UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): _____ Caption [use short title] _____

Motion for: _____

Set forth below precise, complete statement of relief sought:

_____

_____

_____

_____

MOVING PARTY: _____ **OPPOSING PARTY:** _____

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: _____ **OPPOSING ATTORNEY**: _____

[name of attorney, with firm, address, phone number and e-mail]

_____ _____

_____ _____

_____ _____

_____ _____

Court-Judge/Agency appealed from: _____

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):

☐ Yes ☐ No (explain): _____

_____

Opposing counsel's position on motion:

☐ Unopposed ☐ Opposed ☐ Don't Know (See Attached)

Does opposing counsel intend to file a response: (See Attached)

☐ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency: _____

_____

_____

Is oral argument on motion requested? ☐ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☐ No If yes, enter date: _____

Signature of Moving Attorney:

_____ **Date:** _____ Service by: ☐ CM/ECF ☐ Other [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: _____ By: _____

Form T-1080 (rev. 7-12)

Opposing counsel's position on motion: (continued from prior page)

- H. Thomas Byron III (for Defendants-appellees John Ashcroft and Robert Mueller)
  _x_Unopposed __ Opposed __ Don't Know

- William Alden McDaniel, Jr. (for Defendant-appellee James Ziglar)
  _x_Unopposed __ Opposed __ Don't Know

- Jeffrey A. Lamken for Defendant-Appellant-Cross-Appellee James Sherman)

  _x_Unopposed __ Opposed __ Don't Know

- Hugh D. Sandler and Shari Ross Lahlou (for Defendant-Appellant-Cross-Appellee Warden Dennis Hasty)
  __Unopposed __ Opposed _x_ Don't Know

- Allan Taffet and Joshua Klein (for Defendant-Appellant-Cross-Appellee Warden Michael Zenk
  __Unopposed __ Opposed _x_ Don't Know

- James J. Keefe (for Defendant--Appellant-Cross-Appellee Salvatore LoPresti)
  __Unopposed __ Opposed _x_ Don't Know

Does opposing counsel intend to file a response: (continued from prior page)

- H. Thomas Byron III (for Defendants-appellees John Ashcroft and Robert Mueller)
  __Yes __ No _x_ Don't Know

- William Alden McDaniel, Jr. (for Defendant-appellee James Ziglar)
  __Yes __ No _x_ Don't Know

- Hugh D. Sandler, Shari Ross Lahlou, Justin Murphey and Kyler Smart (for Defendant-Appellant-Cross-Appellee Warden Dennis Hasty)
  __Yes __ No _x_ Don't Know

- Allan Taffet and Joshua Klein (for Defendant-Appellant-Cross-Appellee Warden Michael Zenk)
  __Yes __ No _x_ Don't Know

- Jeffrey A. Lamken (for Defendant-Appellant-Cross-Appellee James Sherman)
  __Yes __ No _x_ Don't Know

- James J. Keefe (for Defendant-Appellant-Cross-Appellee Salvatore LoPresti)
  __Yes __ No _x_ Don't Know

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Ibrahim Turkmen, et al.,	)	
Plaintiffs-Appellees-Cross-Appellants,	)	
v.	)	No. 13-0981-cv(L)
John Ashcroft, et al.,	)	
Defendants-Cross-Appellees.	)	

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*
IN SUPPORT OF THE PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

I. INTRODUCTION

Amici Curiae, National Immigration Project of the National Lawyers Guild and American Immigration Council, move this Court for leave to proffer the accompanying brief to assist the Court in reviewing the District Court's decision in this case. *See Turkmen v. Ashcroft*, 915 F. Supp. 2d 314, 337 n.10 and 351-54 (E.D.N.Y. 2013) (*Turkmen III*). The issue of concern to amici in this case is whether a remedy under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), is available for violations of Plaintiffs' free exercise, substantive due process, and equal protection claims under the First

and Fifth Amendments. Amici urge the Court to affirm the District Court's decision and affirm the availability of a *Bivens* remedy to Plaintiffs.

II. POSITIONS OF THE PARTIES

Plaintiffs consent to this motion. Undersigned counsel contacted counsel for Defendants, who provided the following responses: H. Thomas Bryon, III indicated that Defendants-Appellees John Ashcroft and Robert Mueller do not oppose this motion; William Alden McDaniel, Jr. consented to the motion on behalf of Defendant/Appellee James Ziglar; Jeffrey Lamken indicated that Defendant-Appellant-Cross-Appellee James Sherman had no objection to the motion; Hugh D. Sandler, Shari Ross Lahlou, Justin Murphey and Kyler Smart, representing Defendant-Appellant-Cross-Appellee Warden Dennis Hasty, did not respond to counsel's email; Allan Taffet and Joshua Klein, representing Defendant-Appellant-Cross-Appellee Warden Michael Zenk, did not respond to counsel's email; and James J. Keefe representing Defendant-Appellant-Cross-Appellee Salvatore LoPresti, did not respond to counsel's email.

III. STATEMENT OF AMICI

The National Immigration Project is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws.

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy and to advance fundamental fairness, due process, and constitutional and human rights in immigration law and administration.

Both organizations have a direct interest in ensuring that noncitizens are not unduly prevented from pursuing remedial suits in response to unlawful and unconstitutional action by federal officers.

III. MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Recognizing a remedy under *Bivens* serves to deter future constitutional violations by holding federal officers accountable for unlawful actions and provides noncitizens with the only viable possibility of compensation for the constitutional harms they suffered.

Here, in relevant part, the violations alleged by Plaintiffs stem from discriminatory and punitive detention policies and actions implemented by federal officers employed by the Metropolitan Detention Center, a facility within the Federal Bureau of Prisons (BOP), in the aftermath of the terrorist attacks of September 11, 2001.

Plaintiffs allege Fifth Amendment constitutional harms based upon horrendous detention conditions, including 23-hour confinement, meager and barely edible food, deprivation of adequate food, deprivation of property and

personal hygiene items, inadequate clothing, handcuffing and shackling, sleep and exercise deprivation, discriminatory and racial insults and physical abuse. The First Amendment Free Exercise Clause violations relate to Defendants' malicious interference with Plaintiffs' practice of Islam through, *inter alia*, deprivation of clocks and calendars to observe prayer timings and Ramadan, banging on cell doors and yelling insults during prayer, and deprivation of Halal food.

For the reasons discussed in the proposed amici brief, the Court should uphold the District Court's findings with respect to the appropriateness and availability of a *Bivens* remedy. The District Court determined that Plaintiffs' confinement claims under the Fifth Amendment substantive due process and equal protection clauses do not arise in a "new context" and, thus, determined that *Bivens* is an appropriate and available remedy. Amici submit that the Court should uphold this finding because the confinement claims at issue here long have been recognized as warranting a *Bivens* remedy and the claims squarely fit within *Bivens'* core holding and purpose. Moreover, any attempt Defendants make to analogize these confinement claims to the unlawful detention claim at issue in *Mirmehdi v. United States*, 689 F.3d 975 (9th Cir. 2011) (en banc) must fail; the case is neither binding nor applicable.

With respect to Plaintiffs' free exercise clause claims, the District Court found that these claims arise in a new context, but nevertheless determined that the

claims warrant a *Bivens* remedy. The District Court found that the Immigration and Nationality Act (INA) does not provide a comprehensive remedial scheme and that special factors do not outweigh the necessity of individual liability for Defendants' purposeful and malicious violation of Plaintiffs' right to practice Islam.

As set forth in the proffered amici brief, the Court should affirm the District Court's finding for at least three reasons. First, it does not provide any incentive for potential defendants to comply with the Free Exercise Clause. Second, it does not authorize *any* compensation to victims of abuse by federal prisoner officers and, thus, is not even remotely compensatory. Third, Congress, through the INA, is keenly aware of and has acquiesced in the availability of damage remedies – as some courts, in *dicta*, also have recognized.

In addition, no special factors are present in this case. As demonstrated in the attached brief, all noncitizens present within the United States are protected under the First and Fifth Amendments, regardless of the lawfulness of their status. *See, e.g.*, *Hellenic Lines Ltd. V. Rhoditis*, 398 U.S. 306, 310 n.5 (1970) (explaining that once noncitizens enter the United States, they are protected by the First and Fifth Amendments and the Due Process Clause of the Fourteenth Amendment, none of which "'acknowledges any distinction between citizens and resident aliens."); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("Due Process Clause

applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.") Thus, Plaintiffs' immigration status is not a special factor warranting hesitation.

Similarly, although Congress exercises plenary power in the field of immigration, this power must be implemented in a lawful manner, within the bounds of the U.S. Constitution. *See, e.g.*, *Fiallo v. Bell*, 430 U.S. 787, 792 n.4 (1977); *INS v. Chadha*, 462 U.S. 919, 941-942 (1983). Where, as alleged here, the constitutional limits on the government's plenary power have been far exceeded, this power cannot be used to deprive a victim of a *Bivens* remedy.

Finally, national security is not an issue where, as here, the abuses were carried out in the non-exigent setting of a prison cell, *Iqbal v. Hasty*, 490 F.3d 143, 159-60 (2d Cir. 2007) (reversed on other grounds, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)), and where Defendants' malicious interference with Plaintiffs' attempt to observe their religion does not further national security.

In sum, as the District Court found, Defendants' policies and actions were directed at Plaintiffs "not because of any suspected links to terrorism, but because of their race, national origin and/or religion." *Turkmen III*, 915 F. Supp. 2d at 326. Affirming the District Court's decision is critical both to deterring future violations by BOP officers and compensating Plaintiffs for their suffering. Moreover, on a national and global scale, it would send a clear message that America's war on

terror is not a war on religion. *See, e.g.*, Department of Justice, "Confronting Discrimination in the Post-9/11 Era: Challenges and Opportunities Ten Years Later" (Oct. 19, 2011) (detailing the anti-Muslim backlash that occurred following September 11 and the Department of Justice's response) (available at http://www.justice.gov/crt/publications/post911/post911summit_report_2012-04.pdf).

IV. CONCLUSION

For the foregoing reasons, amici curiae respectfully request leave to file the accompanying brief.

Respectfully submitted,

s/ Trina Realmuto
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s/ Mary Kenney
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Attorneys for *Amici Curiae*

Dated: October 4, 2013

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system and that six paper copies were sent to the Office of the Clerk via Federal Express. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/_Mary Kenney_____

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Dated: October 4, 2013

13-0981-cv(L)

13-0999-cv(CON), 13-1002-cv(CON), 12-1003-cv(CON), 13-1662-cv(XAP)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IBRAHIM TURKMEN, AKIL SACHVEDA, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, PURNA BAJRACHARYA, AHMER ABBASI,

Plaintiffs-Appellees-Cross-Appellants,

ASIF-UR-REHMAN SAFFI, SYED AMJAD ALI JAFFRI, on behalf of themselves and all others similarly situated, SHAKIR BALOCH, HANY IBRAHIM, YASSER EBRAHIM, ASHRAF IBRAHIM, AKHIL SACHDEVA,

Plaintiffs-Appellees,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AND THE AMERICAN IMMIGRATION COUNCIL AS *AMICI CURIAE* IN SUPPORT OF THE PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

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of the National Lawyers Guild
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-V.-

WARDEN DENNIS HASTY, former Warden of the Metropolitan Detention Center (MDC), MICHAEL ZENK, Warden of the Metropolitan Detention Center, JAMES SHERMAN, SALVATORE LOPRESTI, MDC Captain,

Defendants-Appellants-Cross-Appellees,

JOHN ASHCROFT, Attorney General of the United States, ROBERT MUELLER, Director, Federal Bureau of Investigations, JAMES W. ZIGLAR, Commissioner, Immigration and Naturalization Service, JOHN DOES 1-20, MDC Corrections Officers, JOHN ROES, 1-20, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents, CHRISTOPHER WITSCHEL, MDC Correctional Officer, UNIT MANAGER CLEMETT SHACKS, MDC Counselor, BRIAN RODRIGUEZ, MDC Correctional Officer, JON OSTEEN, MDC Correctional Officer, RAYMOND COTTON,
MDC Counselor, WILLIAM BECK, MDC Lieutenant, STEVEN BARRERE, MDC Lieutenant, LINDSEY BLEDSOE, MDC Lieutenant, JOSEPH CUCITI, MDC Lieutenant, LIEUTENANT HOWARD GUSSAK, MDC Lieutenant, LIEUTENANT MARCIAL MUNDO, MDC Lieutenant, STUART PRAY, MDC Lieutenant, ELIZABETH TORRES, MDC Lieutenant, SYDNEY CHASE, MDC Correctional Officer, MICHAEL DEFRANCISCO, MDC Correctional Officer, RICHARD DIAZ, MDC Correctional Officer, KEVIN LOPEZ, MDC Correctional Officer, MARIO MACHADO, MDC Correctional Officer, MICHAEL MCCABE, MDC Correctional Officer, RAYMOND MICKENS, MDC Correctional Officer, SCOTT ROSEBERY, MDC Correctional Officer, DANIEL ORTIZ, MDC Lieutenant, PHILLIP BARNES, MDC Correctional Officer, UNITED STATES OF AMERICA, JAMES CUFFEE,

Defendants-Cross-Appellees,

OMER GAVRIEL MARMARI, YARON SHMUEL, PAUL KURZBERG, SILVAN KURZBERG, JAVAID IQBAL, EHAB ELMAGHRABY, IRUM E. SHIEKH,

Intervenors.

CORPORATE DISCLOSURE STATEMENT UNDER RULE 26.1

I, Beth Werlin, attorney for Amici Curiae, the American Immigration Council, certify that we are a non-profit organization which does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of our stock.

s/ Mary Kenney

Mary Kenney
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Dated: October 4, 2013

I, Trina Realmuto, attorney for Amici Curiae, the National Immigration Project of the National Lawyers Guild, certify that we are a non-profit organization which does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of our stock.

s/ Trina Realmuto

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Dated: October 4, 2013

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OTHER AUTHORITIES

I. INTRODUCTION AND STATEMENT OF AMICI[1]

Amici Curiae National Immigration Project of the National Lawyers Guild and American Immigration Council proffer this brief to assist the Court in reviewing the District Court's decision holding that a remedy under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) is available for violations of Plaintiffs' free exercise, substantive due process, and equal protection claims under the First and Fifth Amendments. *See Turkmen v. Ashcroft*, 915 F. Supp. 2d 314, 337 n.10 and 351-54 (E.D.N.Y. 2013) (*Turkmen III*). Recognizing a remedy under *Bivens* serves to deter future constitutional violations by holding federal officers accountable for unlawful actions and provides noncitizens with the only viable possibility of compensation for the constitutional harms they suffered.

Amici urge the Court to uphold the District Court's findings with respect to the appropriateness and availability of a *Bivens* remedy. In relevant part, the violations alleged by Plaintiffs stem from discriminatory and punitive detention policies and actions of federal officers employed by the Metropolitan Detention

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1, amici state that no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person — other than amici, their members, or their counsel — contributed money that was intended to fund preparing or submitting the brief.

Center (MDC), a facility within the Federal Bureau of Prisons (BOP), in the aftermath of the terrorist attacks of September 11, 2001.

Plaintiffs allege Fifth Amendment constitutional harms based upon horrendous detention conditions, including 23-hour confinement, insufficient and barely edible food, deprivation of adequate clothing, property and hygiene items, handcuffing and shackling, sleep and exercise deprivation, discriminatory and racial insults, and physical abuse. The First Amendment Free Exercise Clause violations relate to Defendants' malicious interference with Plaintiffs' practice of Islam through, *inter alia*, deprivation of clocks and calendars to observe prayer timings and Ramadan, banging on cell doors and yelling insults during prayer, and deprivation of Halal food.

As the District Court found, Defendants' policies and actions were directed at Plaintiffs "not because of any suspected links to terrorism, but because of their race, national origin and/or religion." *Turkmen III*, 915 F. Supp. 2d at 326. Recognizing a *Bivens* remedy to hold Defendants accountable is critical both to deterring future violations by BOP officers and compensating Plaintiffs for their suffering. Moreover, on a national and global scale, it would send a clear message that America's war on terror is not a war on religion. *See, e.g.*, Department of Justice, "Confronting Discrimination in the Post-9/11 Era: Challenges and Opportunities Ten Years Later" (Oct. 19, 2011) (detailing the anti-Muslim

backlash that occurred following September 11 and the Department of Justice's response) (available at http://www.justice.gov/crt/publications/post911/post911summit_report_2012-04.pdf).

The National Immigration Project is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy and to advance fundamental fairness, due process, and constitutional and civil rights in immigration law and administration. Both organizations have an interest in ensuring that noncitizens are not unduly prevented from pursuing remedial suits in response to unconstitutional action by federal officers.

II. ARGUMENT

This Court's decision in *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc) governs the analysis for determining whether a *Bivens* claim arises in a "new context" and, if so, whether a *Bivens* remedy is available. The court construed the term "context" as "reflect[ing] a potentially recurring scenario that has similar legal and factual components." 585 F.3d at 572. A context is "new" if "no court has previously afforded a *Bivens* remedy" in that particular scenario (context). *Id.*

If courts previously have afforded *Bivens* remedies for factually and legally similar claims, it is not "new" and a *Bivens* remedy is available.

If, *and only if*, a court identifies a "context" as "new," it must go on to decide whether to recognize a *Bivens* remedy under a two-part inquiry.[2] *Arar*, 585 F.3d at 563 (citing *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)). Under this inquiry, a court must consider: (1) the availability of an alternative remedial scheme which would adequately compensate the plaintiff; and (2) the presence of any special factors which would outweigh *Bivens*' deterrent effect.

The District Court determined that Plaintiffs' confinement claims under the Fifth Amendment substantive due process and equal protection clauses do not arise in a "new context" and, thus, determined that *Bivens* is an appropriate and available remedy. The District Court found that Plaintiffs' free exercise clause claims arise in a new context, but nevertheless determined that the claims warrant a *Bivens* remedy because the Immigration and Nationality Act (INA), 8 U.S.C. § 1101, *et seq*., does not provide a comprehensive remedial scheme and special factors do not outweigh the necessity of individual liability for Defendants' malicious violation of Plaintiffs' right to practice Islam. Amici urge the Court to affirm these holdings.

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[2] Defendant Hasty argues that the District Court erred in failing to analyze the confinement claim under this two-part inquiry. Hasty Br. at 19-20. As discussed below, because the court correctly found that the confinement claim did not present a new context, further inquiry was unnecessary.

A. THE DISTRICT COURT PROPERLY DETERMINED THAT PLAINTIFFS' CONFINEMENT CLAIMS UNDER THE FIFTH AMENDMENT SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION CLAUSES DO NOT PRESENT A "NEW CONTEXT."

Relying both on the en banc decision in *Arar* and its prior analysis in *Turkmen I*,[3] the District Court properly found that Plaintiffs' confinement claims do not represent a "new context" under *Bivens*. *Turkmen*, 915 F. Supp. 2d at 337 n.10 citing *Arar*, 585 F.3d at 587 (Sack, J., dissenting). This Court should uphold this finding because courts long have recognized that similar confinement claims warrant a *Bivens* remedy and the claims squarely fit within *Bivens'* core holding and purpose. The Ninth Circuit's decision in *Mirmehdi v. United States*, 689 F.3d 975 (9th Cir. 2011) (en banc), is neither binding nor applicable.

1. Courts Long Have Recognized the Availability of *Bivens* for Confinement Claims Such As These.

In *Arar*, this Court identified the "new context" at issue as "international rendition, specifically 'extraordinary rendition.'" 585 F.3d at 572. Importantly, the court reasoned that the "context" was "new" because "*no* court has previously afforded a *Bivens* remedy for extraordinary rendition." *Id*. (emphasis added).

Unlike the claim in *Arar*, courts regularly recognize personal damage liability of federal employees and prison officials. These types of claims remain at the unquestioned core of the *Bivens* doctrine as exemplified by *Carlson v. Green*,

[3] *Turkmen v. Ashcroft*, Case No. 02-cv-2307, 2006 U.S. Dist. LEXIS 39170 (E.D.N.Y. June 14, 2006).

446 U.S. 14 (1980), in which the Court recognized a *Bivens* remedy against federal prison officials for inadequate medical attention. *See, e.g.*, *Thomas v. Ashcroft*, 470 F.3d 491, 497 (2d Cir. 2006) (finding *Bivens* allegations sufficient where detainee alleged that prison officials "knew of his urgent medical needs but ignored them, and nevertheless ordered or acquiesced in his transfer to a facility where he received no medication . . ."); *Bistrian v. Levi*, 696 F.3d 352, 377 (3d Cir. 2012) (denying prison officials' motion to dismiss Fifth Amendment *Bivens* claims where prison officials exposed detainee to danger of inmate assault); *Cleavinger v. Saxner*, 474 U.S. 193 (1985) (affirming denial of Fifth Amendment *Bivens* claims against members of disciplinary committee on qualified immunity grounds); *Young v. Quinlan*, 960 F.2d 351, 360-64 (3d Cir. 1992) (reversing summary denial of Eighth Amendment claims of adequate protection and conditions of confinement); *Williams v. Meese*, 926 F.2d 994, 998 (10th Cir. 1991) (finding error in dismissal of Fifth Amendment *Bivens* claims against prison officials over allegedly discriminatory adverse actions); *Cale v. Johnson*, 861 F.2d 943, 948 (6th Cir. 1988) (recognizing *Bivens* claims in where disciplinary action taken in retaliation for inmate complaints about food); *accord Arar*, 585 F.3d at 597 (Sack, J., dissenting) (citing cases recognizing *Bivens* remedies).

That the victim of the mistreatment is not a U.S. citizen does not alter the availability of the remedy. *See, e.g, Martinez-Aguero v. Gonzales*, 459 F.3d 618,

627 (5th Cir. 2006) (holding *Bivens* available where INS officer beat and yelled profanities at a defenseless noncitizen without provocation); *Guerra v. Sutton*, 783 F.2d 1371, 1375 (9th Cir. 1986) (finding *Bivens* available where immigration officers assisted in searches and arrests "without knowledge of the details of the warrant which they claimed authorized their actions"); *Papa v. United States*, 281 F.3d 1004, 1010-11 (9th Cir. 2002) (reversing district court dismissal of *Bivens* claim where federal officers "knowingly plac[ed] [immigration detainee] in harm's way"); *De La Paz v. Coy*, No. SA-12-CV-00957-DAE, 2013 U.S. Dist. LEXIS 87250 (W.D.Tx. June 21, 2013) (finding *Bivens* remedy appropriate where Border Patrol agents alleged to have arrested and detained noncitizen solely based on Hispanic appearance). *Cf. Humphries v. Various Fed. USINS Emp.*, 164 F.3d 939, 944 (5th Cir. 1999) (reversing dismissal of damages suit against INS and FBI officials involving claims under the Thirteenth and Fifth Amendments).

In sum, prior precedent recognizes the appropriateness and availability of a *Bivens* remedy for Fifth Amendment confinement claims. Thus, Plaintiffs' confinement claims do not present a "new context."

2. **Plaintiffs' Confinement Claims Fit Within *Bivens* Core Holding and Purpose.**

Plaintiffs' confinement claims also do not present a new context because they fit squarely within *Bivens* "core holding" that money damages may be sought

from "federal officers who abuse their constitutional authority." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 67 (2001).

In *Bivens*, the Court provided a remedy where federal agents violated the Fourth Amendment when, without a warrant or probable cause, they entered and searched the plaintiff's apartment, arrested him using unreasonable force, interrogated him, and conducted a visual strip search. *Bivens*, 403 U.S. at 390-91. In *Davis v. Passman*, the Court extended *Bivens* to cover Fifth Amendment substantive due process violations where a U.S Congressman terminated an assistant's employment on the basis of her sex. 442 U.S. 228, 230 & n.3 (1979). In *Carlson v. Green*, the Court recognized a *Bivens* remedy under the Eighth Amendment when federal prison agents ignored the medical advice of a prisoner's doctors and failed to administer competent medical attention, and these actions allegedly led to his death. 446 U.S. 14 (1980).

Whatever limitations the Court since has placed on *Bivens*, it has not questioned its core holding. The Court also never has questioned the propriety of a damages remedy where the threat of individual liability is necessary, either to deter future unconstitutional acts or to ensure that the plaintiff has a remedy to compensate for the constitutional harm. *Malesko*, 534 U.S. at 61, 70. Here, recognizing a *Bivens* remedy serves both purposes.

First, recognizing a *Bivens* remedy is necessary to deter future acts of abuse, discrimination and mistreatment by individual federal prison officers. In *Carlson*, the Court reasoned that *Bivens* "serves a deterrent purpose," has the potential for an award of "punitive damages," permits a trial by a jury of one's peers, and allows the federal judiciary to redress federal constitutional violations (rather than relying on the availability of a state cause of action). *Id.*, 446 U.S. at 21-23. These rationales all apply here. The threat of individual officer liability is critical to deter imposition of similar unconstitutional conditions against a vulnerable population. *FDIC v. Myer*, 510 U.S. 471, 485 (1994) ("It must be remembered that the purpose of *Bivens* is to deter *the officer*.") (emphasis in original). In addition, the availability of punitive damages is warranted given the length, amount and malicious intentions with which Defendants imposed the challenged conditions. Moreover, the availability of a jury trial is necessary, both to determining the amount of any damages award and to promoting a public sense of accountability and transparency. Lastly, the fact that these violations stem from a federal policy predicated on largely fabricated federal immigration concerns strongly favors recognition of a *Bivens* cause of action rather than reliance on any state law remedies.

Second, and as discussed in detail below in § II.B.1, without a *Bivens* remedy, Plaintiffs would be left without any means of redress for the harms caused

by Defendants. The INA is not compensatory or remedial. While the INA governs the *legality* of immigration-related detention (*see, e.g.*, 8 U.S.C. §§ 1226, 1231(a)), the Act is completely silent as to the *conditions* of such detention.

3. *Mirmehdi* Is Neither Binding Nor Applicable.

This Court should reject any reliance on *Mirmehdi v. United States*, 689 F.3d 975 (9th Cir. 2011) (en banc). *See* Sherman Opening Brief at 29, 46. There, a panel of the Ninth Circuit declined to recognize a *Bivens* remedy against immigration officers for "illegal immigrants to recover for unlawful detention during deportation proceedings." *Id*. at 981. The decision is not binding on this Court and it is inapposite to the instant case.[4]

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[4] The decision also is flawed. Insofar as the court attempts to justify its holding by asserting that the opinion is limited to *Bivens* actions by "illegal immigrants" arising in the deportation context, *see id*. at 1079 n.3, 1082 (Silverman, J., concurring), that limitation is untenable because federal immigration law contains no such category; rather, the INA's entry, admission, and removal scheme creates various categories of individuals whose status cannot be so easily described.

In addition, officials have authority to permit inadmissible noncitizens to come into the United States, *see* 8 C.F.R. § 212.5; authority to allow those who are removable to remain here, *see* 8 U.S.C. §§ 1227(a)(1)(E)(iii), (a)(1)(H), (a)(7); and authority to grant various forms of relief to removable non-citizens, some of which are mandatory. *See, e.g.*, 8 U.S.C. § 1229b(b)(2) (cancellation for certain battered spouses and children); *id*. § 1231(b)(3) (mandatory prohibition against removal of individuals subject to persecution).

Even those ordered removed by an immigration judge may be permitted to remain and work in the U.S. *See* 8 C.F.R. § 274a.12(a)(11-13), (c)(8)-(11), (14), (18)-(20), (22), (24) (listing categories of individuals who can receive federal permission to work in the U.S. even after removal order).

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In *Mirmehdi*, four brothers brought a damages action against immigration and FBI officers for, *inter alia*, both unlawful detention and inhumane detention conditions. *Mirmehdi*, 689 F.3d at 980. These claims stemmed from allegations that the officers unlawfully conspired to place them in deportation proceedings and detain them during proceedings. *Id*. at 979. Significantly, the parties settled the Mirmehdis' detention conditions claim. *Id*. at 980. Thus, unlike this case, a detention conditions claim never was before the court. Rather, the court considered the availability of a *Bivens* remedy to challenge the legality of plaintiffs' detention during deportation proceedings and concluded that it arose in a "new context." *Mirmehdi*, 689 F.3d at 981.

The factual and legal basis for Plaintiffs' claims stands in stark contrast to those in *Mirmehdi*. Plaintiffs do not challenge the legality of their detention during deportation proceedings; rather, they claim that Defendants subjected them to abusive and discriminatory confinement conditions. Thus, because the Ninth Circuit considered a factually and legally different claim, its "new context" finding is not relevant to this Court's analysis of Plaintiffs' conditions-of-confinement claims.

Furthermore, *Mirmehdi's* analysis regarding whether to extend a *Bivens* remedy to this new context also is distinguishable. The court concluded that a

Bivens remedy was not available because plaintiffs could and did take advantage of two alternative remedial schemes to challenge the legality of their detention: in their removal hearing and through a habeas petition under 28 U.S.C. § 2241. *Mirmehdi*, 689 F.3d at 982. In contrast, Defendants here actively impeded Plaintiffs from pursuing any legal redress for the harsh detention conditions they suffered. *See* Plaintiffs Fourth Amended Compl., Dkt. No. 726, at 27-33.

Finally, one district court questioned whether the Ninth Circuit intended to bar *Bivens* claims beyond the very specific factual context of *Mirmehdi*. *De La Paz v. Coy*, 2013 U.S. Dist. LEXIS 87250 at *15. Doubt over *Mirmehdi*'s intended reach is similarly warranted here; nothing in *Mirmehdi* suggests that the court intended the decision would preclude a remedy for the types of emotional, physical and mental harms suffered by Plaintiffs.

* * * * * * * * * *

In sum, the Court should uphold the District Court's decision and find that *Bivens* relief is available to remedy substantive due process violations by federal prison officials. To the extent there is any doubt, the arguments set forth below for extending a *Bivens* remedy to Plaintiffs' free exercise claims apply with equal force to Plaintiffs' confinement claims.

B. THE DISTRICT COURT CORRECTLY RECOGNIZED A *BIVENS* REMEDY FOR PLAINTIFFS' FREE EXERCISE CLAIM.

The District Court properly concluded that Plaintiffs' confinement claims satisfy this test because (1) the INA does not provide an alternative remedial scheme; and (2) no "special factors" counsel hesitation.[5]

1. The INA Does Not Provide an Alternative Remedial Scheme for Protecting Plaintiffs' Interest or Compensating Them – Monetarily or Otherwise.

Although Defendants Hasty and Sherman attempt to argue that a *Bivens* remedy does not extend to Plaintiffs' free exercise claims, wisely, neither claims that the INA provides an alternative remedial scheme. Nevertheless, amici briefly address this point to dispel any notion that the INA provides adequate remedial measures for the constitutional violations alleged by Plaintiffs.

In *Wilkie*, the Supreme Court stated that the existence of an "alternative remedial scheme" alone is not enough to find a *Bivens* remedy inappropriate. Rather, the "alternative existing process for protecting the interest" must "amount[] to a convincing reason" for the court to refrain from extending a *Bivens* remedy. *Wilkie*, 551 U.S. 537, 550 (2007) (citation omitted). In light of the purpose of

[5] Amici agree with Plaintiffs that the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act were not alternative remedial schemes available to Plaintiffs. *See* Plaintiffs' Opening Brief, Dkt. 147, at 60-62. Amici will not repeat these arguments. Instead, as amici are immigrant rights organizations with expertise in the scope of remedies available under the INA, this section exclusively focuses on the inadequacy of the INA as a comprehensive remedial scheme.

Bivens, any alternative remedial scheme must serve to deter future constitutional violations and provide adequate compensation for the victims. *See Minneci v. Pollard*, -- U.S. --, 132 S. Ct. 617, 625 (2012) ("[I]n principle, the question is whether, in general, state tort law remedies provide *roughly similar incentives* for potential *defendants* to comply with the Eighth Amendment while also providing *roughly similar compensation* to *victims* of violations.") (emphasis added).

Here, the INA does not serve either underlying purposes. First, it does not provide any incentive for potential defendants to comply with the Free Exercise Clause. Second, it does not authorize *any* compensation to victims of abuse by federal prison officers and, thus, is not remotely compensatory. Third, Congress, through the INA, is keenly aware of and has acquiesed to the availability of damage remedies – as some courts, in *dicta*, also have recognized. In sum, the INA does not "amount[] to a convincing reason" to forego allowing a *Bivens* remedy for constitutional violations which are not covered by, and cannot be remedied through, that Act.

***

a. The INA Does Not Provide "Roughly Similar Incentives" for Potential Defendants to Comply With the Free Exercise Clause as Would a *Bivens* Remedy.

The Federal Bureau of Prisons (BOP) is an agency within the Department of Justice. The BOP is responsible for housing Federal inmates.[6] It runs both Federal Correctional Centers (FCC) and administrative detention facilities, known as Federal Detention Centers (FDC).

The Executive Office for Immigration Review (EOIR), which consists of immigration judges and the Board of Immigration Appeals, is a separate agency within the Department of Justice. It is responsible for adjudicating immigration cases, including removal proceedings and administrative appeals.[7] A separate executive department, the Department of Homeland Security (DHS), is charged with enforcing the INA. The BOP does not play a meaningful role in a noncitizen's removal proceeding, other than to provide the facility for some hearings and house the noncitizen during the pendency of proceedings and pending execution of a removal order.[8]

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[6] *See* Federal Bureau of Prisons website, available at: http://www.bop.gov/about/index.jsp (last visited Oct. 3, 2013).

[7] *See* EOIR website, *available at* http://www.justice.gov/about/about.html.

[8] Congress directed DHS to initiate removal hearings at both FCCs and FDCs. *See* 8 U.S.C. § 1228(a) requiring DHS to provide for removal hearings at select federal facilities. *See* Federal Bureau of Prisons, FCC Oakdale, http://www.bop.gov/locations/institutions/oax/index.jsp (last visited Oct. 3, 2013).

For there to be a meaningful incentive to deter, there would have to be a nexus between the misconduct of a BOP officer and the statutory scheme. No such nexus exists. The reality is that the agencies run on parallel tracks in conducting their activities. Just as no two parallel lines ever intersect in a plane, BOP officers do not intersect with the INA. Thus, it would be simply wrong to conclude that provisions of the INA would have a "roughly similar" deterrent effect when, in fact, the INA has *no* deterrent effect whatsoever on the misconduct of BOP officers.

b. The INA Does Not Provide Victims with *Any* Compensation, Let Alone "Roughly Similar Compensation" to a *Bivens* Remedy.

The INA's "scheme" is not compensatory or remedial. Because the INA does not provide for monetary compensation, it is not comparable to suits for damages under *Bivens*.[9] For noncitizen victims of constitutional violations caught up in the immigration system, "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in judgment).

Additionally, the INA is not remedial. Immigration courts are powerless to hold BOP officers or other federal officers accountable for the suffering, outrage,

[9] *See Schweiker v. Chilicky*, 487 U.S. 412, 428-29 (1988) (finding that Congress, through the Social Security Act, adequately addressed state agencies' unlawful termination of disability benefits by providing for the "belated restoration of back benefits"); *Hudson Valley Black Press v. IRS*, 409 F.3d 106, 111-13 (2d Cir. 2005) (discussing 26 U.S.C. § 7433, in which Congress "provided a mechanism by which aggrieved taxpayers may bring a civil action for damages").

emotional distress, humiliation and horror Plaintiffs experienced, all of which were caused by Defendants' confinement policies and actions. *See* § II.B.1.a, *supra*; *see also Cesar v. Achim*, 542 F. Supp. 2d 897, 900 (E.D. Wis. 2008) (stating that the INA contains "nothing of a remedial nature, much less an intricate and carefully crafted remedial scheme") (internal quotation marks and citation omitted); *Khorrami v. Rolince*, 493 F. Supp. 2d 1061, 1074 (N.D. Ill. 2007) ("While [the INA] is comprehensive in terms of regulating the in-flow and outflow of aliens, it is not comprehensive in terms of providing a remedy for [constitutional violations]"); *Diaz-Bernal v. Myers*, 758 F. Supp. 2d 106, 127-29 (D. Conn. 2010) ("[the INA] does not provide a remedial scheme for violations committed by immigration officials outside of removal proceedings"). As noted, federal prison officials are not subject to EOIR's jurisdiction and, consequently, immigration courts and the Board of Immigration Appeals have no adjudicatory, injunctive or even advisory authority over BOP officials.

At most, an immigration court could suppress or terminate removal proceedings based on a constitutional violation, but even this potential relief, which immigration courts rarely grant,[10] does not compensate victims in roughly the same manner as would a *Bivens* remedy. In rejecting the availability of habeas

[10] *See, e.g.*, *Cotzojay v. Holder*, 725 F.3d 172 (2d Cir. 2013) (remanding because violation in this case met the egregious standard for suppression, but noting that "This Court has never found a violation sufficiently severe, and therefore egregious, to require suppression in a removal hearing.")

corpus as an adequate alternative remedy for a *Brady* violation, the Seventh Circuit reasoned:

> But the habeas remedy is limited to securing prospective relief from unlawful incarceration, halting the ongoing harm from a conviction prejudicially tainted by a constitutional violation--a powerful remedy to be sure, but not a *compensatory* one. The habeas writ is akin to an injunction; it cannot provide a retrospective compensatory remedy. Stated differently, habeas corpus is categorically incapable of compensating the victim of a *Brady* violation for the constitutional injury he has suffered.

Engel v. Buchan, 710 F.3d 698, 706 (7th Cir. 2013) (italics in the original). Similarly here, any reprieve provided by an immigration court via termination or suppression does not retrospectively compensate Plaintiffs for the time Defendants deprived them of their constitutional right to practice their religion.

c. The INA Evidences Congressional Intent to Allow Damages Remedies.

The INA itself demonstrates that Congress considers damages actions as available to remedy constitutional violations. Congress demonstrated its awareness of, and acquiescence in, the availability of damage remedies in a set of provisions that establish certain limited authority for state and local officials to enforce the immigration laws. Congress specified that such state or local officers and employees "shall not be treated as a Federal employee for any purpose other than for purposes of . . . sections 2671 through 2680 of Title 28 [the Federal Tort

Claims Act] (relating to tort claims)." 8 U.S.C. § 1357(g)(7). The provision immediately following states:

> [a]n officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting *under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.*

8 U.S.C. § 1357(g)(8) (emphasis added). Because these provisions are intended to make state and local officers who carry out enforcement under the immigration laws liable in damage actions to the same extent as federal officers, it presupposes that federal immigration officers already are liable in such actions. Congress obviously would not have included this language if it considered the INA to be a comprehensive remedial scheme. On the contrary, it explicitly contemplated that sources other than the INA would provide damage remedies against state and local officials who violate the law when acting under § 1357, which gives them authority to, *inter alia*, detain non-citizens incident to deportation.[11]

In addition, at least in dicta, some courts recognize the availability of *Bivens* remedies for constitutional violations by federal officers against noncitizens in removal proceedings. *See, e.g.*, *Ballesteros v. Ashcroft*, 452 F.3d 1153, 1160 (10th

[11] The explicit reference to the FTCA in § 1357(g)(7) cannot be read to imply that Congress intended to permit *only* suits under the FTCA, and not under *Bivens*. Congress legislated against the backdrop of the Supreme Court's decision in *Carlson v. Green*, 446 U.S. 14, 19-24 (1980), which held that the availability of a remedy under the FTCA does not preclude a *Bivens* action for the same injury.

Cir. 2006) ("No remedy for the alleged constitutional violations would affect the BIA's final order of removal. Any remedy available to Mr. Ballesteros would lie in a *Bivens* action."); *Matter of Sandoval*, 17 I&N Dec. 70, 82 (BIA 1979) (citing *Bivens* for the proposition that "civil or criminal actions against the individual officer may be available."). *Cf*. Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Officers, All Special Agents in Charge and All Chief Counsel (Jun. 17, 2011) (recognizing the availability of litigation to noncitizen plaintiffs seeking to protect civil rights and civil liberties) *available at* https://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.

* * * * * * * * * *

For these reasons, the INA is not an alternative remedial scheme that operates as an incentive to deter constitutional violations by federal prison officers and it does not compensate noncitizen victims of egregious prison conditions, discrimination, and malicious religious infringement. Therefore, this Court should uphold the District Court's finding that "there is no scheme -- statutory or regulatory, comprehensive or otherwise -- for a person detained in a federal facility to seek *any* remedy from an officer for intentionally and maliciously interfering with his right to practice his religion." *Turkmen III*, 915 F. Supp. 2d at 353.

2. There Are No Special Factors Counseling Hesitation In This Case.

The District Court correctly determined that the second prerequisite for implying a *Bivens* remedy – that special factors do not counsel hesitation – also was satisfied in this case. 915 F. Supp. 2d at 354. The threshold for this test is a low one. *Arar*, 585 F.3d at 574. Although special factors are not easily defined, they must be "substantial enough to justify the absence of a damages remedy." *Id.* at 573.

The District Court applied the *Arar* standard with respect to national security, the only factor cited as raised by Defendants. *Turkman III*, 915 F. Supp. 2d at 353. However, neither national security nor the other factors susbsequently raised by Defendants are substantial enough to justify depriving Plaintiffs of a *Bivens* remedy.

a. Plaintiffs Are Entitled to Constitutional Protections Irrespective of Their Immigration Status.

Plaintiffs' immigration status is not a special factor. Plaintiffs are entitled to constitutional protection irrespective of their immigration status. It is well-settled that the "Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citations omitted); *see also Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953) ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings

conforming to traditional standards of fairness encompassed in due process of law"); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("The Fifth Amendment . . . protects every [alien] … from deprivation of life, liberty or property without due process of law . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection").

Similarly, in *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 310 n.5 (1970), the Court explained that once noncitizens enter the United States, they are protected by the First and Fifth Amendments and the Due Process Clause of the Fourteenth Amendment, none of which "'provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority.'" (quotations omitted).

b. *Bivens* Actions Are Available In Fields Over Which Congress Has Plenary Power.

Plaintiffs challenge the unconstitutional treatment they suffered while detained by Defendants, including Defendants' intentional and malicious interference with their ability to practice their religion. The plenary power that Congress exercises over immigration – that is, the "power of Congress over the admission of aliens and their right to remain," *Galvan v. Press*, 347 U.S. 522, 530 (1954) – is not implicated in such a challenge. The fact that Congress has

authority over immigration policy cannot mean that Congress condones federal officers violating constitutional rights during the execution of these policies. Taken to its logical conclusion, Defendants' position would mean that Congress' plenary power allows federal immigration officers to perpetrate flagrant and grave violations of constitutional rights with impunity. This is a position that the Supreme Court has repeatedly rejected.

As early as 1903, the Court admonished:

> [The Supreme Court] has never held …that administrative officers, when executing … a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution.

Yamataya v. Fisher, 189 U.S. 86, 100 (1903). Since then, the Court has reiterated this position numerous times. *See, e.g.*, *Fiallo v. Bell*, 430 U.S. 787, 792 n.4 (1977) ("[i]n the enforcement of [immigration] policies, the Executive Branch of the Government must respect the procedural safeguards of due process … [even if] the formulation of these policies is entrusted exclusively to Congress") (quotations omitted); *INS v. Chadha*, 462 U.S. 919, 941-942 (1983) (Congress must choose "a constitutionally permissible means of implementing" its plenary power).

More recently, the Sixth Circuit enforced exactly such a constitutional limitation on the implementation of immigration policies in a post-September 11 case involving removal cases which the Attorney General (AG) had designated of "special interest" because of security concerns. *Detroit Free Press v. Ashcroft*, 303

F.3d 681 (6th Cir. 2002). A noncitizen whose case was so designated, along with several newspapers and a congressman, challenged the AG's policy of closing hearings in these cases to the public. *Id*. at 683-84. The government argued, *inter alia*, that the plenary power doctrine "supercedes" any First Amendment right of access, a claim the court rejected. *Id*. at 686 n.7. The government also argued that this doctrine required judicial deference to all immigration policies, whether substantive or non-substantive.[12] *Id*. at 686. The court disposed of this argument by demonstrating, through a detailed description of Supreme Court precedent, that it is only *substantive* immigration policies that are subject to the plenary power doctrine; non-substantive policies, such as the procedural policy before the court, were not entitled to deference. *Id.* at 688-94 (emphasis added).

Here, the complaint demonstrates that Defendants far exceeded the constitutional limits placed upon the government's plenary power. In light of the alleged abuse of authority, the plenary power doctrine is not relevant; it is not a "special factor" which should be considered in the *Bivens* analysis.

Moreover, even were this not so, federal plenary power is not unique to the immigration context. In other contexts in which Congress exercises plenary

[12] The court defined a substantive immigration issue as one involving a question of whether a person will be allowed to enter or will be deported. *Id.* at 686 n. 6. Under this definition, the policies and practices at issue here are non-substantive. *Turkman III*, 915 F.Supp. 2d at 352 ("The plaintiffs in this case do not complain about their deportations").

power, courts have not hesitated to allow plaintiffs to proceed with a *Bivens* claim that, as here, does not implicate that power.

For example, although Congress possesses plenary power over Indian affairs, *see, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1988), the Court in *Wilkinson v. United States*, 440 F.3d 970 (8th Cir. 2006), permitted plaintiffs to pursue *Bivens* claims against a Bureau of Indian Affairs officer. Similarly, in a *Bivens* suit against patent officers, the court rejected the defendants' claim of absolute immunity. *Goldstein v. Moatz*, 364 F.3d 205 (4th Cir. 2004). As in the immigration context, Congress has plenary power to "to legislate upon the subject of patents." *McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843).

c. National Security Concerns Do Not Counsel Hesitation In This Case.

The District Court correctly rejected Defendants' claims that a national security emergency constituted a special factor in this case. *Turkman III*, 915 F.Supp. 2d at 354. The District Court was not denying the need for the "full exercise" of government power in the aftermath of September 11. *Id*. Instead, the court explained that "the right of a person detained in an American prison not to be subjected to malicious mistreatment by federal officers that is specifically intended to deprive him of his right to free exercise of his religion was not diminished by the September 11 attacks." *Turkman III*, 915 F.Supp. 2d at 354 (citing *Iqbal v.*

Hasty, 490 F.3d 143, 159-60 (2d Cir. 2007) (reversed on other grounds, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

In *Iqbal*, a case involving the same detention policies at issue here, this Court distinguished between legitimate governmental responses to the exigencies of the post-September 11 emergency – which might permit government action that would "exceed constitutional limits in normal times" – and subsequent conduct that occurred in the non-exigent confines of a prison cell. *Iqbal*, 490 F.3d at 159. The court made clear that "most of the rights that the Plaintiff contends were violated do not vary with surrounding circumstances, such as the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination. The strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times." *Id.* at 159; *see also* 159-160 ("the exigent circumstances of the post-9/11 context do not diminish the Plaintiff's right not to be needlessly harassed and mistreated … by repeated strip and body-cavity searches. This and other rights, such as the right to be free from use of excessive force and not to be subjected to ethnic or religious discrimination, were all clearly established prior to 9/11, and they remained clearly established even in the aftermath of that horrific event").

Here, the District Court specifically based its determination that national security was not a special factor warranting hesitation on the failure of the defendants to "even attempt[] to explain why the availability of a damages remedy if the plaintiffs prove their claim would adversely impact our national security," coupled with allegations of "malicious mistreatment" and craven abuse of government power. *Turkman III*, 915 F. Supp. 2d at 354. As the court explained:

> Intuition suggests the opposite: if an American jury finds that federal officers deprived detainees of the Koran and Halal food, refused to tell them the correct time of day, and banged on their cell doors while screaming profanities and anti-Muslim epithets, all for the specific purpose of interfering with their exercise of their Muslim faith, one would think our national security interests would only be enhanced if the world knew that those officers were held liable for the damages they caused.

Id.

Defendants Hasty and Sherman again argue that national security is a special factor that should preclude a *Bivens* remedy here, but they still fail to provide any specific reason to justify this claim. Defendants' treatment of Plaintiffs while in detention, including their malicious interference with Plaintiffs' ability to observe their religion, is not tied to the United States' national security. It certainly is not so substantial as to warrant depriving Plaintiffs of a *Bivens* remedy.

d. Defendants' Position Creates Virtually Blanket Immunity for Unconstitutional Conduct by Federal Immigration Officials.

Amici underscore the breadth of abusive conduct potentially immunized from *Bivens* remedies by Defendants' position. Defendants contend that *Bivens* is not an available remedy for Plaintiffs where federal officials deliberately and maliciously violated their constitutional rights. If Defendants' position were adopted, it would be next to impossible for victims of egregious wrongdoing to obtain any remedy for mistreatment by federal officials acting under color of the immigration laws.

Officials acting under color of immigration authority too often have detained and, in some cases, removed U.S. citizens[13] and illegally detained lawfully present non-citizens.[14] Additionally, and even more relevant here, non-citizens with various forms of immigration status have brought damage actions asserting claims of shocking abuse in immigration detention. *See, e.g.*, *Lynch v. Cannatella*, 810 F.2d 1363, 1367 (5th Cir. 1987) (alleging "severe mistreatment" of stowaways

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[13] *See, e.g.*, *Castillo v. Skwarski*, No. 08-5683, 2009 U.S. Dist. LEXIS 115169 (W.D. Wash. Dec. 10, 2009) (U.S. citizen veteran detained for over seven months and ordered removed by Immigration Judge settled *Bivens* suit); *Guzman v. United States*, No. CV 08-01327 GHK (C.D. Cal. May 11, 2010) (American citizen with mental disability who was detained and removed filed and settled damages suit).

[14] *See, e.g.*, *Riley v. United States*, No. 00-cv-06225 ILG/CLP (E.D.N.Y. filed Oct. 17, 2000) (*Bivens* and FTCA claims for unlawful detention, shackling and strip search of lawful permanent resident upon return to U.S. that settled for monetary damages).

detained during attempted entry to U.S., including being "shackled and forced to perform labor," being "hosed down with a fire hose that slammed them against the iron walls of their cells," being "drugged," and beaten); *Martinez-Aguero*, 459 F.3d at 620-21 (border patrol agent not entitled to qualified immunity for kicking a woman in the back and pushing her against a concrete wall, triggering epileptic seizures); *Jama v. U.S. I.N.S.*, 334 F. Supp. 2d 662, 666 (D.N.J. 2004) (asylum seekers alleged they were "tortured, beaten, harassed" and "subjected to abysmal living conditions" in detention); *Diouf v. Chertoff*, No. 07-03977 (C.D. Cal. May 6, 2008) (damage action under *Bivens* and FTCA by non-citizens who were forcibly drugged with powerful anti-psychotic medications during attempts to remove them); *Doe v. Neveleff*, No. 11-cv-00907 (W.D. Tex. filed Oct. 19, 2011) (*Bivens* claim by three female asylum-seekers on behalf of a class, seeking redress for sexual assault while in ICE custody).

Bivens is a critical deterrent to such abuse. Without it, federal immigration officers will have license to violate constitutional rights with impunity, and victims of abuses will have no remedy. The Court should avoid this consequence by preserving its availability.

III. CONCLUSION

For the foregoing reasons, amici urge the Court to affirm the District Courts decision recognizing a *Bivens* remedy for Defendants' violations of Plaintiffs'

rights under the Substantive Due Process and Equal Protection Clauses of the Fifth Amendment and the Free Exercise Clause of the First Amendment.

Respectfully submitted,

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Dated: October 4, 2013

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s/_Mary Kenney_____

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E-mail: _____

Appearance for: _____
(party/designation)

Select One:

☐ Substitute counsel (replacing lead counsel: _____)
(name/firm)

☐ Substitute counsel (replacing other counsel: _____)
(name/firm)

☐ Additional counsel (co-counsel with: _____)
(name/firm)

☐ Amicus (in support of: _____)
(party/designation)

CERTIFICATION

I certify that:

☐ I am admitted to practice in this Court and, if required by Interim Local Rule 46.1(a)(2), have renewed my admission on _____ OR

☐ I applied for admission on _____.

Signature of Counsel: _____

Type or Print Name: _____