No. 3:13-cv-05481-FLW-TJB

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

HERIBERTO AVALOS-PALMA,

Plaintiff,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants.

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL AND THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS *AMICI CURIAE* IN SUPPORT OF THE PLAINTIFF

Trina Realmuto
National Immigration Project
of the National Lawyers Guild
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727 ext. 8
(617) 227-5495 (fax)

Mary Kenney
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7512
(202) 742-5619

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

I. INTRODUCTION

Amici curiae National Immigration Project of the National Lawyers Guild and American Immigration Council proffer this brief to assist the Court in assessing the grounds on which Defendant United States seeks dismissal of Plaintiff's claims under the Federal Tort Claims Act (FTCA) and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). This Court's authority to review whether a noncitizen, like Mr. Avalos-Palma, may seek redress for tortious conduct and for violations of constitutional rights committed by federal immigration officers raises important jurisdictional and merits issues. In far too many cases, the Department of Homeland Security (DHS) wrongfully deports individuals without legal authority to do so, in violation of immigration laws and court-orders. Remedies under FTCA and *Bivens* provide these individuals with their only legal recourse for redressing these violations. Moreover, such actions serve to deter future violations by making it clear that immigration officers are accountable for unlawful conduct. Thus, *amici* urge the Court to deny Defendant's motion to dismiss Mr. Avalos-Palma's complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction (Def. Mx).[1]

The National Immigration Project is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the

[1] The instant brief specifically addresses Defendant's arguments based on lack of jurisdiction under 8 U.S.C. § 1252 and lack of a private analogue for Plaintiff's tort claims. Although *amici* do not address Defendant's statute of limitations and artful pleading arguments, *amici* note that these arguments are addressed in Plaintiff's opposition.

enduring contributions of America's immigrants. Both organizations have an interest in ensuring that individuals are not unduly prevented from pursuing remedial suits in response to unlawful and unconstitutional action by federal immigration agents.

II. ARGUMENT

A. DAMAGES ACTIONS ARE AN IMPORTANT DETERRENT TO, AND THE SOLE COMPENSATORY REMEDY FOR, WRONGFUL DEPORTATIONS.

Amici underscore the breadth of wrongful deportations that are potentially immunized from damages remedies and accountability by Defendant's position. Defendant contends that there is no remedy for unsanctioned deportation, and, as such, no agency accountability for forcibly removing someone from the United States without authority to do so, or, as in this case, despite express authority prohibiting deportation. Significantly, however, the Court should reject this position because recognizing the propriety of a damages remedy is necessary to deter future wrongful deportations and to ensure that plaintiffs have a remedy to compensate for their harm.

First, recognizing a remedy is necessary to deter future wrongful deportations by DHS officers. Officials acting under color of immigration authority all too often wrongfully deport individuals, including U.S. citizens, individuals whose deportations have been stayed by operation of law (as here), and individuals granted an administrative or court-ordered stay of removal. *See, e.g.*, *Guzman v. Chertoff et al.*, No. 08-cv-01327 GHK (C.D. Cal. Feb. 27, 2008) (U.S. citizen with mental disability who was detained and removed; ultimately settled); *Lyttle v. United States*, 867 F. Supp. 2d 1256 (2012) (American citizen with mental disabilities who was wrongfully detained and deported to Mexico and forced to live on the streets and in prisons for months; ultimately settled); *Turnbull v. United States et al.*, No. 1:06-cv-858 SL, 2007 U.S. Dist. LEXIS 53054, *6-8 (N.D. Ohio, July 23, 2007) (lawful permanent resident wrongfully deported in violation of magistrate judge's stay order and forced to remain outside the country

for thirty two days, after district court issued order directing his return; ultimately settled); *Rodriguez-Franco v. Reno et al.*, No. 3:00-cv-03546 MEJ (N.D. Cal. Sept. 26, 2000) (lawful permanent resident wrongfully deported to Mexico for three days in violation of Ninth Circuit stay order; ultimately settled); *Araujo v. United States*, 301 F. Supp. 2d 1095 (N.D. Cal. 2004) (unlawful arrest and removal; ultimately settled). *Accord Ramirez-Chavez v. Holder*, No. 11-72297 (9th Cir. Order of April 10, 2012), ECF Dkt. No. 18 at p. 2 ("Despite respondent's clear and unequivocal knowledge, no later than October 5, 2011, that a stay of removal was in effect in this docket, petitioner was removed on October 19, 2011" and directing the government to locate and return petitioner "using every contact and address at their disposal") (attached for the Court's convenience as Exhibit A). *Cf. Matter of Diaz-Garcia*, 25 I&N Dec. 794, 797 (BIA 2012) (retaining jurisdiction over BIA appeal where DHS unlawfully deported noncitizen in violation of regulation at 8 C.F.R. § 1003.6, which automatically stays execution of removal orders pending agency appeal).

In addition to providing a remedy for the injured individual, these lawsuits serve to hold immigration agents and the agencies within which they work accountable for their unlawful conduct and, therefore, serve to curb such conduct in the future. The very "purpose of *Bivens* is to deter individual federal officers from committing constitutional violations." *Correctional Services Corporation v. Malesko*, 534 U.S. 61, 70 (2001). Similarly, the purpose of the FTCA was to "waive the Government's traditional and all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability." *Rayonier Incorporated v. United States*, 352 U.S. 315, 377 (1957) (rejecting argument that holding the government responsible for the negligence of Forest Service firemen would impose a heavy burden on the

public treasury, and finding that Congress believed charging such negligence against the public was in the best interest of the nation).

Second, unless a damages remedy is available, it would be impossible for victims of unlawful deportations to obtain any remedy for their injuries at the hands of federal officials acting under color of the immigration laws. The Immigration and Nationality Act (INA) is not compensatory or remedial. While the INA governs the *legal merits* of immigration-related deportations (*see*, *e.g.*, 8 U.S.C. §§ 1229a, 1231(a)(5), 1228(b)), the Act is completely silent as to compensation for *illegal* deportations. Thus, it is not remotely compensatory; for noncitizen victims of unauthorized and unlawful deportations, "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in judgment).

Moreover, immigration courts are powerless to hold DHS officers or other federal officers accountable for the suffering and emotional distress Plaintiff experienced. *See Cesar v. Achim*, 542 F. Supp. 2d 897, 900 (E.D. Wis. 2008) (stating that the cited INA provisions contain "nothing of a remedial nature, much less an intricate and carefully crafted remedial scheme") (internal quotation marks omitted); *Khorrami v. Rolince*, 493 F. Supp. 2d 1061, 1074 (N.D. Ill. 2007) ("While [the INA] is comprehensive in terms of regulating the in-flow and outflow of aliens, it is not comprehensive in terms of providing a remedy for [constitutional violations]"). At most, an immigration court could suppress or terminate removal proceedings based on a constitutional violation, but even this potential relief, which immigration courts rarely grant,[2] does not compensate victims in roughly the same manner as would a damages remedy.

[2] *See, e.g.*, *Cotzojay v. Holder*, 725 F.3d 172, 180 (2d Cir. 2013) (remanding because violation in this case met the egregious standard for suppression, but noting that "This Court has never found a violation sufficiently severe, and therefore egregious, to require suppression in a removal hearing").

In sum, *amici* urge the Court to consider the repercussions of Defendant's position, which allows federal officials to illegally deport citizens and noncitizens alike with impunity. Damages actions are an important deterrent to such abuse.

B. THIS COURT HAS JURISDICTION TO REVIEW ALL PLAINTIFF'S CLAIMS.

1. 8 U.S.C. § 1252(g) Does Not Apply.

a. *Plaintiff's claims fall outside of the plain language of § 1252(g).*

Section 1252(g) of the INA, in relevant part, bars review of "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 this Act [the INA]." Importantly, Plaintiff's claims do not "arise from…[a] decision or action by the Attorney General… to execute [a] removal order under this Act [i.e. the INA]." Rather, Plaintiff's claims "arise from" the U.S. Constitution (the *Bivens* claims) and state common law torts (the FTCA claims) and are supported by a statute and regulation expressly prohibiting DHS from exercising discretionary authority to decide to execute, or to act to execute, a removal order when a motion to reopen an *in absentia* deportation order based on lack of notice is pending before an immigration judge. 8 U.S.C. § 1229a(b)(5) and 8 C.F.R. §§ 1003.23(b)(1)(v), (b)(4)(iii)(C). As Plaintiff alleges and the United States concedes (Def. Mx. at 1), the filing of this motion triggered an automatic stay prohibiting removal. When DHS deported Plaintiff in violation of these laws, it violated his constitutional rights and committed torts recognized by the courts of New Jersey. *Id*. It is from these violations that Plaintiff's claims arise. Accordingly, under its plain language, § 1252(g) does not apply.

b. *Section 1252(g) does not apply where the challenged action was taken without authority under the law.*

In *Reno v. American-Arab Anti-Discrimination Committee* (*AADC*), the Supreme Court held that § 1252(g) only bars jurisdiction over three discrete events which are discretionary in nature: a decision or action to commence removal proceedings, adjudicate cases, or execute removal orders. 525 U.S. 471, 482 (1999). The Court specifically rejected the "unexamined assumption that § 1252(g) covers the universe of deportation claims." *Id*. The Court's language is so clear it bears repeating:

> In fact, what § 1252(g) says is much narrower. The provision [applies only to three discrete actions that the Attorney General may take]: her "decision or action" to "*commence* proceedings, *adjudicate* cases, or *execute* removal orders." (Emphasis added.) There are of course [many other decisions or actions that may be part of the deportation process] -- such as the decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to refuse reconsideration of that order.
>
> It is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings.

Id. (emphasis in the original). The Court reasoned that, at the time § 1252(g) was enacted, "the INS had been engaging in a regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience." *Id.* at 483-84.[3] "Section 1252(g) seems clearly designed to give some measure of protection to 'no deferred action' decisions and similar *discretionary* determinations," the Court concluded. *Id.* at 485 (emphasis added).

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[3] *Id.* at 485 n.9 ("Section 1252(g) was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial *discretion.*"); at 487 ("It is entirely understandable, however, why Congress would want only the *discretion*-protecting provision of § 1252(g) applied even to pending cases: because that provision is specifically directed at the deconstruction, fragmentation, and hence prolongation of removal proceedings.") (emphasis added).

Read narrowly, as it must be, *see AADC*, 8 U.S.C. § 1252(g) is not a bar to jurisdiction over this action because Defendant and its agents have no discretion to refuse to follow binding statutory and regulatory law prohibiting removal during the pendency of a motion to reopen an *in absentia* deportation order based on lack of notice of the hearing. *See Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) ("In general, governmental conduct cannot be discretionary if it violates a legal mandate.") (citation omitted); *Meyers and Meyers, Inc. v. U.S. Postal Service*, 527 F.2d 1252, 1261 (2d Cir. 1975) (noting that, with respect to a claim that a federal official violated governing regulations, "[i]t is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority"). *Accord Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954) (finding that agency is obligated to follow its own regulations).

Following *AADC*, several courts, including the Third Circuit, have distinguished between challenges to the agency's authority to act and discretionary decisions made pursuant to uncontested authority, and have concluded that § 1252(g) extended only to the latter. For example, the Third Circuit exercised jurisdiction over a petition for review contending that the five year statute of limitations in 8 U.S.C. § 1256(a) barred the government from placing petitioner in removal proceedings based on a fraudulent act that took place prior to the five year limitation period. *Garcia v. Attorney General*, 553 F.3d 724, 726 (3d Cir. 2009). The Court found § 1252(g) is "not implicated" where the petitioner was "not challenging the discretionary *decision* to commence proceedings, but [was] challenging the government's very *authority* to

commence those proceedings after the limitation period has expired." *Garcia*, 553 F.3d at 729 (emphasis in original).[4]

Similarly, in *United States v. Hovsepian*, 359 F.3d 1144, 1155-56 (9th Cir. 2004), the court rejected the government's argument that § 1252(g) stripped the district court of jurisdiction to issue an injunction because the claim involved a challenge to the agency's "commencement" of removal proceedings. Instead, the court held that the district court had jurisdiction because the challenge involved the agency's legal authority to commence proceedings and not its discretionary decision to do so in circumstances in which it had such authority. *Id.* *See also Madu v. Attorney General*, 470 F.3d 1362, 1368 (11th Cir. 2006) (explaining that, while § 1252(g) "bars courts from reviewing certain exercises of discretion by the attorney general, it does not proscribe substantive review of the underlying legal bases for those discretionary decisions and actions" and concluding that court had jurisdiction over a constitutional challenge to detention and impending removal); *Mustata v. Jennifer*, 179 F.3d 1017, 1022 (6th Cir. 1999) (holding that § 1252(g) does not bar review of ineffective assistance of counsel claim and noting that petitioners "are not claiming that the Attorney General should grant them *discretionary*, deferred-action-type relief"); *Flores-Ledezma v. Gonzales*, 415 F.3d 375, 380 (5th Cir. 2005) (finding that § 1252(g) does not preclude jurisdiction over a challenge to the constitutionality of

[4] Notably, Defendant's citation to the Third Circuit's unpublished decision in *Adegbuj v. Fifteen Immigration and Customs Enforcement Agents*, No. 05-1506, 2006 U.S. App. LEXIS 5801 (3d Cir. Feb. 22, 2006) pre-dates the *Garcia* Court's binding interpretation of §1252(g). Def. Mx. at 8. Moreover, unlike here, the essence of the claims brought by the pro se petitioner in that case sought to challenge his July 2002 deportation order, which, as the Court pointed out, already was the subject of a then pending petition for review. *Id*. at *4-5.

the statutory scheme allowing Attorney General the discretion to choose between regular and expedited removal proceedings).[5]

Significantly, these cases demonstrate that federal courts retain jurisdiction over actions taken outside of an officer's discretionary authority in all types of cases – from habeas corpus petitions (*Madu*); to claims for injunctive relief (*Hovsepian*); to petitions for review *(Garcia, Mustata,* and *Flores-Ledezma*). As the Ninth Circuit has explained, the interpretation of § 1252(g) does not depend upon the nature of the case. *Hovsepian,* 359 F.3d at 1155 (noting that "the same [statutory construction] principle applies" for the interpretation of § 1252(g) whether a case arises in the context of a habeas petition or a district court action for injunctive relief).[6]

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[5] Prior to *Flores-Ledezma,* the Fifth Circuit held that § 1252(g) extends to non-discretionary decisions and thus bars jurisdiction over challenges to the agency's authority to carry out one of the three discrete actions specified in § 1252(g). *Foster v. Townsley*, 243 F.3d 210, 214-15 (5th Cir. 2001). This result, and Defendant's reliance on *Foster* (Def. Mx. at 9), is called into question by *Flores-Ledezma*. Moreover, even if *Foster* remains valid, the Fifth Circuit stands alone – amongst all circuits to have ruled on the issue – in extending § 1252(g) to bar review of nondiscretionary, unlawful agency conduct.

[6] In contrast, of course, courts have held that § 1252(g) will apply where the agency is empowered to exercise discretion over the challenged action, including challenges to discretionary agency decisions to deny a request for a stay of removal. *See, e.g., Moussa v. Jenifer,* 389 F.3d 550, 553-54 (6th Cir. 2004) (discussing *AADC* and finding § 1252(g) precludes review of INS district director's refusal to stay deportation because "[t]his refusal is a decision that is wholly within the discretion of the Attorney General…"); *Sharif v. Ashcroft*, 280 F.3d 786, 787-88 (7th Cir. 2002) (discussing *AADC* and finding that § 1252(g) precluded review over habeas corpus petition seeking to "stop the INS from implementing the removal orders," which the court treated as a request to stay removal); *Barrios v. Attorney General of the United States*, Nos. 10-3248, 10-3763, and 11-1566, 2011 U.S. App. LEXIS 23228, *4 (3d Cir. Nov. 18, 2011) (denying petition for review "appealing the [BIA's] denial of [petitioner's] motion to stay removal" pending motion to reopen, citing *Moussa* and *Sharif* for the proposition that § 1252(g) bars review of challenges to an agency's decision to deny a request to stay removal).

Defendant relies heavily on these three cases in asserting that § 1252(g) applies, Def. Mx. at 8-9, yet all three are distinguishable because the immigration service (DHS, formerly INS) and the BIA actually possessed the discretionary authority to deny the administrative stay requests at issue in those cases. *See* 8 C.F.R. §§ 241.6 (immigration service has discretion over administrative stay requests); 1003.2(f) (BIA authority to grant a stay pending adjudication of a motion to reopen or reconsider, unless the motion seeks reopening of an *in absentia* order and is based on lack of notice). Here, DHS possessed no such discretion as the statute and regulations

The rationale of these decisions applies equally here. Defendant and its agents' actions in deporting Plaintiff were not an exercise of discretion – prosecutorial or otherwise – since federal officers have no discretionary authority to fail to follow the governing statute and their own regulations. That is, a deportation that is expressly prohibited by law simply cannot be found to be discretionary. Such an interpretation would have dramatic negative ramifications.[7]

In sum, under Supreme Court and Third Circuit precedent, § 1252(g) applies only to decisions or actions within DHS's discretion. Because compliance with the law prohibiting Plaintiff's deportation (8 U.S.C. § 1229a(b)(5) and 8 C.F.R. § 1003.23(b)(1)(v), (b)(4)(iii)(C)) was mandatory, not discretionary, § 1252(g) does not preclude review of Defendant's failure to comply with the law.

2. 8 U.S.C. § 1252(b)(9) Does Not Apply.

In a set of footnotes, relying on 8 U.S.C. § 1252(b)(9), Defendant further challenges this Court's jurisdiction. Def. Mx. at 8 n.1 (citing *Bonhometre v. Gonzales*, 414 F.3d 442, 446 (3d

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expressly prohibited deportation. 8 U.S.C. § 1229a(b)(5) and 8 C.F.R. §§ 1003.23(b)(1)(v), (b)(4)(iii)(C).

Defendant's reliance on the Ninth Circuit's decision in *Sissoko* also is factually distinct. There, the government did not take the plaintiff into custody until after the immigration officer learned facts that formed the basis of her decision to commence removal proceedings. *See Sissoko v. Rocha*, 440 F.3d 1145, 1150 (9th Cir. 2006), *withdrawn and replaced*, 509 F.3d 947 (9th Cir. 2007) (referencing the vacated decision for the factual and procedural background of the case). Additionally, at the time of Sissoko's detention, the agent completed a form indicating that the plaintiff was inadmissible, thereby demonstrating that her decision to commence proceedings had been made. Based upon these facts, the court "conclude[d] that Sissoko's detention arose from [the immigration officer's] decision to commence expedited removal proceedings" and thus concluded that § 1252(g) barred review. 509 F.3d at 949.

[7] For example, under this rationale, as long as they could justify that their unlawful actions fell within the exercise of their discretion to commence proceedings, adjudicate cases, or execute removal orders, DHS officers could take unlawful actions against noncitizens and the latter would have no recourse to justice. An officer could beat, yell profanities, spit on, torture or even shoot a non-citizen with impunity. *Cf. Martinez-Aguero v. Gonzales*, 459 F.3d 618, 627 (5th Cir. 2006) (affirming denial of summary judgment in plaintiff's favor where INS officer beat and yelled profanities at a defenseless non-citizen without provocation).

Cir. 2005) and 9 n.2 (citing *AADC*, 525 U.S. at 483). Defendants appear to contend that Plaintiff's only recourse to judicial review lies with the Third Circuit via a petition for review of a removal order. Defendant's position is nonsensical under the plain language of § 1252(b)(9),[8] the facts of this case and 8 U.S.C. § 1101(a)(47).[9]

The opening language of subsection (b) plainly provides that the entire subsection, including subsection (b)(9), is limited to actions challenging "an order of removal under subsection (a)(1)." 8 U.S.C. § 1252(b). Accordingly, as the Supreme Court explained in *AADC*, § 1252(b)(9) functions to "consolidate 'judicial review' of immigration proceedings into one action in the court of appeals, but it applies only 'with respect to review of an order of removal under subsection (a)(1)." *Id*. (citations omitted). *See generally Bonhometre*, 414 F.3d at 445-46

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[8] The statute reads:

> (b) Requirements for review of orders of removal. With respect to review of an order of removal under subsection (a)(1), the following requirements apply:
> . . .
> (9) Consolidation of questions for judicial review. 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 title [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 under section 2241 of title 28, United States Code [28 U.S.C. § 2241], or any other habeas corpus provision, by section 1361 or 1651 of such title [28 U.S.C. §§ 1361 or 1651], or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

[9] The statute defines a final order of deportation (removal) as follows:

> (A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.
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> (B) The order described under subparagraph (A) shall become final upon the earlier of—
> (i) a determination by the Board of Immigration Appeals affirming such order; or
> (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

(discussing consolidation of judicial review over removal orders in the courts of appeal). Plaintiff here does *not* challenge an order of removal; rather he challenges Defendant and its agents' wrongful conduct that resulted in his removal in violation of a stay of his prior *in absentia* removal order, which the Board of Immigration Appeals since has reopened.

Defendant nevertheless contends that Plaintiff "is free to file a petition for review with the Third Circuit if he so chooses." Def. Mx. at 9 n.2. However, as the Supreme Court and the lower courts have indicated or held explicitly, reopening vacates the underlying removal order. *Nken v. Holder*, 556 U.S. 418, 430 (2009) ("[A] determination that the BIA should have granted Nken's motion to reopen would necessarily extinguish the finality of the removal order).[10] Thus, even if he were challenging a removal order (which he is not), Plaintiff no longer has a removal order to challenge, let alone a final removal order as defined in 8 U.S.C. § 1101(a)(47)(B).

3. The INA Specifically Evidences Congressional Intent to Allow Damages Remedies.

The INA itself demonstrates that Congress considers damages actions as available to remedy DHS misconduct. Congress demonstrated its awareness of, and acquiescence in, the availability of damage remedies in a set of provisions that establish certain limited authority for state and local officials to enforce the immigration laws. Congress specified that such state or local officers and employees "shall not be treated as a Federal employee for any purpose other than for purposes of . . . sections 2671 through 2680 of Title 28 [the Federal Tort Claims Act] (relating to tort claims)." 8 U.S.C. § 1357(g)(7). The provision immediately following states:

[10] *See also Bronisz v. Ashcroft*, 378 F.3d 632, 637 (7th Cir. 2004) (holding that "the grant of a motion to reopen vacates the previous order of deportation or removal and reinstates the previously terminated immigration proceedings"); *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) ("The BIA's granting of the motion to reopen means there is no longer a final decision to review").

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

8 U.S.C. § 1357(g)(8) (emphasis added). Because these provisions are intended to make state and local officers who carry out enforcement under the immigration laws liable in damage actions to the same extent as federal officers, it presupposes that federal immigration officers already are liable in such actions. Congress obviously would not have included this language if it intended the judicial review provisions in 8 U.S.C. § 1252 to usurp jurisdiction over damages actions. On the contrary, it explicitly contemplated that sources other than the INA would provide damage remedies against state and local officials who violate the law when acting under § 1357, which gives them authority to, *inter alia*, detain non-citizens incident to deportation.

Furthermore, courts already recognize the availability of FTCA and *Bivens* remedies for statutory, regulatory and constitutional violations by federal immigration officers. *See, e.g.*, *Liranzo v. United States*, 690 F.3d 78 (2d Cir. 2012) (false arrest and imprisonment of U.S. citizen); *Martinez-Aguero v. Gonzales*, 459 F.3d 618 (5th Cir. 2006) (false imprisonment and excessive force by border patrol); *Rhoden v. United States*, 55 F.3d 428 (9th Cir. 1995) (six-day detention of lawful permanent resident at port of entry); *Garcia v. United States*, 826 F.2d 806 (9th Cir. 1987) (shooting by border patrol agent); *Badrawi v. Dep't of Homeland Sec.*, 579 F. Supp. 2d 249 (D. Conn. 2008) (unlawful arrest and detention of immigrant who was also denied religious freedom and access to medical treatment); *Adedeji v. United States,* 782 F. Supp. 688 (D. Mass. 1992) (false imprisonment and strip search by customs officials). *See also Ballesteros v. Ashcroft*, 452 F.3d 1153, 1160 (10th Cir. 2006) ("No remedy for the alleged constitutional violations would affect the BIA's final order of removal. Any remedy available to Mr.

Ballesteros would lie in a *Bivens* action."); *Matter of Sandoval*, 17 I&N Dec. 70, 82 (BIA 1979) (citing *Bivens* for the proposition that "civil or criminal actions against the individual officer may be available."). In addition, the Department of Homeland Security recognizes the availability of litigation to noncitizen plaintiffs seeking to protect civil rights and civil liberties, and calls on immigration officers to "exercise all appropriate prosecutorial discretion" in such cases. *See* Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Officers, All Special Agents in Charge and All Chief Counsel (Jun. 17, 2011), *available at* https://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf (last visited Jan. 17. 2014).

C. PLAINTIFF PROPERLY HAS PLED TORT CLAIMS FOR WHICH PRIVATE INDIVIDUALS WOULD BE LIABLE UNDER NEW JERSEY LAW, THUS SATISFYING THE FTCA'S PRIVATE ANALOGUE REQUIREMENT.

The United States concedes that its agents from the Department of Homeland Security (DHS) acted unlawfully when – at a time that Plaintiff was in their full custody and control – they placed him on a plane and forced his removal to Guatemala. Def. Mx. at 3. In his suit against the United States for the injuries that he suffered as the result of the DHS agents' unlawful action, Plaintiff has pled five common law torts recognized under New Jersey law: false imprisonment; negligence; intentional inflectional of emotional distress; negligent infliction of emotional distress; and malicious prosecution/malicious use of process. For the reasons set forth in Plaintiff's opposition brief and below, the United States would be liable under New Jersey law, were it a private party, with respect to each of these claims.

Defendant erroneously contends that the "private analogue" requirement of the FTCA, 28 U.S.C. §§ 1346(b)(1) and 2674,[11] is not met. In doing so, Defendant improperly misconstrues

[11] 28 U.S.C. § 1346(b)(1) states in relevant part that United States district courts:

this action, which is predicated on established New Jersey torts, as an action for a so-called "tort" of "Improper Removal." Def. Mx. at 19. While the injury to Plaintiff stems directly from his unlawful removal by DHS agents, he is not attempting to fashion a new tort – or even to ask this Court "to establish novel and unprecedented governmental liability," which is the well-recognized purpose behind the FTCA's waiver of the government's "traditional all-encompassing immunity from tort actions." *Rayonier Incorporated v. United States*, 352 U.S. 315, 319 (1957). By conflating Plaintiff's independent claims with a fabricated general claim for "unlawful removal," and arguing that there is no private analogue for the tort of "unlawful removal," Defendant fails to properly analyze, under relevant law, the torts actually pled by Plaintiff.[12]

1. Defendant's Conclusory Attempt to Immunize the Conduct at Issue as "Uniquely Governmental" Ignores Established Supreme Court Precedent.

Without ever analyzing the specifics of the challenged conduct in light of the relevant torts, Defendant claims immunity from FTCA liability because of the "unique governmental" nature of the conduct involved. Def. Mx. at 21. Its justification for this claim is that no other

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> shall have exclusive jurisdiction of civil actions in claims against the United States, for money damages … 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, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2674 states that the "United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances."

[12] By Defendant's logic, nearly every FTCA case could be made into a more general, non-existent tort. For example, the Supreme Court in *Indian Towing Co., Inc. v. United States*, 350 U.S. 61, 67 (1955) – which involved a claim that the Coast Guard failed to properly maintain a lighthouse – could have considered the creation of a new tort for "faulty lighthouse operation," rather than evaluating it under traditional state law negligence principles.

entity besides the United States engages in the removal of noncitizens. *Id*. In a line of decisions not cited by Defendant, the Supreme Court specifically rejected exactly this type of overreaching interpretation of the private analogue requirement that would immunize the United States for "uniquely governmental functions." *Indian Towing Co., Inc. v. United States*, 350 U.S. 61, 67 (1955) (noting that "all Government activity is inescapably 'uniquely governmental' in that it is performed by the Government."); *Rayonier*, 352 U.S. at 318-319. "To say that the challenged action is one that only the federal government does in fact perform does not necessarily mean that no private analogue exists," as courts are "require[d] ... to look further afield" for a private analogue when the government is the only entity that performs such actions. *Liranzo v. United States*, 690 F.3d 78, 94 (2d Cir. 2012) (quoting *United States v. Olson*, 546 U.S. 43, 46 (2005) (finding that although immigration detentions are "uniquely governmental," there is a private analogue for such claims).

Rather than focus on whether the activity is uniquely governmental, a court analyzing whether the private analogue requirement has been met must assess "whether a private person would be responsible for similar negligence [or other tort] under the laws of the State where the acts occurred." *Rayonier*, 352 U.S. at 319. As the Court recognized, this inquiry applies to government "activities which private persons do not perform." *Olson*, 546 U.S. at 46 (quoting *Indian Towing*, 350 U.S. at 64). Consequently, and as the statute dictates, the circumstances under which liability arises must be examined to determine if they are similar – not identical. 28 U.S.C. § 2674 (United States will be liable in the same manner and to the same extent as a private person in "like circumstances"); *see also Olson*, 546 U.S. at 46 ("the words 'like circumstances' do not restrict a court's inquiry to the *same circumstances*, but require it to look further afield") (emphasis in original). "The 'like circumstances' inquiry is not overly stringent."

Lozada v. United States, 974 F.2d 986, 988 (8th Cir. 1992) (quoting *Owen v. United States*, 935 F.2d 734, 737 (5th Cir. 1991), *cert. denied*, 502 U.S. 1031 (1992)). To the contrary, the FTCA "expresses so strong a public policy that the statute has been deemed to be highly remedial and has received a liberal construction." *City of Pittsburgh v. United States*, 359 F.2d 564, 567 (3d Cir. 1966) (original quotations and citations omitted); *accord Lozada*, *supra* (citations omitted) ("[T]he FTCA should be interpreted broadly in order to effectuate the legislative aim of putting private parties and the federal government on an equal footing.").

Applying this standard, the Supreme Court has found that a private analogue exists in several cases involving activity which, as here, the United States argued was "uniquely governmental." In *Indian Towing*, for example, the Court found a private analogue where a Coast Guard employee was negligent in maintaining a lighthouse, causing a tugboat to go aground. 350 U.S. at 69. The Court compared the claim to one of negligence brought against a private person who undertakes a "good Samaritan" role to warn the public of danger and must perform the task in a careful manner. *Id*. at 64-65. As with a "good Samaritan," the Court found that once the Coast Guard undertook the role of operating the lighthouse, it was under a duty to carry out the job in a careful manner. *Id*. In so holding, the Court readily rejected the notion that a private analogue could not be found because only the government operated lighthouses. *Id.* at 64. *See also United States v. Muniz*, 374 U.S. 150, 159-160 (1963) (finding private analogue for claims relating to negligence of federal prison guards); *Olson*, 546 U.S. at 47-8 (finding private analogue for claims relating to federal mine safety inspection).

Lower courts have similarly rejected a narrow reading of the private analogue requirement. As the Third Circuit explained, "'[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its vigor by

refinement of construction where consent has been announced.'" *Valn v. U.S.A. Department of Defense*, 708 F.2d 116, 120 n.7 (3d Cir. 1983) (quoting *Block v. Neal*, 460 U.S. 289 (1983)). In *Valn*, a civilian who had been honorably discharged from the Army alleged that Department of Defense employees negligently and wrongfully overlooked his discharge papers, reinstated him to active military duty, and ultimately imprisoned him when he refused to submit to military authority. *Id*. at 117-18. The court first distinguished *Feres v. United States*, 340 U.S. 135 (1950) – which held there was no private analogue for claims arising from active service in the armed forces. It then found that Valn's claim of negligence was one that Delaware courts recognized as a valid cause of action, and, thus, satisfied the private analogue. *Id*. at 120. *See also Liranzo*, 690 F.3d at 97 (private analogue for claims arising from immigration detention); *Pudeler v. United States*, No. 09-1543, 2010 U.S. Dist. LEXIS 103574, *16 (D. Conn. Sept. 30, 2010) (finding that, although it was the exclusive authority of Transportation Safety Administration employees to screen passengers at airports, their functions were comparable to private persons who screen at entrances to private buildings).

As noted, Defendant has failed to specifically address the circumstances of the unlawful removal; rather, Defendant makes the conclusory assertion that there was no private analogue because only the government removes noncitizens from the United States. Defendant relies solely on *Akutowicz v. United States*, 859 F.2d 1122 (2d. Cir. 1988), and two district court cases which follow *Akutowicz* in support of this contention. However, *Akutowicz* should not be read for such a sweeping proposition, given the contrary Supreme Court precedent. Notably, the general statement in *Akutowicz* cited by Defendant (Def. Mx. at 21 (citing *Akutowicz*, 859 F.3d at 1125)) relies exclusively on *Feres*, 340 U.S. at 146 and *Dalehite v. United States*, 346 U.S. 15 (1953). The *Feres* holding – which found no private analogue in state tort law for a claim arising

out of active service in the military – essentially has been limited to active duty military cases by subsequent Supreme Court decisions. *See Muniz*, 374 U.S. at 162; *Indian Towing*, 350 at 69; *see also Valn*, 708 F.2d at 119-20 (explaining the rationale behind and limitations on *Feres*). Similarly, *Dalehite*, to the degree it contradicts *Indian Towing*, has been rejected by the Court. *Rayonier*, 352 U.S. at 319.

More significantly, and despite the language cited by Defendant (Df. Mx. at *21), *Akutowicz* carried out exactly the analysis required by the Supreme Court. *Akutowicz*, 859 F.2d at 1126. There, the issue was whether there was a private analogue for the Department of State's adjudication that the plaintiff had lost his citizenship. The court found that the closest analogy was that of a private association and its membership. *Id.* It then determined, however, that no cause of action existed under state law for the alleged misconduct of a private association. *Id.* As such, the court's decision did not hinge solely on a finding that the adjudicative citizenship determination at issue was unique to the federal government. *See also Munyua v. United States*, No. 03-04538, 2005 U.S. Dist. LEXIS 11499, *13 (N.D. Ca. Jan. 10, 2005) (distinguishing between quasi-adjudicative activity at issue in *Akutowicz* and immigration enforcement activity for private analogue purposes). *Akutowicz* does not permit a short-circuiting of the necessary search for a private analogue simply because the activity is uniquely governmental, as Defendant asserts.

As noted, in each of the cases cited above in which a private analogue was found, courts have considered the specific circumstances of the conduct at issue in light of the state law which the plaintiff pled. This is precisely what Plaintiff has done in his Complaint and his opposition brief. *Amici* agree with and adopt his arguments in full, without repeating them here. In

addition, in the following section, *amici* add support to Plaintiff's analysis by suggesting a further state law analogy that fits precisely with his negligence claims.

2. As Plaintiff's Jailors, the DHS Agents Had a Duty, Recognized by the New Jersey Courts, to Protect Him from Exactly the Type of Harm They Caused When They Unlawfully Removed Him from the United States.

Contrary to Defendant's claim, Plaintiff does not rely solely on DHS' failure to comply with federal law in support of his claims. Def. Mx. at 19-20. Instead, and as one example, in support of his negligence claim, Plaintiff argues that DHS officers had a duty to act with reasonable care when they deported him, just as they did when they detained him. *See* Plaintiff's Brief at 27-28 (citing *Ramirez v. United States*, 998 F. Supp. 425 (D.N.J. 1995) (finding that immigration agents had a duty to act with a reasonable level of care when detaining plaintiff in accord with state negligence common law). In *Gray v. United States*, No.10-1772, 2013 U.S. Dist. LEXIS 57281 (M.D. Pa. Mar. 28, 2013), the court rejected the argument that the plaintiff was relying solely on federal law under similar circumstances. There, plaintiff, an inmate at the federal Bureau of Prisons (BOP), sued the United States under the FTCA after he was slashed with a razor by his cellmate. He claimed that BOP personnel were negligent in furnishing the razor to his cellmate and in failing to collect it later, in violation of mandatory prison policies governing the distribution and collection of razors. *Id*. at *1. The United States moved to dismiss, arguing that plaintiff's reliance on mandatory federal rules conflicted with the FTCA's requirement that the claim be brought under state law. *Id*. at *22-23. The court disagreed, labeling the government's argument an attempt to make the claim into one of negligence per se. *Id*. at 22. It explained that "these allegations do not constitute a narrow claim of negligence per se, but rather a claim for negligence supported as an evidentiary matter by allegations that [the BOP officer] failed to adhere to mandatory prison policies governing the retrieval of razors." *Id*.

at *30-31. The same is true here. The statute and regulations governing the mandatory nature of the stay of deportation that applied to Plaintiff is presented as evidence in support of the state law torts that he has pled.

Moreover, the state law analogy for the DHS agents' duty, as jailors, to act with reasonable care towards Plaintiff while he was in their custody can be found in Section 314A of the Restatement (Second) of Torts (1965). This section explains that there are certain "special relationships" which give rise to a duty to protect. Included among the special relationships identified in the Restatement is that of a person "who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection." *Id*. at § 314A(4).[13] The duty engendered by this relationship is to "take reasonable action [ ] to protect the[] [other person] against unreasonable risk of physical harm." *Id*. at § 314A(1)(a). Courts in New Jersey have adopted Restatement § 314A. *See, e.g*., *Clohesy v. Food Circus Supermarkets, Inc.*, 149 N.J. 496, 515, 694 A.2d 1017, 1027 (N.J. 1997) (relying on the duty created between a landowner and invitee under § 314A, and finding that "the imposition of a duty on the [landowner] to exercise reasonable care to prevent foreseeable harm to its customers comports with notions of fairness and sound public policy."); *Berrios v. United Parcel Service*, 265 N.J.Super. 436, 441, 627 A.2d 701, 704 (N.J.

[13] § 314A Special Relations Giving Rise to Duty to Aid or Protect

> (1) A common carrier is under a duty to its passengers to take reasonable action (a) to protect them against unreasonable risk of physical harm, and (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others. (2) An innkeeper is under a similar duty to his guests. (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation. (4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

1992) (aff'd 265 N.J. Super. 368, 627 A.2d 665 (1993)) (citing Restatement § 314A with respect to the duty owed by a landowner to an invitee).

Here, it is undisputed that Plaintiff was in DHS' full custody and control at the time of his unlawful removal. He had no control over the actions of the officers with respect to their decision to remove him, or subsequently, their actions when they physically took him from the detention center, transported him to the airport, and forced him onto a plane for Guatemala. *See, e.g.*, Def. Mx. at 3 (admitting that the "'John Doe' Defendants placed Plaintiff on a plane and removed him to Guatemala."). Clearly, DHS and its agents were the custodians of Plaintiff. Equally clear is the fact that their custody of him deprived him of normal opportunities to protect himself from danger, such as the danger of unlawful deportation. Moreover, under § 314A, it is immaterial that the harm was inflicted by DHS agents themselves, as the Restatement makes clear that the "duty to protect the other against unreasonable risk of harm extends to risks arising out of the actor's own conduct." Restatement § 314A, Comment (d).

Courts have recognized a duty of care on the part of a custodian in cases involving private entities that are analogous to the present case. For example, in *Wormley v. United States*, 601 F. Supp. 2d 27 (D.D.C. 2009), the plaintiff brought claims against four sets of defendants for their negligence and other wrongful conduct which allegedly caused her to remain in custody for five months beyond her imposed period of incarceration. She alleged that her unlawful "overdetention" – which the defendants all admitted had occurred – was the result of a series of mistakes and erroneous communications by the various defendants. *Id*. at 29-31. With respect to the common law negligence claims that she filed against the private detention center, the Corrections Corporation of America (CCA), that defendant moved to dismiss, arguing that it had no decision-making authority over plaintiff's release. *Id*. at 44. The court denied this motion,

accepting plaintiff's argument that her complaint satisfactorily alleged facts demonstrating that, as her custodian, the CCA had a duty of care, and citing Restatement § 314A.[14] *Id*. at 44-45. In particular, the court relied upon plaintiff's claims that CCA's "failure to look into her status or respond to her inquiry" breached its duty of care as custodian. *Id*. at 44.

In *Coffey v. United States*, 870 F. Supp. 2d 1202 (D.N.M. 2012), the family of a Native American inmate who died after the Bureau of Indian Affairs (Bureau) moved him 900 miles from one detention center to another, brought an FTCA action against the United States. The family claimed, *inter alia*, that the Bureau had negligently failed to screen the inmate for health problems prior to the transfer. *Id*. at 1236. In finding that an analogous duty in state law existed, the court relied upon Restatement § 314A(4), the duty of a custodian to one who is under his protection. *Id*. at 1237-38. *See also Hall v. Knipp*, 982 S.2d 1196, 1198 (Fla. 2008) (in suit against correctional officer in his individual capacity for negligent and malicious conduct towards inmate, court relied upon Restatement § 314A to find and define the duty of care that correctional officer owed to plaintiff).

As in *Wormley*, 601 F. Supp. 2d at 44, and *Coffey*, *supra*, Plaintiff rests his claim of negligence on Defendant's "failure to look into his status" or to "screen" his case prior unlawfully removing him from the United States. These cases demonstrate that a private analogue exists under Restatement § 314A. They further define the duty of the DHS agents as one of reasonable care to protect Plaintiff from harm, including harm of their own making, based upon their role as his custodian. Because New Jersey recognizes the duty outlined in § 314A, it

[14] The court made clear that, on a motion to dismiss, it did not have to "determine whether CCA defendants in fact owed a duty to plaintiff or whether plaintiff was in fact unlawfully detained. Plaintiff does state a claim that could *plausibly* entitle her to relief." *Id*. at 45 (emphasis in original).

provides a further example of an analogous state law, in addition to the examples cited by Plaintiff.

III. CONCLUSION

For the foregoing reasons, amici urge the Court to deny Defendant's motion to dismiss.

Respectfully submitted,

s/ Trina Realmuto
National Immigration Project
of the National Lawyers Guild
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727 ext 8
(617) 227-5495 (fax)

s/ Mary Kenney
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7512
(202) 742-5619 (fax)

Attorneys for *Amici Curiae*

Dated: January 21, 2014

EXHIBIT A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALONSO RAMIREZ-CHAVEZ, Petitioner, v. ERIC H. HOLDER, Jr., Attorney General, Respondent.	No. 11-72297 PRO BONO Agency No. A039-812-513 ORDER

Before: CANBY and FISHER, Circuit Judges.

This petition for review was filed August 9, 2011, along with a motion for stay of removal, which resulted in a temporary stay of removal as of that date. *See* Ninth Circuit General Orders 6.4(c). Petitioner had filed a previous petition for review in docket no. 11-71741, which petitioner voluntarily dismissed on September 2, 2011. Respondent was aware of the fact that two petitions for review had been filed because it filed a motion on October 3, 2011 to file the administrative record from the 11-71741 petition in this petition for review. Respondent was further aware that there was a temporary stay of removal in this docket no later than October 5, 2011, when this court granted the October 3, 2011 motion and directed respondent to file a response to the pending motion for stay of

removal in this docket. This court granted the opposed motion for stay of removal on January 11, 2012.

Despite respondent's clear and unequivocal knowledge, no later than October 5, 2011, that a stay of removal was in effect in this docket, petitioner was removed on October 19, 2011. Respondent states in its notice of such removal to this court, filed on January 24, 2012, that the Department of Homeland Security (DHS) was "understandably unaware" of this petition for review and the stay that was in effect at the time of petitioner's removal. We disagree that DHS' violation of the stay of removal was understandable in light of respondent's actual knowledge of the pendency of this petition and the stay in place at the time of petitioner's removal.

Respondent is hereby directed to make substantial further attempts to locate petitioner and to return him to this country. Within 28 days from the date of this order respondent shall file a status report that describes in detail all efforts made by respondent to locate and return petitioner, using every contact and address at their disposal.

Petitioner's counsel's motion to withdraw as pro bono counsel and all other proceedings in this petition for review are held in abeyance pending further order of this court.

CERTIFICATE OF SERVICE