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 MOTION TO DISMISS

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, and James Brown, all sued in their individual capacity for money damages, and the United States of America hereby move to dismiss the Plaintiffs' amended complaint.

INTRODUCTION

In this lawsuit, Plaintiffs challenge their arrest and detention on immigration charges. They also allege they were subjected to unconstitutional treatment once they were in immigration custody. At its core, this lawsuit is an attempt by Plaintiffs to collaterally attack their current immigration proceedings, which are pending before an Immigration Judge in Hartford, Connecticut. Plaintiffs are in removal proceedings where they are charged with being aliens present in the United States without being admitted or paroled after inspection by an immigration

officer. 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 their immigration arrests, detention and the decision to commence removal proceedings to determine whether Plaintiffs are subject to removal from the United States. Here, Plaintiffs also assert various tort claims against the United States based on the same conduct.

Plaintiffs' claims against the individual federal defendants fail for several reasons. First, the law prohibits Plaintiffs from collaterally challenging their immigration proceedings in this lawsuit. Second, the special factors present in this country's immigration laws preclude Plaintiffs from seeking damages against individuals directly under the Constitution. As to the tort claims asserted against United States of America, those claims are jurisdictionally barred and cannot lie in this Court. Therefore, this Court should dismiss this action against all of the federal defendants.

FACTS[1]

On September 26, 2007, plaintiffs, ten in total, filed a civil rights complaint against six Danbury Police Officers, the Mayor of Danbury, the Danbury Chief of Police, the City of Danbury, three officers of the Immigration and Customs Enforcement Agency ("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

[1] 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.

States and dropped the number of John Doe defendants to 14.[2]

In response, the federal defendants now move to dismiss the amended complaint on the following bases: 1) for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1); and 2) the independent contractor exception to the Federal Tort Claims Act ("FTCA").[3]

The above-captioned civil action arises out of two separate and distinct incidents -- one occurring on or about September 19, 2006 and one occurring on or about February 17, 2007.

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[2] Specifically, the amended complaint alleges that the Danbury defendants (Agosto, DeJesus, Fisher, Lalli, Martin, Norkus, and John Does 1-5): 1) violated the Fourth Amendment and §§ 7, 9 of the Connecticut Constitution by arresting them without a warrant - Count 1; 2) violated the Fourth Amendment and §§ 7, 9 of the Connecticut Constitution by intentionally and knowingly detaining and/or arresting them on suspicion of civil immigration violations - Count 2; 3) violated the Fourteenth Amendment Equal Protection Clause and § 20 of the Connecticut Constitution by intentionally targeting plaintiffs based on their race, ethnicity, and national origin - Count 3; 4) violated the First Amendment and §§ 4,14 of the Connecticut Constitution by stopping, detaining, investigating, and arresting plaintiffs based on their exercise of protected speech and association in a public forum - Count 4; 5) violated their due process rights afforded under the Fourteenth Amendment and § 8 of the Connecticut Constitution by civilly arresting them - Count 5; and 6) committed the torts of false arrest/false imprisonment, intentional infliction of emotional distress, negligent infliction of emotional distress - Counts 10-12. The amended complaint alleges that Danbury defendants Boughton, Baker and Fisher are liable for these alleged civil rights violations under 42 U.S.C. § 1983 - Count 8 and that there is municipal liability against the City of Danbury - Count 9. The plaintiffs further allege that the Danbury defendants and ICE defendants conspired to inflict an unconstitutional injury and violate their equal protection rights - Counts 6 and 7.

With respect to the ICE agents, the Plaintiffs allege: 1) a *Bivens* claim for the arrest in violation of the Fourth Amendment - Count 13; 2) a *Bivens* claim alleging a violation of the equal protection clause - Count 14; 3) a *Bivens* due process claim - Count 15; and 4) a *Bivens* conspiracy claim - Count 16.

Lastly, plaintiffs assert claims under the Federal Tort Claims Act against the Federal Defendants for false arrest/imprisonment; intentional infliction of emotional distress; negligent infliction of emotional distress; and abuse of process - Count 17.

[3]While not raised at this stage of the proceedings, the individual federal defendants do not waive their qualified immunity defense and will raise it at a later stage in these proceedings.

Neither incident involves the same parties or underlying facts. As the Court must accept Plaintiffs' allegations as true at this stage of the proceedings, the following is a summary of the facts, for each incident, as alleged in the complaint. Not surprisingly, defendants dispute many of the facts as alleged.

A. September 19, 2006

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. Compl., ¶¶ 48-49. Kennedy Park, a public park in the center of Danbury, was a gathering site for day-laborers. Compl., ¶ 50.

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. Complaint, ¶¶ 3 through 11. 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. Compl., ¶ 62. Detective Fisher, of the Danbury Police Department, informed the federal defendants about the operation and the probability that immigration violators and/or immigrants with outstanding orders of removal would be present. Compl., ¶ 65. The federal

defendants agreed to assist the Danbury defendants in this operation. Compl., ¶ 66. Plaintiffs claim that all defendants proceeded on the basis of ethnic and racial stereotypes. Compl., ¶¶ 67-70.

On the morning of September 19, 2006, the federal defendants met the Danbury defendants at the Danbury Police Station. Compl,¶ 78. The Danbury defendants, utilizing an undercover vehicle, approached Kennedy Park.[4] Compl., ¶¶ 76, 83. 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. Compl., ¶ 83.[5]

The Danbury police officer then drove the vehicle behind an office building on Main Street in Danbury. Compl., ¶ 87. The vehicle stopped in the corner of the lot, and Plaintiffs exited the vehicle. Compl., ¶¶ 87, 90. 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. Compl., ¶¶ 90-91, 96. All of these actions allegedly occurred without a single question being asked by any defendant. Compl., ¶ 96. 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 were placed in the back of the van. Compl., ¶¶ 91, 96.[6]

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[4] Plaintiffs allege that no Town ordinance prohibited them from soliciting work in Kennedy Park, and employers seeking assistance would drive by the Park to get workers. Compl., ¶¶ 51-52.

[5] There are no allegations that Plaintiffs were forced to enter the vehicle.

[6] Defendants assert that none of Plaintiffs are legally present in the United States. All are currently in removal proceedings.

Plaintiffs were then transported to the Danbury Police Station where they were processed. Compl., ¶ 100. 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]." Compl., ¶ 104. After being booked, the Day-Laborer plaintiffs were transferred to the ICE office in Hartford, Connecticut. Compl., ¶ 113. While in custody at the ICE Hartford Office, Plaintiffs allege that they were denied access to telephones and were forced to sign documents. Compl., ¶¶ 116-124. After two nights in Hartford, Plaintiffs were then transferred to state prisons in Massachusetts. Compl., ¶ 116.

Plaintiffs also claim that they were subjected to unconstitutional treatment at these state facilities. Compl., ¶ 117. First, they allege they were denied "access to a telephone for periods ranging from several days to several weeks." Compl., ¶ 117. Second, Plaintiffs allege that, while in **state custody**, an "unknown law enforcement agent" questioned them regarding a murder which occurred in Danbury. Compl., ¶ 125 (emphasis added). The state prison officials allegedly subjected Plaintiffs to a medical examination and a "full-body search." Compl., ¶ 126. 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. Compl., ¶¶ 127-128. Plaintiff Barrera states that, as a result of his blood test, the Suffolk County Correctional guards placed him in isolation. Compl., ¶ 129.

On October 3, 2006, Plaintiffs Barrera, Duma, Llibisupa, and Maldonado, were released on $1,500 bond. Compl., ¶ 131. However, Plaintiffs Chavez, Sanchez, Simbana, Cabrera, and Redrovan were transferred to detention facilities in Texas. Compl., ¶ 134. On October 16, 2006,

an Immigration Judge in Texas set bond for Plaintiffs Cabrera, Chavez, Sanchez, and Simbana. Compl., ¶ 139. Another Immigration Judge in Texas set bond for Redrovan. Compl, ¶ 139. Once these Plaintiffs posted bond, they were released from custody, and the release dates ranged from October 20, 2006 to October 26, 2006. Compl, ¶¶ 141-144.

B. February 17, 2007

On or about February 17, 2007, Plaintiff Vargas claims he was driving home with his wife when he was pulled over by a Danbury Police Officer. Compl., ¶ 169. Vargas alleges that this officer, John Doe 6, told him that he was being pulled over because his muffler was too loud. Compl., ¶ 170. John Doe 6 then asked Vargas for identification. Compl., ¶ 170. Vargas states that, after he produced his Ecuadorian passport, John Doe 6 returned to his cruiser, ran his name through the NCIC database, and radioed for assistance. Compl., ¶ 171-72. Subsequently, two additional Danbury Police Officers, John Does 7 and 8, arrived. Compl., ¶ 172. Vargas contends that he was then arrested and detained before being placed in removal proceedings. Compl., ¶¶ 173-174. Vargas was removed to Ecuador in April or May of 2007. Compl, ¶ 175.

In his complaint, Vargas alleges that John Does 6-8: 1) committed a violation of the Fourth Amendment and §§ 7, 9 of the Connecticut Constitution by unlawfully arresting him on an immigration warrant; 2) committed a violation of the Fourteenth Amendment and Article First, § 20 of the Connecticut Constitution by creating a pre-textual traffic stop on the basis of his race, ethnicity, and national origin; 3) committed false arrest and false imprisonment; 4) intentionally inflicted emotional distress; and 5) negligently inflicted emotional distress. Vargas also alleges that defendants Boughton and Baker are liable in their individual capacities as supervisors for John Does 6-8 and that the City of Danbury is liable for the promulgation and

execution of a municipal policy or custom. Compl., ¶¶ 286-325. Vargas makes no claims against any federal defendant.[7]

ARGUMENT

I. Plaintiffs May Not Pursue Claims That Can And Should Be Raised During Their Pending Immigration Proceedings

No matter how much Plaintiffs dress up their legal arguments as Bivens or tort claims Plaintiffs' complaints about their arrest and detention are nothing more than a secondary attack on their pending immigration proceedings. Indeed, in determining the merits of Plaintiffs' arrest and detention claims in this case, the Court will in essence be examining the merits of their pending immigration case. However, as detailed below, the Immigration and Nationality Act ("the INA") explicitly prohibits this type of review, that is, district courts cannot review the merits of pending immigration proceedings. Thus, as Plaintiffs are challenging the alleged actions of the federal defendants leading up to and including their immigration arrests, detention and transfers, all of which relate to the removal process and actions taken to remove them from the United States, *see* Amended Complaint ¶¶ 66, 75, 96, 114-28, 132-37, this Court is jurisdictionally barred from hearing such claims by the INA. Specifically, 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

[7] Plaintiff, Danilo Brito Vargas, does not bring any claims against the federal defendants and thus this motion only addresses the claims alleged by the remaining Plaintiffs.

execute removal orders. *See* 8 U.S.C. § 1252(g). Third, the Act bars judicial review of 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).

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 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' claims relating to their arrest and detention. *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 Arar v. Ashcroft,* 414 F. Supp. 2d 250, 268-70 (E.D.N.Y. 2006) (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. Congress Has Limited Challenges Arising From Any Action Taken To Remove An Alien to Being Brought In The Court Of Appeals After Being Exhausted

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) (emphasis added). 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.

In short, Plaintiffs have declined to follow this exclusive path and instead have also brought this lawsuit challenging the same conduct that they challenge in their removal proceedings. 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 requirements contained in the INA.[8] Plaintiffs can and should be required to present all of their claims before an Immigration Court 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.[9] Specifically, in their motions to suppress Plaintiffs maintain that the conduct of the individual federal defendants, along with other

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[8] The fact that the text and legislative history of the INA do not indicate that Congress sought to preclude Bivens or FTCA 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. Accordingly, such claims fall squarely within § 1252(b)(9).

[9] Based on representation from ICE trial attorneys within the Department of Homeland Security, those motions to suppress have been ruled on in the Immigration Court in Hartford, Connecticut. Moreover, although there are some minor differences in each Plaintiff's motion to suppress based on their individual affidavits, the legal claims appear to be identical. Because such motions range from 63 to 71 pages excluding exhibits, the Government has not included them with this motion to dismiss. In the event the Court requires such motions the Government will file them with the Court and all parties.

unnamed ICE officials, to remove them from the country violated the Fourth[10] and Fifth Amendments–the identical claims made before this Court, although styled here as Bivens and FTCA claims. More precisely, 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 upon their Fifth Amendment due process rights to fundamental fairness in immigration proceedings. (*See id.* pp. 52-57). If Plaintiffs are unsuccessful with their arguments before an immigration judge they can appeal that decision to the Board of Immigration Appeals ("BIA") and ultimately 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 and FTCA claims.[11] *See* H.R. Rep. No. 109-72, at 174 (2005).

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[10] 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."

[11] Prudential reasons further support the Government's position that Plaintiffs' claims should be raised and adjudicated before the Immigration Court. Moreover, courts have rebuffed attempts by litigants to bypass mandatory exhaustion requirements simply by claiming that the remedies they seek are not available. *See Booth*, 532 U.S. 731, 741 (2001) (holding that prisoners must exhaust administrative remedies under the Prisoner Litigation Reform Act "regardless of relief offered through administrative process.").

Plaintiffs cannot avoid the application of § 1252(b)(9) by simply characterizing their claims as Bivens actions or FTCA 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' amended complaint reveals that all of their claims arise from ICE's action to remove them from the United States.[12] Congress has explicitly channeled all such claims (not just those arising from proceedings to remove an alien) to the Court of Appeals (after being initially presented and adjudicated by the BIA) and has explicitly 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 ultimately the Second Circuit Court of Appeals. In fact, if Plaintiffs' claims are found valid, the immigration

[12]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. It is clear Congress intended this broad language to include pre-removal arrests and detention because most removal proceedings begin with an arrest, detention and issuance of a notice to appear.

judge (or the BIA for that matter) could terminate removal proceedings against these aliens. This type of relief creates a sufficient incentive for immigration officials to comply with the Constitution. Simply characterizing their allegations as Bivens or FTCA 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 ICE's actions take to remove them from the United States.[13] Moreover, any assertion by Plaintiffs that their claims here do not arise from actions taken to remove them would be disingenuous considering they have raised the identical claims in this lawsuit that are pending before the Immigration Court and which can be raised on appeal to the BIA and ultimately the Court of Appeals. In the event an Immigration Judge (or the BIA for that matter) determines that Plaintiffs' constitutional rights have been violated, although money damages are unavailable, suppression and termination of proceedings would adequately protect any violation of their constitutional rights. Additionally, such claims are subject to judicial review within 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' claims here and in removal proceedings all arise from their arrests, detention and treatment while detained. As outlined above, Plaintiffs have ample administrative 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

[13]Although Plaintiffs' conditions of confinement claims alleging harsh treatment arguably fall outside of the purview of § 1252(b)(9), they still must be exhausted before the immigration court. Regardless, concerning the conditions of confinement claims at the state facilities, there are no specific allegations directed at the individual federal defendants named in this lawsuit and thus any Bivens claim based on that conduct should be dismissed.

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 outlined by Congress in the INA. To entertain their claims under § 1331, *Bivens* or the FTCA would overstep the limits on district court jurisdiction and read the zipper-clause and exhaustion requirements out of the INA. Accordingly, Plaintiffs are jurisdictionally barred from presenting those claims to this Court. *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).

In *AADC*, the Supreme Court concluded that where a case arises from one of the "three discrete events" encompassed by § 1252(g) – the decision or action to "commence proceedings, adjudicate cases, or execute removal orders" – judicial review is not available in the district

courts. *AADC*, 525 U.S. at 482, 487. In this case, Plaintiffs' Fourth Amendment claim and Fifth Amendment equal protection claim attack ICE's decision to commence proceedings. *See* Amended Complaint ¶ 112, 244-45, 247-49, 252-53, 255-58, 260-82. Plaintiffs' claims against the individual federal defendants are focused almost exclusively on their allegedly wrongful actions leading up to their arrest, issuance of notices to appear and initial determination to detain them, which by their very terms serve to initiate removal proceedings. *See* 8 U.S.C. §1229. Plaintiffs cannot evade the jurisdictional bar by couching their cause of action as a Fourth Amendment violation or a Fifth Amendment equal protection claim. Plaintiffs were arrested solely because ICE decided to commence removal proceedings against them.

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 at bottom Plaintiffs have challenged 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 a constitutional violation and thus protect their rights. In sum, Plaintiffs cannot challenge the propriety of the arrest and detention in this lawsuit, and this Court thus 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. Medina*, 92 F. Supp. 2d at 553 (explaining § 1252(g) does not bar a money damages claim where the immigration proceedings have terminated).

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 bond for varying amounts of time and objecting to bond at the various bond redetermination hearings before an immigration judge. Complaint ¶¶ 274-84. Indeed, Plaintiffs claim, among other things, that the individual federal defendants along with other unnamed ICE officials detained them without bond for improper and illegal reasons. A. Complaint ¶¶ 251-53; 274-84. Although Plaintiffs' causes of action are styled as constitutional violations and tort 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 complaint or his theory of recovery. *See* 8 U.S.C. § 1226(e). *See also United States v. Fausto*, 484 U.S. 439, 443-49 (1988).

II. Plaintiff May Not Pursue A *Bivens* Remedy In Light Of Alternative Remedies In Place And The Special Factors Present In The Immigration And Nationality Act

Even if Plaintiffs' claims are properly before this Court, they have no damages remedy against the individual federal defendants for claims regarding their arrest and detention. To the extent Plaintiffs have alleged constitutional violations, such claims are actionable—if at all—under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971). 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 its last term, the Supreme Court again 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.* In this case, the INA addresses the very subject of Plaintiffs' complaints, and it provides an alternative, existing process to protect aliens' constitutional interests. In addition, Congress'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's arrest and detention.

A. The Comprehensive Administrative and Judicial Review Scheme Of The INA Is An Existing Process For Protecting Aliens Constitutional Rights Which Precludes A Bivens Remedy

The presence of a deliberately crafted statutory remedial system is a "special factor" that precludes a *Bivens* remedy because it demonstrates that Congress has not intended to allow a private right of action for damages. *Schweiker*, 487 U.S. at 421-25. That is, because there are meaningful administrative and judicial remedies available to aliens like Plaintiffs in dealing with government employees, this Court should refrain from providing a cause of action for alleged constitutional violations. In this case, Plaintiffs' arrest and detention are governed by the INA, which the Supreme Court itself has characterized as "the comprehensive federal statutory scheme for regulation of immigration and naturalization." *De Canas v. Bica*, 424 U.S. 351, 353 (1976). 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 detention 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 Board of Immigration Appeals, *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. As such, Plaintiffs have meaningful remedies available within the administrative process, which includes judicial review before the Court of Appeals. *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.

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).

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. As such, because this is an alternative, existing process for protecting Plaintiffs' constitutional rights (albeit a claim channeling provision), this Court should refrain from extending *Bivens* remedies to the immigration field.

Due to the INA's provisions limiting judicial review, it is not unreasonable for the Court "to stay its *Bivens* hand." *Wilkie*, 127 S. Ct. at 2600. Indeed, 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 specific remedial mechanisms within a 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). *See 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). Here, the INA encompasses the same type of comprehensive scheme that this Circuit and the Supreme Court have found to be a special factor counseling hesitation. A thorough review of the INA shows that Congress has created an elaborate 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. As such, because Plaintiffs have meaningful and adequate administrative, and ultimately judicial, process available to them under the INA to redress constitutional violations regarding their arrest, detention and treatment while detained, 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 their 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 an alternative remedy exists to protect one's constitutional rights, 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 legislates in an area of plenary power over immigration matters, its legislative judgments carry almost conclusive weight. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952). 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 constitutional and public policy issues. *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 regulatory 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. To resolve the questions posed in Plaintiffs' amended complaint—the review of legal and factual questions arising from ICE's actions taken to remove Plaintiffs who are alleged to be 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 improperly. Even if these issues do not trigger the jurisdictional bar, 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. 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 from investigations of illegal aliens (including arrest, detention and removal) to the adjudication of various forms of discretionary relief available under the INA. 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. As such, this Court should refrain from providing a new remedy in damages under *Bivens*, and thus Plaintiffs' claims should be dismissed.

III. FTCA Claims against the United States

In the amended complaint, Plaintiffs make several tort claims against the United States under the Federal Tort Claims Act. These counts include claims for false arrest/imprisonment; intentional infliction of emotional distress; negligent infliction of emotional distress; and abuse of process. The United States moves to dismiss these claims based on the independent contractor exception to the FTCA.

A. Subject Matter Jurisdiction Under the FTCA

"The United States, as sovereign, is immune from suit save as it consents to be sued ..., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood,* 312 U.S. 584, 586 (1941)). Waivers of sovereign immunity must be strictly construed in favor of the Government. *Lane v. Pena,* 116 S. Ct. 2092, 2096 (1996); *Morales v. United States,* 38 F.3d 659, 660 (2d Cir. 1994). The defense of sovereign immunity is jurisdictional. *Broussard v. United States,* 989 F.2d 171, 177 (5th Cir. 1993); *Kramer v. United States,* 843 F. Supp. 1066, 1068 (E.D. Va. 1994).

The FTCA creates a limited waiver of sovereign immunity, authorizing claims against the Government "to the same extent as a private person" for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the

Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). The FTCA defines "employee" as follows:

> Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training ..., and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

28 U.S.C. § 2671. Because Plaintiffs have the burden of establishing subject matter jurisdiction, see *United Food Local 919 v. Centermark Properties*, 30 F.3d 298, 301 (2d Cir. 1994), they have to prove that the alleged state facility tortfeasors were Government employees under the FTCA, *see McFeely v. United States,* 700 F. Supp. 414, 419 (S.D. Ind. 1988).

B. The United States is not Liable for the Actions of Independent Contractors

In the amended complaint, the Plaintiffs claim that state prison officials subjected them to unconstitutional treatment at two Massachusetts state facilities, Plymouth County and Suffolk County Correctional Facilities. Compl., ¶ 117. These allegations include: 1) denying plaintiffs "access to a telephone for periods ranging from several days to several weeks;" 2) questioning by an "unknown law enforcement agent" regarding a murder which occurred in Danbury; 3) subjecting plaintiffs to a medical examination and a "full-body search;" 4) forcing Plaintiffs Barrera, Llibisupa, Maldonado, Redrovan, and Simbana to give blood samples; 5) forcing Plaintiffs Barrera, Maldonado, Redrovan, and Simbana to give urine samples; and 6) placing Plaintiff Barrera in isolation. Compl., ¶¶ 117, 125-29. To the extent that any of these claims are asserted against the United States, the United States moves to dismiss these claims based on the

independent contractor exception to the FTCA. If there are no claims against the federal defendants arising out of these claims, the federal defendants move to strike these facts as irrelevant to the claims made against these defendants. Allowing claims of alleged mistreatment by individuals who are not named as a party to the litigation would be unduly prejudicial and have no bearing on the litigation against these defendants. *See* 2A *Moore's Federal Practice* P 12.21, at 2429 ("Motions to strike allegations from a complaint are strongly disfavored and will be granted only where it is clear that (the allegations) can have no possible bearing upon the subject matter of the litigation."); *accord*, *Federated Dep't Stores, Inc. v. Grinnell Corp. [1968 TRADE CASES P 72,444]*, 287 F. Supp. 744, 747 (S. D. N. Y. 1968) (Cooper, J.).

1. Applicable Law Regarding Independent Contractors

The FTCA specifically excludes "any contractor with the United States" from the category of entities for whose negligence the Government may be held liable. *Id.* "The Government cannot be held liable for the negligence of independent contractors." *Fraser v. United States*, 490 F. Supp. 2d 302, 309 (E.D.N.Y. 2007). Thus, subject matter jurisdiction over the claims regarding plaintiffs' treatment at the state facilities depends on whether the state facilities are considered agencies of the United States or independent contractors.

2. Independent Contractor v. Government Agency

Whether an entity/person is a government agency/employee or an independent contractor is a question of federal law. *Leone v. United States*, 910 F.2d 46, 49 (2d Cir. 1990). The "distinction between the servant or agent relationship and that of independent contractor turn[s] on the absence of authority in the principal to control the physical conduct of the contractor in performance of the contract." *Logue v. United States*, 412 U.S. 521, 527 (1973). A contractor is

a Government employee under the FTCA only where the contractor's "day-to-day operations are supervised by the Federal Government." *United States v. Orleans*, 425 U.S. 807, 815 (1976) (rejecting view that federal agency, by requiring local, federally funded grantee to select new chairman, was exercising sufficient control over grantee's workers to make them Government employees). A contractor whose daily activities are not governmentally supervised is not a Government employee under the FTCA even where the Government retains control over key personnel decisions, *see Orleans,* 425 U.S. at 816-17, or imposes safety conditions on the contractor, *Hines v. United States,* 60 F.3d 1442, 1446-47 (9th Cir. 1995); *Lipka v. United States,* 369 F.2d 288, 291 (2d Cir. 1966), *cert. denied,* 387 U.S. 935 (1967). Whether the contractor's work was previously performed by Government employees is irrelevant for FTCA purposes. *See Logue v. United States,* 412 U.S. 521, 531-32 (1973). "Courts look to the terms of the contract to determine whether the Government controlled the detailed physical performance of the contractor or whether the Government supervised the day-to-day operations of the contractor." *Fraser*, 490 F. Supp. 2d at 310. [14]

Here, the two contracts in question clearly delegated control over the detained plaintiffs' physical confinement and their daily supervision to the local officials running each facility. Specifically, the United States Marshals Service contract with Plymouth County states that the State government agrees, in part, to:

- provide medical care and services at the same level as provided to local

[14] This Court may look to evidence outside the pleadings (i.e. the contracts) in determining whether to dismiss a case for lack of jurisdiction under Rule 12(b)(1). *Bldg. and Const. Trades Council of Buffalo, New York and Vicinity* v. *Downtown Dev., Inc.*, 448 F.3d 138, 150 (2d Cir. 2006)

prisoners;

- accept and provide for the secure custody, care and safekeeping of federal prisoners in accordance with state and local laws;
- allow periodic inspections of the jail;
- provide adequate, trained jail staff provided 24 hours a day to supervise prisoners;
- provide three meals a day;
- provide guard/transportation service; and
- notify the Marshals' Service of ***significant changes*** in the facility.

See Declaration of Susan D. Erickson[15] and Plymouth County Contract, attached thereto as Exhibit A (emphasis added). Plymouth County had no obligation to inform the United States Marshals Service of the day-to-day operations of the facility, and the United States Marshals had no control over these day-to-day operations. Instead, Plymouth County was only obliged to inform the Marshals Service of "significant changes," which included "significant variations in inmate populations, which [would] cause[] a significant change in the level of services under [the contract]." Exhibit A, p. 7. Additionally, the contract provided that the Local Government must defend against and/or indemnify the United States for all liability caused by property provided by the federal government and for injuries to prisoners and/or employees occurring during transport. Exhibit A.

Likewise, the Suffolk County contract with the Department of Homeland Security

[15]The United States Marshals Service entered into an Inter-Government Agreement with Plymouth County in which the Marshals Service authorized ICE full usage of the Plymouth County Correction Facility for ICE detention services. *See* Declaration of Susan D. Erickson.

provides that the Suffolk County Sheriff's Department agrees to:

- provide the basic needs for all ICE detainees, including housing, subsistence, on-premises medical services, and other service, such as interpretive services;
- provide escort/transportation services;
- ensure compliance with ICE's detention procedures and may adopt, adapt or establish alternative procedures, provided they meet or exceed the standard;
- request approval for off-site, non-emergent medical treatment;
- provide 24 hour emergency medical care;
- allow for periodic inspections;
- indemnify the federal government for all liability claims arising out of the "occupancy, use, service, operation or performance of work ..., resulting from the negligent acts or omissions of the Service Provider, or any employee, or agent of the Service Provider;" and
- and retains the Provider's right to refuse to accept or request removal of any detainee exhibiting violent or disruptive behavior or who has a medical condition beyond the prison's ability to treat.

See Declaration of Susan D. Erickson and Suffolk County Sheriff's Department, attached thereto as Exhibit B. Similar to the Plymouth contract, Suffolk County had no obligation to inform ICE of the day-to-day operations of the facility, and ICE had no control over these day-to-day operations. Suffolk County was only obliged to seek approval to incur outside medical expenses for non-emergent care. Additionally, the Suffolk County contract specifically provided for indemnification for all liability arising from the negligent acts or omissions of the Service Provider, or any employee, or agent of the Service Provider. Exhibit B, page 9.

Based on the above, it is clear that the United States did not have any role in the day-to-

day supervision of these plaintiffs. The daily care, meals, medical coverage, transportation, and safety of prisoners, including Plaintiffs, at these state facilities was provided by the local officials. The fact the federal government reserved the right to conduct periodic inspections and approve expenses for non-emergent medical care is of no relevance. "Neither the retention of the right to inspect the contractor's work, nor the power to control a contractor's compliance with the contract's specifications, is sufficient to convert the contractor's status from an independent contractor to an agent of the Government ...." *O'Neill v. United States*, 927 F. Supp. 599, 606-07 (E.D.N.Y. 1996).

Therefore, any claims made by Plaintiffs for the alleged 1) denial of access to a telephone; 2) questioning by an "unknown law enforcement agent;" 3) medical examinations and "full-body search[es];" 4)taking of blood and urine samples; and 5) placement of Plaintiff Barrera in isolation, cannot be maintained against the United States and should be dismissed. Additionally, these alleged facts should be stricken from the complaint.

CONCLUSION

Based on the above, the individual federal defendants respectfully request that the Bivens claims asserted against them in the Amended Complaint be dismissed pursuant to Rule 12(b)(1) and the United States also requests that any and all FTCA claims relating to Plaintiffs' treatment at the state facilities be dismissed pursuant to the independent contractor exception.

Respectfully submitted,
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CERTIFICATION OF SERVICE

I hereby certify that on February 1, 2008, a copy of the foregoing memorandum in support of the 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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