial scheme does not exist, *Bivens* actions should be denied if special factors exist which caution against extending *Bivens* to a new context.[4] In *De La Paz*, the Fifth Circuit held that the civil removal proceedings set out in the Immigration and Nationality Act of 1952 ("INA") provide an alternative process for protecting the Fourth Amendment rights of immigrants subjected to unconstitutional traffic stops and arrests and that special factors required denying a *Bivens* remedy for claims arising out of federal immigration enforcement actions.[5]

This Comment focuses on the first prong of the *Bivens* analysis, the alternative statutory scheme bar to a *Bivens* remedy, and argues that the Fifth Circuit erroneously applied the first prong of the *Bivens* analysis when it concluded that the INA provides an adequate remedial scheme for immigrants who fall victim to unconstitutional stops, arrests, and seizures at the hands of federal immigration officials.[6] This Comment further argues that the INA provides no meaningful remedy to such immigrants and has no ability to deter federal immigration officers from engaging in unconstitu-

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[3] *Id.*; *see also* Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (holding that the judiciary should refrain from creating a new damages remedy when an existing process adequately protects the constitutional interest at stake); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 67–68, 70 (2001) (same); Carlson v. Green, 446 U.S. 14, 18–19 (1980) (same); Davis v. Passman, 442 U.S. 228, 245, 247 (1979) (same).

[4] *De La Paz II*, 786 F.3d at 375; *see also Malesko*, 534 U.S. at 67–69 (noting that special factors, such as separation of powers concerns, foreclose imposition of a judicially created *Bivens* remedy even when a plaintiff does not have the opportunity for adequate compensation); *Carlson*, 446 U.S. at 18 (same); *Davis*, 442 U.S. at 245 (same); *Bivens*, 403 U.S. at 396 (holding that imposition of a judicially created damages remedy was appropriate where there were no special factors advising hesitation in an area of law in which Congress had chosen not to authorize a damages remedy).

[5] *See De La Paz II*, 786 F.3d at 375 (concluding that there was an adequate existing process for protecting the Fourth Amendment rights of immigrants stopped and arrested unconstitutionally and that special factors required denying the availability of a *Bivens* claim to such immigrants). The INA established the federal statutory scheme for regulating immigration to the United States. Pub. L. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.); *see* Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) (providing overview of certain provisions of the INA). The Immigration and Nationality Act of 1952 ("INA") is primarily a set of laws that govern the admission and exclusion of foreign citizens into the United States. 8 U.S.C. §§ 1151–1381 (2012) (governing immigration generally); *id.* §§ 1401–1504 (governing nationality and naturalization); *id.* §§ 1521–1525 (governing refugee assistance); *id.* §§ 1531–1537 (governing alien terrorist removal); *see Arizona*, 132 S. Ct. at 2499 (summarizing entry and removal procedures).

[6] *See infra* notes 83–105 and accompanying text (explaining that the INA does not provide an alternative, meaningful remedy for violations of immigrants' Fourth Amendment rights); I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1040 (1984) ("The mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding."); *In re* Sandoval, 17 I. & N. Dec. 70, 79 (B.I.A. 1979) (noting that an unconstitutional stop and arrest does not tamper with the government's ability to successfully deport the illegally apprehended immigrant).

tional conduct.[7] Part I of this Comment discusses the factual background of *De La Paz*, as well as the history and framework of the *Bivens* action.[8] Part II details the Fifth Circuit's holding and reasoning in *De La Paz*.[9] Part III argues that *De La Paz* was decided incorrectly because the INA fails to adequately protect immigrants' Fourth Amendment rights.[10]

I. THE *BIVENS* ACTION: CONSTITUTIONAL PROTECTION THROUGH DAMAGES

Since the U.S. Supreme Court decided *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* in 1971, the Court has crafted a framework for analyzing extensions of the judicially crafted damages remedy to new contexts.[11] Prior to *De La Paz*, however, the immigration enforcement context had not been explicitly addressed by the Court or any federal circuit court.[12] Section A of this Part describes the two immigration stops and the alleged Fourth Amendment violations that led to the litigation in *De La Paz*.[13] Section B details the history of the *Bivens* action and the

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[7] *See infra* notes 83–105 and accompanying text (explaining that the INA does not provide an alternative, meaningful remedy for violations of immigrants' Fourth Amendment rights and does not deter federal immigration officers from engaging in unconstitutional conduct); *see, e.g.*, *Lopez-Mendoza*, 468 U.S. at 1040 (holding that the government's illegal arrest of an immigrant does not affect the government's ability to deport that immigrant); Lopez-Gabriel v. Holder, 653 F.3d 683, 686 (8th Cir. 2011) (citing United States v. Janis, 428 U.S. 433, 457–58 (1976)) (stating that the prospect of evidence being suppressed during immigration deportation proceedings does not have a deterrent effect on law enforcement officials); Nathan Treadwell, *Fugitive Operations and the Fourth Amendment: Representing Immigrants Arrested in Warrantless Home Raids*, 89 N.C. L. REV. 507, 507 (2011) (explaining that, despite internal regulations, U.S. Immigration and Customs Enforcement ("ICE") has made warrantless home raids in violation of the Fourth Amendment a "key component" of immigration enforcement activities).

[8] *See infra* notes 11–47 and accompanying text.

[9] *See infra* notes 48–82 and accompanying text.

[10] *See infra* notes 83–105 and accompanying text.

[11] *See Wilkie*, 551 U.S. at 550 (explaining how the Court analyzes the proposed extension of the *Bivens* remedy to new contexts); Ryan D. Newman, *From* Bivens *to* Malesko *and Beyond: Implied Constitutional Remedies and the Separation of Powers*, 85 TEX. L. REV. 471, 482 (2006) (detailing the history of the *Bivens* action and how the Court developed its analytical framework); *infra* notes 38–47 and accompanying text (detailing the two steps that the U.S. Supreme Court follows when deciding whether to extend *Bivens* to a new context).

[12] *See De La Paz II*, 786 F.3d at 375 (explaining that no court had decided whether *Bivens* extends to claims of constitutional violations that occurred during federal immigration arrests and detentions); Mirmehdi v. United States, 689 F.3d 975, 983 (9th Cir. 2012) (holding that a *Bivens* remedy cannot be extended to immigrants challenging their unlawful detention, but limiting the holding to the unlawful detention context); Martinez-Aguero v. Gonzalez, 459 F.3d 618, 620, 625 (5th Cir. 2006) (holding that an immigrant stopped at the border had constitutional rights at the time of the incident, but declining to decide whether a *Bivens* remedy was available to defend those rights).

[13] *See infra* notes 15–34 and accompanying text.

framework the Court has established for analyzing its applicability in new scenarios.[14]

A. The Border Patrol Stops and Arrests of Daniel Frias and Alejandro Garcia de la Paz

The *De La Paz* case began on April 28, 2010, when Daniel Frias was stopped by U.S. Customs and Border Patrol ("CBP") agent Arturo Torrez while driving in Texas over 250 miles from the Mexican border.[15] Before Torrez made the stop, he passed by Frias' truck and noticed that the vehicle had a large shielded rear bed and what appeared to be bodies lying in the bed.[16] After noticing this and learning that the truck was not from the area, Torrez believed he had enough information to stop Frias' vehicle.[17] Following the stop, Torrez questioned Frias briefly, and Frias admitted that he was a non-U.S. citizen without legal documentation allowing him to be in the United States.[18] Torrez then arrested Frias.[19]

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[14] *See infra* notes 35–47 and accompanying text.

[15] Frias v. Torrez, No. 3:12-CV-1296-B, 2013 WL 460076, at *1 (N.D. Tex. Feb. 6, 2013), *rev'd in part sub nom. De La Paz II*, 786 F.3d 367. Frias was driving a Dodge 3500 pickup truck, a work vehicle common to the area. *Id.* According to facts alleged in the complaint, Torrez believed that Frias was abiding by all traffic laws when Torrez stopped Frias's vehicle. Complaint at 9, *Frias*, No. 3:12-CV-1296-B. A U.S. Customs and Border Patrol ("CBP") agent works for the U.S. Department of Homeland Security ("DHS"). *See Border Patrol Agent*, U.S. CUSTOMS & BORDER PROTECTION, http://www.cbp.gov/careers/join-cbp/which-cbp-career/border-patrol-agent [https://perma.cc/7EY6-AS6A] (describing the role of a CBP agent). CBP agents do not enforce local or state laws; rather, they enforce federal laws related to border security. *See Authority of U.S. Customs and Border Protection: An Overview*, AM. IMMIGR. COUNCIL (Feb. 23, 2012), http://www.immigrationpolicy.org/just-facts/authority-us-customs-and-border-protection-agents-overview [https://perma.cc/W24N-QJCX] (noting that CBP agents only enforce federal statutes and regulations).

[16] *De La Paz II*, 786 F.3d at 370. According to the opinion issued by the U.S. District Court for the Northern District of Texas and the facts alleged in Frias' complaint, there were not bodies lying in the backseat and the truck was not modified in any way. *Frias*, 2013 WL 460076, at *1; Complaint, *supra* note 15, at 5, 7.

[17] *Frias*, 2013 WL 460076, at *1; *see infra* note 36 and accompanying text (describing that law enforcement requires reasonable suspicion before making a stop). Once Torrez noticed the large shielded rear bed, he turned around and followed Frias' truck. *De La Paz II*, 786 F.3d at 370. Torrez then pulled alongside Frias and again saw what looked like bodies lying in the backseat. *Id.* He then radioed for a "1028" to determine where the truck originated and learned that it was not from the area. *Id.*

[18] *De La Paz II*, 786 F.3d at 370. Frias was living in the United States at the time and had a valid New Mexico driver's license. *Frias*, 2013 WL 460076, at *1.

[19] *De La Paz II*, 786 F.3d at 370. He was taken into custody as a noncitizen present in the United States in violation of federal immigration law. *Id.* His immigration proceedings were later terminated. *Id.*

Frias brought five claims against the U.S. government and Torrez in response to this stop and arrest.[20] One of these was a *Bivens* claim against Torrez individually.[21] Frias alleged that Torrez violated his Fourth Amendment rights because Torrez lacked both reasonable suspicion for the stop and probable cause for the arrest.[22] Torrez moved to dismiss the *Bivens* complaint, arguing that the INA provides a remedy for Frias' claim, and thus makes a *Bivens* action unavailable.[23] The U.S. District Court for the Northern District of Texas disagreed with Torrez and held that the INA did not bar Frias' *Bivens* claim.[24]

Several months later, on October 11, 2010, Alejandro Garcia de la Paz ("Garcia") was traveling in Texas 100 miles from the Mexican border when he passed CBP agents Jason Coy and Mario Vega.[25] Upon passing Garcia, Coy and Vega decided to turn around and stop him.[26] During the stop, Vega questioned Garcia about his citizenship status, but Garcia refused to answer the question.[27] Garcia was then arrested by the agents.[28]

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[20] *Id.* Immigrants that have made an entry into the United States and are present on U.S. soil are afforded Fourth Amendment, due process, and other constitutional rights. *See Lopez-Mendoza*, 468 U.S. at 1040 (holding that immigrants are afforded full Fourth Amendment rights, but limiting the application of the Fourth Amendment's exclusionary remedy during civil deportation proceedings); Brian G. Slocum, *The War on Terrorism and the Extraterritorial Application of the Constitution in Immigration Law*, 84 DENV. U. L. REV. 1017, 1023 (2007) (explaining that although immigrants seeking entry into the United States are not afforded full constitutional protection, immigrants present on U.S. soil have rights under the Constitution). Additionally, immigrants are allowed to bring claims against United States federal agencies. *See Lopez-Mendoza*, 468 U.S. at 1034 (allowing an immigrant's claim against the former Immigration and Naturalization Service, a federal agency, to proceed).

[21] *Lopez-Mendoza*, 468 U.S. at 1034; *Frias*, 2013 WL 460076, at *2. *Bivens* claims are allowed to be brought against individual federal agents. *See Bivens*, 403 U.S. at 397 (holding that an individual can bring a private action for damages directly against an individual federal official who violates his or her constitutional rights).

[22] *Bivens*, 403 U.S. at 397; *Frias*, 2013 WL 460076, at *1–2; *see also infra* note 36 (explaining the provisions of the Fourth Amendment, the U.S. Supreme Court's definition of "reasonable suspicion," and the Court's definition of the probable cause standard).

[23] *De La Paz II*, 786 F.3d at 370.

[24] *Id.*

[25] De La Paz v. Coy (*De La Paz I*), 954 F. Supp. 2d 532, 537–38 (W.D. Tex. 2013), *rev'd in part*, *De La Paz II*, 786 F.3d 367. Alejandro Garcia de la Paz ("Garcia") was traveling in Texas 100 miles from the Mexican border when he passed was traveling in a red Ford F-150 extended-cab pickup truck, a very common work truck in the area. *Id.*

[26] *Id.* The agents decided to stop Garcia after following him for an unspecified period of time. *Id.* According to his complaint, Garcia was driving in accordance with all applicable state rules and regulations. *Id.*

[27] *Id.* Garcia was an undocumented immigrant without legal status in the United States. *Id.* Garcia's immigration proceedings were eventually administratively closed. *De La Paz II*, 786 F.3d at 371.

[28] *De La Paz I*, 954 F. Supp. 2d at 537–40.

In response to his arrest, Garcia sued Coy, Vega, and the U.S. government.[29] Like Frias, Garcia brought a *Bivens* claim against Coy and Vega individually, alleging that his stop and arrest were both unconstitutional.[30] Coy and Vega moved to dismiss the *Bivens* claims, asserting, like Torrez, that the existence of alternative remedies under the INA barred a *Bivens* claim in this context.[31] The U.S. District Court for the Western District of Texas rejected this argument, held that the INA did not provide an adequate alternative remedy, and refused to dismiss the claim.[32]

The federal immigration officers involved in both *Bivens* claims, Torrez, Coy, and Vega, appealed the respective district court decisions refusing to dismiss the *Bivens* claims.[33] On appeal, the Fifth Circuit consolidated the *Bivens* actions of Frias and de la Paz into one case.[34]

B. The History and Application of the Bivens *Action*

On June 21, 1971, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court first recognized a private action for damages against federal officers who violate an individual citizen's constitutional rights.[35] The defendants in *Bivens* were individual federal law enforcement agents who had conducted an unlawful search of the plaintiff's home and had arrested him without probable cause in violation of the Fourth Amendment.[36] By recognizing the plaintiff's cause of action under

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[29] *De La Paz II*, 786 F.3d at 371. In addition to the *Bivens* claim, two of his claims against the U.S. government sought declaratory relief under the Declaratory Judgment Act and the Administrative Procedure Act. *Id.* His other two claims against the United States government were brought under the Federal Tort Claims Act for false imprisonment and assault. *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at 370–71.

[34] *Id.* at 367.

[35] *Bivens*, 403 U.S. at 397; *see also Malesko*, 534 U.S. at 66 (providing the *Bivens* action's historical background).

[36] *Bivens*, 403 U.S. at 397. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The Court has declined to precisely define or quantify the probable cause standard, but the general definition is "a reasonable ground for belief of guilt." Maryland v. Pringle, 540 U.S. 366, 371 (2003) (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)). In determining whether an officer has probable cause to make an arrest, a court will consider the totality of the events leading to the arrest and examine these facts from the viewpoint "of an objectively reasonable police officer." *Id.* (quoting Ornelas v. United States, 517 U.S. 690, 696 (1996)). The U.S. Supreme Court also has determined that, under the Fourth Amendment, a police officer can briefly stop and detain a person for further investigation if there is reasonable suspicion, sup-

the Fourth Amendment, the Court created a damages remedy derived directly from the Constitution.[37]

A *Bivens* action has two purposes: (1) to provide effective remedies to individuals who are the victims of unconstitutional conduct by federal agents, and (2) to deter federal officers from engaging in future unconstitutional conduct by imposing individual liability.[38] In order to further these goals, the Court has developed a two-step inquiry to determine whether to recognize a *Bivens* remedy in new contexts.[39] First, a court must decide whether any existing legal remedy adequately safeguards the constitutional interest in question and makes the creation of a judicially created remedy unnecessary.[40] Second, even absent an alternative remedy, courts must be cognizant of their limited judicial role and pay heed to any special factors that would caution against authorizing a new class of federal litigation.[41]

The Court has followed these analytical steps and advanced the *Bivens* remedy's constitutional goals by extending the *Bivens* damages remedy under two additional Constitutional provisions: the Due Process Clause of the Fifth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment.[42] When considering the extension of *Bivens* to a new

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ported by sufficient facts, that criminal activity "may be afoot." Terry v. Ohio, 392 U.S. 1, 30–31 (1968). The Fourth Amendment, however, requires officers to articulate more than just a general "hunch." United States v. Sokolow, 490 U.S. 1, 7 (1989) (quoting *Terry*, 392 U.S. at 27). Although the standard for when a police officer can make a stop is lower than that for probable cause, the officer must have at least some level of objective justification for making the stop. *Id.*

[37] *See Bivens*, 403 U.S. at 397 (reasoning that this legal remedy must be implied because no statute or other legal provision provided the plaintiff with meaningful compensation for the violation of his constitutional rights); *see also Malesko*, 534 U.S. at 66–67 (noting that the *Bivens* decision was the first time the Court exercised its "authority to imply a new constitutional tort" in the absence of statutory authorization).

[38] *See Malesko*, 534 U.S. at 70 (explaining the *Bivens* action's purpose). *See generally* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 814 n.17 (2010) (explaining that although the original *Bivens* decision focused on providing adequate compensation to victims of unconstitutional conduct, the Court has interpreted the decision to promote deterrence through individual liability).

[39] *See Wilkie*, 551 U.S. at 550 (detailing the two factors involved in the two step sequence); *Carlson*, 446 U.S. at 18–19 (citing *Bivens*, 403 U.S. at 397) (same).

[40] *Wilkie*, 551 U.S. at 550.

[41] *See* Bush v. Lucas, 462 U.S. 367, 378 (1983) (holding that courts must be mindful of any special factors that would make authorization of a new federal damages remedy inappropriate). Even in the absence of an alternative remedy, federal courts must always be mindful of separation of powers concerns, and consider all relevant factors before approving a novel extension of *Bivens* in an area of law in which Congress has declined to provide a statutory remedy. *See Wilkie*, 551 U.S. at 550 (detailing the Court's *Bivens* remedy analytical framework). Analysis of these special factors usually involves considering why Congress decided to not already authorize a damages remedy, but can include all relevant factors. *See id.* (explaining the special factors analysis); Schweiker v. Chilicky, 487 U.S. 412, 423 (1988) (same).

[42] *See Malesko*, 534 U.S. at 67–68 (explaining the Court's history of extending the *Bivens* action); *Carlson*, 446 U.S. at 18–21, 23 (allowing a *Bivens* claim against individual prison officials when the plaintiff's only alternative remedy, a Federal Tort Claims Act claim against the

context, however, the Court examines the legal and factual scenario presented by the case, rather than extending *Bivens* on an amendment-by-amendment basis.[43]

Indeed, in subsequent decisions, the Court has narrowed the availability of *Bivens* actions and has declined to extend the remedy to most new factual scenarios.[44] The Court has made clear that under the first step of the analysis, when a court examines existing, alternative remedies for protecting the constitutional interest, such remedy need not provide specific monetary damages to foreclose the application of a *Bivens* action.[45] In addition, the Court has taken the second prong's special factors limitation seriously, giving a high degree of deference to Congress's choice to decline to provide a remedy for certain constitutional violations.[46] Accordingly, although the purpose of a *Bivens* action is to accomplish the lofty goals of deterring federal officers from violating private citizens' constitutional rights and to provide individual victims of constitutional violations meaningful legal remedies, there are significant limitations on the action.[47]

United States, would not deter the unconstitutional acts of the individual prison officials); *Davis*, 442 U.S. at 245, 248–49 (applying *Bivens* principally because the plaintiff, a former congressional staff member who was discriminated against on the basis of her sex, had no other remedy available after suffering this violation of her due process rights).

[43] Arar v. Ashcroft, 585 F.3d 559, 572 (2d Cir. 2009). A *Bivens* remedy is not available for every Fourth or Fifth Amendment violation, even if a prior case allowed a *Bivens* action under that same Amendment. *Id. Compare Davis*, 442 U.S. at 245, 248–49 (allowing a congressional employee's *Bivens* discrimination claim under the Fifth Amendment), *with Schweiker*, 487 U.S. at 414 (rejecting a *Bivens* remedy for a Social Security recipient's Fifth Amendment claim).

[44] *See, e.g.*, *Wilkie*, 551 U.S. at 550 (establishing that a *Bivens* action is not "an automatic entitlement no matter what other means there may be to vindicate a protected interest"); *Malesko*, 534 U.S. at 68 (detailing the history of the Court's refusal to extend *Bivens* to all situations in which the victim of the unconstitutional conduct could not collect damages under the alternative remedial scheme); *Schweiker*, 487 U.S. at 423–27, 429 (reasoning that a *Bivens* damages remedy is not always the best way to implement a constitutional guarantee).

[45] *See Wilkie*, 551 U.S. at 550 (explaining the Court's history of denying *Bivens* claims). For example, in 1983, in *Bush v. Lucas*, the U.S. Supreme Court declined to allow a *Bivens* remedy against federal officials in the context of a federal employment First Amendment violation even though the plaintiff did not have an opportunity to collect damages or hold the federal officials individually accountable. 462 U.S. at 386–88. The Court instead held that the administrative review process in place, which allowed the erroneously demoted plaintiff to recover back pay and receive other employment benefits, provided adequate redress, thereby making a judicially crafted *Bivens* remedy unnecessary. *Id.*; *see also Malesko*, 534 U.S. at 68 (detailing the history of the Court's refusal to extend *Bivens* to all situations in which the victim of the unconstitutional conduct could not collect damages under the alternative remedial scheme).

[46] *See Malesko*, 534 U.S. at 68–69 (detailing the Court's history of denying *Bivens* actions based on the special factors analysis); *Schweiker*, 487 U.S. at 423 (explaining that when Congress has designed a statutory scheme to explicitly provide administrative remedies for constitutional violations that may occur under the statute, the Court has not created new *Bivens* remedies).

[47] *See Malesko*, 534 U.S. at 68–69, 70 (explaining that the *Bivens* remedy has only been extended twice: "to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked

II. THE FIFTH CIRCUIT'S *BIVENS* DECISION IN CONTEXT

As a matter of first impression, the U.S. Court of Appeals for the Fifth Circuit held in 2015 in *De La Paz v. Coy* that Frias and de la Paz could not bring *Bivens* actions against the individual CBP agents who stopped and arrested them because their claims could be addressed during civil removal proceedings provided under the INA.[48] The court concluded that the INA provided an adequate alternative process for protecting the Fourth Amendment rights of immigrants subjected to illegal traffic stops and arrests.[49] In reaching this decision, however, the court did not precisely explain how the INA's Fourth Amendment protections operate during removal proceedings.[50] Section A of this Part reviews the Fifth Circuit's decision to decline to extend the *Bivens* remedy to this legal and factual scenario.[51] Section B explains the Fourth Amendment protections provided to immigrants during removal proceedings under the INA.[52]

A. The INA Does Enough: The Fifth Circuit Declines to Extend Bivens

The Fifth Circuit declined to extend *Bivens* to the immigration enforcement context because of the INA's extensive coverage in the field of federal immigration law.[53] Specifically, the court held that because the INA had specific provisions meant to protect immigrants' Fourth Amendment rights and mechanisms by which immigrants could enforce these rights, it

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any alternative remedy for harms caused by an individual officer's unconstitutional conduct"); *see also Carlson*, 446 U.S. at 18–21, 23 (allowing a *Bivens* claim under the Eighth Amendment); *Davis*, 442 U.S. at 245, 247–49 (extending *Bivens* under the Fifth Amendment).

[48] De La Paz v. Coy (*De La Paz II*), 786 F.3d 367, 375 (5th Cir. 2015).

[49] *Id.* at 375. The Fifth Circuit also found that special factors necessitated the denial of *Bivens* remedies for claims arising from stops and arrests conducted for the purpose of immigration enforcement. *See id.* at 375, 378 (concluding that there was an adequate existing process for protecting the Fourth Amendment rights of immigrants stopped and arrested unconstitutionally and also that special factors required denying the availability of a *Bivens* claim to such immigrants). The Fifth Circuit specifically held that the existing procedures under the INA were enough to constitute a denial of *Bivens* to immigrants stopped in violation of the Fourth Amendment, regardless of any special factors. *Id.* at 377–78 (holding that the INA's comprehensive set of regulations provided an adequate remedy and, on its own, made extending *Bivens* to the immigration enforcement context unnecessary).

[50] *Id.*; *see also* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1040 (1984) (holding that the government's illegal arrest of an immigrant does not affect the government's ability to deport that immigrant under the INA's current statutory framework); *In re* Sandoval, 17 I. & N. Dec. 70, 79 (B.I.A. 1979) (describing the irrelevance of an unconstitutional stop and arrest during a deportation proceeding).

[51] *See infra* notes 53–68 and accompanying text.

[52] *See infra* notes 69–82 and accompanying text.

[53] *See De La Paz II*, 786 F.3d at 375–77 (citing Arizona v. United States, 132 S. Ct. 2492, 2499 (2012)) (detailing the INA's comprehensive regulation of immigration law in the United States and, specifically, the legal protections provided to immigrants).

provided an adequate alternative remedial scheme.[54] The court emphasized that the INA's extensively detailed removal procedure for immigrants unlawfully in the United States was the type of elaborate statutory scheme that should not be augmented by a judicially created *Bivens* remedy.[55]

First, the Fifth Circuit focused on the fact that the INA included specific provisions that were able to sufficiently protect the rights of undocumented immigrants stopped by CBP agents.[56] The court cited the INA provision that stated that CBP agents could only search individuals if they had reasonable cause to believe that such a search would disclose evidence that would warrant denying the individual admission to the United States.[57] The court also noted that CBP agents could only make an arrest if they had a reasonable belief that the person to be arrested had committed or was committing a felony or immigration violation.[58] The court also cited the INA sections mandating that an apprehended immigrant be taken, without unnecessary delay, before the nearest available immigration officer with the power to examine an immigrant's right to remain in the United States.[59]

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[54] *Id.*

[55] *Id.*

[56] *See id.* at 375–77 (discussing 8 U.S.C. § 1357(a)–(c) (2012) (providing the powers of federal immigration officers), 8 C.F.R. § 287.8(c) (2015) (providing standards that must be followed by federal immigration officers while enforcing federal immigration law), and 8 C.F.R. § 287.10(a) (2015) (providing the details of the DHS internal review process)).

[57] *De La Paz II*, 786 F.3d at 376. The relevant INA section provides:

> Any officer or employee of the Service . . . shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for denial of admission to the United States . . . which would be disclosed by such search.

8 U.S.C. § 1357(c).

[58] *De La Paz II*, 786 F.3d at 376. The cited statute gives an immigration official the power, without warrant, to arrest any "alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens." 8 U.S.C. § 1357(a)(2). An official can also arrest any alien "if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest." *Id.*; *see also* 8 C.F.R. § 287.8(c)(2)(i) ("An arrest shall be made only when the designated immigration officer has reason to believe that the person to be arrested has committed an offense against the United States or is an alien illegally in the United States."); 8 C.F.R. § 287.8(c)(2)(ii) ("A warrant of arrest shall be obtained except when the designated immigration officer has reason to believe that the person is likely to escape before a warrant can be obtained.").

[59] *De La Paz II*, 786 F.3d at 376; *see* 8 U.S.C. § 1357(a)(2) (requiring that aliens arrested for immigration violations "be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States"); *id.* § 1357(a)(4) (requiring that aliens arrested for felonies related to immigration regulations "be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States").

Second, after noting these provisions, which regulated the conduct of CBP agents when interacting with immigrants, the court documented the ways in which immigrants could enforce their rights under these regulations.[60] The two main avenues available to immigrants were motions, during removal proceedings, to suppress illegally seized evidence, and internal Department of Homeland Security ("DHS") review processes that the INA mandated for violations of the above statutory provisions.[61] The court stated that motions to suppress were satisfactory remedies because an immigrant who successfully suppresses evidence may be able to terminate removal proceedings.[62] Furthermore, the court cited DHS review procedures that mandated investigations for complaints of alleged Fourth Amendment violations, required appropriate action in the case of actual violations, and allowed for criminal prosecutions of agents for using excessive force against immigrants.[63]The court held that such procedures, in combination with an immigrant's right to file motions to suppress, adequately protected immigrants' Fourth Amendment rights and thus foreclosed extension of a *Bivens* action.[64]

In concluding that extending *Bivens* to the immigration enforcement context was unnecessary, the court held that the INA did not need to provide monetary damages in order to qualify as an adequate alternative remedy scheme.[65] The court cited the U.S. Supreme Court's 2001 decision in *Correctional Services. Corp. v. Malesko* to affirm that the INA need not provide such damages, or any avenue for action against individual agents, in order to be an adequate alternative remedy scheme.[66] Additionally, like the Su-

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[60] *De La Paz II*, 786 F.3d at 376–77.

[61] *Id.*

[62] *Id.*

[63] *Id.*; *see* 8 C.F.R. § 287.10(a) (providing that allegations that federal agents violated the standards of conduct for immigration enforcement activities "shall be investigated expeditiously consistent with the policies and procedures of the [DHS] and pursuant to any guidelines issued by the Secretary"); *id.* § 287.10(b) ("Any persons wishing to lodge a complaint pertaining to violations of enforcement standards contained in § 287.8 may contact the [DHS], Office of the Inspector General . . . . With respect to employees of the former INS, persons may contact the Office of Internal Audit, Bureau of Immigration and Customs Enforcement."); *id.* § 287.10(c) (stating that at the conclusion of an investigation, "the investigative report shall be referred promptly for appropriate action"); *Lopez-Mendoza*, 468 U.S. at 1050–51 (determining that evidence seized under certain egregious circumstances may be suppressed during removal proceedings); United States v. Brugman, 364 F.3d 613, 614 (5th Cir. 2004) (affirming the criminal conviction of a border patrol agent for violating an alien's right against excessive force).

[64] *De La Paz II*, 786 F.3d at 376–78.

[65] *Id.* at 377.

[66] *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001) (citing Bush v. Lucas, 462 U.S. 367, 386–88 (1983)) (holding that an administrative review process, which allowed an unconstitutionally demoted federal employee to recover back pay and retroactive seniority, provided adequate redress, thereby making a judicially-imposed *Bivens* remedy unnecessary).

preme Court's *Malesko* decision and its 1988 decision in *Schweiker v. Chilicky*, the Fifth Circuit found that a *Bivens* remedy should not be allowed in this case because Congress, through the INA, had already provided what it considered an adequate compensatory system for constitutional violations in the sphere of immigration law.[67] The Fifth Circuit held that the choice to implement a damages remedy against individual federal immigration agents should be left to the legislature.[68]

B. Fourth Amendment Protection Under the INA

Although the INA does provide remedial mechanisms during removal proceedings for unlawfully stopped and arrested immigrants, more context is needed in order to fully understand the way in which these mechanisms operate.[69] This section will explain two key concepts that will help frame the Fifth Circuit's holding: (1) the relevance of illegal arrests during removal proceedings, and (2) the way in which the Fourth Amendment, and the accompanying exclusionary rule, apply during removal proceedings.[70]

First, the legality of an immigration arrest is usually irrelevant during removal proceedings because regardless of the arrest's legality, deportation will still occur as long as evidence obtained independent from the arrest is

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[67] *See De La Paz II*, 786 F.3d at 377 (noting that an analysis of the legislative history of United States federal immigration law makes it clear that Congress purposely declined to provide an individual damages remedy); *see also Malesko*, 534 U.S. at 69–74 (denying a *Bivens* claim because existing statutory provisions provided the claimant with an effective remedy); Schweiker v. Chilicky, 487 U.S. 412, 423 (1988) (rejecting a *Bivens* remedy for Social Security disability claimants who were denied benefits in violation of due process of law because Congress had already enacted a statutory scheme which it felt provided sufficient redress for victims of constitutional violations). The Fifth Circuit also cited to Congress's repeated legislative action regarding immigration to reinforce the point that it has consciously and purposefully crafted the existing INA scheme. *De La Paz II*, 786 F.3d at 377 (citing REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302; Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-54; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978; Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3359; Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703; Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911).

[68] *De La Paz II*, 786 F.3d at 377–78; *see* Wilkie v. Robbins, 551 U.S. 537, 561–62 (2007) (favoring legislative action over extending a *Bivens* remedy in a context too large and complicated for unilateral judicial action).

[69] *See Lopez-Mendoza*, 468 U.S. at 1040 (explaining the Fourth Amendment's lack of sufficient protection during removal proceedings under the INA).

[70] *Id.* The exclusionary rule is a judicially created remedy that declares that evidence obtained in violation of the Fourth Amendment, under certain factual contexts and legal proceedings, will be deemed inadmissible. *See* United States v. Calandra, 414 U.S. 338, 348 (1974) (describing the purpose and effect of the exclusionary rule). It is principally "designed to safeguard Fourth Amendment rights . . . through its deterrence effect." *Id.*

sufficient to support deportation.[71] In a majority of removal proceedings, the only matter the government needs to prove is the alien's identity and lack of lawful presence in the United States.[72] The most important evidence acquired through an illegal arrest is custody of the immigrant's body, evidence that can be used to prove identity.[73] Because the immigrant's body and identity cannot be suppressed, even if the government concedes that the alien was apprehended through illegal arrest, search, or interrogation, the government must only prove alienage during the removal hearing.[74] The government can then prove alienage through a variety of evidence obtained independently of the illegal arrest or even through evidence closely connected to the illegal arrest itself.[75] Once the government proves identity and

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[71] *See, e.g.*, *Lopez-Mendoza*, 468 U.S. at 1040 (holding that, under the INA, an illegal arrest of an immigrant has no effect on the government's ability to deport that alien during a deportation proceeding); Hoonsilapa v. I.N.S., 575 F.2d 735, 738 (9th Cir. 1978) (explaining that it is "well settled" that an unconstitutional arrest of an immigrant does not require suppression of evidence that is gathered through an independent source); Wong Chung Che v. I.N.S., 565 F.2d 166, 168 (1st Cir. 1977) (holding that an illegal arrest does not invalidate subsequent removal proceedings); *In re Sandoval*, 17 I. & N. Dec. at 79 (noting that the government can successfully deport an immigrant regardless of the fact that the immigrant was initially stopped and arrested in violation of the Fourth Amendment). Removal proceedings begin when the government files a Notice to Appear with an immigration court. *See* 8 C.F.R. §§ 1003.13–.14 (2015) (providing the procedure for commencing immigration proceedings); *see also* 8 C.F.R. § 1239.1(a) (2015) (providing that federal immigration proceedings are commenced with the filing of a Notice to Appear). When this Notice is served on an immigrant, it informs the immigrant that he or she is charged with being present in the United States in violation of U.S. immigration laws, and demands that he or she appear in U.S. immigration court to respond to the charge. *See* 8 U.S.C. § 1229(a) (2012) (providing the procedure for a federal immigration deportation proceeding); 8 C.F.R. § 1239.1(a) (providing that federal immigration proceedings are commenced with the filing of a Notice to Appear). In *De La Paz*, the constitutional interest at stake was Frias's and Garcia's right to be free from illegal search, seizure, and arrest in violation of the Fourth Amendment. *De La Paz II*, 786 F.3d at 370–371. Neither Frias nor Garcia challenged the initiation of immigration removal proceedings against them under the INA. *Id.* Nor did they maintain that any procedure during the removal proceedings, including their detention, violated their constitutional rights. *Id.* Rather, they both challenged the unconstitutional conduct of CBP agents, which occurred before removal proceedings against them even began. *Id.*

[72] *See Lopez-Mendoza*, 468 U.S. at 1043 (stating that in most deportation proceedings "the sole matters necessary for the Government to establish are the respondent's identity and alienage" (citing *In re Sandoval*, 17 I. & N. Dec. at 79)).

[73] *See id.* (noting that the identity of an alien can be ascertained through the alien's body, evidence that cannot be suppressed even if the body was captured through illegal arrest); *In re Sandoval*, 17 I. & N. Dec. at 79 (explaining the evidentiary consequences of an illegal immigration enforcement arrest).

[74] *See Lopez-Mendoza*, 468 U.S. at 1043 (noting that immigration officers must only prove alienage once the immigrant's identity has been established through an arrest); *Wong Chung Che*, 565 F.2d at 168 (holding that an illegal arrest does not invalidate subsequent removal proceedings); *In re Sandoval*, 17 I. & N. Dec. at 79 (holding that the identity of an alien is not suppressible, even if discovered through unlawful arrest, search, or interrogation).

[75] *Lopez-Mendoza*, 468 U.S. at 1043. The government can prove alienage through any records lawfully in its possession, including immigration records. *See In re Sandoval*, 17 I. & N. Dec. at 79. It can also use other means, such as the immigrant's own testimony during removal proceed-

unlawful presence through admissible evidence, it can then concede the unconstitutionality of the initial stop and arrest, and a successful motion to suppress will have no effect on the proceedings.[76]

Further, even where the legality of the underlying arrest is relevant to proceedings, immigrants are not afforded the Fourth Amendment's normal protections when attempting to suppress that evidence.[77] Unlike in criminal proceedings, any voluntary statement that an immigrant makes to support a motion to suppress unconstitutionally gathered evidence can be used against him to carry the government's burden of proving alienage, the very thing the immigrant is trying to contest.[78] Thus, an immigrant is often forced to implicate his own deportability while challenging a constitutional violation, thereby making the challenged violation irrelevant.[79]

In addition to this deficiency, the Fourth Amendment's exclusionary rule does not apply during removal proceedings.[80] For an immigrant to successfully have evidence deemed inadmissible during his removal proceeding, he has to prove that the manner in which the evidence was seized was "so egregious" that, not only was there a Fourth Amendment violation, but there also was a violation of his right to fundamental fairness and due pro-

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ings. *See* Rodriguez-Gonzalez v. I.N.S., 640 F.2d 1139, 1140–41 (9th Cir. 1981) (concluding that illegal arrest and interrogation do not preclude the government from relying on voluntary admissions made at the removal hearing); *In re* Carrillo, 17 I. & N. Dec. 30, 32–33 (B.I.A. 1979) (holding that the immigrant's voluntary statement made at the removal hearing rendered his inadmissible testimony obtained in violation of the Fifth Amendment irrelevant and unnecessary).

[76] *See Lopez-Mendoza*, 468 U.S. at 1043 (noting that even if an unconstitutional arrest initiated deportation proceedings, deportation will still occur as long as there is evidence independent from the arrest to support a deportation order); *In re Sandoval*, 17 I. & N. Dec. at 79 (same).

[77] *See* Katris v. I.N.S., 562 F.2d 866, 869 (2d Cir. 1977) (describing the lack of Fourth Amendment protections provided to immigrants during removal proceedings). The Fourth Amendment provides that, during a criminal trial, a defendant's testimony in support of a motion to suppress evidence cannot be admitted against the defendant at trial to establish ultimate guilt. Simmons v. United States, 390 U.S. 377, 88 (1968). Immigrants in removal proceedings are not afforded this protection. *See Katris*, 562 F.2d at 867–69 (explaining that if an immigrant who is unlawfully present in the United States admits his or her unlawful status during testimony in support of a motion to suppress evidence, this testimony can be used against the immigrant to support a subsequent deportation order).

[78] *See In re Carrillo*, 17 I. & N. Dec. at 32–33 (holding that an immigrant's voluntary statement made at the removal hearing rendered his illegally obtained, inadmissible testimony irrelevant and unnecessary). To support a motion to suppress, the immigrant must personally testify to the events that surrounded the constitutional violation. *See In re* Barcenas, 19 I. & N. Dec. 609, 611 (B.I.A. 1988) (explaining that when an immigrant challenges the admissibility of the government's evidence during a deportation hearing, the immigrant must personally testify to the facts supporting the challenge).

[79] *See In re Barcenas*, 19 I. & N. Dec. at 611 (holding that an immigrant can be deported based on evidence of alienage gathered through the immigrant's testimony).

[80] *See Lopez-Mendoza*, 468 U.S. at 1050–51 (holding that the Fourth Amendment's exclusionary rule does not apply during removal proceedings); *In re* Wadud, 19 I. & N. Dec. 182, 188 (B.I.A. 1984) (noting that strict rules of evidence are not applicable in deportation proceedings); *see also supra* note 70 (explaining the exclusionary rule).

cess of law under the Fifth Amendment.[81] Thus, even if an immigrant is able to successfully argue that he was stopped and arrested in violation of the Fourth Amendment, any evidence of alienage acquired by the federal officer will not necessarily be rendered inadmissible.[82]

III. *DE LA PAZ*: A MISGUIDED DECISION WITH GRAVE IMPLICATIONS FOR IMMIGRANTS ACROSS THE UNITED STATES

The U.S. Court of Appeals for the Fifth Circuit's 2015 decision in *De La Paz v. Coy* was erroneous because the INA does not provide an alternative, meaningful remedy for the violation of immigrants' Fourth Amendment rights.[83] The purpose of a *Bivens* remedy is to provide victims of unconstitutional conduct adequate redress and to deter federal officers from participating in future unconstitutional conduct.[84] In order to be adequate, the alternative remedy must have the capacity to effectively safeguard the relevant constitutional interest.[85]

The provisions of the INA cited by the Fifth Circuit fail to safeguard immigrants' Fourth Amendment rights for two reasons.[86] First, in contrast to

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[81] *In re* Toro, 17 I. & N. Dec. 340, 343 (B.I.A. 1980). In 1980, in *In re Toro*, the Board of Immigration Appeals stated that every Fourth Amendment violation will not necessarily result in exclusion of the seized evidence. *Id.* In order for this evidence to be suppressed, the circumstances surrounding the arrest and seizure need to be "so egregious" that they constitute a violation of the Fifth Amendment's guarantees of due process and fundamental fairness. *Id.*

[82] *See* Santos v. Holder, 506 F. App'x 263, 264 (5th Cir. 2013) (holding that the evidence federal immigrant agents seized during an immigrant's arrest should not be suppressed, even though the immigrant was arrested in violation of the Fourth Amendment, because the federal immigration agents' conduct was "not egregious"); Puc-Ruiz v. Holder, 629 F.3d 771, 778–79 (8th Cir. 2010) (holding that the exclusionary rule did not apply in deportation proceeding because the alleged arrest without probable cause was not an egregious violation of the Fourth Amendment).

[83] *See* De La Paz v. Coy (*De La Paz II*), 786 F.3d 367, 375–78 (5th Cir. 2015). *See generally* David Antón Armendáriz, *On the Border Patrol and Its Use of Illegal Roving Patrol Stops*, 14 SCHOLAR 553, 553–54 (2012) (outlining the circumstances that allow the CBP, regardless of the INA's constitutional protections, to abuse its power and conduct illegal stops and arrests along the border region).

[84] *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70 (2001) (explaining the *Bivens* action's purpose); Reinert, *supra* note 38, at 814 n.17 (explaining that although the original *Bivens* decision focused on providing adequate compensation to victims of unconstitutional conduct, the U.S. Supreme Court has interpreted the decision to promote deterrence through individual liability).

[85] *See* Minneci v. Pollard, 132 S. Ct. 617, 623 (2012) (declining to extend *Bivens* when an existing statute already "protect[ed] the constitutional interest at stake"). A plaintiff's ability to bring state tort law claims against the federal agents who violated his or her constitutional rights is one example of an existing statute that adequately protects the constitutional interest at stake. *Id.*

[86] *See* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (1984) (holding that the Fourth Amendment does not apply with full force during removal proceedings); Treadwell, *supra* note 7, at 507 (explaining that federal immigration officers routinely violate immigrants' Fourth Amendment rights despite internal regulations forbidding these violations); *infra* notes 90–105 and ac-

the Fifth Circuit's holding, motions to suppress illegally acquired evidence are usually irrelevant to removal proceedings, and even when relevant, are very rarely successful.[87] Second, there is ample evidence that internal DHS review procedures very rarely penalize immigration officers' constitutional violations and do nothing to inhibit their unconstitutional conduct.[88] Thus, the INA neither provides immigrant victims of unconstitutional conduct adequate redress nor deters federal immigration officials from acting unconstitutionally.[89]

Due to the irrelevancy of the initial arrest's constitutionality during removal proceedings, a motion to suppress any illegally acquired evidence does not provide an immigrant with a satisfactory remedy in the case of a Fourth Amendment violation.[90] In most cases, the government will be able to deport an immigrant even after conceding that immigration officials stopped him in violation of the Constitution.[91] An allegation, or even proof,

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companying text (detailing the reasons why the INA fails to adequately protect immigrants' Fourth Amendment rights).

[87] *See Lopez-Mendoza*, 468 U.S. at 1050–51 (holding that the Fourth Amendment's exclusionary rule does not require suppression of illegally seized evidence during removal proceedings); *In re* Sandoval, 17 I. & N. Dec. 70, 79 (B.I.A. 1979) (describing the immateriality of the government's initial unconstitutional arrest of an immigrant during that immigrant's deportation proceeding); *infra* notes 90–97 (explaining why motions to suppress illegally acquired evidence do not provide an adequate remedy for an immigrant subjected to an unconstitutional stop and arrest).

[88] *See* Treadwell, *supra* note 7, at 507 (explaining that ICE agents systematically disregard internal regulations prohibiting them from committing Fourth Amendment violations); *infra* notes 98–105 and accompanying text (detailing why internal DHS review procedures fail to adequately protect immigrants' Fourth Amendment rights).

[89] *See Lopez-Mendoza*, 468 U.S. at 1040 (holding that the INA's current provisions do not limit the ability of the government to deport an unconstitutionally arrested immigrant); Henry G. Watkins, *The Fourth Amendment and the INS: An Update on Locating the Undocumented and a Discussion on Judicial Avoidance of Race-Based Investigative Targeting in Constitutional Analysis*, 28 SAN DIEGO L. REV. 499, 565–69 (1991) (noting that immigrants in removal proceedings are very rarely successful in challenging immigration officials' conduct that violated the regulations governing immigration enforcement); *infra* notes 90–105 and accompanying text (detailing the reasons why the INA fails to adequately protect immigrants' Fourth Amendment rights).

[90] *See, e.g.*, *Lopez-Mendoza*, 468 U.S. at 1040 (holding that, even if an immigrant is able to prove that he was unconstitutionally stopped and arrested, it will have no effect on the government's ability to successfully pursue deportation); Hoonsilapa v. I.N.S., 575 F.2d 735, 738 (9th Cir. 1978) (explaining that an immigrant's unconstitutional arrest will not allow the immigrant to suppress evidence obtained independently from the arrest); Wong Chung Che v. I.N.S., 565 F.2d 166, 168 (1st Cir. 1977) (explaining that the law is clear: an immigrant's illegal arrest that leads to the immigrant being identified for deportation proceedings does not affect the proceedings); *In re Sandoval*, 17 I. & N. Dec. at 79 (noting that, regardless of an initial unconstitutional stop and arrest, the government can successfully deport an immigrant based on any evidence legally in its possession).

[91] *See Lopez-Mendoza*, 468 U.S. at 1040 (holding that an illegal arrest does not affect removal proceedings); *In re Sandoval*, 17 I. & N. Dec. at 79 (noting that, even if an immigrant is able to prove that he or she was unconstitutionally arrested, he or she will not necessarily be able to prevent deportation).

of an illegal arrest, stop, or seizure is only relevant in the small percentage of removal cases where the government must rely on evidence directly obtained from an illegal arrest to prove alienage.[92] Unless the immigrant's case falls into this small percentage, he is left with absolutely no recourse for a Fourth Amendment violation.[93]

Further, even in the rare situations where illegally obtained evidence is relevant, the INA still does not provide adequate redress because immigrants are not afforded the normal protections of the Fourth Amendment while attempting to suppress the evidence.[94] Immigrants are not entitled to a separate hearing on the suppression issue, and any statement they make to support the motion to suppress can be used against them to prove deportability.[95] Additionally, even in cases where immigrants do not implicate their own deportability through testimony, it is almost impossible to suppress illegally acquired evidence and terminate removal proceedings.[96] The rules of evidence in removal proceedings only allow for victims of the most egregious Fourth Amendment violations, a very small percentage of affect-

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[92] *See, e.g.*, *Lopez-Mendoza*, 468 U.S. at 1040 (explaining that an illegal arrest is generally irrelevant during removal proceedings); *Wong Chung Che*, 565 F.2d at 168 (holding that an illegal arrest does not invalidate subsequent removal proceedings); *In re Sandoval*, 17 I. & N. Dec. at 79 (noting that the government can sustain a deportation based on any records lawfully in its possession, regardless of an illegal stop and arrest).

[93] *See Lopez-Mendoza*, 468 U.S. at 1043 (noting that even if an unconstitutional arrest initiated deportation proceedings, deportation will still occur as long as there is evidence independent from the arrest to support a deportation order); *In re* Cervantes-Torres, 21 I. & N. Dec. 351, 353 (B.I.A. 1996) (holding that an alien's illegal arrest is irrelevant as long as the government has independently obtained evidence of alienage). *But see De La Paz II*, 786 F.3d at 375–78 (noting that motions to suppress do provide immigrants a remedy for Fourth Amendment violations).

[94] *See Lopez-Mendoza*, 468 U.S. at 1050–51 (holding that the Fourth Amendment's exclusionary rule does not offer immigrants a remedy during removal proceedings); Katris v. INS, 562 F.2d 866, 869 (2d Cir. 1977) (explaining that an immigrant is not protected from self-incrimination while testifying in support of a motion to suppress); *supra* note 77 (explaining that during criminal proceedings, unlike immigration removal proceedings, the Fourth Amendment requires that a defendant's statement in support of a motion to suppress cannot be used against the defendant to satisfy the government's ultimate burden of proof).

[95] *See Katris*, 562 F.2d at 869 (explaining that, even in the case of an unlawful arrest of an immigrant, deportation of that immigrant can be sustained based on the immigrant's admission of his or her unlawful status at the removal hearing); *In re* Carrillo, 17 I. & N. Dec. 30, 32–33 (B.I.A. 1979) (holding that an immigrant's voluntary statement made at his removal hearing rendered his illegally obtained, inadmissible testimony irrelevant and unnecessary).

[96] *See, e.g.*, *Lopez-Mendoza*, 468 U.S. at 1050–51 (holding that immigrants in removal proceedings are not able to utilize the exclusionary rule while attempting to suppress evidence); Puc-Ruiz v. Holder, 629 F.3d 771, 778–79 (8th Cir. 2010) (holding that, during removal proceedings, only evidence obtained through an egregious violation of the Fourth Amendment can be suppressed); *In re* Wadud, 19 I. & N. Dec. 182, 188 (B.I.A. 1984) (noting that strict rules of evidence are not applicable in deportation proceedings).

ed individuals, to suppress evidence and to have an opportunity to receive any form of redress for the violation.[97]

Finally, internal DHS procedures regulating the conduct of immigration officers fail to offer immigrants any further protection of their Fourth Amendment rights or provide them with any avenue for redress.[98] Voluminous research exposes the fact that federal immigration officials regularly and systematically disregard internal procedures designed to protect immigrants' constitutional rights.[99] Scholars have found that these federal officials routinely violate immigrants' Fourth and Fifth Amendment rights despite internal regulations and also systematically violate internal regulations when conducting worksite immigration raids.[100] Instead of providing constitutional protections, internal DHS policies actually encourage constitutional violations by incentivizing maximum arrest numbers and failing to offer sufficient training regarding reasonable suspicion requirements.[101] In fact, the U.S. Court of Appeals for the Ninth Circuit found that federal immigration policy has created a "systemic" practice of Fourth Amendment viola-

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[97] *See Lopez-Mendoza*, 468 U.S. at 1050–51 (holding that the exclusionary rule is severely diminished in effectiveness during immigration removal proceedings); *Puc-Ruiz*, 629 F.3d at 778–79 (holding that only egregious violations of the Fourth Amendment result in suppressed evidence during removal proceedings).

[98] *See* Treadwell, *supra* note 7, at 507 (explaining that, despite internal regulations, ICE has made warrantless home raids in violation of the Fourth Amendment a "key component" of immigration enforcement activities).

[99] *See, e.g.*, Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109, 1146 ("[T]he Justice Department's internal regulations have failed to prevent behavior by immigration officers that violates the Fourth and Fifth Amendments."); Treadwell, *supra* note 7, at 559–61 (explaining that ICE has made home raids a "key component" of immigration enforcement activities); Watkins, *supra* note 89, at 565–69 (noting that immigrants in removal proceedings are very rarely successful in challenging immigration officials' conduct that violated the regulations governing immigration enforcement); Michael J. Wishnie, *Introduction—The Border Crossed Us: Current Issues in Immigrant Labor*, 28 N.Y.U. REV. L. & SOC. CHANGE. 389, 392–93 (2004) [hereinafter Wishnie, *The Border Crossed Us*] (displaying evidence that immigration officials "regularly raid worksites engaged in a labor controversy" in violation of agency regulations); Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 517 (2004) (concluding that immigration officials routinely ignore statutory provisions in the field of immigrant labor law).

[100] *See* Elias, *supra* note 99, at 1146 (explaining that internal regulations have not prevented federal immigration officials from violating immigrants' Fourth and Fifth Amendment rights); Treadwell, *supra* note 7, at 560 (finding that internal DHS procedures have incentivized systematic Fourth Amendment violations rather than preventing them); Wishnie, *The Border Crossed Us*, *supra* note 99, at 392–93 (displaying evidence that immigration officials regularly conduct workplace raids in violation of federal regulations).

[101] *See* Treadwell, *supra* note 7, at 560 (stating that internal DHS training procedures "no longer adequately address Fourth Amendment concerns" and instead act to incentivize Fourth Amendment violations).

tions by immigration agents.[102] These ineffective procedures do not provide the type of internal administrative remedy necessary to foreclose the extension of a *Bivens* remedy.[103]

By not supplementing these current procedures under the INA with the possibility of a *Bivens* remedy for immigrant victims of Fourth Amendment violations, the Fifth Circuit has authorized unconstitutional conduct by federal immigration officers.[104] Under this current state of the law, immigrants in the United States will not be able to guarantee any meaningful protection of their constitutional right to be free from illegal search, seizure, or arrest under the Fourth Amendment.[105]

CONCLUSION

As the INA stands now, immigrants have very little chance of defending their Fourth Amendment rights during removal proceedings. Motions to sup-

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[102] Int'l Molders' & Allied Workers' Local Union v. Nelson, 799 F.2d 547, 551 (9th Cir. 1986) (agreeing with district court's finding of "an evident systematic policy and practice of [F]ourth [A]mendment violations by INS" (quoting INS v. Delgado, 466 U.S. 210, 218 n.6 (1984))).

[103] *See* Bush v. Lucas, 462 U.S. 367, 386–88 (1983) (detailing the reasons why the Court decided against allowing the extension of the *Bivens* remedy when there was an adequate administrative remedial process in place). In 1983, in *Bush v. Lucas*, the administrative review process in place allowed the unconstitutionally demoted federal employee to recover back pay and to receive other employment benefits, avenues for redress not available to immigrants in removal proceedings. *Id.*

[104] *See Lopez-Mendoza*, 468 U.S. at 1044 (explaining that every federal immigration officer understands that an immigrant will almost never attempt to suppress evidence based on the illegality of his initial arrest during a deportation proceeding and, thus, the prospect of these challenges provides practically no deterrent effect on the unconstitutional conduct of immigration officers); *De La Paz II*, 786 F.3d at 375 (holding that the INA's statutory scheme adequately protects immigrants' Fourth Amendment rights and thus makes extending *Bivens* to the immigration enforcement context unnecessary); Lopez-Gabriel v. Holder, 653 F.3d 683, 686 (8th Cir. 2011) (citing United States v. Janis, 428 U.S. 433, 457–58 (1976)) (stating that the prospect of evidence being suppressed during immigration deportation proceedings does not have a deterrent effect on law enforcement officials); Elias, *supra* note 99, at 1139–41 (arguing that current Fourth Amendment protections granted to immigrants during removal proceedings have done nothing to prevent widespread Fourth Amendment violations by federal immigration agents); Steve Helfand, *Desensitization to Border Violence & the* Bivens *Remedy to Effectuate Systemic Change*, 12 LA RAZA L.J. 87, 122 (2001) (concluding that without the availability of a *Bivens* remedy, immigrants unconstitutionally stopped in the border region will not be guaranteed any adequate constitutional remedy and future abuses will not be curtailed).

[105] *See Lopez-Mendoza*, 468 U.S. at 1044 (explaining that the possibility of an immigrant challenging an initial illegal arrest during a deportation hearing does not deter federal immigration agents from acting unconstitutionally); *Lopez-Gabriel*, 653 F.3d at 686 (stating that the current posture of immigration removal proceedings does not deter law enforcement officials from violating immigrants' Fourth Amendment rights); Helfand, *supra* note 104, at 122 (concluding that the availability of a *Bivens* remedy to immigrants unconstitutionally stopped in the border region would help to guarantee such immigrants an adequate constitutional remedy and to curtail future abuses).

press do not offer immigrants a legitimate chance to terminate their proceedings, and no evidence suggests that immigration officers follow regulations mandating compliance with the Fourth Amendment. Due to these realities, immigrants are neither provided an adequate remedy for constitutional violations, nor offered any hope that immigration officers will be deterred from violating their rights in the future. The Fifth Circuit's failure to extend *Bivens* to the immigration enforcement context in *De La Paz* has thus undermined the entire purpose of the *Bivens* remedy, denied constitutional protection to immigrants in the United States, and endorsed the unconstitutional behavior of federal immigration officials.

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