UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JUAN BARRERA, JOSE CABRERA, DANIEL CHAVEZ, JOSE DUMA, JOSE LLIBISUPA, ISAAC MALDONADO, EDGAR REDROVAN, NICOLAS SEGUNDO SANCHEZ, JUAN CARLOS SIMBANA, and DANILO BRITO VARGAS	:	
V.	:	No. 3:07CV1436 (RNC)
MARK BOUGHTON, Mayor of Danbury, et al.	:	

MEMORANDUM IN SUPPORT OF RENEWED MOTION TO DISMISS[1]

Pursuant to Local Rule 7(a)1. of the Local Rules of Civil Procedure for the District of Connecticut, and Rule 12(b)(1) of the Federal Rules of Civil Procedure, the federal defendants, Ronald Preble, Richard McCaffrey, James Brown, Bruce Chadbourne,[2] Jim Martin and George Sullivan, all sued in their personal capacity for money damages, hereby move to dismiss all of Plaintiffs' *Bivens* claims contained in the second amended complaint.

INTRODUCTION

In this lawsuit, Plaintiffs challenge their arrest, detention and removal on immigration charges. At its core, this lawsuit is an attempt by Plaintiffs to collaterally attack their current

[1]Although the Court has a pre-filing conference requirement, at oral argument on the federal defendants' original motion to dismiss, the Court indicated that the government could file a renewed motion to dismiss after the Second Circuit issued its ruling in *Arar v. Ashcroft*.

[2]Although Bruce Chadbourne and Jim Martin have yet to be served by Plaintiffs, they have both designated an ICE official to accept service on their behalf and the undersigned anticipates service will be completed very shortly.

immigration proceedings, which are on appeal before the Board of Immigration Appeals ("BIA"). In fact, Plaintiffs have raised the same legal arguments in their immigration proceedings that they raise here: that the individual federal defendants violated their Fourth and Fifth Amendment rights based on the circumstances surrounding their immigration arrests, detention and the decision to commence removal proceedings to determine whether Plaintiffs are subject to removal from the United States. Plaintiffs also assert various tort claims against the United States based on the same conduct.

This Court should dismiss Plaintiffs' claims against the defendants for the following reasons:

1. The Immigration and Nationality Act, specifically, 8 U.S.C. §§ 1252(b)(9) and 1252(g), divests this particular court of jurisdiction to hear constitutional tort claims relating to Immigration and Customs Enforcement law enforcement actions taken for the purposes of removing illegal aliens, raised by alien plaintiffs who are subject to removal.

2. Special factors, including Congress' comprehensive statutory scheme governing the arrest and removal of aliens and the plenary power of the political branches over immigration, foreign policy and national security matters, preclude plaintiffs, who have been found to be unlawful aliens illegally present in the United States, from seeking damages directly under the Constitution.

3. Because plaintiffs fail to allege that Chadbourne, Martin or Sullivan were personally involved in any alleged violation of plaintiffs' constitutional rights, qualified immunity bars all of plaintiffs' individual capacity claims against them.

PROCEDURAL BACKGROUND

On September 26, 2007, plaintiffs filed a civil rights complaint against several Danbury Police Officers, the Mayor of Danbury, the Danbury Chief of Police, the City of Danbury, three officers of United States Immigration and Customs Enforcement ("ICE") (the "federal defendants") and John Does 1-20. On November 26, 2007, plaintiffs filed an amended complaint. The amended complaint added a Federal Tort Claims Act count against the United States and dropped the number of John Doe defendants to 14. In response, the federal defendants moved to dismiss the first amended complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1); and arguing that the independent contractor exception to the Federal Tort Claims Act ("FTCA") bars certain of their detention claims. On March 10, 2009, following briefing and oral argument, this court orally denied part of the federal defendants' motion to dismiss without prejudice to renewal pending a decision by the Second Circuit Court of Appeals in *Arar v. Ashcroft*. (*See* Dkt. No. 129.) At the same time, the Court denied the federal defendants' motion to dismiss plaintiffs' claims relating to their detention under the independent contractor exception to the FTCA.

On October 1, 2009, plaintiffs filed a second amended complaint ("SAC") and added three supervisory level ICE officials–Chadbourne, Martin and Sullivan–as defendants. In addition, plaintiffs purported to allege supervisory liability claims against the three new ICE defendants in their personal capacity for money damages claiming that Chadbourne, Martin and Sullivan failed to properly supervise and/or train the subordinate ICE agents named in this action.

On November 2, 2009, the Second Circuit, after an en banc hearing, held in the *Arar* case that special factors counseled against inferring a *Bivens* action and thus dismissed the plaintiff's

substantive due process claims. *See Arar v. Ashcroft*, __F.3d__, 2009 WL 3522887 (November 2, 2009, 2d Cir.). In light of the Second Circuit's decision in *Arar*, the individual federal defendants file the instant motion to dismiss.

FACTS[3]

As part of an alleged immigration enforcement campaign, the plaintiffs, Barrera, Cabrera, Chavez, Duma, Llibisupa, Maldonado, Redrovan, Sanchez, and Simbana, (the "Plaintiffs"), claim that Danbury Mayor Boughton and the Danbury defendants purposely singled out "Latino men" from the day-laborer community which congregated in Kennedy Park for special harassment. SAC, ¶¶ 55-56. Kennedy Park, a public park in the center of Danbury, was a gathering site for day-laborers. SAC, ¶ 58.

On September 19, 2006, the Danbury Police Department conducted an undercover sting operation aimed at day laborers who congregated at Kennedy Park in downtown Danbury. As a result of these efforts, Plaintiffs were arrested, detained in ICE custody, and were transferred to the Suffolk County House of Correction or the Plymouth County Detention Center, both located in Massachusetts. SAC, ¶¶ 3 through 10. Ultimately, some Plaintiffs were transferred to detention facilities in Texas. *Id.* All of Plaintiffs are currently released on bond.

With respect to the specific allegations, plaintiffs claim that, on September 19, 2006, Danbury defendants planned a "sting" operation against day-laborers who congregated in Kennedy Park. SAC, ¶ 70. Detective Fisher, of the Danbury Police Department, informed the federal defendants about the operation and the probability that immigration violators and/or

[3] For purposes of the motion to dismiss the federal defendants accept Plaintiffs' facts as true but note that they dispute many of the factual allegations contained in the amended complaint.

immigrants with outstanding orders of removal would be present. SAC, ¶ 74-75. The federal defendants agreed to assist the Danbury defendants in this operation. SAC, ¶ 78. Plaintiffs claim that all defendants proceeded on the basis of ethnic and racial stereotypes. SAC, ¶¶ 75-79.

On the morning of September 19, 2006, the federal defendants met the Danbury defendants at the Danbury Police Station. SAC,¶ 85. The Danbury defendants, utilizing an undercover vehicle, approached Kennedy Park. SAC, ¶¶ 83, 115. Defendants did not approach any particular individual in the Park. Instead, Plaintiffs approached the Danbury defendants' vehicle and were then offered work for the day. SAC, ¶ 115.

The Danbury police officer then drove the vehicle behind an office building on Main Street in Danbury. SAC, ¶ 119. The vehicle stopped in the corner of the lot, and Plaintiffs exited the vehicle. SAC, ¶¶ 119, 122. Plaintiffs allege that they were then surrounded by the Danbury and federal defendants, some with guns drawn; arrested by the Danbury defendants; handcuffed; placed in the back of a van; and their requests to make phone calls were refused. SAC, ¶¶ 122-123, 127. All of these actions allegedly occurred without a single question being asked by any defendant. SAC, ¶ 128. Plaintiffs contend that they were not asked about their identity, their nationality, the place and manner of their entry into the United States, and their immigration status until they had already been seized and/or arrested. SAC, ¶¶ 128.[4]

Plaintiffs were then transported to the Danbury Police Station where they were processed. SAC, ¶ 132. Because they were processed in the Danbury Police Department, Plaintiffs claim that they were arrested by Danbury Police and charged by them with "illegal entry into [the United States]." SAC, ¶ 136. After being booked, the Day-Laborer plaintiffs were transferred to

[4] There are no allegations in the SAC that Plaintiffs are legally present in the United States.

the ICE office in Hartford, Connecticut. sac, ¶ 144. While in custody at the ICE Hartford Office, Plaintiffs allege that they were denied access to telephones and were forced to sign documents. SAC, ¶¶ 173-180. After two nights in Hartford, Plaintiffs were then transferred to state prisons in Massachusetts. SAC, ¶ 172.

Plaintiffs also claim that they were subjected to unconstitutional treatment at these state facilities. SAC, ¶ 173. First, they allege they were denied "access to a telephone for periods ranging from several days to several weeks." SAC, ¶ 173. Second, Plaintiffs allege that, while in state custody, an "unknown law enforcement agent" questioned them regarding a murder which occurred in Danbury. SAC, ¶ 184. The state prison officials allegedly subjected Plaintiffs to a medical examination and a "full-body search." SAC, ¶ 182. As part of the medical examination, Plaintiffs Barrera, Llibisupa, Maldonado, Redrovan, and Simbana, claim they were forced to give blood samples, and Plaintiffs Barrera, Maldonado, Redrovan, and Simbana claim they were forced to give urine samples. SAC, ¶¶ 183-184. Plaintiff Barrera states that, as a result of his blood test, the Suffolk County Correctional guards placed him in isolation. SAC, ¶ 185.

On October 3, 2006, Plaintiffs Barrera, Duma, Llibisupa, and Maldonado, were released on $1,500 bond. SAC, ¶ 187. However, Plaintiffs Chavez, Sanchez, Simbana, Cabrera, and Redrovan were transferred to detention facilities in Texas. SAC, ¶ 189. On October 16, 2006, an Immigration Judge in Texas set bond for Plaintiffs Cabrera, Chavez, Sanchez, and Simbana. SAC, ¶ 193. Another Immigration Judge in Texas set bond for Redrovan. SAC, ¶ 194. Once these Plaintiffs posted bond, they were released from custody, and the release dates ranged from October 20, 2006 to October 26, 2006. SAC, ¶¶ 195-199.

ARGUMENT

I. This Court Has No Subject Matter Jurisdiction Over Claims That Can Be Raised During Their Pending Immigration Proceedings

The INA prohibits alien plaintiffs who may be subject to removal from challenging in district court the alleged actions of the individual federal defendants leading up to and including their arrests, detention and removal proceedings. The INA limits judicial review of immigration proceedings in three ways material to this case. First, the INA consolidates in the courts of appeals review of all legal and factual questions arising from actions taken to remove an alien. *See* 8 U.S.C. § 1252(b)(9). Second, the INA precludes challenges to the Government's decisions and actions to commence removal proceedings, adjudicate cases, or execute removal orders. *See* 8 U.S.C. § 1252(g). Third, the Act bars judicial review of specified discretionary decisions altogether, including the decision to grant or deny bond. *See* 8 U.S.C. § 1252(a)(2)(B)(ii), 8 U.S.C. § 1226(e). Here, in determining the merits of Plaintiffs' claims as alleged in Counts 13 through 17 of the SAC, the Court will be required to examine the actions taken by ICE to remove plaintiffs from the United States.[5] As outlined more fully below, because Plaintiffs are challenging the alleged actions of the federal defendants leading up to and including their immigration arrests, detention, transfers and removal processing, all of which relate to the removal process and are actions taken to remove them from the United States, *see* SAC ¶¶ 70, 74, 91-113, 144-87, this Court is jurisdictionally barred from hearing such claims by the INA.

As the Supreme Court noted, the "theme of the legislation['s]" jurisdiction-stripping provisions is to "protect[] the Executive's discretion from the courts." *Reno v. American-Arab*

[5]These claims are brought under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

Anti-Discrimination Committee, 525 U.S. 471, 486 (1999) ("*AADC*"). Likewise, as the Second Circuit explained, a "primary effect" of the amendments to the INA is "to 'limit all aliens to one bite of the apple ... [and thereby] streamline what the Congress saw as uncertain and piecemeal review of orders of removal.'" *Xiao Ji Chen v. DOJ*, 471 F.3d 315, 324 n.3 (2d Cir. 2006), (*quoting Bonhometre v. Gonzales*, 414 F.3d 442, 446 (3d Cir. 2005), *cert. denied*, 546 U.S. 1184 (2006)). The fact that Plaintiffs seek money damages in this action does not alter the INA's preclusive effect. *See Aguilar v. U.S.I.C.E.*, –F.3d–, 2007 WL 4171244 (1st Cir. Nov. 27, 2007) (explaining that § 1252(b)(9) aims to consolidate "all questions of law and fact" arising from removal proceedings regardless of the characterization of the claims). Applied to this case, the INA divests this Court of jurisdiction to hear Plaintiffs' *Bivens* claims relating to their arrest, detention and removal. *Cf. Humphries v. Various Federal USINS Employees*, 164 F.3d 936, 942, 945 (5th Cir. 1999) (dismissing First Amendment claim based on § 1252(g)); *Foster v. Townsley*, 243 F.3d 210 (5th Cir. 2001) (dismissing excessive force, due process, equal protection, and First Amendment claims); *Van Dinh v. Reno*, 197 F.3d 427 (10th Cir. 1999) (dismissing *Bivens* class action suit regarding the Government's decision to transfer aliens between detention facilities); *but see El Badrawi v. DHS*, 579 F. Supp.2d (D. Conn. 2008) (FTCA claims not precluded); *Medina v. United States*, 92 F. Supp. 2d 545, 553 (E.D. Va. 2000) (same). As such, the Court should dismiss Plaintiffs' Bivens claims for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

A. There Is No Subject Matter Jurisdiction in This Court For Any Action Taken to Remove An Alien

The Act's central avenue for judicial review is its provision requiring all legal and factual questions arising from actions taken to remove an alien to be reviewed *only* by the courts of

appeals. *See* 8 U.S.C. § 1252(b)(9). The Supreme Court has described this provision as "the unmistakable 'zipper' clause" because it consolidates all judicial review in a single place, the courts of appeals. *AADC*, 525 U.S. at 475. Specifically, this section states:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter [8 U.S.C. §§ 1151 et seq.] shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus ... or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

8 U.S.C. § 1252(b)(9). Under this clause, judicial review is thus limited to the courts of appeals, *see* 8 U.S.C. § 1252(a), and "other challenges" may no longer be "brought pursuant to a federal court's federal question . . . jurisdiction under 28 U.S.C. § 1331." *Calcano-Martinez v. INS*, 232 F.3d 328, 340 (2d Cir. 2000), *aff'd*, 533 U.S. 348 (2001).

The "zipper clause" provision dovetails with the Act's exhaustion requirement. Before an alien can present a claim to the court of appeals, the alien must first "exhaust[] all administrative remedies available to the alien as of right," 8 U.S.C. § 1252(d)(1), which includes raising his claims before an Immigration Judge and the Board of Immigration Appeals. An alien's failure to do so deprives the courts of jurisdiction to hear his claims. *See* 8 U.S.C. § 1252(d)(1); *see also McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), *superseded on other grounds*, 42 U.S.C. § 1997(e); *United States v. Copeland*, 376 F.3d 61, 69 (2d Cir. 2004). Together, the "zipper clause" and the exhaustion requirement map out the exclusive path that all challenges arising from any action taken to remove an alien must follow.

Notably, the Second Circuit recently discussed the applicability of the INA's jurisdictional bar. *See Arar*, 2009 WL *3522887 at * 7-8.* In doing so, however, the Second

Circuit found that the application of the INA's jurisdictional bar problematic in *Arar* because the plaintiff there alleged that the government took actions to prevent him from meaningfully utilizing the judicial review scheme normally afforded by the INA. *See Arar*, 2009 WL 3522887 at * 7 (explaining acts taken by government which prevented plaintiff from INA review). In addition, the Second Circuit explained that it "was not clear that the INA's judicial review provisions govern[ed] circumstances of involuntary rendition [as alleged by plaintiff]." *Arar*, 2009 WL 3522887 at * 7. Nonetheless, the Second Circuit declined to answer whether the INA barred jurisdiction over plaintiff's substantive due process claims because other reasons required dismissal. *Arar*, 2009 WL 3522887 at * 8.

As explained in more detail below, the concerns raised by the Second Circuit in *Arar* are not present in this case. Plaintiffs have not alleged that they have been prevented from pursuing review under the INA or that ICE or any of the individual federal defendants has done anything to prevent them from obtaining meaningful review under the INA. Additionally, there is no doubt that the INA governs the removal proceedings regarding plaintiffs. Indeed, the record is clear that plaintiffs have raised the same claims they seek to litigate here before the immigration court and the BIA. Instead, here, Plaintiffs have brought this lawsuit challenging the same conduct being challenged within their removal proceedings.

In short, Plaintiffs have declined to follow the exclusive path for review delineated by the INA. The fact that here Plaintiffs are seeking a different form of relief, that is, money damages and not suppression of evidence or termination of removal proceedings, does not exempt them

from the statutory bar contained in the INA.[6] Plaintiffs can and should be required to present all of their claims within the INA's comprehensive statutory scheme because they all arise from the alleged actions taken by ICE officials to remove them from the Country due to the fact that they are unlawfully present in the United States. In fact, Plaintiffs have raised these exact claims before the Immigration Court on motions to suppress.[7] Specifically, in their motions to suppress Plaintiffs maintain that the conduct of the individual federal defendants, along with other unnamed ICE officials, to remove them from the country violated the Fourth[8] and Fifth Amendments–the identical claims made before this Court, although styled here as *Bivens* claims. *See* Attached Motion to Suppress.

More precisely, in their motions to suppress, Plaintiffs allege that they were arrested without probable cause or reasonable suspicion that they were illegally present in the United States. (*See* Plaintiffs' Motion to Suppress pp. 24-28). Plaintiffs' further assert that their arrests were based on race and thus a violation of the Equal Protection Clause. (*See id.* pp. 29-34). Finally, Plaintiffs maintain that the totality of the circumstances surrounding their arrest infringed

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[6] The fact that the text and legislative history of the INA do not indicate that Congress sought to preclude *Bivens* claims does not alter the applicability of § 1252(b)(9) as the conduct alleged by Plaintiffs falls squarely within its coverage. No matter how they style their claims, at bottom, Plaintiffs' claims arise out of ICE's actions in seeking to investigate, arrest, detain and remove Plaintiffs from the country due to the fact that Plaintiffs are illegally present here–all of which are contemplated by the plain language of § 1252(b)(9) to be raised in the Court of Appeals.

[7] All plaintiffs have been found removable by an IJ as being illegal present in the United States. Those decisions are presently on appeal before the BIA.

[8] In *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 236 (2d Cir. 2007), the Second Circuit concluded that "exclusion of evidence is appropriate . . . if record evidence established either (a) that an egregious violation that was fundamentally unfair had occurred, or (b) that the violation–regardless of its egregiousness or unfairness–undermined the reliability of the evidence in dispute."

upon their Fifth Amendment due process rights to fundamental fairness in immigration proceedings and that they were detained improperly by ICE. (*See id.* pp. 52-57). These are the identical claims made in this action. *See* SAC ¶¶ 275-93. Notably, if Plaintiffs are unsuccessful with their arguments to the BIA, they are entitled to judicial review before the Court of Appeals for the Second Circuit. Because Congress plainly intended to put an end to piecemeal review that has previously been commonplace in removal proceedings and due to the fact that Plaintiffs' claims fall squarely within § 1252(b)(9) since they arise from actions taken to remove them, this Court lacks jurisdiction to hear their *Bivens* claims.[9] *See* H.R. Rep. No. 109-72, at 174 (2005); *see also Arias v. ICE*, 2008 WL 1827604 at *5-6 (D. Minn. April 23, 2008) (holding that § 1252(b)(9) barred plaintiffs' *Bivens* claims because they were commonly made in removal proceedings and could directly impact immigration status).

Plaintiffs cannot avoid the application of § 1252(b)(9) by simply characterizing their claims as *Bivens* actions claims. Again, by its terms, § 1252(b)(9) aims to consolidate "all questions of law and fact" that "aris[e] from **any** action taken . . . to remove an alien from the United States . . . ." (Emphasis added). By the plain language of the statute, § 1252(b)(9)'s reach is not limited only to proceedings brought to remove an alien but also applies to **any action** taken to remove an alien. The face of Plaintiffs' SAC reveals that all of their claims arise from

[9] Prudential reasons further support the Government's position that Plaintiffs' claims should be raised and adjudicated through the INA's administrative process and potentially the Court of Appeals because in this case, in determining the merits of plaintiffs' claims, this Court will be adjudicating the same issues raised administratively and before the Court of Appeals. With that being said, in the event the BIA affirms the IJ decisions, the federal defendants will likely argue that collateral estoppel bars re-litigation of those issues here at least as to the FTCA claims and arguably the *Bivens* claims.

ICE's actions taken to remove them from the United States.[10] *See* SAC ¶¶ 70-199. Congress has explicitly channeled all such claims (not just those arising from actual court proceedings to remove an alien) to the Court of Appeals (after being initially presented and adjudicated by the BIA) and has statutorily barred all other methods of judicial review. *See* § 1252(b)(9). Section 1252(b)(9) could not be clearer in precluding Plaintiffs' claims in this lawsuit–"Except as otherwise provided in this section, no court shall have jurisdiction . . . by any other provision of law (statutory or nonstatutory), to review such an order *or* such questions of law or fact." (Emphasis added).

In addition, as outlined above, Plaintiffs' claims are of the character that can be efficaciously raised within their pending removal hearings as delineated by the INA. Moreover, although money damages are concededly not available under the INA, Plaintiffs will still have meaningful review of their claims before the Immigration Court, the BIA and possibly the Second Circuit Court of Appeals. Such meaningful review of allegedly unconstitutional conduct by ICE officials creates a sufficient incentive for immigration officials to comply with the Constitution. Simply characterizing their allegations as *Bivens* claims does not take them outside the scope of § 1252(b)(9) because all of their claims raise questions of law or fact arising from

[10]Any attempt by Plaintiffs to interpret § 1252(b)(9) narrowly so as not to include claims that occurred prior to the institution of removal proceedings is likewise without merit. Nothing in the statute limits its reach to claims arising from things occurring prior to the initiation of formal removal proceedings. The zipper-clause's reach is clear– no court has jurisdiction to review a factual or legal claim arising from *any* action to remove an alien. The statutory language could not make plainer Congress' intent to include pre-removal arrests and detention because most removal proceedings begin with an arrest, detention and issuance of a notice to appear.

ICE's actions take to remove them from the United States.[11] Moreover, any assertion by Plaintiffs that their claims here do not arise from actions taken to remove them would be disingenuous considering the identical claims in this lawsuit were raised before the Immigration Court, they are pending on appeal to the BIA and could ultimately be raised before the Court of Appeals. As such, Plaintiffs have meaningful administrative and judicial review of the claims they raise in this lawsuit within the statutory scheme delineated by Congress in the INA.

The bases for Plaintiffs' arrests and detention, of course, are the same bases on which the government is seeking removal. Plaintiffs' *Bivens'* claims here and in removal proceedings all arise from their arrests, detention and treatment while detained and any argument by plaintiffs' to the contrary is disingenuous and plainly belied by the allegations in the SAC. *See* SAC ¶¶ 70-199. Plaintiffs have ample and meaningful review protections in place under the INA to redress violations, constitutional or otherwise, alleged to have been committed by immigration officers as part of the removal process. Any such legal and factual claims arising from ICE's actions to remove them can and should be raised through the appropriate channels specified in the INA. Again, the remedy sought by Plaintiffs under the INA and supporting case law–suppression of all evidence and termination of removal proceedings–is sufficient to protect their constitutional rights and to deter any alleged future misconduct by ICE officials. Plaintiffs have raised such claims administratively and they are pending within the administrative scheme specifically outlined by Congress in the INA. To entertain their claims under § 1331, would overstep the

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[11]Plaintiffs' conditions of confinement claims alleging harsh treatment arguably fall outside of the purview of § 1252(b)(9). However, because there are no specific allegations directed at the individual federal defendants named in this lawsuit regarding those claims, no *Bivens* claim based on that conduct can proceed in this Court. *Iqbal*, 129 S. Ct. at 1947-53.

limits on district court jurisdiction and read the zipper-clause and exhaustion requirements out of the INA. Accordingly, this particular court is barred from hearing plaintiffs *Bivens* claims. *See Copeland*, 376 F.3d at 69.

B. Congress Has Precluded Challenges To Government Decisions To Commence Proceedings, Adjudicate Cases, Or Execute Removal Orders

In addition to consolidating review through the "zipper clause," Congress has also precluded district courts from entertaining claims arising from actions to commence removal proceedings, adjudicate cases, or execute a removal order:

> Except as provided in this section and notwithstanding any other provision of law[,] ... no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [8 U.S.C. §§ 1101-1537].

8 U.S.C. § 1252(g).

Although the Supreme Court in *AADC* concluded that § 1252(g) should be read narrowly, the Supreme Court expressly held that Section 1252(g) applies to "three discrete actions that the Attorney General may take: [the Attorney General's] 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'" *Id.* at 482. Importantly, the Supreme Court in *AADC* did not suggest that, when a lawsuit involves these three categories of actions, federal court jurisdiction turns on the nature of the arguments raised by the alien to challenge the Attorney General's action. Rather, when a challenge "arise[s] from" the Attorney General's "decision or action" to "commence proceedings, adjudicate cases, or execute removal orders," federal district courts lack jurisdiction to review these decisions. 8 U.S.C. 1252(g).

In this case, Plaintiffs' *Bivens* claims are focused exclusively on the individual federal

defendants' alleged wrongful actions leading up to their arrests, detention and removal proceedings–which at bottom, is an attack on ICE's decision to commence removal proceedings and adjudicate their cases in removal proceedings. *See* SAC ¶¶ 114-43, 275-77, 277-82, 283-88, 289-93. In their SAC, plaintiffs allege conduct by the individual federal defendants which was plainly taken for purposes of commencing removal proceedings and removing Plaintiffs from the United States. Although Plaintiffs also allege that ICE conspired with the Danbury Police Department to violate their rights, they do not allege that ICE was present for anything other than the removal of illegal aliens from Danbury. Plaintiffs cannot evade the jurisdictional bar by couching their causes of action as a Fourth or Fifth Amendment claims. The SAC's allegations makes clear that ICE agents were present in Danbury to commence removal proceedings against any individuals found to be unlawfully present in the United States.

To the extent Plaintiffs claim that they do not challenge the commencement of proceedings but rather the alleged unconstitutional conduct of the federal defendants such a characterization should be rejected by this Court because, as the Supreme Court explained in *AADC*, plaintiffs characterization of their claims does not control. *See AADC*, at 482. More importantly, the SAC makes abundantly clear that Plaintiffs are indeed challenging the commencement of proceedings both here and in the Immigration Court. The fact that Plaintiffs seek money damages in this action likewise does not foreclose § 1252(g)'s application to this case. Plaintiffs have adequate protections and relief available in Immigration Court to remedy any alleged constitutional violations and thus to adequately and meaningfully protect their rights.

In sum, the plain language of § 1252(g) is controlling and bars Plaintiffs' claims.[12] Accordingly, Plaintiffs cannot challenge the propriety of their arrests and detentions in this lawsuit, and thus this Court lacks jurisdiction to hear those claims. *See* 8 U.S.C. § 1252(g); *see also Sissoko v. Rocha*, 509 F.3d 947 (9th Cir. 2007) (finding that Section 1252(g) bars an alien's *Bivens* action for false arrest); *Cf. El Badrawi*, 579 F. Supp.2d at 266-68 (finding no bar to FTCA claims); *Medina*, 92 F. Supp. 2d at 553 (explaining § 1252(g) does not bar a money damages claim where the immigration proceedings have terminated). As such, § 1252(g) bars Plaintiffs' Fourth and Fifth Amendment claims as well as their conspiracy claim and thus this Court should dismiss those counts from the SAC.

C. Congress Has Precluded Challenges To The Discretionary Decisions To Detain An Alien And To Deny Bond

Finally, Congress has also barred judicial review of discretionary decisions authorized under the INA, including the discretionary decision to deny bond:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

See 8 U.S.C. § 1252(a)(2)(B)(ii); 8 U.S.C. § 1226(e).

In this case, Plaintiffs directly challenges ICE's initial decision to detain them without

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[12]Where the statute in question is jurisdictional, it "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968); *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989) ("We start from the settled proposition that the subject-matter jurisdiction of the lower federal courts is determined by Congress 'in the exact degrees and character which to Congress may seem proper for the public good.'") (*quoting Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)).

bond and objecting to bond at the various bond redetermination hearings before an immigration judge. SAC ¶¶ 285-87. Indeed, as part of their Fifth Amendment *Bivens* claims, Plaintiffs claim, among other things, that McCaffrey detained them without bond for improper and illegal reasons.[13] SAC ¶¶ 285-87. Although Plaintiffs' causes of action are styled as constitutional claims, "'[a] petitioner may not create the jurisdiction that Congress chose to remove simply by cloaking an abuse of discretion argument in constitutional garb.'" *Saloum v. United States Citizenship & Immigration Servs*., 437 F.3d 238, 243-44 (2d Cir. 2006), *quoting Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001)). If Plaintiffs believed that ICE abused its discretion in initially detaining them without bond, their sole recourse under the INA was to challenge that denial through the immigration process. *See Demore v. Kim*, 538 U.S. 510, 51617 (2003) (holding that 8 U.S.C. § 1226(e) bars judicial review of the decision over whether to release an alien).

In this case, Plaintiffs exercised their legal right to have an immigration judge review ICE's bond determination, *see* 8 C.F.R. § 236.1(d)(1), and all Plaintiffs were released on bond packages. As Congress has explicitly laid out, the INA divests district courts of jurisdiction to hear challenges to bond determinations, and thus this Court may not review Plaintiffs' claims regarding bond, regardless of its label in the SAC or their theory of recovery. *See* 8 U.S.C. § 1226(e); s*ee also United States v. Fausto*, 484 U.S. 439, 443-49 (1988). Accordingly, the Fifth Amendment *Bivens* claims directed at the actions taken by McCaffrey in making bond

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[13]Plaintiffs also allege that McCaffrey or another ICE official failed to file documents concerning plaintiffs' detention. *See* SAC ¶ 287. McCaffrey cannot be sued under *Bivens* for the conduct of other persons because each government official "is only liable for his or her own misconduct." *Iqbal*, 129 S.Ct. at 1949.

determinations should be dismissed.

II. Plaintiffs May Not Pursue A *Bivens* Remedy In Light Of The Special Factors Present by The INA and Congress and the Executive's Exercise of Its Plenary Immigration Authority

Even if Plaintiffs' claims were not specifically precluded by the INA, this Court should refrain from implying a constitutional tort remedy because special factors counsel against doing so. In *Bivens*, the Supreme Court asserted its general remedial powers to imply a private cause of action for damages, directly under the Constitution, against federal officers in their individual capacities. *Id.* at 396. Nonetheless, *Bivens* and subsequent decisions have made clear that federal courts have no freewheeling authority to imply a damages remedy any time a plaintiff can show a violation of the Constitution by a federal officer. *See*, *e.g.*, *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61 (2001). In fact, for twenty-five years the Supreme Court "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68; *see also Schweiker v. Chilicky*, 487 U.S. 412, 421-25 (1988) ("[o]ur more recent decisions have responded cautiously to suggesting that *Bivens* remedies be extended into new contexts").

In *Wilkie*, the Supreme Court rejected an attempt to create a new *Bivens* remedy, reiterating that a damages remedy "is not an automatic entitlement ... and in most instances we have found a *Bivens* remedy unjustified." *Wilkie v. Robbins*, 127 S. Ct. 2588, 2597 (2007). The Supreme Court explained that a *Bivens* remedy should only be inferred if (1) there is no alternative, existing process for protecting a constitutional interest, and (2) if there are no special factors counseling hesitation against a judicially created remedy. *Id.* Moreover, the Second Circuit in *Arar*, although dismissing plaintiff's claims based on other special factors, observed

that the INA was a "substantial, comprehensive, and intricate remedial scheme in the context of immigration." *Arar*, 2009 WL 3522887 at * 7. However, because the plaintiff in *Arar* alleged that he was actively prevented from seeking any meaningful review and relief through the INA, the Second Circuit declined to decide whether an alternative remedial scheme was available under the INA. *Id.* Instead, the Second Circuit held that a *Bivens* action could not lie for alleged Fifth Amendment substantive due process violations because special factors were present counseling hesitation. *Id.*

In this case, the INA addresses the very subject of Plaintiffs' complaints, and it adequately and meaningfully provides an alternative, existing process to protect aliens' constitutional interests. In addition, Congress and the Executive's plenary power over immigration is another special factor counseling hesitation. Taken together, these mutually reinforcing special factors preclude a *Bivens* remedy in this case for claims relating to Plaintiffs' arrest, detention and removal.

A. The Comprehensive Statutory Scheme Of The INA Is A Special Factor Which Precludes A Bivens Remedy

The presence of a deliberately crafted statutory process is a "special factor" that precludes a *Bivens* remedy because it demonstrates that Congress has not intended to supplement the scheme it created by permitting a private right of action for damages. *Schweiker*, 487 U.S. at 421-25. In this case, Plaintiffs' arrest, detention and removal are governed by the INA, which the Second Circuit very recently itself has characterized as a "substantial, comprehensive, and intricate remedial scheme in the context of immigration." *Arar*, 2009 WL 3522887 at * 7; *see also De Canas v. Bica*, 424 U.S. 351, 353 (1976) (characterizing the INA as a "comprehensive federal statutory scheme for regulation of immigration and naturalization."). In the INA,

Congress has broadly provided that all aliens are subject to detention during their removal proceedings. *See* 8 U.S.C. §1226(a). Congress has also delineated the types of remedies available to aliens, taking into account their status in the United States and the likelihood and imminence of their removal. *See*, *e.g.*, 8 U.S.C. § 1225, 8 U.S.C. § 1229, 8 U.S.C. § 1229a, and 8 U.S.C. § 1229b. The INA also details specific procedures for detention as well as the requirements for relief from detention. *See*, *e.g.*, 8 U.S.C. § 1222, 8 U.S.C. § 1225(b)(1)(B)(iii)(IV), 8 U.S.C. § 1226 and 8 U.S.C. § 1231.

In addition to regulating the arrest, detention and removal of aliens, the INA and its implementing regulations encompass a host of safeguards to protect the constitutional rights of aliens: the right to seek review of an initial bond determination, *see* 8 C.F.R. § 1236.1(d); the right to challenge that determination in an adversarial evidentiary proceeding before an immigration judge with the ability to present evidence and to be represented by counsel, *see* 8 C.F.R. § 1003.19(d) and 8 U.S.C. § 1003.16; and the right to seek review of the Immigration Judge's bond decision by the BIA, *see* 8 C.F.R. § 1003.1(b)(7). An alien may also seek review of constitutional issues concerning the propriety of his detention, *see Demore,* 538 U.S. at 516-17, through a writ of habeas corpus in the relevant United States District Court, with a right of further review in the Courts of Appeal. *See* 28 U.S.C. § 2241. Moreover, as explained in detail above, Plaintiffs have raised several constitutional arguments in support of their claim for suppression of evidence and termination of their removal proceedings within the comprehensive statutory scheme delineated by the INA. The fact that Plaintiffs have raised such claims is further evidence of the comprehensive reach of the INA. S*ee* *Sugrue v. Derwinski*, 26 F.3d 8 (2d Cir. 1994) (denying *Bivens* relief where meaningful remedies available within the administrative

context). The sole fact that money damages are not available in the administrative process pursuant to the INA does not automatically mean that Plaintiffs are entitled to *Bivens* relief. Thus, this Court should refrain from providing a damages remedy for alleged constitutional violations.

The aforementioned protections afforded to aliens such as Plaintiffs demonstrate that "Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." *Schweiker*, 487 U.S. at 423. Where such a comprehensive program exists, it is a plaintiff's burden to show that Congress has "plainly expressed an intention that the courts preserve *Bivens* remedies" alongside the program. *Spagnola v. Mathis*, 859 F.2d 223, 228 (D.C. Cir. 1988). Unless this burden is met, courts must not create additional *Bivens* remedies. *See id.*; *accord Schweiker*, 487 U.S. at 423; *Dotson v. Griesa*, 398 F.3d 156, 166-67 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2859 (2006).

Here, Plaintiffs have not met their burden of showing that Congress expressed an intention to preserve *Bivens* remedies in this context. To the contrary, Congress cut off judicial review of immigration decisions except for those expressly provided in the INA, and these judicial review provisions have repeatedly been strengthened over the years. *See, e.g.,* REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a)(1)(A)(iii), 119 Stat. 23, 310 (2005) (codified at 8 U.S.C. § 1252(a)(2)(D)). As discussed in the previous section, the INA provides a "sole and exclusive" means for questions of law and fact arising from any action taken or proceeding brought to remove an alien from the United States: a petition filed in the appropriate court of appeals. 8 U.S.C. § 1252(a)(5). *See also id.* 8 U.S.C. § 1252(g), 8 U.S.C. § 1252(a)(2)(B)(ii), and 8 U.S.C. § 1226(e). Had Congress wanted to carve out a *Bivens* remedy they could have

explicitly done so.

In sum, a thorough and careful review of the INA establishes that Congress has created an elaborate alternative process within the administrative system (with judicial review) that has been constructed step by step with careful attention to the many conflicting policy considerations that abound within the immigration field. Congress made clear that removal-related decisions would be reviewed under the administrative procedures authorized in the INA, rather than through actions in the federal courts. In situations like this, where Congress delineates a specific meaningful alternative process within a comprehensive statutory scheme, "federal courts will generally not attempt to supplement the relief afforded by that statute through other actions, including those implied under *Bivens*." *Dotson*, 398 F.3d at 160 (finding that a comprehensive remedial scheme precluded a *Bivens* remedy); s*ee also Hudson Valley Black Press v. IRS*, 409 F.3d 106, 113 (2d Cir. 2005) (same); *Sugrue v. Derwinski*, 26 F.3d 8, 12 (2d Cir. 1994) (same). The INA encompasses the same type of comprehensive statutory scheme that this Circuit and the Supreme Court have found to be a special factor counseling hesitation. Accordingly, because Plaintiffs have meaningful and adequate administrative, and ultimately judicial, process available to them under the comprehensive statutory scheme delineated by the INA to redress constitutional violations regarding their arrest, detention and removal, this Court should refrain from providing a new remedy for money damages under *Bivens*.

B. Congress's Plenary Power Over Immigration Is A Special Factor That Precludes A *Bivens* Remedy

In addition to there being an alternative, existing process for protecting Plaintiffs'

constitutional rights, Congress's plenary power over immigration is a special factor counseling against the creation of a *Bivens* remedy in this case. In *Wilkie*, the Supreme Court stated that in addition to considering whether a statutory scheme exists to regulate the area, courts need to be mindful that "a *Bivens* remedy is a subject of judgment: 'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation.'" 127 S. Ct. at 2598, *quoting Bush v. Lucas*, 462 U.S. 367, 378 (1983). One special factor that precludes a *Bivens* remedy is when Congress has plenary power over the subject matter for which a *Bivens* remedy is sought. *See Chappell v. Wallace*, 462 U.S. 296, 298 (1983) (citing Congress's plenary power over military matters as a basis to deny a *Bivens* remedy for claims arising in the context of military affairs); *accord Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) (rejecting creation of *Bivens* remedy because of the "foreign affairs implications" of the suit).

Because Congress has plenary power over immigration matters, its legislative judgments carry almost conclusive weight. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952). The Executive, in turn, is charged with implementing that power. In *Shaughnessy*, the Supreme Court held that immigration matters "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Id*. Accordingly, federal courts must afford substantial deference to the Executive Branch entities that have been granted authority by Congress to enforce and implement those laws. *See INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (deference on immigration matters is "especially appropriate" because "officials 'exercise especially sensitive political functions that implicate questions of

foreign relations'"), (*quoting INS v. Abudu*, 485 U.S. 94, 110 (1988)). Thus, just as in *Chappell*, where Congress failed to provide a damages remedy when it legislated in military matters, "[a]ny action to provide a judicial response by way of such a remedy would be plainly inconsistent with Congress' authority in this field." 462 U.S. at 304.

To permit *Bivens* suits in the immigration field would also unnecessarily enmesh the courts in difficult foreign affair and public policy issues, as well as matters of national security. *See Wilkie*, 127 S. Ct. at 2602-04, n.11 (holding that even where there is no comprehensive remedial scheme, courts should consider the "difficulty" in defining and implementing the proposed *Bivens* remedy). The INA is a unique federal law that encompasses an intricate and carefully crafted statutory scheme while balancing many competing policy considerations. As the Supreme Court has explained, "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Demore*, 538 U.S. at 522 (internal quotations and citations omitted).

This case in particular would require this Court to invade the realm of federal immigration policy normally reserved to Congress and the Executive Branch. To resolve the questions posed in Plaintiffs' SAC—the review of legal and factual questions arising from ICE's actions taken to remove Plaintiffs who are illegally present in the United States—this Court will need to interpret and apply immigration law and regulations, as well as determine whether federal immigration officers acted properly in areas in which Congress has given them broad discretion. Even if these issues do not trigger the jurisdictional bar under the INA, they illustrate why staying "the *Bivens* hand" makes sense. One of the reasons Congress consolidates

challenges under a statutory scheme is to avoid a patchwork body of interpretation produced by different courts during different types of proceedings. *See Bush,* 462 U.S. at 378.

There are a host of reasons to not apply a right of action in this case to the removable plaintiffs, including the INA's comprehensive and statutory scheme, and the plenary power of the political branches in immigration, foreign policy, and national security concerns inherent in the immigration arena. *See, e.g., Chappel*, 462 U.S. at 304 (explaining numerous factors taken together constitute special factors). Indeed, to permit a *Bivens* action against immigration officials who are seeking to enforce the law would invite such claims in every sphere of the immigration field including investigations of illegal aliens (i.e., arrest, detention and removal), over which Congress has given broad discretion to the Executive in the performance of their duties. Consequently, any damages remedy for immigration-related claims by aliens should come through further legislation, not judicial intervention. *See Wilkie*, 127 S. Ct. at 2604-05. Therefore, this Court should refrain from creating a *Bivens* remedy and the claims of Plaintiffs should be dismissed.

II. Qualified Immunity Bars All Plaintiffs' Individual Capacity Claims Against Defendants Chadbourne, Martin and Sullivan

Chadbourne, Martin and Sullivan move to dismiss the individual capacity supervisory claims against them based on qualified immunity because Plaintiffs fail to provide anything but conclusory assertions that the three supervisors were personally involved in the alleged violations of Plaintiffs' constitutional rights.

On a constitutional tort theory of recovery under *Bivens* Plaintiffs seek damages from the personal resources of three supervisory federal government officials: the Field Office Director

and the Deputy Field Office Director for ICE/DRO in Boston and Assistant Field Office Director for ICE/DRO in Hartford. "The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations" and thus federal officers may only be subject to suit for constitutional violations if they are "directly responsible" for them. *Correctional Serv. Corp. v. Malesko*, 534 U.S. 61, 70-71 (2001). Qualified immunity shields government officials sued in their individual capacities from the litigation process, however, so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added). The qualified immunity doctrine enunciated in *Harlow* was formulated precisely to allow government officials, such as these, the necessary latitude to vigorously exercise their authority without the chill and distraction of damages suits, by ensuring that only personal conduct that unquestionably violates the Constitution will subject an official to individual liability.

The Supreme Court recently decided *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), a case in which the Court evaluated the sufficiency of a complaint against two high-ranking government officials sued in their individual capacities under *Bivens*. In reversing the denial of the officials' motion to dismiss for failure to sufficiently allege their personal involvement in clearly established unconstitutional conduct, the Court explained how the *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), pleading standard applies to a *Bivens* supervisory liability claim. In so doing, the Court made clear that in a *Bivens* action, conclusory allegations of misconduct will not suffice. *Iqbal*, 129 S. Ct. at 1947-53. The Supreme Court also rejected the notion that the motion to dismiss analysis for officials who have raised qualified immunity should be influenced by whether limited discovery might weed out groundless claims. *Id*. at 1953-54. Notably, *Iqbal*

made clear that vicarious liability does not apply in a *Bivens* action. *Id*. at 1948-49 (supervisors "may not be held accountable for the misdeeds of their agents"). Rather, a plaintiff must plead that each Government-official defendant, "through the official's own individual actions, has violated the Constitution." *Id.* at 1948; *see also id*. at 1949 (each Government official "is only liable for his or her own misconduct"). Under the facts as alleged here, even a supervisor's knowledge of and acquiescence in a subordinate's wrongful conduct is not sufficient to hold a supervisor liable in a *Bivens* action. *Id.* The concept of "supervisory liability" based simply on knowledge and acquiescence, the Court explained, is inconsistent with the premise that supervisors "may not be held accountable for the misdeeds of their agents." *Id.* at 1949.

Iqbal compels dismissal of the individual capacity claims against Chadbourne, Martin and Sullivan because their particular actions, as alleged in the SAC, do not establish a violation of clearly established law. Plaintiffs complain of the manner in which subordinate ICE agents assisted the Danbury Police Department on September 19, 2006. Plaintiffs do not allege that Chadbourne, Martin or Sullivan seized or arrested them or that the three were personally involved in any manner regarding detention-related decisions concerning plaintiffs. Nor do Plaintiffs allege that Chadbourne, Martin or Sullivan personally targeted them based on their ethnicity, race or perceived national origin or that the three somehow conspired with the Danbury Police Department to allegedly violate plaintiffs' constitutional rights. Plaintiffs also do not allege that Chadbourne, Martin or Sullivan personally planned or participated in any of the specific actions in Danbury of which plaintiffs complain or that the three were even in Connecticut at the time of the events in question. In sum, Plaintiffs have not alleged any facts that Chadbourne, Martin or Sullivan were personally involved in any of the decisions regarding

their arrest, detention or removal or that they even knew that it occurred.

Instead Plaintiffs pursue a theory of supervisory liability against Chadbourne, Martin and Sullivan. The *Iqbal* Court engaged in a two-pronged approach for evaluating a complaint: first, identifying the conclusions that are not entitled to the assumption of truth; and second, evaluating the factual allegations to determine if they plausibly suggest an entitlement to relief. *Id.* at 1949-52. Applying that analysis here, plaintiffs' SAC fails to satisfy the threshold personal involvement requirement of alleging a claim against the senior federal officials sufficient to overcome their qualified immunity defense. An individual's status as a supervisor is insufficient to make them personally liable–there must be some intentional conduct on their part. Indeed, even if any subordinate ICE agents in this case acted wrongfully, those actions cannot automatically be imputed to the individual supervisory defendants. A careful reading of Plaintiffs' SAC reveals that they have failed to plead facts that each supervisory official, "through the official's own individual actions" has violated the Constitution. Accordingly, as explained in more detail below, under the standards enunciated in *Iqbal*, the allegations in the SAC are insufficient to hold any one of the three of these supervisory defendants personally liable to Plaintiffs here.

In the paragraphs within the SAC dedicated to defendants Chadbourne, Martin and Sullivan's purported "supervisory liability," Plaintiffs offer only conclusory allegations wholly devoid of factual support. Other than an alleged description of their positions, SAC ¶¶25-27, Plaintiffs allege that "[u]pon information and belief" Sullivan, Martin and Chadbourne "knowingly failed to implement an adequate training program for the HARFOT defendants on how to question, detain, and make arrests of individuals without violating their constitutional

rights", SAC ¶104, that they "knew or should have known that the HARFOT Defendants would engage in questioning, detain individuals, and make arrests; that such questioning, detention, and arrests call for agents to make difficult choices that call for special training to avoid serious and unconstitutional misconduct; that the FOT training provided to the HARFOT Defendants before September 19, 2006 was inadequate; that FOT teams had a long and known history of engaging in unconstitutional questioning, detention, and arrests; and that the HARFOT Defendants were likely to commit egregious constitutional violations in mishandled questioning, detention, and arrests. Defendants' failure to create an adequate training or supervision program caused Plaintiffs' injuries", SAC ¶105, that they "were also grossly negligent in their supervision and training of their ICE agent subordinates. They knew or should have known that there was a high degree of risk that their subordinates would violate individuals' constitutional rights in the course of their questioning, detention, and arrests, and yet they consciously or recklessly disregarded that risk by failing to take any corrective actions." SAC ¶106,

Plaintiffs go on to allege that Sullivan, Martin and Chadbourne "knew or should of known of the anti-immigrant campaign and activities of Mayor Boughton and the City of Danbury before September 19, 2006, based on the inclusion of media accounts of these activities in ICE Clips, prior Hartford FOT operations or actions in Danbury, the absence of specific targets for the September 19, 2006 operation or action, and other sources", SAC ¶112 and that " [a]s the supervisors of an FOT unit that had an extensive history with Danbury, Defendants Sullivan, Martin, and Chadbourne knew or should have known that there was a high degree of risk that the Danbury operation or action was discriminatory and non-specific, and that one or more of the HARFOT Defendants would violate the constitutional rights of the arrestees by participating in

it. However, Defendants Sullivan, Martin, and Chadbourne either deliberately or recklessly disregarded that risk by failing to take any actions to supervise the operation, and that failure caused Plaintiffs' constitutional injuries." SAC ¶113.

In addition, Plaintiffs' claim that Sullivan, Martin, and Chadbourne "supervise HARFOT officers in their detention-related decisions, and are responsible for training HARFOT officers on how to make initial custody determinations and how to set appropriate bond", SAC ¶ 166, that "upon information and belief, Defendants Sullivan, Martin, and Chadbourne knowingly failed to implement an adequate training program for the HARFOT Defendants on how to make initial custody determinations, and how to set bond for detainees without violating their constitutional rights", SAC ¶167, that "[b]y failing to implement an adequate training or supervision program on custody and bond decisions for the HARFOT officers, Defendants Sullivan, Martin, and Chadbourne acted with deliberate indifference to the rights of Plaintiffs. They knew their agents would make custody and bond decisions; that such decisions call for agents to make difficult choices that call for special training; that the current training was inadequate; and that agents were likely to commit egregious constitutional violations in mishandled custody and bond decisions without proper supervision or training. Defendants' Sullivan, Martin, and Chadbourne's failure to create an adequate training or supervision program caused Plaintiffs' injuries." SAC ¶168.

Finally, Plaintiffs' allege that Sullivan, Martin and Chadbourne "were also grossly negligent in their supervision and training of their ICE agent subordinates on custody and bond decisions. They knew or should have known that there was a high degree of risk that their subordinates would violate individuals' constitutional rights in the course of their custody and

bond decisions, and yet they consciously or recklessly disregarded that risk by failing to take any corrective actions", SAC ¶169, that "[a]s a result of Defendant McCaffrey's failure to set any bond for the Plaintiffs, even though there was no evidence that any of the Plaintiffs was dangerous or a flight risk or within a category of persons subject to mandatory detention, and of Defendants' failure to file or cause to be filed in Immigration Court the request of each Plaintiff for review of the ICE no bond decision by an Immigration Judge --along with Defendant Sullivan, Martin and Chadbourne's failure to remedy these constitutional violations--the Plaintiffs were unconstitutionally detained in violation of the Fifth Amendment", SAC ¶170, and that "[s]everal of the Plaintiffs also suffered additional injuries, including a transfer to Texas, horrendous prison conditions, and higher bond payments, due to the actions of Defendants McCaffrey, Sullivan, Martin and Chadbourne." SAC ¶171.[14]

Plaintiffs offer no factual support whatsoever for any of these conclusions. As *Iqbal* teaches, a complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 129 S. Ct. at 1949 (alterations in original), quoting *Twombly*, 550 U.S. at 557. *Iqbal*, which rejected as "bare assertions" the allegations that Ashcroft and Mueller "knew of" and "condoned" allegedly unconstitutional conduct, *id.* at 1951, requires that Plaintiffs' similarly conclusory assertions about Sullivan, Martin and Chadbourne's purported knowledge and failure to act not be entitled to any presumption of truth. *E.g., id.* ("It is the conclusory nature of [Iqbal's] allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."); *Twombly*, 550 U.S. at 554-555. There certainly is no reasonable or

[14]The remaining allegations in the SAC against Sullivan, Martin and Chadbourne are contained within the seventeenth claim for relief and simply offer formulaic recetation of the purported elements of a constitutional claim unsupported by any facts. SAC ¶¶ 295-300.

plausible inference to be drawn that Sullivan, Martin or Chadbourne's own actions amount to a constitutional violation in this case. Plaintiffs do not allege facts showing that any one of the defendants promulgated an unconstitutional policy. Nor do Plaintiffs allege any facts showing the three supervisors undertook a course of action for some invidious purpose of intentionally discriminating against Plaintiffs. *See Iqbal*, 129 S. Ct. at 1953-54. Indeed, some of what Plaintiffs allege to be unconstitutional is fully consistent with an official lawfully carrying out his duties. *Cf., Iqbal*, 129 S. Ct. at 1950-51; *Twombly*, 550 U.S. at 567 (concluding that although conduct was consistent with unlawful behavior, allegations did not suggest illicit accord because it was not only compatible with, but indeed more likely explained by lawful behavior).

Again, Plaintiff's conclusory allegations in the SAC are not entitled to an assumption of truth under *Iqbal*. Such boilerplate assertions about failing to act, train and/or supervise – without any factual "enhancement" about what should have been done, but was not – could be made against any high ranking government official in any agency. *See* SAC ¶¶ 104-06; 166-71. Under *Iqbal, Twombly*, and qualified immunity jurisprudence, such conclusory, unsupported allegations are insufficient to hold high-ranking federal officials subject to personal liability. *See Iqbal,* 129 S. Ct. at 1949-50; *Twombly*, 550 U.S. at 553-54 ("Factual allegations must be enough to raise a right to relief above the speculative level..."); *cf., Benzman v. Whitman*, 523 F.3d 119, 129 (2d Cir. 2007) ("a bare allegation that the head of a Government agency ... knew that her statements were false and 'knowingly' issued false press releases is not plausible in the absence of some supporting facts").

Finally, Plaintiffs' contention that Sullivan, Martin and Chadbourne were placed on notice of alleged unconstitutional activities of ICE agents and of the alleged anti-discrimination

campaign of Mayor Boughton and the City of Danbury through ICE clips, media reports, and other sources, SAC ¶¶97-98, 110-112, are insufficient to hold any of them personally liable for subordinate ICE agents' alleged unconstitutional conduct. An allegation of "mere knowledge," or that they "should have known" is not enough to hold a supervisor personally liable in a *Bivens* action. *Iqbal*, 129 S. Ct. at 1949. Moreover, the indicia of past conduct Plaintiffs allege in their SAC is simply insufficient to demonstrate that Sullivan, Martin or Chadbourne had personal knowledge of subordinates' alleged conduct in this case or of any purported discriminatory intent on the part of the City of Danbury or Mayor Boughton. *E.g., Rode v. Dellarciprete*, 845 F.2d 1195, 1208 (3d Cir. 1988) (explaining that numerous articles, the introduction of a legislative resolution seeking an investigation into retaliation, the filing of grievances in the Governor's office of administration, and telephone calls and correspondence with the Lieutenant Governor's office are insufficient to show that the Governor had actual knowledge of the alleged misconduct). First, the alleged "pattern of widespread constitutional violations" of which Plaintiffs contend Sullivan, Martin and Chadbourne had notice has nothing to do with any alleged past conduct of the agents whose actions are at issue in this lawsuit. In fact, much of the alleged conduct of which Plaintiffs' complain came well after the issues raised in their SAC. To the extent Plaintiffs are urging some sort of pattern and practice liability on these individuals, it is not permitted under *Bivens*. *See Iqbal*, 129 S.Ct. at 1947-53.

Second, simply because someone claims that ICE agents acted unconstitutionally and, in turn, passes that claim on to a reporter or law maker – or includes the claim in a lawsuit – does not make it so. It certainly does not put Sullivan, Martin and Chadbourne on notice that ICE agents are actually violating both the agency's policy and an individual's constitutional rights.

Nor does it put them on notice of any alleged anti-immigrant campaign on the part of Mayor Boughton or the City of Danbury. Notably, of the alleged conduct cited by plaintiffs, no federal court has determined that any ICE agent acted unconstitutionally – nor do Plaintiffs point to any investigative body that has found the conduct unconstitutional. Also lacking is any determination by any court that the City of Danbury or Mayor Boughton is engaging in some type of alleged anti-immigrant campaign. Finally, even if Sullivan, Martin and Chadbourne were actually aware of the alleged conduct or media coverage identified in the SAC, unsubstantiated claims of a handful of alleged violations occurring over the course of several years in an agency of over 15,000 employees does not trigger particular actions mandated by the Constitution. Under Plaintiffs' theory, these supervisory defendants, who oversee DRO in the Boston region, could be subject to personal liability each time some ICE agent somewhere in the United States is alleged to have acted unconstitutionally during their tenure as supervisors or when a municipality is **alleged** to be engaged in some anti-immigrant campaign simply because they were aware of such alleged conduct. That cannot be the law and it is not: *Iqbal* confirms that each Government official "is only liable for his or her own misconduct." *Iqbal*, 129 S. Ct. at 1949. Because the SAC fails to allege that any of the three Individual Supervisory Federal Defendants violated clearly established law, all individual capacity claims against Sullivan, Martin and Chadbourne must be dismissed.

At bottom, in the SAC, Plaintiffs seek to hold Sullivan, Martin and Chadbourne personally liable on a *respondeat superior* theory. A plain reading of the SAC reveals that they are included in the SAC only by virtue of the positions they hold rather than because "they themselves" violated the Constitution. *Iqbal,* 129 S. Ct. at 1948 (stating that a plaintiff must

plead that each official, "through the official's own individual actions, has violated the Constitution."); *id.* at 1952 (emphasis added) ("petitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic"). Rather, like the plaintiff in *Iqbal*, Plaintiffs here offer only "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," without pleading "sufficient factual matter" to show that they personally violated Plaintiffs' constitutional rights. *See id.* at 1949, 1952. Accordingly, defendants Sullivan, Martin and Chadbourne are entitled to qualified immunity and the supervisor liability claim alleged in Count seventeen should be dismissed.

CONCLUSION

Based on the above, the individual federal defendants respectfully request that the Bivens claims asserted against them in the SAC be dismissed as outlined above.

Respectfully submitted,
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CERTIFICATION OF SERVICE

I hereby certify that on December 7, 2009, a copy of the foregoing memorandum in support of the renewed motion to dismiss with attachments was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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