No. 16-___

IN THE

Supreme Court of the United States

SANTIAGO ALVAREZ,

Petitioner,

v.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FELICIA SKINNER, FIELD OFFICE DIRECTOR, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) is categorically unavailable in a case arising from immigration detention.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, Santiago Alvarez, was the plaintiff in the district court and the appellant in the Eleventh Circuit Court of Appeals.

Respondents, Felicia Skinner, Michael Gladish, Juan C. Munoz, Robert Emery and Sheetul S. Wall were defendants in the district court and appellees in the court of appeals. Petitioner is limiting this petition to the Eleventh Circuit's affirmance of the dismissal of his *Bivens* claims against Respondents, Juan C. Munoz, Felicia Skinner, and Michael Gladish.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Santiago Alvarez, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The two-one opinion of the Eleventh Circuit (Pet. App. 1a-73a) affirming the dismissal of Petitioner, Santiago Alvarez's Amended Complaint is published at 818 F.3d 1194. The opinion of the district court (Pet. App. 76a-106a) dismissing the Amended Complaint is not published.

JURISDICTION

The Eleventh Circuit entered judgment on March 24, 2016. Pet. App. 1a-73a. It denied rehearing *en banc* on September 13, 2016. *Id*. at 74a-75a. On December 6, 2016, Justice Thomas extended the time to file a petition for writ of *certiorari* to and including January 11, 2017. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Fourth and Fifth Amendments of the U.S. Constitution and 8 U.S.C. §1252(g) are set forth in the Appendix. Pet. App. 161a.

PRELIMINARY STATEMENT

This predominantly-based *Bivens* action – foreclosed by two of the three circuit judge panel of the Eleventh Circuit[1] – arises from the deprivation of freedom and liberty of a once lawful permanent resident of the United States for 53 years whose immigration detention was unduly prolonged due to the fraudulent misrepresentations or fabrication of evidence of immigration agents and the sham post-removal 180-day constitutionally required review of an immigration officer.[2]

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[1] The Majority Panel was comprised of Circuit Judges Stanley M. Marcus and William Pryor. The dissenting Circuit Court Judge was Jill Pryor ("Judge Jill Pryor").

[2] Petitioner, Santiago Alvarez ("Petitioner Alvarez" or "Alvarez"), notwithstanding his disagreement with the dismissal of all defendants/appellees, is pursuing this petition only as to Respondents, Juan C Munoz, Felicia Skinner and Michael Gladish.

In denying a *Bivens* remedy, the Majority Panel established the broad categorical rule that no non-citizen can recover damages under *Bivens* for constitutional violations arising from immigration detention. Pet. App. 28a, 36a, 38a, 47a. In reaching this far reaching, categorical conclusion, the Majority Panel did not fully or correctly consider this Court's precedents and directives and broke ground with the precedents of other circuit courts.

The Majority Panel's ultimate determination that a *Bivens* remedy is not available in this case or in any other case arising from immigration detention conflicts with the decision of another court of appeals, currently on review before this Court and exacerbates an existing circuit split. *Turkmen v. Hasty*, 789 F.3d 218 (2d Cir. 2015), *cert. granted* 137 S. Ct. 293 (2016);[3] *Mirmehdi v. United States*, 689 F.3d 975 (9th Cir. 2011); *De La Paz v. Coy*, 786 F.3d 367 (5th Cir. 2015), *petition for cert. pending*, No. 13-50768 (filed Jan. 12, 2016).

The Majority Panel's decision, apart from being in tension with *Bivens* and post-*Bivens* precedents of this Court as well as conflicting with the decisions of other circuit courts, also raises questions of "exceptional importance" meriting review by this Court. The fundamental question in this case, as dissenting Judge Jill Pryor noted, is whether an ICE official can ignore the law, intentionally deprive a non-citizen of meaningful post-removal review, and knowingly make false statements to keep him/her in custody when the

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[3] The Court has granted and consolidated three petitions in *Turkmen*: *Ashcroft v. Abbasi, cert. granted*, No. 15-1359 (Oct. 11, 2016), *Hasty v. Abbasi, cert. granted*, No. 15-1363 (Oct. 11, 2016), and *Ziglar v. Abbasi, cert. granted*, No. 15-1358 (Oct. 11, 2016).

law required him/her to be released, without the deterrent consequence of being held accountable for monetary damages, solely because the constitutional violations and resulting injuries occurred in an immigration setting. Pet. App. 38a, 47a. And in a broader sense, the fundamental question is whether the due process and other constitutional rights of non-citizens, who have long been recognized by this Court to be no less deserving of protection of the same constitutional rights of citizens, can be violated with impunity, without any monetary repercussion to the violator, only because the violations and injuries occurred in an immigration detention center.

STATEMENT

The crux of Alvarez's *Bivens* claims is that each of the defendants, Emery, Skinner, Wall, Gladish, and Munoz played a role in either delaying review of his removal or conducting sham reviews to prolong his immigration detention past constitutional limits.[4] The relevant background is set forth below.

On November 25, 2008, a few weeks before serving a federal prison sentence, the United States Immigration and Customs Enforcement ("ICE") lodged a detainer against Petitioner Alvarez and placed him in

[4] Petitioner Alvarez is only seeking *certiorari* review of the judgment of the Eleventh Circuit affirming the dismissal of his claims against defendants below, Respondents herein, Juan C Munoz, Felicia Skinner and Michael Gladish. In the interest of setting the complete factual context of his claims below, this Statement and summation of the proceedings, discuss his admission and residency in the United States for 53 years, how he lost his permanent resident status and became a removable alien, and how the district court and Eleventh Circuit addressed his claims as to all of the defendants/appellees below.

custody at the Stewart Detention Center in Georgia on that day. Pet. App. 2a, *id*. at 151a.

At the time he was placed in ICE's custody and detained, Petitioner Alvarez had been a lawful permanent resident of the United States since 1959. With his wife, he lived permanently in Miami, Florida, where he raised his two American-born children and grandchildren. Pet. App. 3a, *id*. at 110a (¶¶30-31).

Between 1960 and 1968, Alvarez was recruited by the Central Intelligence Agency ("CIA") to participate in the Bay of Pigs invasion and other operations and enlisted in the U.S. Army. Alvarez was Honorably Discharged from the Army in 1968. Pet. App. 110a (¶¶16-22).

During his 49-year residency in the United States, Alvarez became a well-respected businessman and community leader. Pet. App. 110a (¶31), *id*. at 77a.

Alvarez lost his permanent resident legal status and became a removable alien due to three criminal cases.

After 31 years of residency in the United States, in 1990, Alvarez was charged with aggravated assault and battery with a gun arising from a confrontation with a repossession agent, who mistakenly removed Alvarez's car from the family home while the Alvarez family was asleep. Alvarez plead *nolo contendere*. Pet. App. 112a (¶¶32-33). Due to the lack of any prior criminal history and the circumstances of the offense, Alvarez was sentenced to six months of community service with five years of probation. Pet. App. at 150a.

Fifteen years later in 2005, Alvarez was indicted for possessing illegal weapons for the benefit of anti-Castro activities outside the United States. He ultimately pled guilty to conspiracy to possess such illegal weapons. Pet. App. 151a, Pet. App. 3a. In the

plea negotiations, the government agreed as a condition of the final plea agreement, "to utilize its best efforts" to communicate with ICE officials and "to reach a definitive understanding of [Alvarez's] immigration status and the effect of this case on his immigration status." *Id*. at 3a.

Alvarez was sentenced to 46 months, but his sentence was later reduced to 30 months for providing substantial assistance to the government. Pet. App. 4a. During the sentencing hearing, the judge described Alvarez as "by all accounts . . . compassionate, benevolent, and patriotic, not only to Cuba but to the United States." *Id*. at 4a. Later, at the sentence reduction hearing, the sentencing judge noted the undisputed community support for Alvarez and that his actions, while violative of the law, were altruistically motivated. *Id*., *see also* 113a (¶¶38-40).

In November 2007, Alvarez was scheduled to be moved to a halfway house to serve the duration of his prison term. ICE, however, lodged an immigration detainer against him. Alvarez filed a motion under 28 U.S.C. §2255 to lift the detainer, or alternatively, to modify his sentence, claiming that the government had breached the plea agreement by failing to use its best efforts to reach a timely resolution of his immigration status. Based upon the recommendation of the magistrate judge, the district court denied the motion. Pet. App. 115a (¶¶46-47), *id*. at 4a.

Shortly thereafter, Alvarez was summoned to appear before a federal grand jury in the Western District of Texas to elicit his testimony that he had helped an individual illegally enter the United States. Alvarez refused to testify and was charged with obstruction of justice, to which he pled guilty and was

sentenced to an additional 10-month prison term. Pet. App. 117(a) (¶¶50-52), *id*. at 5a.

Upon completing his 10-month prison term on November 25, 2008, ICE took custody of Alvarez and detained him. Pet. App. 151a, *id*. at 5a. Before his scheduled release on November 25, 2008, Alvarez attempted to reach a stipulated final order of removal under 8 U.S.C. §1229a(a)-(c), to start the statutory 90-day removal period mandated by 8 U.S.C. §1231(a)(1)(A) as soon as possible. Alvarez's efforts were frustrated when ICE's Chief Deputy Counsel, Robert Emery, without prior notice, unexpectedly withdrew the stipulation the parties had been negotiating for months and were close to completing. Pet. App. 118a (¶¶55-56), 119a (¶¶59-63), *id*. at 5a-6a.

The removal hearing was scheduled on January 22, 2009, two months after Alvarez had been in ICE custody. Alvarez stipulated to his removal and a Final Order of Removal to Cuba was entered on January 22, 2009. Pet. App. 119a (¶63), *id*. at 6a.

Immediately after the Final Order of Removal, Alvarez's attorneys contacted Felicia Skinner, the Field Office Director of the Atlanta Office of Detention and Removal, and requested that ICE expedite the 90-day removal process. Alvarez's attorneys pointed out that removal to Cuba was not a humane possibility because he would be "dead on arrival" and that removal to a third country was not a practical reality. Documentation was provided to Skinner demonstrating that Alvarez was neither a "flight risk" nor a "danger to the community." Pet. App. 120a, *id*. at 6a.

Skinner declined to expedite review, and on the last day of the 90-day period, April 22, 2009, she issued a First Decision to Continue Detention, stating that

there was "no reason to believe that [Alvarez's] removal to Cuba will not take place within the reasonably foreseeable future."[5] She also noted that Alvarez should be detained because he was a flight risk and a danger to the community. Skinner notified Alvarez that if he was not removed by July 21, 2009, jurisdiction over his removal would be "transferred to the Headquarters Case Management Unit ["HCMU"]." Pet. App. 120a-121a (¶¶66-69), *id*. at 6a.

ICE, through HCMU, was required under 8 C.F.R. §241.4(k)(2)(iii) to complete its review of Alvarez's removability within 180 days of the Final Order of Removal to Cuba, by July 21, 2009, "or as soon thereafter as practicable." Pet. App. 44a.

After no action was taken during the intervening period of April 22, 2009, and July 11, 2009, being under ICE's continuous custody for seven months since November 25, 2008, Alvarez, on July 28, 2009, filed a petition for a writ of *habeas corpus* with United States District Court for the Middle District of Georgia. Pet. App. 152a, *id*. at 6a-7a.

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[5] The magistrate judge at the §2225 hearing, asked Deputy Counsel, Robert Emery, "[i]f in fact [Alvarez] cannot be deported back to Cuba, why is it that you would keep him in custody for several months if there is no way he's going to be able to be deported?" Emery responded that the INA allowed the government to deport Alvarez to a third country. The magistrate judge then inquired whether any Cuban national had ever been deported to a third county, and whether it was conceivable that any other country would accept Alvarez. Emery said that he did not know but that the court ought to allow ICE to take the full statutory 90-day period to investigate the possibility of his removal. The magistrate judge commented: "maybe it is a collateral issue, but it does smack of unnecessarily punitive if at the end of the day you are going to cut him loose and you're going to say, "well, there is no place we could deport him." Pet. App. 115a-116a (¶48).

I. Proceedings In The *Habeas* District Court For The Middle District Of Florida

On July 29, 2009, the *habeas* district court ordered the respondents to file their response, the record and transcripts, by September 28, 2009. Pet. App. 154a.

On September 17, 2009, ICE, through Attorney Sheetul Wall, moved for a three month extension of time stating that the government was no longer seeking to remove Alvarez to Cuba, but was actively pursuing his deportation to Spain. This application included the declaration of Michael Gladish, an ICE Supervisory Detention and Deportation officer, which left the impression that deportation to Spain was a realistic and foreseeable option because Alvarez was eligible for Spanish citizenship. Gladish claimed that, as a result of a "recent change" in Spanish law, foreign nationals with Spanish ancestors could apply for citizenship. Gladish affirmed that Alvarez's paternal grandfather had been a national and citizen of Spain. Gladish also stated that Alvarez had been given, and promised to complete, an application for Spanish citizenship. Pet. App. 7a. Accepting the basis for the motion, the following day, September 18, 2009, the *habeas* district court immediately granted the extension giving the government three additional months to respond. Pet. App. 124 (¶ 85).

Alvarez moved for reconsideration, arguing, among other things, that the motion for extension and declaration were a ruse to further delay his release because he was clearly ineligible for Spanish citizenship.[6] Pet. App. 7a. In a sworn affidavit, Alvarez stated that ICE officials had given him two pages of a nine-page

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[6] *See Santiago Alvarez v. Michael Swinton, Warden, et al.*; No. 09-cv-00089 (M.D. Ga. September 24, 2009), ECF 10.

application for Spanish citizenship and asked him to fill them out. The missing pages made clear that the citizenship opportunity extended only to individuals whose ancestors had fled the Spanish Civil War, which occurred between 1936 and 1939. Alvarez claimed that, when he learned this, he knew he was ineligible for citizenship because his grandfather had emigrated from Spain around 1875. He immediately informed a deportation officer of this fact – who is not named as a defendant – on September 14, 2009. *Id.* at 7a.

As a result of Alvarez's motion, the *habeas* district court entered two orders on October 5, 2009, rescinding the additional three months extension for the respondents to respond[7], *see* Pet. App. 8a, and scheduling a status conference and hearing on October 26, 2009,[8] to consider Alvarez's claims in the motion for reconsideration and the respondents position on the merits of the *habeas corpus* petition.

After the October 26, 2009 hearing was set, Acting HCMU Chief Juan Munoz issued a Second Decision to Continue Detention on October 14, 2009. Pet. App. 8a. In it, Munoz acknowledged that although Alvarez's removal to Cuba was not "presently possible," ICE was working to secure his removal to Spain. *Id*. Munoz stated that there was no reason to believe that Alvarez's removal would not occur in the reasonably foreseeable future. *Id*. But on October 21, 2009 – approximately 11 days after Alvarez was first transferred to ICE custody – ICE officials notified him that he was being released. *Id*.

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[7] *See Santiago Alvarez v. Michael Swinton, Warden, et al.*; No. 09-cv-00089 (M.D. Ga. October 5, 2009), ECF 13.

[8] *See Santiago Alvarez v. Michael Swinton, Warden, et al.*; No. 09-cv-00089 (M.D. Ga. October 5, 2009), ECF 12.

The next day, October 22, 2009, the government moved to dismiss the *habeas* proceedings as moot, but the *habeas* district court denied the motion and proceeded with the hearing on October 26, 2009, finding:

> There is no dispute in the record that at all times all parties hereto knew that Petitioner Alvarez was not removable to Cuba, that there was no repatriation agreement between Cuba and the United States, and that Petitioner's removal to Cuba would not be in the reasonably foreseeable future. Nonetheless, repeated requests that Petitioner Alvarez be released after January 22, 2009, were denied.

Pet. App. 8a.

The *habeas* district court also found that by releasing Alvarez, "ICE had tacitly admitted . . . that its [earlier] determination that Petitioner Alvarez was a threat to the community and a flight risk was no longer a valid determination" – and therefore that those grounds were "obviously no basis for illegal indefinite detention." For these reasons, the *habeas* district court retroactively granted Alvarez's petition, effective October 21, 2009. Pet. App. 8a. The *habeas* district court also struck several conditions of Alvarez's release as unconstitutional.[9] *Id*. at 8a-9a.

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[9] The Eleventh Circuit reversed that determination in *Alvarez v Holder*, 454 F. App'x 769 (11th Cir. 2011) (per curiam) finding that the district court had properly exercised jurisdiction but reinstated all of the conditions the lower court had invalidated. *Id*. at 773-74.

II. Proceedings In The District Court For The Southern District Of Florida

On April 11, 2013, Alvarez commenced this lawsuit in the United States District Court for the Southern District of Florida against various federal officials. He amended his complaint on December 10, 2013, ultimately asserting *Bivens* claims against Robert Emery, ICE's Chief Deputy Counsel; Felicia Skinner, Field Office Director of the Atlanta Office of Detention and Removal; Sheetul Wall, Assistant U.S. Attorney in the Middle District of Georgia handling the *habeas* proceedings; Michael Gladish, ICE Supervisory Detention and Deportation Officer and Juan Munoz, the Acting Headquarters Case Management Unit Chief. Alvarez brought claims for (1) "Conspiracy to prolong [his] release and to violate his fundamental right to freedom and liberty," (Count I); (2) "Violation of [his] Fourth Amendment right against unreasonable seizure," (Count II); and (3) "Violation of [his] Fifth Amendment right to due process and liberty," (Count III).[10] Pet. App. 9a-10a, 76a, 83a.

A. Petitioner's Claims

Robert Emery: Alvarez claims that Emery was responsible for the deprivation of his liberty and freedom by falsely testifying at the 28 U.S.C. §2255 hearing that he did not know whether any Cuban national had ever been deported to a third country, and whether it was conceivable that any other country would accept Alvarez given his background. Emery, as ICE's Chief Deputy Counsel, had to know the answer,

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[10] Alvarez also asserted ancillary state law tort claims, which the government moved to dismiss, but later withdrew in light of the district court's ruling that it lacked subject matter jurisdiction. Pet. App. 10a at n. 2.

but chose to conceal from the magistrate judge that Cuban nationals with Alvarez's background are not accepted by third countries. Pet. App. 115a-116a (¶48).

Alvarez also claims that Emery's unexpected withdrawal of the stipulation for removal the parties were close to completing to expedite ICE's statutory 90-day removal period, was designed to prolong Alvarez's immigration detention. Pet. App. 119a (¶¶59-62), *id*. at 130a, (¶¶107-109).

Felicia Skinner: Alvarez claims that Skinner knew that the reasons she gave for issuing a First Decision to Continue Detention were false. First, Skinner knew that Cuban nationals, especially of Alvarez's profile, were not deported to Cuba, and also knew, as the *Habeas* District Court noted, that there was no repatriation agreement between the United States and Cuba. Second, Skinner knew that, as a 53-year resident of the United States, with American-born children and grandchildren residing in the South Florida area, and businesses and community ties in the South Florida area, Alvarez was not a flight risk. Skinner's refusal to release Alvarez based upon the false premises she gave unconstitutionally prolonged Alvarez's immigration detention. Pet. App. 120a-121a (¶¶65-70), 131a (¶¶112-115).

Sheetul Wall: Alvarez claims that Wall, the attorney handling the *habeas* proceedings, knew that when she filed the motion for extension of time to extend the adjudication of Alvarez's *habeas corpus* petition for three months, the stated basis for the extension – that Alvarez was eligible for Spanish citizenship and that the government was actively pursuing his removal to Spain – was false. The falsely-based motion delayed the adjudication of Alvarez's petition and prolonged

his immigration detention. Pet. App. 123a-125a (¶¶81-89).

Michael Gladish: Alvarez claims that Gladish's declaration, which attorney Wall attached to her motion for extension, falsely stated that, based upon a recent change in Spanish law, Alvarez was eligible for citizenship and based upon his eligibility, the government was actively pursuing Alvarez's removal to Spain. Gladish knew that the Spanish citizenship application that was provided to Alvarez was incomplete and that the missing pages clearly stated that Alvarez was not eligible for Spanish citizenship. The falsely-based declaration delayed the determination of Alvarez's petition and prolonged his immigration detention. Pet. App. 123a-125a (¶¶81-89), 132a (¶¶118-121), 135a (¶¶131-132).

Juan C. Munoz: Alvarez claims that Munoz, after delaying his 180-day statutorily mandated post-removal review by 85 days, purposely undermined his post-removal review, by (after reviewing his entire file) falsely stating that Alvarez was eligible for Spanish citizenship and that there was no reason to believe that Alvarez's removal to Spain would not occur in the reasonably foreseeable future. The falsely-based Second Decision to Continue Detention Munoz issued delayed the determination of Alvarez's petition and prolonged his immigration detention. Pet. App. 126a-127a (¶¶90-92), 131a (¶¶112-15).

B. The District Court's Ruling

Defendants, Robert Emery, Felicia Skinner, Sheetul Wall, Michael Gladish, and Juan C. Munoz moved to dismiss the case for failure to state a claim. Pet. App. 76a. The district court granted the motion, articulating various grounds for its decision. *Id*. at 84a-105a.

The district court first found that it did not have subject matter jurisdiction over Alvarez's claims as a result of the jurisdiction stripping provision of 8 U.S.C. §1252(g). Pet. App. 88a. Next, it found that, in the alternative, the claims were barred: (1) by the two-year statute of limitations of Georgia. *Id*. at 93a-94a; and (2) this Court's decision in *Heck v. Humphrey*, 512 U.S. 477,487 (1994). The district court also concluded that no *Bivens* remedy should be recognized in this new context, without explaining why it concluded the case involved a "new context," because the INA provides alternative remedial remedies and several special factors counsel against extending *Bivens* into the immigration context. *Id*. at 98a-101a. The district court finally determined that each official was entitled to qualified immunity, *see id*. at 103a-104a, and defendants, Emery and Wall, as attorneys, were entitled to absolute immunity. *Id*. at 104a-105a.

Alvarez timely appealed the district court's Order dismissing his claims against Felicia Skinner ("Skinner"), Sheetul Wall ("Wall"), Robert Emery ("Emery"), Michael Gladish ("Gladish") and Juan C. Munoz ("Munoz").

III. Proceedings In The Eleventh Circuit

The Majority Panel affirmed the dismissal of the Amended Complaint over the 38-page vigorous dissent of Circuit Judge Jill Pryor where she concluded that "[t]he allegations in this case are disturbing" and the majority's analysis are also troubling. Pet. App. 72a-73a.

The entire panel agreed that the district court erroneously concluded that it had no jurisdiction to consider the merits of Alvarez's claim under 8 U.S.C. §1252(g). Pet. App. 19a-21a, 36a, 37a. Where Circuit

Judge Jill Pryor parted with the Majority Panel was with its fundamental broad holding that a non-citizen does not have a *Bivens* remedy in a case arising from immigration detention. Judge Jill Pryor concluded that Alvarez had a *Bivens* claim against Respondent, Munoz, and should be allowed to proceed with that claim. *Id*. at 38a, 47a, 72a-73a.

A. The Majority Panel's Decision

The Majority Panel first addressed whether the district court had jurisdiction to consider Alvarez's *Bivens* claims under 8 U.S.C. §1252(g). Pet. App. 12a. The majority held that the district court's interpretation of the operative language of §1252(g) precluding judicial review of any cause or claim "arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal" orders, was too broad. *Id*. at 20a.

The majority noted that this Court in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) instructs courts to narrowly interpret §1252(g). Pet. App. 15a-16a, (citing to decisions of several circuit courts following this Court's command). *Id*. at 13a.

The majority agreed with the district court that Emery's decision to suddenly withdraw the stipulated order of removal was a decision arising from the commencement of Alvarez's removal proceedings and was exempt from judicial review under §1252(g). *Id*. at 17a-19a.

The majority also agreed with the district court that Alvarez's allegations that Emery knowingly misrepresented to the magistrate judge at the §2255 motion hearing, that he was unaware of whether a Cuban national of Alvarez's background had ever been

removed, arose from ICE's decision to commence Alvarez's proceedings by lodging a detainer against him and was not subject to judicial review. Pet. App. 19a.

The Majority Panel, however, disagreed with the district court that all of ICE's actions, through Skinner, Wall, Gladish, and Munoz, arose from the discretionary decision to execute Alvarez's removal order and fell within the scope of §1252(g)'s jurisdictional bar. Pet. App. 19a-20a. The majority held that the discretionary authority to execute a removal order presupposes that Skinner, Wall, Gladish, and Munoz intended to remove Alvarez when they made the decisions or took the actions to continue to prolong his detention. *Id*. at 20a. The majority pointed out that Alvarez had sufficiently alleged that no decision to execute his removal order was ever reached as he repeatedly alleged that the "removal officials knew that he could not be removed – to Cuba, Spain, or any other country and never intended to remove him." *Id*. at 20a-21a.

As the majority put it, "the decision to indefinitely detain an alien – and thus, by definition, never to remove him/her – cannot arise from the decision to execute removal. Pet. App. 20a. This Court's core holding in *Zadvydas v. Davis*, 533 U.S. 678, 699-700 (2001), that "if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute" would be undermined if ICE officials were permitted to make decisions or take actions with the sole purpose of indefinite by detaining aliens. The Majority Panel, therefore, held that §1252(g) did not preclude judicial review of Respondents, Skinner, Wall, Gladish and Munoz's decisions/actions. *Id*. at 21a.

The majority then considered the "central merits question" of whether to "expand the judicially crafted *Bivens* cause of action to cover [Alvarez's] claims…" against all of the Respondents, including Emery. Pet. App. 21a. Agreeing with the district court that no *Bivens* remedy is available and affirming the dismissal of Alvarez's claims on this basis, the majority deemed, as not necessary, consideration of the district court's other rationales for dismissal. *Id.* at 21a-22a.

In determining that a *Bivens* remedy was not available, the Majority Panel, without considering the two-part inquiry required by *Wilkie v. Robbins*, 551 U.S. 537 (2007), and other precedents of this Court as well as circuit courts to determine if the claims arose in a familiar *Bivens* context or in a "new context," assumed that Alvarez's claims arose in a "new context." By doing so, the majority framed the *Bivens* issue in terms of whether the *Bivens* remedy should be "expanded" and engaged in a "new context" analysis considering whether there were alternative remedial mechanisms or special factors counselling hesitation. Pet. App. 21a, 23a.

The majority first inquired "whether any alternative existing process for protecting the constitutionally recognized interest amount[ed] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Minneci v. Pollard*, 132 S. Ct. 617, 621 (2012) (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)). And, noted that the alternative existing process does not need "to provide complete relief to the plaintiff." *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1998) (quoting *Bush v. Lucas*, 462 U.S. 367, 388 (1983)). Pet. App. 23a. The majority then held that the INA is an elaborate comprehensive scheme Congress established, which provides for

various review procedures, pointing specifically to 8 U.S.C. §1225(a)(2)(b)(1)(A)(ii), §(b)(1)(B)(iii)(III), §1228(e), §1229a(a)(1), §1229a(c)(7), §1229b(a)-(b), and 8 C.F.R. §241.4(k)(2)(iii). *Id*. at 27a-28a. However, except for 8 C.F.R. §241.4(k)(2)(iii), these review procedures exclusively relate to challenges to removability, or waivers or exemptions from removability – matters never challenged, or at issue in Alvarez's case. And, as Judge Jill Pryor noted in her dissent, 8 C.F.R. §241.4(k)(2)(iii), which permits a non-citizen to request review of his/her detention after he/she is detained for longer than 90 days, is meaningless if the review process is intentionally subverted as happened in Alvarez's case. Pet. App. 50a-51a.

The Majority Panel next relied on Congress' silence in creating a damages remedy in the INA, despite seven amendments, as evidencing Congress' intent not to create a damages remedy. Pet. App. 29a-30a.

The majority, citing to *Ex parte Yerger*, 75 U.S. 85, 95 (1868), also relied upon Alvarez's remedy to seek *habeas* relief, which he exercised, as providing the "most speedy, direct and powerful remedy from wrongful detention." Pet. App. 28a.

The Majority Panel also relied on several special factors as counseling against "extending" a *Bivens* remedy in this "new context." These special factors included Congress' plenary power with respect to immigration matters, the breadth and detail of the INA and the remedial mechanisms provided therein, separation of powers, the Executive Branch's exclusive authority to control and conduct relations with foreign nations, and that recognizing a *Bivens* remedy in this "new context" would be doctrinally novel and difficult to administer. Pet. App. 31a-34a. These "special factors" were dismissed, as overstated or completely

irrelevant, by Circuit Judge Jill Pryor in her dissent and will be discussed below. *Id*. at 59a-65a.

Despite acknowledging that Alvarez had plausibly claimed that Respondents Munoz, Skinner and Gladish had acted wrongly in taking actions in his *habeas* proceedings solely to prolong his immigration detention, *see* Pet. App. 19a, and may have violated his constitutional rights, the majority still found that recognizing a *Bivens* remedy would be "worse than the disease" (quoting *Wilkie v. Robbins*, 551 U.S. at 561). *Id*. at 34a.

B. Circuit Judge Jill Pryor's Dissent

Judge Jill Pryor agreed with the Majority Panel's conclusion that Alvarez's *Bivens* case arose in a new context and agreed with the majority's application of the two-part inquiry in determining whether to "extend" a *Bivens* remedy in this case. Pet. App. 47a n. 12, 48a. Judge Jill Pryor also agreed, but for entirely different reasons, with the majority's affirmance of the dismissal of all *Bivens* claims against the defendants/appellees, except for Munoz. *Id*. at 38 at n. 1. While the majority recognized that, except for his claims against Emery, Alvarez's plausible claims against Skinner, Wall, Gladish, and Munoz were not precluded under 8 U.S.C. §1252(g), but ultimately dismissed these claims based upon its *Bivens* holding, Judge Jill Pryor concurred with the dismissal of the claims against Emery, Skinner, Wall and Gladish for other reasons. Judge Jill Pryor determined that Alvarez had not sufficiently asserted plausible Bivens claims against Respondents, Skinner, Wall, and Gladish. Judge Jill Pryor determined that the claims against Respondent Emery were barred under §1252(g). *Id*. at 37a, 38a n. 1.

Judge Jill Pryor strongly disagreed with the majority that a *Bivens* remedy should not be extended to allow Alvarez to proceed with his plausibly stated *Bivens* claims against Munoz. Pet. App. 37a. Judge Jill Pryor was "unable to reconcile the majority's conclusion that Alvarez was afforded meaningful review with his plausible claim that Munoz performed a sham review and continued to detain him, knowing that the law required his release." *Id*. at 38a.

Analyzing Alvarez's *Bivens* claim against Munoz under the premise that it arose in a "new context," Judge Jill Pryor, citing to decisions of the Eleventh Circuit, *see e.g., Magluta v. Samples*, 375 F. 3d 1269, 1284 (11th Cir. 2004), and decisions of other circuit courts, *see e.g., Turkmen v. Hasty*, 789 F. 3d 218, 237 (2d Cir. 2015) (applying a *Bivens* remedy for claims arising out of immigration detention), noted that *Bivens* remedies have been both implicitly and explicitly recognized in a "new context." Pet. App. 48a, 49a at n. 13.

Based upon the case-by-case approach recently reaffirmed by this Court in *Minneci v. Pollard*, 132 S. Ct. 617, 621 (2012), Judge Jill Pryor determined that, with respect to the *Bivens* claims asserted against Munoz, the INA did not provide a meaningful remedy to Alvarez. Judge Jill Pryor did not agree that the INA and the availability of *habeas* relief was sufficiently protective. Pet. App. 50a. Judge Jill Pryor first noted that the host of the INA's review procedures that the majority pointed to were irrelevant to whether Alvarez had a meaningful opportunity to challenge his continued detention after the 180th day of his final order of removal. *Id*. at 50(a) n. 14. And, the review procedures of 8 C.F.R. §241.4(k)(2)(iii) were not meaningful

because Alvarez had plausibly claimed that they were intentionally subverted by Munoz. *Id*.

Judge Jill Pryor also disagreed with the Majority Panel's conclusion that, because Congress never added a damages remedy when amending the INA, Congress intended to make damages unavailable. She saw no suggestion by Congress, even by its silence, indicating that Alvarez should have no damages remedy when he alleged that he was affirmatively denied the review the law required. *See Arar v. Ashcroft*, 585 F.3d 559, 573 (2d Cir. 2009) (*en banc*) (explaining that "any reliance on the [Immigration and Nationality Act] as an alternative remedial scheme presents difficulties" because the alien "alleged that he was actively prevented from seeking any meaningful review and relief through the [Immigration and Nationality Act] processes"). Pet. App. 54a-55a.

Judge Jill Pryor took exception to the Majority Panel's position that *habeas* relief was an alternative remedy foreclosing a *Bivens* remedy. Pet. App. 58a-59a. She explained that the existence of a *habeas* remedy alone – which gives aliens prospective, as opposed to retroactive, relief – is insufficient to support a conclusion that alternative remedies "amount to a convincing reason to refrain from" recognizing a *Bivens* remedy. *Id*. at 58a. (*citing to Engel v. Buchan*, 710 F.3d 698, 705-06 (7th Cir.2013)); see also 58a-59a, n. 23, n. 24 and n. 25.

Judge Jill Pryor also took issue with the two "special factors" – "the importance of demonstrating due respect for the Constitution's separation of powers" and the difficulties associated with recognizing a "doctrinally novel and difficult to administer" claim – the Majority Panel also relied upon in determining

that a *Bivens* remedy should not be extended in an immigration context. Pet. App. 59a.

Judge Jill Pryor noted that this Court in *Zadvydas v. Davis*, 533 U.S. at 695, rejected a similar separation of powers rationale, explaining that the Executive and Legislative Branches' "power [in immigration matters] is subject to important constitutional limitations." Pet. App. 60a-61a. When removal is impossible, judicial review of an alien's detention in no way "den[ies] the right of Congress to remove aliens." *Id.* at 60a. She also pointed to this Court's rejection of the argument that judicial review would impinge upon the authority of Congress and the Executive Branch to control entry into the United States after a final order of removal is entered because, at that point, "[t]he sole foreign policy consideration" is that review by the courts might "interfere with sensitive repatriation agreements." But, as Judge Jill Pryor observed, the majority provided no explanation as to how the intentional sham post-final 180-day detention review of Alvarez's continued detention would interfere with "sensitive repatriation agreements." *Id.* at 60a-61a.

Judge Jill Pryor also rejected the proposition that Alvarez's claim was either doctrinally novel or difficult to administer citing to precedents of this Court and circuit courts recognizing a due process claim when government officials failed to provide a meaningful review required by law or policy. Pet. App. 62a-63a. She also was unconvinced by the majority's concerns that a *Bivens* remedy "would likely lead to widespread litigation" pointing to available data that indicated otherwise. *Id.* at 64a & n. 27.

Judge Jill Pryor finally addressed the other grounds the district court relied upon in dismissing Alvarez's claims – the *Heck* rule, Qualified Immunity, and the

statute of limitations – not addressed by the Majority Panel, and found that these alternative grounds were not a basis to dismiss to Alvarez's claims against Munoz. Pet. App. 65a-74a.

REASONS FOR GRANTING THE WRIT

The Court should grant *certiorari* because the Eleventh Circuit's holding conflicts with the holding of another court of appeals and presents a question of exceptional importance. At a minimum, the Court should grant the petition, vacate the decision below, and remand for reconsideration in light of the Court's disposition of *Turkmen v. Hasty*, 789 F.3d 218 (2d Cir. 2015), *cert. granted* 137 S. Ct. 293 (2016).

I. The Decision of the Majority Panel of the Eleventh Circuit Below Exacerbates an Existing Circuit Split Regarding the Availability of *Bivens* Claims Arising From Immigration Detention.

The Eleventh Circuit's sweeping decision in this case conflicts with the holding of another court of appeals, currently on review before this Court, and thereby exacerbates an existing circuit split on this issue. *See Turkmen v. Hasty*, 789 F.3d 218 (2d Cir.2015), *cert. granted* 137 S. Ct. 293 (2016);[11] *Mirmehdi v. United States*, 689 F.3d 975 (9th Cir.2011); *De La Paz v. Coy*, 786 F.3d 367 (5th Cir.2015), *petition for cert. pending*, No. 13-50768 (filed Jan. 12, 2016).

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court

[11] The Court has granted and consolidated three petitions in *Turkmen*: *Ashcroft v. Abbasi, cert. granted*, No. 15-1359 (Oct. 11, 2016), *Hasty v. Abbasi, cert. granted*, No. 15-1363 (Oct. 11, 2016), and *Ziglar v. Abbasi, cert. granted*, No. 15-1358 (Oct. 11, 2016).

recognized a cause of action under the Constitution for the violation of the plaintiff's constitutional rights. The "core holding of *Bivens*," this Court has explained, was that "a claim for money damages" is available "against federal officers who abuse their constitutional authority." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 67 (2001). Under the Eleventh Circuit's decision below, that core holding would be inapplicable to effectively any claim arising out of immigration detention.

This Court's precedents establish a two-step analysis for the application of *Bivens* in a "new context." *Id.* at 68. First, the Court inquires whether an "alternative, existing process for protecting the [constitutionally recognized] interest amounts to a convincing reason for the Judicial Branch to refrain from providing" a remedy under *Bivens*. *Minneci v. Pollard*, 565 U.S. 118, 122-23 (2012) (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)) (alteration in original). In the absence of such an alternative, the Court makes "the kind of remedial determination that is appropriate for a common-law tribunal," considering "any special factors counselling hesitation before authorizing a new kind of federal litigation." *Id.* (quoting *Wilkie*, 551 U.S. at 550). Addressing the application of *Bivens* to the "immigration context," Pet. App. 24a, 36a, the Eleventh Circuit broadly held that a *Bivens* remedy was unavailable under both prongs in a case arising from immigration detention.

Relying heavily on *Mirmehdi* and *De La Paz*, the Eleventh Circuit first concluded that the INA is a "complex" and "elaborate remedial scheme" affording "numerous avenues for aliens to obtain review of ICE decisions by an immigration judge or federal court, as well as opportunities for aliens to seek discretionary

relief" and allowing "a detained alien" to "seek a petition for a writ of *habeas corpus* to challenge his detention." Pet. App. 27-28a, 30a (internal quotation marks omitted). However, as Judge Jill Pryor pointed out in her dissent, in *Mirmehdi*, the circuit court held that no *Bivens* remedy was available because the aliens were able to "challenge their detention through not one, but two different remedial systems." Pet. App. 56a. As Judge Jill Pryor insightfully observed: "[i]mportantly, though, in *Mirmehdi* the aliens raised no claim that this administrative and judicial review was a sham." Pet. App. 56a-57a. The Eleventh Circuit likewise noted that Congress has repeatedly amended the INA without establishing a money damages remedy. *Id.* at 29a-30a. The Eleventh Circuit agreed with the Ninth and Fifth Circuits that the INA "provides an adequate alternative remedy" sufficient to displace a *Bivens* remedy. *Id.* at 24a.

The Eleventh Circuit also concluded that special factors were sufficient to foreclose a *Bivens* remedy, including the "breadth and detail of the Immigration and Nationality Act" and separation-of-powers concerns implicated by applying *Bivens* in the immigration context. *See* Pet. App. 31a (asserting that the political branches "are generally better 'situated to consider sensitive foreign policy issues' that immigration cases may implicate, and involvement of the courts into their domain can in some instances 'undermine the Government's ability to speak with one voice in this area.'") (*quoting Munaf v. Geren*, 553 U.S. 674, 702 (2008)).

In short, the Eleventh Circuit sweepingly held that both the complexity of the INA and separation of powers concerns foreclosed a *Bivens* remedy in this case. As Judge Jill Pryor cogently observed, "the

majority's separation of powers analysis . . . would seem to foreclose a *Bivens* remedy in any case arising in the immigration context." Pet. App. 61a (Jill Pryor, J., concurring in part and dissenting in part). The same is true with regard to the Eleventh Circuit's generalized reliance on the provisions of the INA. The district court below relied on "complexity of the Immigration and Nationality Act, and Congress's frequent amendments to it" as sufficient to foreclose a *Bivens* remedy. Pet. App. 30a. But that reasoning would indicate that *Bivens* is unavailable not just in this case but in effectively every case "arising from civil immigration apprehensions and detentions"—and indeed in every case in the immigration context more generally. Pet. App. 25a (quoting *De La Paz*, 786 F.3d at 375) (internal quotation marks omitted).

This sweeping conclusion conflicts with the Second Circuit's holding in *Turkmen*, which permitted non-citizens to assert *Bivens* conditions-of-confinement and unlawful-strip-search claims against federal officers, including immigration officials. These claims arose from the plaintiffs' immigration detention, and the Second Circuit specifically rejected the plaintiffs' status as "illegal aliens" as a reason to deny a *Bivens* remedy, 789 F.3d at 236, over the dissenting Judge's invocation of "the executive's immigration authority" as a basis to foreclose *Bivens*, *id*. at 274 (Raggi, J., concurring in part in judgment and dissenting in part). Had *Turkmen* been litigated in the Eleventh Circuit under the rule established by the decision below, no *Bivens* remedy would have been available.

The Eleventh Circuit seemingly sought to distinguish *Turkmen*. *See* Pet. App. 26-27a n.6 (addressing conditions of confinement but not the strip search claim in *Turkmen*). But, as the dissenting opinion

correctly observed, *Turkmen* no less than *Alvarez* involved a *Bivens* claim "arising out of immigration detention." 49a n.13 (Jill Pryor, J., concurring in part and dissenting in part). Moreover, as already explained, the Eleventh Circuit's broad reasoning was as applicable to the claims in *Turkmen* as it was to those in *Alvarez*.

Indeed, the conflict between *Turkmen* and the decision in this case is underscored by the government's subsequent filings in *Turkmen*. In the *certiorari* petition filed by the federal government in *Turkmen*, the Solicitor General relied on *Alvarez* as at least "at odds" with the holding in *Turkmen*. See Petition For a Writ of Certiorari, *Ashcroft v. Abbasi*, No. 15-1359, at 19-20 (internal quotation marks omitted). Moreover, in his merits brief in *Abbasi*, the Solicitor General effectively adopted the Eleventh Circuit's reasoning in this case, arguing that a remedy is unavailable under *Bivens* for "claims intimately related to immigration" both because of separation-of-powers considerations and because "Congress has established a substantial, comprehensive, and intricate remedial scheme in the context of immigration." Pet. Br., *Ashcroft v. Abbasi*, No. 15-1359, at 29 (quoting *Mirmehdi*, 689 F.3d at 982) (internal quotation marks omitted); *see also* Pet. Br., *Hasty v. Abbasi*, No. 15-1363, at 32 (similar). This argument amounts to a recognition that, if *Alvarez* is right, *Turkmen* was wrongly decided.

The Court should therefore grant *certiorari* to resolve the circuit split, exacerbated by the Eleventh Circuit's decision in this case, regarding the availability of a *Bivens* remedy in cases arising out of immigration detention.

II. Denying the Availability of a *Bivens* Remedy Ignores Contrary Statutory and Circuit Authority and Raises an Issue of Exceptional Importance.

A. The Majority Panel's Alternative Existing Processes Analysis Conflicts with Other Circuit Court Precedents.

The Majority Panel relied on the allegedly "elaborate remedial system" established by the INA and Congress' purported failure to create a statutory damage remedy in the INA as justification for finding no *Bivens* cause of action. Pet. App. 27a-30a.

As Judge Jill Pryor aptly explained in her dissent, the INA's alternative processes to review Alvarez's detention that the Majority Panel relied upon, *see* Pet. App. 27a-28a, were not meaningful. Except for 8 C.F.R. § 241.4(k)(2)(iii), the other procedures the majority relied upon had nothing to do with the constitutional authority to continue to detain Alvarez after the 180-day post-removal period. Pet. App. 50a & n. 14. And, as Judge Jill Pryor pointed out, the post-removal review procedures of §241.4 were meaningless in light of Alvarez's plausible claim that the 180-day review Respondent Munoz performed was a sham. Pet. App. 50a-51a.

The *habeas* remedy Alvarez exercised after the 180th day of being detained also was not meaningful in any way in light of Alvarez's plausible claim that Munoz who read his entire file, knew that Alvarez was not eligible for Spanish citizenship and could not be removed to Spain. Pet. App. 53a. The existence of a *habeas* remedy alone – which provides prospective and not retrospective relief – is insufficient to support a conclusion that alternative remedies "amount to a

convincing reason to refrain from" recognizing a *Bivens* remedy. *Engel v. Bucan*, 710 F.3d 698, 705-06 (7th Cir. 2013).

The fact that Congress has not explicitly recognized a damages remedy in the INA, under the assumption that the INA's review procedures are "sufficiently protective," conflicts with circuit court precedents. *See, e.g. Arar v. Ashcroft*, 585 F.3d 559, 573 (2d Cir. 2009) (explaining that "any reliance on the [INA] as an alternative remedial scheme presents difficulties" because the alien "alleged that he was actively prevented from seeking any meaningful review and relief through the [INA] processes").

B. The Majority Panel's "Special Factor" Analysis Conflicts With This Court's and Circuit Court Precedents.

This Court and circuit courts recognize that *Bivens* actions are available in fields over which Congress has plenary power. The plenary power that Congress exercises over immigration – that is, the "power of Congress over the admission of aliens and their right to remain," *Galvan v. Press*, 347 U.S. 522, 530 (1954) – is not implicated in a challenge alleging that federal employees intentionally deprived a noncitizen of liberty in violation of the Fifth Amendment. The fact that Congress has authority over immigration policy cannot mean that Congress condones federal officers violating constitutional rights during the execution of these policies. The Majority Panel's conclusion "taken to its logical end, would seem to foreclose a *Bivens* remedy in any case arising in the immigration context" Pet. App. 61a (Pryor, J., dissenting in part). This would mean that Congress' plenary power allows federal immigration officers to perpetrate flagrant and grave violations of

constitutional rights with impunity. The Supreme Court repeatedly has rejected this position.

As early as 1903, the Court admonished:

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

Yamataya v. Fisher, 189 U.S. 86, 100 (1903). Since then, the Court has reiterated this position frequently. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 792 n. 4 (1977) ("[i]n the enforcement of [immigration] policies, the Executive Branch . . . must respect the procedural safeguards of due process . . . [even if] the formation of these policies is entrusted exclusively to Congress") (quotations omitted); *INS v. Chadha*, 462 U.S. 919, 941-42 (1983) (Congress must choose "a constitutionally permissible means of implementing " its plenary power).

The Majority Panel's rationale that separation of powers is a special factor counselling against the recognition of a damages remedy in cases involving the intentional deprivation of due process conflicts with other circuit court precedents. *See, e.g. Morales v. Chadbourne*, 793 F.3d 208, 209-210 (1st Cir.2015) (holding that line and supervisory immigration officers not immune from *Bivens* liability where plaintiff alleged she was held in immigration custody without probable cause); *Turkmen*, 789 F.3d at 235-37 (holding *Bivens* available to challenge unlawful strip searches and punitive conditions in immigration custody); *Martinez-Aguero v. Gonzales*, 459 F.3d 618, 627 (5th Cir. 2006) (holding *Bivens* available where INS officer

beat and yelled profanities at a defenseless noncitizen without provocation).

C. This Court and Circuit Courts Recognize that *Bivens* Remedies to Challenge Intentional Interference With Due Process Rights are Neither Doctrinally Novel Nor Difficult to Administer.

Contrary to the Majority Panel's conclusion, Alvarez's claim that Respondents, Munoz and Gladish, purposefully denied him meaningful review under existing regulations and procedures by fabricating an allegation of deportability to Spain falls within an established *Bivens* context. At issue here are Alvarez's Fifth Amendment rights to fair process and freedom from unlawful deprivation of liberty. It is well established that *Bivens* is available to redress Fifth Amendment violations. Indeed, in *Davis v. Passman*, 442 U.S 228, 230 & n. 3 (1979), this Court held that a *Bivens* remedy is available to redress Fifth Amendment substantive due process violations where a U.S. Congressman terminated an assistant's employment on the basis of her sex.

Since then, circuit courts have found that *Bivens* is available to redress Fifth Amendment due process violations, including violations similar to those alleged by Alvarez. *See, e.g. Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000) (affirming the denial of qualified immunity in a *Bivens* action in which the plaintiff alleged that he had been deprived of due process under the Fifth Amendment when the prosecuting attorney involved in initial investigations of the case fabricated evidence against him). In allowing the *Bivens* claim to proceed, the circuit court held that "there is a constitutional right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting

in an investigatory capacity, at least where the officer foresees that he himself will use the evidence with a resulting deprivation of liberty." *Id*. at 344.

The mechanism of the due process violation – here, intentional interference with the constitutionally mandated post-final order review scheme – has been recognized by numerous circuit courts. *Zahrey* and also *Hammond v. Kunard*, 148 F.3d 692 (7th Cir. 1998) are examples of this. Similarly, in the *Bivens* action *Limone v. Condon*, 372 F.3d 39, 45 (1st Cir. 2004), the circuit court affirmed the denial of qualified immunity for a federal agent emphasizing that:

> . . . if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit . . . Actions taken in contravention of this prohibition necessarily violate due process (indeed, we are unsure what due process entails if not protection against deliberate framing under color of official sanction.)

These cases do not differ from the present case in any significant way. All involve the due process right to fair process and the knowing use of fabricated evidence against the individual by a government agent. This Court and circuit case law demonstrate that the majority's holding that recognizing a *Bivens* remedy to challenge intentional interference with due process rights would be doctrinally novel and difficult to administer is not a "special factor" that should preclude a *Bivens* remedy.

III. At a Minimum, This Court Should Grant, Vacate, and Remand to the Eleventh Circuit for Reconsideration in Light of its Resolution of the Petitions in *Turkmen*.

As already noted, questions presented by the *Turkmen* petitions lie at the heart of the decision below. There is therefore a strong likelihood that the Court's resolution of *Turkmen* will materially affect the legal principles at issue in this case. At a minimum, Petitioner Alvarez, thus respectfully requests that the Court grant this petition, vacate the decision of the Eleventh Circuit, and remand to that court for reconsideration in light of the opinion in *Turkmen* once it is issued. *See Wellons v. Hall*, 558 U.S. 220 (2010).

Petitioner notes that the Court appears to have held the pending petition for *certiorari* in *De la Paz*, No. 13-50768, since the October 7, 2016 conference. The Eleventh Circuit relied heavily on *De la Paz*, which similarly announced a broad preclusion of *Bivens* remedies in the immigration context. *See* Pet. App. 22a, 25-26a & n.5, 29a, 31-34a. And the Solicitor General explicitly relied on *Alvarez* in his opposition to certiorari in *De la Paz*. See Brief For The Respondents In Opposition, *De la Paz v. Coy*, No. 13-50768, at 11 n.6. Therefore, at a minimum, Petitioner requests that this case be held with *De la Paz*, to be granted, vacated, and remanded to the Eleventh Circuit following this Court's decision in *Turkmen*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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January 11, 2017

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed March 24, 2016]

No. 14-14611
D.C. Docket No. 1:13-cv-21286-WPD

SANTIAGO ALVAREZ,

Plaintiff-Appellant,

versus

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FELICIA SKINNER, Field Office Director, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, MICHAEL GLADISH Office of Detention and Removal, Atlanta District, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, JUAN CARLOS MUNOZ, UNITED STATES ATTORNEY, ROBERT EMERY, UNITED STATES ATTORNEY, SHEETUL S. WALL, UNITED STATES OF AMERICA,

Defendants-Appellees,

UNIDENTIFIED OFFICIALS AND/OR AGENTS OF DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants.

Appeal from the United States District Court
for the Southern District of Florida

Before MARCUS, WILLIAM PRYOR, and JILL PRYOR, Circuit Judges. MARCUS, Circuit Judge:

Santiago Alvarez, a Cuban national and longtime United States resident, was serving the last few weeks of a federal prison sentence when United States Immigration and Customs Enforcement ("ICE") lodged a detainer against him. Alvarez was ordered removed and, although ICE does not effectuate removals to Cuba, he remained in ICE custody from November 25, 2008 until October 21, 2009 – an amount of time greatly exceeding the 90-day statutory period for removal. 8 U.S.C. § 1231(a)(1)(A). After Alvarez was released, he filed this *Bivens* action, arguing that various government officials, knowing that his removal order could not be executed, made false statements in order to unconstitutionally prolong his detention.

The district court dismissed his complaint in its entirety, first finding that it did not have subject matter jurisdiction over the claim pursuant to 8 U.S.C. § 1252(g) – which strips the federal courts of jurisdiction over claims "arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien." The court also found that, even if jurisdiction was proper, several other grounds supported its dismissal. Among other things, the district court concluded that no *Bivens* extension would be warranted to remedy an extensive immigration detention because an adequate, statutory remedial scheme already exists and several special factors counsel hesitation.

After thorough review, we affirm. Although we hold that § 1252(g) does not bar us from considering the merits of Alvarez's claim, we also find that no *Bivens* remedy is available to him, both because the Immigration and Nationality Act sets out sufficient meaningful remedies for Alvarez and similarly situated aliens, and because numerous special factors counsel against

supplementing this scheme with a new judicially created cause of action. Notwithstanding having legislated substantially and repeatedly in this area, Congress did not provide an avenue by which Alvarez can seek monetary relief We defer to its judgement and hold that no *Bivens* remedy is available to a plaintiff who claims that immigration officials unconstitutionally prolonged his detention.

I.

A.

The essential facts are these. Santiago Alvarez is a Cuban national who was admitted to the United States as a lawful permanent resident in 1959. He lived primarily in Miami-Dade County, and he worked for the Central Intelligence Agency and the United States military between 1960 and 1968. Alvarez also has a criminal history that dates back to 1990, when he was convicted of aggravated assault and battery with a gun after he assaulted a repossession agent who mistakenly attempted to tow his vehicle. In November 2005, Alvarez was arrested and charged again, this time with possessing illegal weapons for the benefit of anti-Castro activists outside of the United States. He subsequently pled guilty to federal weapons charges, including conspiracy to unlawfully possess machine guns and a grenade launcher.

Throughout the course of the plea negotiations, Alvarez's attorneys voiced concerns that a guilty plea to federal weapons charges would affect his immigration status. The Department of Justice assured counsel that Cubans – particularly Cubans like Alvarez with a documented history of opposing Castro's regime – are not deported to Cuba. The government agreed as a condition of the final plea agreement "to utilize its best

efforts" to communicate with ICE officials and "to reach a definitive understanding of [Alvarez's] immigration status and the effect of this case on his immigration status."

Alvarez was initially sentenced to 46 months' imprisonment, although his sentence was subsequently reduced to 30 months when he assisted the government by arranging an anonymous turnover of various weapons. During the sentencing hearing, the judge described Alvarez and his co-defendants as "by all accounts . . . compassionate, benevolent, and patriotic, not only to Cuba but to the United States."

Alvarez served the first several months of his sentence in a federal prison, and he was due to be moved to a halfway house in November 2007 to serve the duration of his term. In August 2007, however, ICE lodged an immigration detainer against Alvarez with the Federal Bureau of Prisons. Alvarez filed a motion under 28 U.S.C. § 2255 in the Southern District of Florida, asking the court to lift the detainer, claiming that the government had breached the terms of his plea agreement by failing to use its best efforts to reach a timely resolution of his immigration status.

A magistrate judge conducted a hearing on the motion and questioned ICE's counsel, Assistant United States Attorney Robert Emery, about whether or not Alvarez's deportation was a realistic possibility. The magistrate judge asked: "If in fact the Defendant can not [sic] be deported back to Cuba, why is it that you would keep him in custody for several months if there is no way he's going to be able to be deported?" Emery responded that the Immigration and Nationality Act allowed the government to deport Alvarez to a third country. The magistrate judge then inquired whether any Cuban national had ever been deported

to a third country, and whether it was conceivable that any other country would accept Alvarez.

Emery said that he did not know but that the court ought to allow ICE to take the full statutory 90-day period to investigate whether it would be possible to remove him. The court commented, "maybe it is a collateral issue, but it does smack of unnecessarily punitive if at the end of the day you are going to cut him loose and you're going to say, 'well, there is no place we could deport him.'" Ultimately, however, the magistrate judge recommended that Alvarez's motion be denied because Alvarez had sworn at his plea hearing that he understood that his guilty plea could result in his deportation. Additionally, the judge pointed out that the decision to detain or release Alvarez fell within ICE's discretion. The district court adopted the magistrate judge's Report and Recommendations, and as a result, Alvarez remained in custody.

Sometime after the § 2255 hearing, Alvarez was summoned to appear before a federal grand jury in the Western District of Texas. The government sought Alvarez's testimony that he had helped an individual illegally enter the United States. Alvarez refused to testify and was charged with obstruction of justice, in violation of 18 U.S.C. §§ 1503, 6002, and 6003. He pled guilty and was sentenced to an additional ten months in prison. As a result of the new conviction and sentence, Alvarez was scheduled to be released from federal custody on November 25, 2008.

In the time leading up to Alvarez's release date, his attorneys attempted to work with Emery to enter a stipulated final order of removal. Pursuant to 8 U.S.C. § 1231(a)(1)(A), "when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days." An alien can

be ordered removed in two ways: (1) he can be ordered removed by an immigration judge ("IJ") after a removal proceeding, *see* 8 U.S.C. § 1229a(a)-(c); or (2) ICE and the alien can stipulate that the alien is removable and the IJ can enter a stipulated order that serves as "a conclusive determination of the alien's removability," *id.* § 1229a(d). Here, if ICE had agreed to stipulate that Alvarez was removable, the statutory period to remove him would have begun on or around his prison release date. Although it initially appeared that the parties had reached such an agreement, Emery withdrew the offer to stipulate removability one week before Alvarez's November 25 release date, and a removal hearing was scheduled for January 22, 2009. Thus, the statutory 90-day removal period did not begin to run in this case until Alvarez had spent an additional two months in ICE custody.

After Alvarez was ordered removed at the hearing, his attorneys contacted Felicia Skinner, the Field Office Director of the Atlanta Office of Detention and Removal. They pointed out that Alvarez could not be removed to Cuba and requested that ICE expedite his review process. Skinner declined to expedite review, and on the last day of the 90-day period, April 22, 2009, she issued a First Decision to Continue Detention. Skinner said that there was "no reason to believe that [Alvarez's] removal will not take place within the reasonably foreseeable future." She also found that Alvarez should be detained until that time because he was both a danger to his community and a flight risk. Skinner notified Alvarez that if he was not removed by July 21, 2009, jurisdiction over his removal would be "transferred to the Headquarters Case Management Unit." No action was taken on Alvarez's removal in the intervening period.

On July 28, 2009, Alvarez filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia, pursuant to 28 U.S.C. § 2241. On September 17, 2009, ICE filed a motion for an extension of time. The motion, filed by Assistant United States Attorney Sheetul Wall, stated that the government was no longer seeking to remove Alvarez to Cuba, but was actively pursuing his deportation to Spain. This application was accompanied by a declaration from Michael Gladish, an ICE Supervisory Detention and Deportation officer, which left the impression that deportation to Spain was a realistic and foreseeable option because Alvarez was eligible for Spanish citizenship. In the affidavit, Gladish claimed that, as a result of a "recent change" in Spanish law, foreign nationals with Spanish ancestors could apply for citizenship. Gladish affirmed that Alvarez's paternal grandfather had been a national and citizen of Spain. Gladish also stated that Alvarez had been given, and promised to complete, an application for Spanish citizenship. The district court granted the extension, giving the government three more months to respond.

Alvarez moved for reconsideration of the district court's order, arguing, among other things, that he was clearly ineligible for Spanish citizenship. In a sworn affidavit, Alvarez stated that ICE officials had given him two pages of a nine-page application for Spanish citizenship and asked him to fill them out. The missing application pages made clear that the citizenship opportunity extended only to individuals whose ancestors had fled the Spanish Civil War, which took place between 1936 and 1939. Alvarez claimed that, when he learned this, he knew he was ineligible for citizenship because his grandfather had emigrated from Spain around 1875. He immediately informed

a deportation officer – who is not named as a defendant – on September 14.

As a result of Alvarez's motion, the district court rescinded the order and set the matter down for a hearing on October 26, 2009. After the hearing was set, Acting Headquarters Case Management Unit Chief Juan Munoz issued a Second Decision to Continue Detention on October 14, 2009. In it, Munoz acknowledged that although Alzarez's removal to Cuba was not "presently possible," ICE was working to secure his removal to Spain. Munoz explained that there was no reason to believe that Alvarez's removal would not occur in the reasonably foreseeable future. But on October 21, 2009 – approximately 11 months after Alvarez was first transferred to ICE custody – ICE officials notified him that he was being released. The government then moved to dismiss his habeas proceeding as moot, but the court denied the motion. The district court held a hearing and found:

> There is no dispute in the record that at all times all parties hereto knew that Petitioner Alvarez was not removable to Cuba, that there was no repatriation agreement between Cuba and the United States, and that Petitioner's removal to Cuba would not be in the reasonably foreseeable future. Nonetheless, repeated requests that Petitioner Alvarez be released after January 22, 2009, were denied.

The court also found that by releasing Alvarez, "ICE had tacitly admitted . . . that its [earlier] determination that Petitioner Alvarez was a threat to the community and a flight risk was no longer a valid determination" – and therefore that those grounds were "obviously no basis for illegal indefinite detention." For these reasons, the district court retroactively

granted Alvarez's petition, effective October 21, 2009. The court also struck several conditions of Alvarez's release as unconstitutional – although this Court reversed that determination in *Alvarez v. Holder*, 454 F. App'x 769 (11th Cir. 2011) (per curiam).[1] On appeal, the panel found that the district court had properly exercised jurisdiction over the petition because Alvarez was still technically in custody, facing a variety of release conditions, but it reinstated all of the conditions that the lower court had invalidated. *Id.*

B.

Alvarez subsequently commenced this lawsuit against various federal officials involved in continuing his detention in the United States District Court for the Southern District of Florida. He amended his complaint several months later, ultimately asserting *Bivens* claims against five defendants: (1) Robert Emery, the Assistant U.S. Attorney who declined to lift Alvarez's detainer or agree to a stipulated order of removal; (2) Felicia Skinner, the Field Office Director of the Atlanta Office of Detention and Removal who issued the First Decision to Continue Detention; (3) Sheetul

[1] The district court had found that the condition that Alvarez not travel 50 miles beyond his residence would deny him access to the courts in the Middle District of Georgia and prevent him from appearing for his habeas action and any future suits. The court also struck the requirement that Alvarez abstain from all contact with eleven enumerated individuals. Next, the court struck a provision requiring Alvarez to "make good faith and timely efforts to obtain a travel document to effectuate [his] removal" – concluding that an alien has no obligation to effectuate his own removal. Finally, the trial court struck a provision reserving ICE's right to modify the terms of Alvarez's release at any time. The district court *sua sponte* reinstated the condition providing that Alvarez may not contact the named individuals. *Alvarez*, 454 F. App'x at 773-74.

Wall, the Assistant U.S. Attorney who filed the motion for an extension of time to respond to Alvarez's habeas petition; (4) Michael Gladish, the ICE Supervisory Detention and Deportation officer whose declaration regarding Alvarez's eligibility for Spanish citizenship was attached to Wall's motion; and (5) Juan Munoz, the Acting Headquarters Case Management Unit Chief who issued the Second Decision to Continue Detention days before Alvarez was released. Alvarez brought claims for (1) "Conspiracy to prolong [his] release and to violate his fundamental right to freedom and liberty," (Count I); (2) "Violation of [his] Fourth Amendment right against unreasonable seizure," (Count II); and (3) "Violation of [his] Fifth Amendment right to due process and liberty," (Count 111).[2]

The individual defendants moved to dismiss the case for failure to state a claim, and the district court granted the motion, articulating various grounds for its decision. As we have noted, the court first found that it did not have subject matter jurisdiction over Alvarez's claim as a result of the jurisdiction stripping provision contained in the Immigration and Nationality Act, 8 U.S.C. § 1252(g). Next, it concluded that, in the alternative, the claims were barred by the two-year statute of limitations in Georgia – the state with the most significant relationship to the suit. It also found

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[2] Alvarez also asserted other claims not at issue on appeal: "Fraud in immigration proceedings and upon [the] court" (Count IV); "Deprivation of [his] freedom and liberty because of his political beliefs (Count V); False imprisonment (Count VI); Malicious prosecution (Count VII); and Intentional infliction of emotional distress (Count VIII). He subsequently conceded that he had failed to state a claim in Count V. As for the state law tort claims, the government moved to dismiss them, but withdrew its motion in light of the district court's ruling that it lacked subject matter jurisdiction.

that the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), barred the claims. The district court then concluded that no *Bivens* remedy should be recognized in this context because the Immigration and Nationality Act provides an adequate alternative remedy and several special factors counsel against extending *Bivens* into the immigration context. The trial court also determined that, even if it were to decide the case on the merits and find that the defendants had violated Alvarez's constitutional rights, each official was entitled to qualified immunity because Alvarez had failed to sufficiently allege the violation of a clearly established right. Finally, as for two of the defendants, attorneys Emery and Wall, the court concluded that they were entitled to absolute immunity because their actions were intimately associated with the judicial process.

This timely appeal followed.

II.

We review the dismissal of a plaintiff's *Bivens* claim under Federal Rule of Civil Procedure 12(b)(6) and for lack of subject matter jurisdiction *de novo*. *Lee v. Hughes*, 145 F.3d 1272, 1274 (11th Cir. 1998). We must accept the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Hardison v. Cohen*, 375 F.3d 1262, 1263 (11th Cir. 2004). We are free to affirm the district court's dismissal on "any ground that is supported by the record." *United States v. Elmes*, 532 F.3d 1138, 1142 (11th Cir. 2008); *see also Lee*, 145 F.3d at 1277 n.6 ("[T]he district court was incorrect to conclude that it lacked subject matter jurisdiction, but was correct to dismiss for failure to state a claim. We therefore affirm the district court's judgment." (citation omitted)).

III.

This Court is obliged to address first whether we have jurisdiction to consider the merits of Alvarez's claims. We have long recognized that "in the federal tandem, jurisdiction takes precedence over the merits. Unless and until jurisdiction is found, both appellate and trial courts should eschew substantive adjudication." *Belleri v. United States*, 712 F.3d 543, 547 (11th Cir. 2013) (alterations adopted) (quoting *Opelika Nursing Home, Inc. v. Richardson*, 448 F.2d 658, 667 (5th Cir. 1971)); *see also Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999) ("A necessary corollary to the concept that a federal court is powerless to act without jurisdiction is the equally unremarkable principle that a court should inquire into whether it has subject matter jurisdiction at the earliest possible stage in the proceedings."). "The jurisdiction of a court over the subject matter of a claim involves the court's competency to consider a given type of case," and to allow parties to obtain adjudications on the merits where subject matter jurisdiction does not exist would "'work a wrongful extension of federal jurisdiction and give [federal] courts power the Congress denied them.' *Jackson v. Seaboard Coast Line R.R. Co.*, 678 F.2d 992, 1000 (11th Cir. 1982) (quoting *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 18 (1950)). In short, if Congress has stripped us of jurisdiction over Alvarez's claims, then our inquiry is at an end.

The district court concluded that it lacked jurisdiction over Alvarez's *Bivens* claims pursuant to 8 U.S.C. § 1252(g), which provides:

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus

> provision, and sections 1361 and 1651 of such title, 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 this chapter.

Id. (emphasis added). The difficulty in interpreting this provision is that "Congress has provided no explicit definition of the phrase 'arising from,' and courts have not always agreed on its plain meaning." *Humphries v. Various Fed. USINS Emps.*, 164 F.3d 936, 943 (5th Cir. 1999). Congress also has not defined "commence proceedings," "adjudicate cases," or "execute removal orders." We begin with first principles: for ICE "to prevail [on jurisdictional grounds] it must overcome . . . the strong presumption in favor of judicial review of administrative action." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). Indeed, the Supreme Court has long cautioned "that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988); *accord Demore v. Kim*, 538 U.S. 510, 517 (2003); *see also Johnson v. Robison*, 415 U.S. 361, 373-74 (1974) ("[N]either the text nor the scant legislative history of [the provision] provides the 'clear and convincing' evidence of congressional intent required by this Court before a statute will be construed to restrict access to judicial review.").

Moreover, the Supreme Court's decision in *Reno v. American-Arab Anti-Discrimination Committee (AADC)*, 525 U.S. 471 (1999), further counsels in favor of reading § 1252(g) narrowly. In *American-Arab Anti-Discrimination Committee*, the petitioners were resident aliens ordered removed on the basis of routine

immigration violations under circumstances that suggested they had been targeted for removal on account of their membership in a group advocating the creation of an independent Palestinian state. *See id.* at 473-74. They brought a selective enforcement claim against the Immigration and Naturalization Service ("INS"), and the Supreme Court considered whether § 1252(g) barred the federal courts from reaching the merits of the group's claim. *Id.* at 473-76.

Although the parties assumed that § 1252(g) applied to "all or nearly all deportation claims," the Supreme Court rejected this interpretation. *Id.* at 478. The provision, the Court observed, does not say "no judicial review in deportation cases unless this section provides judicial review." *Id.* at 482. Rather, it is drawn in a "much narrower" way and "applies only to three discrete actions," namely, the "'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Id.* (quoting 8 U.S.C. § 1252(g)). Thus, for example, the provision has no effect on a variety of other actions that may be taken before, during, and after removal proceedings – "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." *Id.*

The Court also emphasized, however, that "[t]here was good reason for Congress to focus special attention upon, and make special provision for, judicial review of the Attorney General's discrete acts of commencing proceedings, adjudicating cases, and executing removal orders." *Id.* at 483 (alterations adopted) (internal quotation marks and citation omitted). These three

actions "represent the initiation or prosecution of various stages in the deportation process," and "[alt each stage the Executive has discretion to abandon the endeavor" for any number of reasons. *Id.* The Court noted that the agency's discretionary termination of the removal process for certain aliens had inadvertently "opened the door to litigation in instances where the INS chose *not* to exercise it." *Id.* at 484. Thus, § 1252(g) "seems clearly designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations." *Id.* at 485. It further described the provision as "specifically directed at the deconstruction, fragmentation, and hence prolongation of removal proceedings." *Id.* at 487. Applying these principles to the petitioners' selective enforcement claims, the Supreme Court dismissed their suit – concluding that, at bottom, the claims amounted to a challenge to the Executive branch's decision to commence proceedings. *Id.*

Although *American-Arab Anti-Discrimination Committee* does not answer the question of whether we have jurisdiction over Alvarez's claim, it does guide our inquiry. Notably, it instructs us to narrowly interpret § 1252(g) – a command that our sister circuits have applied in subsequent cases. Thus, for example, the Seventh Circuit has explained that the provision only includes within its scope those challenges that ask the district court, and ultimately the court of appeals, "to block a decision 'to commence proceedings, adjudicate cases, or execute removal orders.'" *Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999) (quoting 8 U.S.C. § 1252(g)). In its view, § 1252(g) is no impediment to adjudicating claims that challenge "detention while the administrative process lasts." *Id.*; *accord Carrera-Valdez v. Perryman*, 211 F.3d 1046, 1047 (7th Cir. 2000) ("Carrera did not ask the district court to

block the commencement or adjudication of a case, nor did he protest the execution of a removal order. . . . Carrera wants review of his placement pending his transfer to another nation, and nothing in § 1252(g) precludes review of the decision to confine Carrera until then."); *see also Zhislin v. Reno*, 195 F.3d 810, 814 (6th Cir. 1999) ("Zhislin . . . challenges neither the constitutionality of the deportation order nor the right of the Attorney General to execute the order. All that [he] is challenging is the right of the Attorney General to detain him indefinitely . . . ."). The Third Circuit has taken a different approach – although significantly, for our purposes, also a narrow one – holding that the provision "only applies to suits challenging the government's selective enforcement of the immigration laws." *DeSousa v. Reno*, 190 F.3d 175, 182 (3d Cir. 1999); *see Mirmehdi v. United States*, 689 F.3d 975, 983 n.4 (9th Cir. 2012) (explaining that "'an alien unlawfully in this country has no constitutional right to assert [a claim of] selective enforcement' of immigration laws" (quoting *AADC*, 525 U.S. at 488)).

The district court concluded that Alvarez's complaint contained two kinds of allegations – those that arose from the decision to *initiate* his removal proceedings, and others that arose from the *execution* of his removal order. First, it found that any challenge to ICE's decision to require Alvarez to attend removal proceedings – rather than agreeing to a stipulated order – fell squarely within the scope of § 1252(g). We agree with this determination. The challenge to ICE's decision, made by its counsel, Defendant Emery, essentially asks this Court to find that the agency should have chosen a different method of commencing proceedings. The district court was correct to find that § 1252(g) strips us of the power to entertain such a claim. By its plain terms, the provision bars us from

questioning ICE's discretionary decisions to commence removal – and thus necessarily prevents us from considering whether the agency should have used a different statutory procedure to initiate the removal process.

Next, the district court addressed Alvarez's challenges to ICE's decision to take him into custody and to detain him during his removal proceedings – concluding that they also were closely connected to the decision to commence proceedings, and thus were immune from our review. Again, the district court was correct. Looking to the specific factual allegations in the complaint, Alvarez alleges, among other claims, that (1) ICE failed to honor the "best efforts" commitment in his plea bargain and reach a timely determination of his immigration status;[3] and (2) during the hearing in federal court on Alvarez's § 2255 motion to lift his detainer, Defendant Emery knowingly misrepresented that he was unaware of

[3] In some instances, the complaint also appears to challenge the conduct of the Department of Justice attorneys who were involved in negotiating Alvarez's plea agreement for weapons charges. Thus, for example, he alleges that their commitment to use their best efforts to timely resolve his immigration status was "a hollow promise" because "*neither the Department of Justice* nor ICE did anything to make a decision regarding [his] immigration status." Notably, however, Alvarez did not name these attorneys as defendants, nor did he assert that they participated in the allegedly unlawful ICE detention on which he bases his constitutional claims. The Supreme Court has made clear that to state a *Bivens* claim, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). Thus, to the extent Alvarez challenges conduct by the Department of Justice attorneys who negotiated his plea agreement, we reject his pleadings as being wholly insufficient to state a claim.

whether a Cuban national with Alvarez's background had ever been removed to a third country. These allegations similarly arise from ICE's decision to commence proceedings. Although the first allegation uses the term "best efforts" and references Alvarez's plea bargain, at its core it challenges ICE's decision to lodge a detainer against him. Accordingly, both allegations challenge the propriety of ICE's decision to detain Alvarez prior to his removal hearing.

As a panel of this Court explained in *Gupta v. McGahey*, "securing an alien while awaiting [his removal hearing] constitutes an action taken to commence proceedings." 709 F.3d 1062, 1065 (11th Cir.), *suggestion for reh'g en banc denied*, 737 F.3d 694 (2013), *cert. denied*, 134 S. Ct. 2840 (2014). In *Gupta*, a removable alien argued that federal agents "illegally procured an arrest warrant, that the agents illegally arrested him, and that the agents illegally detained him." *Id.* We found that § 1252(g) barred us from reaching the merits of these claims – which we said arose from the decision to commence proceedings. *Id.* at 1065-66. Here, Alvarez similarly argues that he was detained by means of misrepresentations and disregard for the Department of Justice's commitment in his plea agreement. Because Alvarez challenges the methods that ICE used to detain him prior to his removal hearing, these claims are foreclosed by § 1252(g) and our decision in *Gupta*.

Finally, the district court concluded that all of ICE's actions taken *after* Alvarez was ordered removed on January 22, 2009, also fell within the scope of § 1252(g)'s jurisdictional bar because they arose from the decision to execute his removal order. The court observed that "ICE has the . . . authority to detain an alien who has been ordered removed if he is

determined 'to be a risk to the community or unlikely to comply with the order of removal.'" *See* 8 U.S.C. § 1231(a)(6). It then found that all of Alvarez's challenges to ICE's post-removal actions constituted challenges to this discretionary determination. The court ultimately found that although Alvarez "dispute[d] that he posed any risk to the community, that determination is exactly the type of action that arises from ICE's discretionary authority to execute a removal order."

We part ways with the district court here. Alvarez claims that the defendants took various steps in order to prolong his detention after the statutory 90-day period that ICE was afforded to execute his removal, which began on January 22, 2009. First, on April 22, 2009, Defendant Skinner issued the "First Decision to Continue Detention" – which allegedly falsely stated that Alvarez's removal would take place in the "reasonably foreseeable future" and that he would not be released in the meantime on the grounds that he was a flight risk and posed a danger to the community. Second, on October 14, 2009, Defendant Munoz issued the "Second Decision to Continue Detention" which made the same alleged misstatements and added that Alvarez was eligible for Spanish citizenship. Moreover, Defendant Wall filed a motion in support of a continuance in Alvarez's habeas proceedings, despite allegedly knowing that Alvarez was not in fact eligible for Spanish citizenship. Finally, Defendant Gladish submitted an affidavit, which was attached to Wall's motion, stating that Alvarez would be removed to Spain in the reasonably foreseeable future because he was eligible for Spanish citizenship, despite allegedly knowing that this was untrue. These habeas actions also occurred months after the statutory removal period had lapsed – indeed, the 90-day removal period

ended on April 22, 2009 and Alvarez did not file his petition for a writ of habeas corpus until July 28, 2009.

As we see it, no matter how broadly we define the term "execute a removal order," we would still be compelled to find that these actions, if accurately portrayed in the complaint, do not "arise from" such a decision. Indeed, Alvarez alleged that no decision to execute his removal orders was ever reached. He repeatedly alleged that the named officials *knew* that he could not be removed – to Cuba, Spain, or any other country and never intended to remove him.

Alvarez's complaint alleges, then, that each action taken by the defendants after the statutory 90-day period was motivated by the singular intent to prolong his detention, not to execute his removal. If, as Alvarez claims, the defendants knew that it would be impossible to execute his removal order at 90-days, at six months, or afterward – when they issued the two Decisions to Continue Detention and opposed his habeas petition – then these acts cannot be said to have arisen from a decision to remove him. Quite simply, a claim that arises from the decision to indefinitely detain an alien – and thus, by definition, never to remove him – cannot arise from the decision to execute removal.

Our interpretation is consonant with the Supreme Court's instructions to read § 1252(g) as a narrow provision. *See AADC*, 525 U.S. at 482; *see also Humphries*, 164 F.3d at 943 ("As a general matter, 'arising from' does seem to describe a nexus somewhat more tight than the also frequently used phrase 'related to."). It is also consistent with the dual purposes of the provision that the Supreme Court identified. *American-Arab Anti-Discrimination Committee* establishes that § 1252(g) is "designed to give

some measure of protection to 'no deferred action' decisions and similar discretionary determinations, providing that if they are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed." 525 U.S. at 485. This means that we should apply it to preclude "[e]fforts to challenge the refusal to exercise [favorable] discretion on behalf of specific aliens," *id.* (quoting C. Gordon, S. Mailman, & S. Yale-Loehr, Immigration Law and Procedure § 72.03 [2][a]), as well as those claims that would lead to "the deconstruction, fragmentation, and hence prolongation of removal proceedings," *id.* at 487.

Alvarez's case presents neither situation. Alvarez does not allege that ICE should have exercised its discretion and released him. Rather, he claims that *after* the initial 90-day removal period, the agency had no statutory grounds on which to detain him because his removal was not reasonably foreseeable. *See Zadvydas v. Davis*, 533 U.S. 678, 699-700 (2001) ("[I]f removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute."). Moreover, there is no danger that our exercise of jurisdiction will lead to the "deconstruction" or "fragmentation" of removal proceedings – Alvarez's removal has already been fully adjudicated, and ICE has already released him from custody. Thus, we hold that § 1252(g) does not strip us of jurisdiction.

IV.

We come then to the central merits question – whether we should expand the judicially crafted *Bivens* cause of action to cover these claims against Defendants Emery, Skinner, Munoz, Wall, and Gladish. We agree with the district court and hold that no

Bivens remedy is available. We affirm on this basis, and thus do not decide whether any of its other rationales would be sufficient to support the dismissal.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 I J. S. 388 (1971), the Supreme Court for the first time recognized an implied private action for damages against federal officers alleged to have violated a citizen's Fourth Amendment rights while acting in their official capacities. The Supreme Court subsequently held that its decision in *Bivens* also allows plaintiffs to bring claims for damages when federal officials engage in certain conduct that violates the Fifth and Eighth Amendments, finding that in these contexts a complete absence of alternative remedies required the recognition of an implied cause of action. *Walden v. Centers for Disease Control & Prevention*, 669 F.3d 1277, 1284 n.3 (11th Cir. 2012) (citing *Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979)). Notably, however, the Court has not extended *Bivens* into a new context since 1980. *Id.*; *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) ("In 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct." (emphases omitted)); *De La Paz v. Coy*, 786 F.3d 367, 372 (5th Cir. 2015) ("The Court has not created a new *Bivens* remedy in the last thirty-five years, although 'it has reversed more than a dozen appellate decisions that had created new actions for damages.'" (quoting *Vance v. Rumsfeld*, 701 F.3d 193, 198 (7th Cir. 2012) (en banc))).

In analyzing whether to recognize a *Bivens* remedy in a new context, we engage in a two-step inquiry. "In the first place," we ask "whether any alternative, existing process for protecting the constitutionally recognized interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Minneci v. Pollard*, 132 S. Ct. 617, 621 (2012) (alterations adopted) (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)). If we find that existing process is sufficiently protective, we do not recognize a *Bivens* remedy. The alternatives need not "provide complete relief for the plaintiff," *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (quoting *Bush v. Lucas*, 462 U.S. 367, 388 (1983)), and as long as Congress has established an "elaborate, comprehensive scheme" governing a particular type of claim, this Court will not allow a *Bivens* remedy to supplement that system, *id.* at 436 (quoting *Bush*, 462 U.S. at 385). As the Supreme Court has put it, "The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue." *Bush*, 462 U.S. at 388.

But even in the absence of an adequate alternative, "a *Bivens* remedy is a subject of judgment," *Minneci*, 132 S. Ct. at 621 (internal quotation marks and citations omitted), and we "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," *Bush*, 462 U.S. at 378. The Supreme Court has

"repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). Accordingly, the federal courts have resisted extending the availability of *Bivens* remedies in new contexts on the basis of numerous special factors, including "military concerns, separation of powers, the comprehensiveness of available statutory schemes, national security concerns, and foreign policy considerations." *Arar v. Ashcroft*, 585 F.3d 559, 573 (2d Cir. 2009) (en bane) (citations omitted).

Although we have never explicitly considered whether to imply a *Bivens* remedy in the immigration context, two of our sister circuits have counseled against it, concluding both that the Immigration and Nationality Act provides an adequate alternative remedy and that, even if it didn't, special factors counsel in favor of hesitation.[4] First, in *Mirmehdi v. United States*, the Ninth Circuit considered a set of facts similar to the ones we currently face. 689 F.3d 975 (9th Cir. 2011). The plaintiffs were arrested for minor immigration violations and released on bond. *Id.* at 979. The following year, however, federal

[4] The Second Circuit has also considered a related question – namely whether a *Bivens* claim is available when a plaintiff alleges constitutional violations that occurred during extraordinary rendition. Arar, 585 F.3d at 572. However, the opinion focused almost exclusively on special factors counseling hesitation that are not implicated by Alvarez's claims – such as the need to examine classified information, *id.* at 576, the impossibility of conducting proceedings in open court, *id.* at 576-77, the potential for relationships with foreign governments to come under scrutiny, *id.* at 578, and the possibility that recognizing a *Bivens* remedy would "make the government 'vulnerable to graymail,'" *id.* at 578 (quoting *Tenet v. Doe*, 544 U.S. 1, 11 (2005)).

officials sought to have their bond revoked because their names appeared on a handwritten document that the officials claimed was a membership list recovered from the headquarters of a known terrorist group. *Id.* The plaintiffs were then detained pending the resolution of their removal proceedings for nearly four years. *Id.* They brought suit alleging that two federal agents knowingly lied about their involvement in the organization in order to induce the immigration judge to revoke their bond, and they asked the court to recognize a remedy under *Bivens*. *Id.* at 979-80.

The Ninth Circuit held that it would be inappropriate to imply a *Bivens* remedy in this context. Looking first to the availability of alternative remedies, it noted that "Congress has established a substantial, comprehensive, and intricate remedial scheme in the context of immigration," and that the availability of a writ of habeas corpus provides additional protection. *Id.* at 982 (quoting *Arar*, 585 F.3d at 572). The court next decided, in the alternative, that at least two special factors weighed against recognizing a *Bivens* remedy. First, "[t]he complexity and comprehensiveness of the existing remedial system," suggested that no judicial intervention was warranted. *Id.* Second, "immigration issues 'have the natural tendency to affect diplomacy, foreign policy, and the security of the nation,' which counseled hesitation. *Id.* (quoting *Arar*, 585 F.3d at 574).

The Fifth Circuit recently reached the same conclusion in *De La Paz v. Coy*, 786 F.3d 367 (5th Cir. 2015), and held that *Bivens* does not extend to "claims arising from civil immigration apprehensions and detentions, other than those alleging unconstitutionally excessive

force."[5] *Id.* at 375. In *De La Paz*, the court undertook the same two-step inquiry, first determining that judicial recognition of a new remedy was unnecessary because the existing "federal governance of immigration and alien status is extensive and complex." *Id.* (alteration adopted) (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012)). The court then found that, even if the INA did not provide an adequate remedy, numerous "special factors unique to the immigration context" counseled against an extension. *Id.* at 378. Among other things, the court found that federal agents may be deterred "from vigorous enforcement and investigation of illegal immigration," *id.* at 379, and that extending *Bivens* suits to the immigration context could lead to a substantial influx in litigation, *id.* at 379-80. Moreover, "immigration policy and enforcement implicate serious separation of powers concerns." *Id.* at 379.

We too hold that a plaintiff cannot recover damages under *Bivens* for constitutional violations that caused him to endure a prolonged immigration detention.[6]

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[5] At first glance, *De La Paz* seems factually distinguishable from *Mirmehdi* – and from Alvarez's allegations – because it involved a Fourth Amendment challenge to decisions by Customs and Border Patrol agents to stop and detain illegal aliens near the border between the United States and Mexico. *Id.* at 370-71. However, the Fifth Circuit characterized the issue before it as "whether *Bivens* extends to claims arising from civil immigration apprehensions and detentions, other than those alleging unconstitutionally excessive force," *id.* at 375, and explicitly rejected the argument that *Mirmehdi* was distinguishable. *See id.* at 375 n.7.

[6] We need not, and do not, decide whether a *Bivens* remedy would be available in cases of physical abuse, *see De La Paz*, 786 F.3d at 374, or punitive confinement conditions, *Turkmen v. Hasty*, 789 F.3d 218, 235-37 (2d Cir. 2015). Alvarez does not allege that he was mistreated during his detention, and thus we

The Immigration and Nationality Act is "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." *Bush*, 462 U.S. at 388. Indeed, Congress has provided for a host of review procedures tailored to the differently situated groups of aliens that may be present in the United States. The Act sets out numerous avenues for aliens to obtain review of ICE decisions by an immigration judge or federal court, as well as opportunities for aliens to seek discretionary relief. *See* 8 U.S.C. § 1225(a)(2), (b)(1)(A)(ii), (b)(1)(B)(iii)(III) (providing that aliens treated as applicants for admission and stowaways may apply for asylum and are entitled to "prompt review by an immigration judge" if they are found ineligible); *id.* § 1228(c) (providing procedures for an alien convicted of an aggravated felony to be immediately ordered removed by a federal district court and granting both parties the right to appeal the court's decision); *id.* § 1229a(a)(1) (providing that an immigration judge shall decide the inadmissibility or deportability of an alien); *id.* § 1229a(c)(7) (providing that an alien may file one motion to reopen his removal proceedings on the basis of newly discovered facts); *id.* § 1229b(a)-(b) (giving the Attorney General discretion to cancel the

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have no occasion to grapple with the unique issues that these types of allegations could present. *See Gupta*, 737 F.3d at 696 (Wilson, J., concurring in denial of rehearing) ("Should the scenario come along where an alien is . . . physically beaten during the course of what ought to be a peaceful arrest arising from a decision to commence removal proceedings, judicial review would likely be necessary . . ."); *see also Turkmen*, 789 F.3d at 235-36 (noting that "[b]oth the Supreme Court and [the Second] Circuit have recognized a *Bivens* remedy for constitutional challenges to [punitive] conditions of confinement" and extending the remedy to the immigration detention context).

removal of aliens, resident aliens, and victims of violence who meet enumerated criteria); 8 C.F.R. § 241.4(k)(2)(iii) (requiring that, when an alien is detained for longer than 90 days, he be permitted to request his release every three months and that he receive review from the Headquarters Post-Order Detention Unit).

Additionally, the Supreme Court has made it abundantly clear that a detained alien can seek a petition for a writ of habeas corpus to challenge his detention in the event that the statute's review procedures are insufficiently protective. *See Zadvydas*, 533 U.S. at 688 ("We conclude that § 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention."); *accord St. Cyr*, 533 U.S. at 314. The dissent discounts the significance of possible habeas relief. But we can discern no reason to exclude the option of seeking habeas relief from our consideration. Surely Congress was aware of the habeas rules it had crafted in 28 U.S.C. § 2241 when it repeatedly legislated in the area of immigration law. Moreover, we have previously held that the availability of habeas relief when paired with a detailed regulatory scheme constitutes a special factor counseling against recognizing a new *Bivens* cause of action. *Rauschenberg v. Williamson*, 785 F.2d 985, 987-88 (11th Cir. 1986). In fact, habeas corpus provides a litigant like Alvarez with the most speedy, direct, and powerful remedy from wrongful detention. *See Ex parte Yerger*, 75 U.S. 85, 95 (1868) ("The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defence of personal freedom."); *accord Boumediene v. Bush*, 553 U.S. 723, 739 (2008) ("The Framers viewed freedom from unlawful restraint

as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom."). In sharp contrast, monetary compensation would afford, at best, an incomplete, secondary, and substantially delayed remedy for a detention based on false claims made by a government agent.

Analysis of the statutory scheme also confirms the conclusion that the congressional decision not to provide a private action for damages was deliberate. *See De La Paz*, 786 F.3d at 377-78; *Mirmehdi*, 689 F.3d at 982. Indeed, Congress has amended the Immigration and Nationality Act on no less than seven occasions. *See, e.g.*, REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005); Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986); Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703 (1976); Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965). In light of the frequent attention that the legislature has given to the complex scheme governing removal and its review procedures over many years, we are satisfied that Congress has weighed the policy considerations in favor of and against providing damages. *See Schweiker*, 487 U.S. at 425-26 (explaining that because "[c]ongressional attention . . . has . . . been frequent and intense" and "[a]t each step, Congress chose specific forms and levels of protection for the rights of persons affected"

it was clear that the failure to provide for damages was intentional).

Thus, the complexity of the Immigration and Nationality Act, and Congress's frequent amendments to it, suggest that no *Bivens* remedy is warranted. We also note that Alvarez has not "alleged that he was actively prevented from seeking any meaningful review and relief through the INA processes." *See Arar*, 585 F.3d at 573 (emphasis added). In fact, Alvarez availed himself of the Act's review mechanisms many different times during his detention. He first sought relief under 28 U.S.C. § 2255, arguing that the magistrate judge should lift his ICE detainer. Next, he appeared before an immigration judge for a hearing – where he had the opportunity to apply for relief or protection from removal, or to contest his removability. *See* 8 U.S.C. § 1229a(a)(1). After he was ordered removed, he sought discretionary relief from Defendant Felicia Skinner, and asked her to expedite review of his case during the statutory removal period. He also received two custody determinations by ICE – though in each instance the agency found sufficient grounds to continue detaining him, as Skinner and Munoz explained in their Decisions to Continue Detention. Finally, Alvarez filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia, pursuant to 28 U.S.C § 2241, alleging that his detention was unconstitutional. In short, he is in no position to argue that the elaborate scheme that Congress designed afforded him no opportunity for a meaningful remedy. *See Schweiker*, 487 U.S. at 425 ("Congress . . . has not failed to provide meaningful safeguards or remedies for the rights of persons situated as respondents were.").

Moreover, even if we were to conclude that no sufficient alternative remedy exists, we would still find that numerous special factors counsel hesitation in this context. For starters, the breadth and detail of the Immigration and Nationality Act itself counsels in favor of hesitation. *Mirmehdi*, 689 F.3d at 982. As the Supreme Court has explicitly cautioned, "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," this constitutes a "special factor[] counseling hesitation." *Schweiker*, 487 U.S. at 423. Another special factor is the importance of demonstrating due respect for the Constitution's separation of powers. As the Fifth Circuit explained, "[t]he Constitution gives Congress the power to 'establish a uniform Rule of Naturalization,'" *De La Paz*, 786 F.3d at 379 (quoting U.S. Const., art. I, § 8, cl. 4), and the Executive possesses "inherent power as sovereign to control and conduct relations with foreign nations," *id.* (quoting *Arizona*, 132 S. Ct. at 2498); *see also Arar*, 585 F.3d at 575 ("The Supreme Court has expressly counseled that matters touching upon foreign policy and national security fall within 'an area of executive action in which courts have long been *hesitant* to' intrude' absent congressional authorization." (quoting *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993))). This "gives the political branches of the federal government `broad, undoubted power over the subject of immigration.'" *De La Paz*, 786 F.3d at 379 (quoting *Arizona*, 132 S. Ct. at 2498). These branches are generally better "situated to consider sensitive foreign policy issues" that immigration cases may implicate, and involvement of the courts into their domain can in some instances "undermine the Government's ability to

speak with one voice in this area." *Munaf v. Green*, 553 U.S. 674, 702 (2008); *see also Mirmehdi*, 689 F.3d at 982-83 (noting that "immigration issues 'have the natural tendency to affect diplomacy, foreign policy, and the security of the nation,'" and may involve "the disclosure of foreign-policy objectives" (quoting *Arar*, 585 F.3d at 574, and *AADC*, 525 U.S. at 490)). In short, "[flack of institutional competence as well as a lack of constitutional authority counsel . . . hesitation by the judiciary in fostering litigation of this sort." *De La Paz*, 786 F.3d at 379.

Finally, Alvarez's allegations implicate one additional special factor counseling hesitation – namely the claim he asks us to recognize would be doctrinally novel and difficult to administer. *See Hernandez v. United States*, 757 F.3d 249, 275 (5th Cir.), *reh'g en banc granted*, 771 F.3d 818 (2014), *adhered to in part on reh'g en banc*, 785 F.3d 117 (2015) ("Another species of special factor is the workability of the cause of action."). Alvarez's claims do not involve "questions of precisely Bivens-like domestic law enforcement and nothing more." *Id.* at 276. Rather, Alvarez asks us to examine ICE'S motivations for continuing not only his own detention, but that of every other alien who may be detained past the statutory 90-day period. The agency's discretion to abandon removal proceedings for humanitarian or efficiency reasons, *see AADC*, 525 U.S. at 48384, would make it particularly difficult for us to undertake this kind of inquiry. As a result, to decide each claim, we would need to consider, among other things, the likelihood of effecting removal, "the [removal's] general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan," and weigh these against the alien's allegations of deceit. *Id.* at 490 (quoting *Wayte v. United States*, 470 U.S.

598, 607 (1985)). In other words, the claim Alvarez asks us to recognize is not generally susceptible to the kind of analysis the courts are competent to undertake. *See id.*

Moreover, it is difficult to conceive that any alien would forgo making such an argument in our Court if we were to recognize the availability of a *Bivens* remedy for this type of conduct. The lack of a clearly defined standard by which to judge such claims, and the nature of the claim as based primarily on the credibility of each party, would likely lead to widespread litigation. And we cannot ignore that this volume of litigation could chill ICE officials from engaging in robust enforcement of this country's immigration laws. As the Fifth Circuit explained, "Faced with a threat to his checkbook from suits based on evolving and uncertain law, the officer may too readily shirk his duty." *De La Paz*, 786 F.3d at 379; *see also AADC*, 525 U.S. at 490 ("Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.' . . . These concerns are greatly magnified in the deportation context." (quoting *Wayte*, 470 U.S. at 607)). While we acknowledge that ICE officials may act wrongly in detaining certain aliens – and may even in some instances violate the Constitution – we cannot agree with Alvarez that recognizing a *Bivens* remedy would be a prudent way to address this possibility. *See Wilkie*, 551 U.S. at 561 ("The point here is not to deny that Government employees sometimes overreach, for of course they do, and they may have done so here if all the allegations are true. The point is the reasonable

fear that a general *Bivens* cure would be worse than the disease.").

Alvarez argues nevertheless that the Immigration and Nationality Act does not serve as an adequate existing remedy because it does not provide him with an avenue to seek damages. However, the Supreme Court has made it clear that Congress's failure to provide monetary relief is not dispositive. *See Malesko*, 534 U.S. at 69 ("So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclose[] judicial imposition of a new substantive liability."); *Schweiker*, 487 U.S. at 421-22 ("The absence of statutory relief for a constitutional violation, for example, does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation."); cf. *Minneci*, 132 S. Ct. at 625 ("[S]tate tort law may sometimes prove less generous than would a *Bivens* action . . . . But we cannot find in this fact sufficient basis to determine state law inadequate.").

This Court, and our sister circuits, have also repeatedly said that we will defer to Congress's decision not to award damages for a particular violation, particularly in the face of a carefully crafted remedial scheme. *See Lee*, 145 F.3d at 1276-77 (declining to find a *Bivens* remedy because "there was no inadvertence by Congress in omitting a damages remedy" in a statutory scheme); *Miller v. U.S. Dep't of Agr. Farm Servs. Agency*, 143 F.3d 1413, 1415 (11th Cir. 1998) ("Congress is in a better position than the courts to weigh the competing policy imperatives involved in the creation of remedies . . . ."); *De La Paz*, 786 F.3d at 377 ("[The plaintiffs] argue that the INA fails adequately to protect their Fourth Amendment interests because it does not provide a damages remedy against

individual agents. This is a misreading of the case law. The INA need not provide an exact equivalent to *Bivens."); Engel v. Buchan*, 710 F.3d 698, 704 (7th Cir. 2013) ("[T]he Court has explained that the existence of a comprehensive, alternative remedial scheme may preclude a *Bivens* remedy even where the alternative relief is imperfect compared to *Bivens* and Congress has not explicitly declared it to be a substitute."); *Mirmehdi*, 689 F.3d at 982 ("Indeed, so long as Congress' failure to provide money damages has not been inadvertent, courts should defer to its judgment." (internal quotation marks omitted and alterations adopted)); *Arar*, 585 F.3d at 573 ("In light of the complexity of the remedial scheme Congress has created (and frequently amended), we would ordinarily draw a strong inference that Congress intended the judiciary to stay its hand and refrain from creating a *Bivens* action in this context.").

Alvarez also suggests that our decision in *Abella v. Rubino*, 63 F.3d 1063 (11th Cir. 1995) (per curiam), counsels in favor of recognizing a *Bivens* remedy in this context. We disagree. In *Abella*, the plaintiff, a federal prisoner, filed a *Bivens* action against "two federal district judges, an assistant U.S. Attorney, U.S. Customs and DEA officials, U.S. Marshals, three federal court reporters, a judicial law clerk, a secretary, and several of [his] co-defendants and their respective attorneys," alleging that these defendants "knowingly and willfully conspired to convict him falsely by fabricating testimony and other evidence against him." *Id.* at 1064. The district court dismissed the claims, finding that they were barred by the Supreme Court's decision in *Heck v. Humphrey*. *Id.* at

1065.[7] We affirmed the district court's dismissal on this ground and noted, in passing, that the plaintiff was entitled to "bring his *Bivens* damages claims in the future should he meet the requirements of *Heck.*" *Id.* With this language, we did not opine on whether we would find a *Bivens* remedy to be available if Abella ever became eligible to challenge his conviction with a civil suit, let alone suggest that *Bivens* should be applied in the immigration context. We merely reiterated that our affirmance of the district court's decision was based *only* on the plaintiff's failure to satisfy *Heck's* requirements. *Abella* in no way suggests that we should recognize an expanded *Bivens* remedy in this context.

V.

Thus, we hold that the district court erroneously concluded that it had no jurisdiction to entertain the merits of Alvarez's claim under 8 U.S.C. § 1252(g). However, we fully agree that no *Bivens* remedy is available when a plaintiff claims that he was unconstitutionally detained after being ordered removed by an immigration judge. Accordingly, we AFFIRM.

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[7] *Heck* and its progeny preclude 42 U.S.C. § 1983 and *Bivens* actions "to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," unless the plaintiff shows that "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Abella*, 63 F.3d at 1065 (quoting *Heck*, 512 U.S. at 486-87).

JILL PRYOR, Circuit Judge, concurring in part and dissenting in part:

I join fully in the majority's thorough analysis in Part III addressing subject-matter jurisdiction. But I dissent from Part IV of the majority opinion holding that plaintiff Santiago Alvarez has no remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). More specifically, I dissent from the majority's opinion affirming the district court's dismissal of Alvarez's claim against defendant Juan Munoz, although I concur with the majority's decision to affirm the dismissal of Alvarez's claims against defendants Robert Emery, Michael Gladish, Felicia Skinner, and Sheetul Wall.

In this case, Supreme Court precedent, a federal statute, and its accompanying regulations required U.S. Immigration and Customs Enforcement ("ICE") to release Alvarez approximately 180 days after his removal order was final if there was no significant likelihood that he would be removed in the reasonably foreseeable future. The majority acknowledges Alvarez's allegation that Munoz, the ICE official who reviewed Alvarez's detention at the 180-day mark, "knew that [Alvarez] could not be removed – to Cuba, Spain, or any other country and never intended to remove him." Maj. Op. at 23. As the majority recognizes, Alvarez alleged that Munoz improperly continued Alvarez's detention knowing there were "no statutory grounds on which to detain him." *Id.* at 25. Nonetheless, the majority concludes that Alvarez has no *Bivens* remedy because he failed to "allege[] that he was actively prevented from seeking any meaningful review and relief" and thus was "in no position to argue that the elaborate scheme that Congress designed afforded him no opportunity for a meaningful

remedy." *Id.* at 35-36 (internal quotation marks omitted). I am unable to reconcile the majority's conclusion that Alvarez was afforded meaningful review with his plausibly alleged claim that Munoz performed a sham review and continued to detain him, knowing that the law required his release. Accordingly, I disagree with the majority that Alvarez can have no *Bivens* remedy for his due process claim against Munoz. [1]

The district court dismissed Alvarez's claims on the alternative grounds that (1) the claims were barred by *Heck v. Humphrey*, 512 U.S. 477 (1994); (2) the defendants were entitled to qualified immunity; and (3) the claims were barred by the statute of limitations. Because I believe that the district court erred in

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[1] The majority properly affirms the dismissal of Alvarez's claims against Emery, Gladish, Skinner, and Wall. The claims against Emery arose out of actions that he took before Alvarez was subject to a final removal order. I agree with the majority that we lack jurisdiction under 8 U.S.C. § 1252(g) to consider these claims. *See* Maj. Op. at 19-21.

Alvarez's claims against Skinner arose out of her refusal to expedite his 90-day review and her decision to continue his detention at the 90-day review. I agree with the majority that no *Bivens* remedy is available for Alvarez's claims against Skinner because he failed to allege a plausible factual basis for his allegation that Skinner intentionally denied him meaningful review. *See infra* note 15.

Alvarez alleged that Gladish and Wall knowingly made false statements—in a motion for extension of time to respond to Alvarez's habeas petition and in a supporting declaration—for the purpose of delaying the habeas court's review of Alvarez's challenge to his detention. These claims were properly dismissed because Alvarez failed to allege a factual basis for his allegation that Gladish and Wall knew that their statements that he could not be removed to Spain in the reasonably foreseeable future were false. *See infra* note 19.

each of these determinations, I would vacate the district court's order and remand so that Alvarez's due process claim against Munoz could proceed.[2]

I. Legal Background

As a starting point, it is important to understand the limits the law imposes on the Attorney General's authority to continue to detain aliens after their removal orders are final. Although the Attorney General may detain certain aliens for a reasonable time after a final order of removal, the Executive Branch must periodically review its decision to continue an alien's detention.

A. Statutory Authority

"[W]hen an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days."[3] 8 U.S.C. § 1231(a)(1)(A). Until aliens are removed, the Attorney General must hold them in custody during this 90-day period. *Id.* § 1231(a)(2). Recognizing that the Attorney General will be unable to remove every alien within the 90-day period, Congress has allowed (but does not require) the Attorney General to detain certain categories of aliens "beyond the removal period."[4] *Id.* § 1231(a)(6). But in

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[2] Although the majority does not discuss the district court's alternative holdings, I address them to show why none of the alternative grounds supports the district court's dismissal of Alvarez's claim against Munoz.

[3] There is no dispute that the 90-day removal period began to run when Alvarez's removal order became administratively final on January 22, 2009. *See* 8 U.S.C. § 1231(a)(1)(B).

[4] Aliens who may be detained beyond the 90-day removal period include those who: (1) are removable because they committed certain criminal offenses, (2) engaged in criminal activities that endangered public safety or national security, or (3) pose a

Zadvydas v. Davis, the United States Supreme Court read into this statute a requirement that the Attorney General may detain these aliens only for a "reasonable time" after their removal orders are final. 533 U.S. 678, 682 (2001) ("[W]e construe the statute to contain an implicit 'reasonable time' limitation . . . .").

In *Zadvydas*, two aliens, who were detained for years after their final orders of removal because the Attorney General could find no country that would accept them, petitioned for habeas corpus relief. *Id.* at 684-86. The government argued that § 1231(a)(6) authorized the Attorney General to detain indefinitely aliens subject to final orders of removal. *Id.* at 689. The Supreme Court rejected this interpretation, explaining that indefinite detention would "raise a serious constitutional problem" because it would violate the aliens' Fifth Amendment rights under the Due Process Clause. *Id.* at 690. Applying the canon of constitutional avoidance, the Court construed § 1231(a)(6) to include an implicit requirement that the Attorney General could detain an alien only for the "period reasonably necessary to secure removal." *Id.* at 699. The Court recognized two independent factors that cabin the period reasonably necessary to secure an alien's removal. First, when an alien's "removal is no longer reasonably foreseeable," the detention is "unreasonable and no longer authorized by statute."

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risk to the community or are unlikely to comply with a removal order. *See* 8 U.S.C. § 1231(a)(6) (identifying aliens who may be detained beyond 90-day removal period to include aliens who are removable under § 1227(a)(2)). There is no question that the Attorney General was authorized to detain Alvarez beyond the 90-day removal period because he was removable based on his conviction of an aggravated felony and an offense related to unlawfully possessing firearms. *See id.* § 1227(a)(2)(A)(iii), (a)(2)(C).

Id. at 699-700. Second, even if removal is reasonably foreseeable, the Attorney General may lack authority to detain an alien who poses no risk of committing further crimes. *See id.* at 700 ("And if removal is reasonably foreseeable, the habeas court should consider the risk of the alien's committing further crimes as a factor potentially justifying confinement within that reasonable removal period.").

The Supreme Court then provided practical guidance about the length of time the Attorney General could detain an alien after his removal order becomes final. Because the Executive Branch has primary responsibility for and expertise in foreign policy matters, the Supreme Court recognized that it must give "expert agencies decisionmaking leeway" and thus must "recognize some presumptively reasonable period of detention." *Id.* at 700-01. The Court therefore held that an alien's detention for six months (approximately 180 days) after a final order of removal is "presumptively reasonable" under § 1231(a)(6). *Id.* at 701. But after the expiration of this six-month period, the Attorney General has no power to detain an alien for whom "there is no significant likelihood of removal in the reasonably foreseeable future."[5] *Id.; accord Akinwale v. Ashcroft*, 287 F.3d 1050, 1051-52 (11th Cir. 2002). Importantly, "as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink." *Zadvydas*, 533 U.S. at 701.

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[5] When it releases an alien subject to a final order of removal, the government may impose appropriate conditions of supervised release. An alien who violates these conditions may be taken back into custody. *Zadvydas*, 533 U.S. at 700.

B. Regulatory Authority

Consistent with *Zadvydas*, regulations now require ICE officials periodically to review the decision to continue to detain an alien subject to a final order of removal.[6] As I explain below, ICE officials must review the decision to detain an alien 90 days and again approximately 180 days after the alien's removal order is final, as well as at least yearly thereafter. Importantly, ICE must release an alien after the 180-day review if there is no significant likelihood that she will be removed in the reasonably foreseeable future. But an alien no right to appeal a decision, upon review, to continue her detention.

1. 90-Day Review

When ICE is unable to remove an alien within 90 days of the removal order becoming final, it must review the alien's detention before the end of that 90-day period (the "90-day review"). 8 C.F.R. § 241.4(k)(1)(i). After reviewing the alien's records, a local ICE official may decide (but is not required) to release an alien whose "release will not pose a danger to the community or to the safety of other persons or

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[6] After *Zadvydas*, the regulations were substantially revised to "add[] new provisions to govern determinations . . . as to whether there is a significant likelihood that an alien will be removed from the United States in the reasonably foreseeable future." Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56967, 56967 (Nov. 14, 2001); *see id.* at 56968 ("In light of the Supreme Court's decision in *Zadvydas*, this rule revises the Department's regulations by adding a new 8 CFR 241.13, governing certain aspects of the custody determination of a detained alien after the expiration of the removal period. Specifically, the rule provides a process for [ICE] to make a determination as to whether there is a significant likelihood that the alien will be removed in the reasonably foreseeable future.").

to property or a significant risk of flight." *Id.* § 241.4(d), (h)(1), (k)(1). An ICE official may exercise her discretion to release an alien at the 90-day review stage only if she concludes that:

> (1) Travel documents for the alien are not available or, in the opinion of the Service, immediate removal, while proper, is otherwise not practicable or not in the public interest;
>
> (2) The detainee is presently a non-violent person;
>
> (3) The detainee is likely to remain nonviolent if released;
>
> (4) The detainee is not likely to pose a threat to the community following release;
>
> (5) The detainee is not likely to violate the conditions of release; and
>
> (6) The detainee does not pose a significant flight risk if released.

Id. § 241.4(e); *see id.* § 241.4(h)(3).[7]

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[7] In applying these factors, an ICE official considers: (1) "disciplinary infractions or incident reports received" while the alien was incarcerated or in custody; (2) the alien's "criminal conduct and criminal convictions, including consideration of the nature and severity of the alien's convictions, sentences imposed and time actually served, probation and criminal parole history, evidence of recidivism, and other criminal history"; (3) "[a]lay available psychiatric and psychological reports"; (4) lejvidence of rehabilitation including institutional progress relating to participation in work, educational, and vocational programs, where available"; (5) "[f]avorable factors, including ties to the United States such as the number of close relatives residing here lawfully"; (6) "[p]rior immigration violations"; (7) "[t]he likelihood that the alien is a significant flight risk"; and (8) "other

An alien must receive written notice before the 90-day review occurs. *Id.* § 241.4(h)(2). She may submit written information supporting her release, which the ICE official must review, and she has the right to receive assistance in preparing her response. *Id.* § 241.4(h)(1), (2). The ICE official must provide the alien with a written copy of the decision. *Id.* § 241.4(h)(4). If the ICE official decides to continue the alien's detention, the decision must "set forth the reasons for the continued detention." *Id.* § 241.4(d). The alien has no right to appeal a decision to continue detention at the 90-day review. *Id.*

2. 180-Day Review

If ICE continues to detain an alien after the 90-day review, ICE's Headquarters Post-Order Detention Unit (the "HQPDU") must review the alien's detention approximately 180 days after the removal order becomes final (the "180-day review").[8] *Id.* § 241.4(k)(2)(ii). The government concedes that, as part of the 180-day review, the HQPDU must consider whether the alien will be removed in the reasonably foreseeable future. If, at the 180-day review, the HQPDU determines

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information that is probative of whether the alien is likely to" adjust to life in a community, engage in future violence or criminal activity, pose a danger to persons or property, or violate the conditions of his release pending removal. 8 C.F.R. § 241.4(0, (h)(3).

[8] As noted above, Alvarez's removal order became final on January 22, 2009. On April 22, 2009, exactly 90 days later, Skinner issued her decision to continue his detention. On October 14, 2009, 265 days after the removal order was final, Munoz issued his decision to continue detention. Although it appears that Munoz completed the 180-day review three months late, the regulations provide some leeway, permitting the 180-day review to be completed within 180 days of the final order of removal "or as soon thereafter as practicable." 8 C.F.R. § 241.4(k)(2)(ii).

"there is no significant likelihood that the alien will be removed in the reasonably foreseeable future," then the alien must be released from custody "under appropriate conditions of supervision."[9] *Id.* § 241.13(c); *see* § 241.4(i)(7). In deciding whether there is a significant likelihood of removal, the HQPDU must consider

> all the facts of the case including . . . the history of the alien's efforts to comply with the order of removal, the history of the Service's efforts to remove aliens to the country in question or to third countries . . . , the reasonably foreseeable results of those efforts, and the views of the Department of State regarding the prospects for removal of aliens to the country or countries in question.

Id. § 241.13(f).[10]

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[9] Under the regulations, an alien may submit a written request that the HQPDU review whether there is a significant likelihood of removal in the reasonably foreseeable future "any time after the removal order becomes final." 8 C.F.R. § 241.13(c), (d)(3). But the HQPDU may postpone consideration of the request until the 90-day removal period expires. *Id.* § 241.13(d)(3). Moreover, the HQPDU "has no obligation to release an alien" until six months after the alien's removal order is final. *Id.* § 241.13(b)(2)(ii). Thus, the 180-day review is the first point at which an alien must be released if there is no significant likelihood of removal in the reasonably foreseeable future.

[10] Even when there is no significant likelihood of removal in the reasonably foreseeable future, ICE may continue to detain an alien if "special circumstances" warrant continued detention. 8 C.F.R. § 241.14. Special circumstances exist when: (1) the alien has a highly contagious disease that poses a threat to public safety; (2) the alien's release is likely to have serious, adverse foreign policy consequences; (3) the alien's release poses a significant threat to national security or a significant risk of terrorism; or (4) the alien is "specially dangerous." *Id.* § 241.14(b)-

Additionally, at the 180-day review, the HQPDU has discretion (but is not required) to release an alien if the "release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight." *Id.* § 241.4(d)(1). When deciding whether to exercise this discretion, the HQPDU must make the same findings that are required to release an alien at the 90-day review. *See id.* § 241.4(e)-(f).

The regulations guarantee an alien certain procedural protections in connection with the 180-day review. The HQPDU must notify the alien before performing the 180-day review. *Id.* § 241.4(k)(2)(ii). If the HQPDU is going to continue detaining the alien, it must interview the alien in person. *Id.* § 241.4(i)(3)(i). The alien must have an opportunity to submit written information to support her release and may receive assistance from a person of her choice. *Id.* § 241.4(i)(3)(ii). The HQPDU must provide the alien with a written copy of the decision. *Id.* § 241.4(d). If the HQPDU decides to continue the alien's detention, the decision must "set forth the reasons for the continued detention." *Id.* An alien has no right to appeal the HQPDU's decision to continue her detention. *Id.*

II. Analysis

A. *Bivens* Remedy

I now turn to the central issue before us: whether Alvarez has a *Bivens* remedy for his claim that Munoz violated his Fifth Amendment right to due process[11] by

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(d), (1). There is no contention that special circumstances were present in this case.

[11] The Fifth Amendment, of course, guarantees due process. *See* U.S. Const. amend V ("No person shall . . . be deprived of . . . liberty . . . without due process of law . . . ."). Aliens like Alvarez

deciding at the 180-day review to continue Alvarez's detention despite knowing there was no significant likelihood he would be removed in the reasonably foreseeable future. I disagree with the majority's broad, categorical holding that "a plaintiff cannot recover damages under *Bivens* for constitutional violations that caused him to endure a prolonged immigration detention." Maj Op. at 31. Instead I would recognize a *Bivens* remedy in this particular case, limited to Alvarez's claim against Munoz, because Alvarez has plausibly alleged that Munoz intentionally denied him meaningful administrative review when, despite knowing that Alvarez was required to be released, Munoz continued his detention.

In *Bivens*, the Supreme Court recognized that an individual had an implied private action for damages against federal officers who allegedly performed an illegal search of his home and arrested him without probable cause in violation of his Fourth Amendment rights. *Bivens*, 403 U.S. at 389-90. It cannot be denied that the Supreme Court has declined to recognize a *Bivens* remedy in a "new context" in more than thirty-five years.[12] *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 67-68 (2001). Nonetheless, "the Court has so far adhered to *Bivens'* core holding: Absent congressional command or special factors counseling hesitation,

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are entitled to due process protections. *See Zadvydas*, 533 U.S. at 693 ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); *Reno v. Flores*, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.").

[12] I agree with the majority that here Alvarez asks us to recognize a *Bivens* remedy in a new context.

'victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.'" *Wilkie v. Robbins*, 551 U.S. 537, 576 (2007) (quoting *Carlson v. Green*, 446 U.S. 14, 18 (1980)). As the majority recognizes, the Supreme Court continues to decide on a case-by-case basis whether a *Bivens* remedy is available in a new context by considering whether (1) there is an "alternative, existing process for protecting the [constitutionally recognized] interest" that "amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy," and (2) "special factors counsel[] hesitation before authorizing a new kind of federal litigation." *Minneci v. Pollard*, 132 S. Ct. 617, 621 (2012) (first alteration in original and internal quotation marks omitted).

Carefully applying this case-by-case approach, our Court has both explicitly and implicitly recognized *Bivens* remedies in new contexts. *See, e.g., Muhammad v. Williams-Hubble*, 380 F. App'x 925, 926-27 (11th Cir. 2010) (unpublished) (recognizing that *Bivens* remedy was available for inmate's claim alleging that because he was Muslim, prison officials refused to accept his high school diploma, which would have entitled him to a higher pay grade for work performed while in custody); *Magluta v. Samples*, 375 F.3d 1269, 1284 (11th Cir. 2004) (reversing dismissal of pretrial detainee's *Bivens* claim alleging that Bureau of Prison officials violated his procedural due process rights under the Fifth Amendment when they placed him in administrative detention yet denied him review guaranteed by regulations); *Uboh v. Reno*, 141 F.3d 1000, 1002-03 (11th Cir. 1998) (recognizing that a Fourth Amendment claim for malicious prosecution

"constitute[s] a cognizable *Bivens* claim" (internal quotation marks omitted)).[13]

1. Alternative Existing Processes

We begin by considering whether there were alternative existing processes to review Alvarez's detention such that the courts should refrain from extending a damages remedy. *See Minneci*, 132 S. Ct. at 621. This inquiry requires us to consider whether Congress has explicitly or implicitly indicated "that the Court's power" to recognize a money damages remedy for constitutional violations "should not be exercised." *Bush v. Lucas*, 462 U.S. 367, 378 (1983). When an

[13] Other circuits also have recognized *Bivens* remedies in new contexts, including in claims arising out of immigration detention. *See Turkmen v. Hasty*, 789 F.3d 218, 237 (2d Cir.) (extending a *Bivens* remedy to a claim alleging punitive conditions of confinement in the immigration detention context), *reh'g en bane denied*, 808 F.3d 197 (2d Cir. 2015); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006) (permitting alien to seek a *Bivens* remedy for Fourth Amendment claim against border patrol agents for unlawful arrest and excessive use of force); *see also Engel v. Buchan*, 710 F.3d 698, 699 (7th Cir. 2013) (recognizing a *Bivens* remedy for alleged violations of *Brady v. Maryland*, 373 U.S. 83 (1963)); *Bistrian v. Levi*, 696 F.3d 352, 376 n.9 (3d Cir. 2012) ("[A] federal cause of action for damages may be implied directly from the [F]irst [A]mendment." (second and third alterations in original and internal quotation marks omitted)); *Robbins v. Wilkie*, 300 F.3d 1208, 1210, 1212 (10th Cir. 2002) (extending *Bivens* remedy to ranch owner alleging that federal employees violated his constitutional rights by trying to force him to grant an easement to federal agency); *Krueger v. Lyng*, 927 F.2d 1050, 1057 (8th Cir. 1991) (recognizing former employee of county office of federal agency had a *Bivens* remedy for claim against federal government officers responsible for his termination); *Dunbar Corp. v. Lindsey*, 905 F.2d 754, 755, 761 (4th Cir. 1990) (recognizing that land purchaser had *Bivens* remedy for claim that federal employees violated his Fifth Amendment rights when they improperly seized his land).

"administrative system created by Congress 'provides meaningful remedies,'" no *Bivens* remedy is available, even if the alternatives fail to "'provide complete relief for the plaintiff.'" *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (quoting *Bush*, 462 U.S. at 386, 388). Although the majority and I agree that in deciding whether to extend a *Bivens* remedy we must consider whether the "existing process is sufficiently protective," Maj. Op. at 27, we disagree about whether that factor is met here.

The majority concludes that Alvarez "is in no position to argue that the elaborate scheme that Congress designed afforded him no opportunity for a meaningful remedy" because (1) ICE performed two custody determinations and "in each instance the agency found sufficient grounds to continue detaining him" and (2) Alvarez was able to petition for a writ of habeas corpus to challenge his detention.[14] *Id.* at 35-36. But in light of Alvarez's plausible claim that the 180-day review Munoz performed was a sham,[15] it

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[14] The majority discusses that Congress "provided for a host of review procedures tailored to the differently situated groups of aliens that may be present in the United States" and lists both the review procedures under § 241.4 as well as procedures available to aliens applying for asylum, challenging a removal order, or seeking to reopen removal procedures on the basis of newly discovered facts. Maj. Op. at 32-33. I do not dispute that Congress provided a variety of review procedures within an extensive statutory scheme. But aside from the review procedures under § 241.4, which Alvarez alleged Munoz purposefully circumvented, the particular review procedures the majority discusses are irrelevant to whether Alvarez had a meaningful opportunity to challenge his continued detention after his final order of removal.

[15] As I noted above, ICE performed a 90-day custody review as well. But Alvarez has failed to make a plausible allegation that Skinner denied him meaningful review. When Skinner continued

cannot be that ICE's periodic review was sufficiently protective. Because a habeas proceeding was the only meaningful way for Alvarez to receive review of his detention, I cannot conclude that Congress explicitly or implicitly indicated that the courts should refrain from providing Alvarez a damages remedy.

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his detention at the 90-day review, she was not required to consider whether there was a significant likelihood that Alvarez would be removed in the reasonable foreseeable future. *See* 8 C.F.R. § 241.4(i)(7); *Zadvydas*, 533 U.S. at 701.

It is true that at the 90-day review Skinner had discretion to release him if she determined that he posed no danger to the community and was not a flight risk. 8 C.F.R. § 241.4(d)(1). Although Alvarez alleged in his complaint that Skinner knew he posed no danger to the community or a flight risk, his allegation was only conclusory. He alleged that he submitted documentation to Skinner "demonstrating that [he] was not a 'flight risk' or a danger to the community." Am. Compl. at ¶ 65 (Doc. 30). (Citations to "Doc." refer to docket entries in the district court record in this case). But the allegation that Alvarez provided some evidence showing he posed no flight risk or danger to the community cannot establish that Skinner knew he posed no danger to the community, especially considering his prior conviction for conspiracy to possess illegal weapons.

Alvarez also contends that Skinner must have known in April 2009 that he posed no danger to the community or flight risk because ICE released him six months later. I disagree. Even assuming that when ICE released Alvarez in October 2009, it implicitly determined that he posed no danger to the community and was not a flight risk at that time, his release in no way shows that Skinner knew he was not a danger to the community or a flight risk nearly six months earlier when she decided to continue his detention. Because Alvarez has failed plausibly to allege that he was denied meaningful administrative review at the 90-day review stage, I agree with the majority's implicit conclusion that he has no *Bivens* remedy arising out of his detention after the 90-day review but before the 180-day review.

As I explained above, ICE was required to release Alvarez if, at the 180-day review, there was "no significant likelihood" that he would "be removed in the reasonably foreseeable future." 8 C.F.R. § 241.13(c); *see id.* § 241.4(i)(7). In his decision, Munoz acknowledged that Alvarez's "removal to Cuba is not presently possible," but found that his removal to Spain would occur in "the reasonably foreseeable future." Decision to Continue Detention (Doc. 34-1); *see* Am. Compl. at ¶ 90 (Doc. 30).[16] Alvarez has alleged, however, that Munoz "knew the statements" about "Alvarez's eligibility for Spanish citizenship and removal to Spain . . . not to be true and only made them to continue to detain and deprive . . . Alvarez of his freedom and liberty." Am. Compl. at ¶ 91 (Doc. 30).

There is no dispute that Alvarez could be removed to Spain only if he were eligible for Spanish citizenship. The application for Spanish citizenship made clear that to be eligible Alvarez had to have an ancestor who fled Spain during the Spanish Civil War from 1936 to 1939. But Alvarez's Spanish ancestor, his

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[16] Like the majority, I consider the content of Munoz's Decision to Continue Detention, Gladish's declaration filed in the habeas action (to the extent it discusses the government's request that Alvarez complete an application for Spanish citizenship), Alvarez's declaration filed in the habeas action (to the extent it discusses the Spanish citizenship application), and similar materials, even though they were attached to the defendants' motion to dismiss, instead of Alvarez's complaint. I acknowledge that "[t]ypically, a Rule 12(b)(6) motion to dismiss must be decided without considering matters outside of or unattached to the complaint," which would preclude us from considering these documents, filed as exhibits to the defendants' motion to dismiss. *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1053 n.12 (11th Cir. 2015). But these documents may be considered because they are (1) "central to a claim in the complaint" and (2) their "authenticity is unchallenged." *Id.*

grandfather, left Spain more than 60 years before the Spanish Civil War, making Alvarez ineligible for Spanish citizenship.

Alvarez has alleged sufficient facts to state a facially plausible claim[17] that Munoz knew Alvarez was ineligible for Spanish citizenship and thus could not be removed to Spain—at the time when Munoz decided to continue Alvarez's detention. Alvarez pled that an ICE agent provided him an incomplete application for Spanish citizenship that omitted the pages detailing the requirement that the applicant must have an ancestor who fled Spain during the Spanish Civil War. Because these pages would have shown that Alvarez was ineligible for Spanish citizenship, these allegations support an inference that the agent gave him an incomplete application knowing, but attempting to hide, that he was ineligible for Spanish citizenship. Admittedly, Alvarez has not alleged that Munoz personally gave him the incomplete application. But by the time Munoz made the decision to continue detention, Alvarez had told the habeas court about the incomplete application and explained why he was ineligible for Spanish citizenship. Because Munoz reviewed Alvarez's entire file, including all the materials Alvarez submitted to the habeas court,[18] it is reasonable to infer that Munoz knew Alvarez was

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[17] *See Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) (recognizing that a pleading must "'state a claim to relief that is plausible on its face' (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

[18] There is no dispute that as part of the 180-day review, Munoz was required to review Alvarez's records. *See* 8 C.F.R. § 241.4(i)(2). And Munoz explained in his decision that he had reviewed Alvarez's file, including any information Alvarez had submitted.

ineligible for Spanish citizenship and could not be removed. If Munoz knew Alvarez could not be removed to Spain, then he had no basis for finding that Alvarez's removal to Spain would occur in the reasonably foreseeable future and thus for continuing Alvarez's detention. In other words, if we accept Alvarez's well-pled allegations as true, as we must, he was affirmatively prevented from receiving the meaningful review required under the regulations.[19]

Crediting Alvarez's allegation that he was intentionally denied meaningful review by Munoz, I fail to see how Congress has indicated (either implicitly or explicitly) that courts should refrain from recognizing a *Bivens* remedy under these circumstances. The majority asserts that because Congress has amended the Immigration and Naturalization Act and never added a private right of action, we should conclude that Congress intended to make damages unavailable. Maj. Op. at 34-35. Even assuming Congress implicitly indicated (through its silence) that aliens who received meaningful review of their detention at the 90-day and

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[19] In contrast, Alvarez's allegation that Gladish and Wall knowingly misrepresented to the habeas court his eligibility for Spanish citizenship is unsupported by factual content. Alvarez alleged that Gladish and Wall made knowingly false statements to the habeas court that he would be removed to Spain in the reasonably foreseeable future. But Alvarez has alleged no facts to support his conclusion that at the time Gladish and Wall made these statements they knew that he could not be removed in the reasonably foreseeable future. He has alleged no facts that show (directly or indirectly) that these two defendants knew when Alvarez's grandfather left Spain or that another ICE officer had given Alvarez an incomplete application for Spanish citizenship. Accordingly, even if Alvarez had a *Bivens* remedy against Gladish and Wall, the claims properly were dismissed because he failed to state a plausible claim that they knowingly deprived him of liberty by continuing his detention.

180-day reviews should have no damages remedy against the federal officials who continued their detention, I see no suggestion by Congress, even by its silence, indicating that Alvarez should have no damages remedy when he alleged that he was affirmatively denied the review the law required.[20] *See Arar v. Ashcroft*, 585 F.3d 559, 573 (2d Cir. 2009) (en banc) (explaining that "any reliance on the [Immigration and Nationality Act] as an alternative remedial scheme presents difficulties" because the alien "alleged that he was actively prevented from seeking any meaningful review and relief through the [Immigration and Nationality Act] processes"); *Rauccio v. Frank*, 750 F. Supp. 566, 571 (D. Conn. 1990) ("In the instant case, the plaintiff's due process claim is premised on the defendants' interference with the procedural mechanism which Congress has created . . . . [A]ssuming plaintiffs factual allegations to be true, defendants have rendered effectively unavailable any procedural safeguard established by Congress.").

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[20] Although the majority says that it leaves for another day the question of whether a *Bivens* remedy would be available when an alien alleges that he was subject to physical abuse or punitive confinement conditions, Maj. Op. at 31-32 n.6, I fear that courts and litigants in the future may read the majority's broad reasoning to foreclose a *Bivens* remedy for such claims. Yet, other circuits have recognized that a *Bivens* remedy is available for such claims, implicitly rejecting the position that no *Bivens* remedy should ever be available in the immigration detention context. *See, e.g., De La Paz v. Coy*, 786 F.3d 367, 374 (5th Cir.) (explaining that a *Bivens* remedy is available for a claim arising out of civil immigration apprehension or detention alleging unconstitutionally excessive use of force), *reh'g denied*, 804 F.3d 1200 (5th Cir. 2015), *petition for cert. filed*, (U.S. Jan. 26, 2016) (No. 15-888).

The majority implicitly takes the position that Alvarez received meaningful review, but it cites no case to support this conclusion. Although the majority relies on the Ninth Circuit's decision in *Mirmehdi v. United States*, 689 F.3d 975 (9th Cir. 2011), to suggest that other circuits have refused to recognize a *Bivens* remedy in the immigration context, nothing in *Mirmehdi* addressed whether a *Bivens* remedy is available when an alien is denied meaningful review through the very administrative procedures that the government asserts make a *Bivens* remedy unnecessary. In *Mirmehdi*, aliens with pending applications for asylum were arrested for immigration violations and then released on bond. *Id.* at 979. Their bond was revoked after FBI and ICE agents testified to evidence showing the aliens supported a terrorist group. *Id.* The aliens claimed the agents knowingly misrepresented evidence as showing that they belonged to the terrorist group so that the immigration judge would revoke their bond. *Id.* The aliens later sued the agents seeking a *Bivens* remedy for their wrongful detention claim.[21]

The Ninth Circuit held that no *Bivens* remedy was available because the aliens were able to "challenge their detention through not one but two different remedial systems." *Id.* at 982. As the Ninth Circuit pointed out, the aliens' claim that the agents fabricated evidence was reviewed multiple times: (1) on direct appeal of their detention, (2) during administrative proceedings related to their asylum applications, and (3) in a federal habeas corpus petition. *Id.* at 979, 982. Importantly, though, in *Mirmehdi* the aliens raised no claim that this administrative and judicial

[21] The aliens in *Mirmehdi* ultimately were granted withholding of removal and released because they demonstrated a likelihood of mistreatment if removed to Iran. 689 F.3d at 979-80.

review was a sham. Accordingly, *Mirmehdi* never considered or addressed the question before the Court in this case: whether an alien could have received meaningful administrative review when he alleged that the only review of his claim (in a non-appealable decision, no less) was a sham.[22]

It is true that Alvarez could and did—challenge his continued detention by petitioning for a writ of habeas corpus in federal court. But given his plausible claim that he was intentionally denied a meaningful 180-day

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[22] The majority's reliance on *De La Paz* is flawed for similar reasons. Although the Fifth Circuit broadly characterized the issue as "whether *Bivens* extends to claims arising from civil immigration apprehensions and detentions, other than those alleging unconstitutionally excessive force," *De La Paz*, 786 F.3d at 375, the Fifth Circuit's analysis never addressed whether a *Bivens* remedy was available when an alien plausibly alleged that he was intentionally denied meaningful review of his unlawful detention. In *De La Paz*, two undocumented aliens, who were arrested by customs and border patrol, sued seeking money damages against the agents, alleging the agents violated their Fourth Amendment rights by performing an illegal stop. *Id.* at 369. In refusing to recognize a *Bivens* remedy, the Fifth Circuit relied on the existing "'[f]ederal governance of immigration and alien status,' which was '"extensive and complex.' *Id.* at 375 (alteration in original) (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012)). The Fifth Circuit pointed to statutes limiting when border patrol agents may search or arrest a person, statutes guaranteeing aliens certain procedural safeguards after arrest, and regulations requiring the Department of Homeland Security to investigate alleged Fourth Amendment violations. *Id.* at 376. Given this remedial scheme, the Fifth Circuit concluded that "Congress's failure to provide an individual damages remedy 'has not been inadvertent.' *Id.* at 377 (quoting *Schweiker*, 487 U.S. at 423). But *De La Paz* did not address whether a *Bivens* remedy should be available where the defendants actively prevented the plaintiffs from receiving meaningful review under the applicable statutes and regulations.

review, petitioning for a writ of habeas corpus was the only way he could obtain review of his continued detention. And the existence of a habeas remedy alone—which gives aliens prospective, as opposed to retrospective, relief—is insufficient to support a conclusion that alternative remedies "amount to a convincing reason to refrain from" recognizing a *Bivens* remedy. *Engel v. Buchan*, 710 F.3d 698, 705-06 (7th Cir. 2013) (internal quotation marks omitted).[23] Significantly, the government never argues—and no court has held that a federal court can infer that Congress intended to foreclose a *Bivens* remedy solely from the fact that the plaintiff was able to challenge his unlawful detention or incarceration by petitioning for a writ of habeas corpus.[24]

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[23] When a habeas remedy is coupled with a "broader, integrated remedial scheme" that can meaningfully address the deprivation, then the availability of a habeas remedy weighs against recognizing a *Bivens* remedy. *Engel*, 710 F.3d at 706; *see also Rauschenberg v. Williamson*, 785 F.2d 985, 987 (11th Cir. 1986) (declining to extend *Bivens* remedy when parolee had alternative remedies available to challenge condition of his parole including, but not limited to, petitioning for habeas corpus relief). In other words, I am not saying that the availability of a habeas remedy has no significance in a *Bivens* analysis, but when habeas is the only available remedy, a court should not conclude that Congress intended to foreclose a *Bivens* remedy.

[24] The majority also suggests that another alternative was available because Alvarez made an informal request to Skinner that she expedite the 90-day review of his case and release him before the end of the 90-day period. *See* Maj. Op. at 35. Given that detention for 90 days after Alvarez's final removal order was mandatory, 8 U.S.C. § 1231(a)(2), I fail to see how this futile request constituted a meaningful alternative remedy. It is true that Alvarez could have requested release between the 90-day and 180-day reviews on the ground that there was no significant likelihood he would be removed in the reasonably foreseeable future. 8 C.F.R. § 241.13(c), (d)(3). But under the regulations, the

Accepting Alvarez's allegations, I cannot say that the sole alternative process available to review his unlawful continued detention that is, petitioning for habeas reliefprovides a compelling reason for the Court to refrain from recognizing a damages remedy. Instead, the existence of habeas review alone is an insufficient basis for concluding that Congress intended to prohibit a damages remedy for Alvarez.

2. Special Factors Counseling Hesitation

The majority alternatively holds that no *Bivens* remedy is available because "numerous special factors counsel hesitation in this context." Maj. Op. at 36. The majority identifies two special factors in this case: "the importance of demonstrating due respect for the Constitution's separation of powers" and the difficulties associated with recognizing a "doctrinally novel and difficult to administer" claim.[25] *Id.* at 36-37. After careful consideration, I remain unconvinced that either of these special factors cautions hesitation in this case.

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government had "no obligation" to release Alvarez on this basis until six months after his removal order became final. *Id.* § 241.13(b)(2)(ii). Given this important limitation, if Alvarez had requested release between the 90-day and 180-day review, the request would have been futile.

[25] The majority offers the availability of "adequate remedial mechanisms" under the existing legislative and regulatory framework as a third special factor counseling hesitation. Maj. Op. at 36 (internal quotation marks omitted). But this is merely a restatement of the majority's reasoning that no *Bivens* remedy is available because of existing alternative remedies. As I explained above, given Alvarez's allegation that Munoz intentionally denied him meaningful review, I cannot say that the government provided adequate administrative review or remedial measures.

a. Separation of Powers

The majority contends that the need to demonstrate due respect for the separation of powers counsels hesitation here. Of course I agree that the Constitution gives "Congress the power to establish a uniform Rule of Naturalization" and that the Executive Branch has inherent authority to conduct relations with foreign nations. *Id.* at 36-37 (internal quotation marks omitted). But given Alvarez's plausible claim that Munoz knew Alvarez could not be removed, I fail to see how such separation of powers concerns are implicated here. The majority offers no compelling reason why concerns about separation of powers are implicated when an ICE official intentionally deprives a detainee of his due process rights under governing law.

In fact, the government raised, and the Supreme Court rejected, a similar separation of powers argument in *Zadvydas*. The government argued that courts could not review a habeas petition challenging the Attorney General's authority to detain indefinitely aliens who could not be removed because "the Judicial Branch must defer to Executive and Legislative Branch decisionmaking" with respect to immigration law. *Zadvydas*, 533 U.S. at 695. The Court rejected this argument, explaining that the Executive and Legislative Branches' "power is subject to important constitutional limitations." *Id.* When removal is impossible, judicial review of an alien's detention in no way "den[ies] the right of Congress to remove aliens." *Id.* The Court also rejected the government's assertion that judicial review would impinge the authority of Congress and the Executive Branch to control entry into the United States. *Id.* at 695-96. For an alien detained after a final removal order is entered, "[t]he sole foreign policy consideration" is that review by the

courts might "interfere with 'sensitive' repatriation negotiations." *Id.* at 696. The government failed to "explain how a . . . court's efforts to determine the likelihood of repatriation, if handled with appropriate sensitivity, could make a significant difference in this respect."[26] *Id.* For the same reasons, I am unpersuaded that judicial review of ICE's decision to continue detention in a *Bivens* action would upset the separation of powers when there is a plausible claim that the ICE official performing the review knew that the alien was entitled to release because he could not be removed to any other country.

I am troubled by the majority's separation of powers analysis because, taken to its logical end, it would seem to foreclose a *Bivens* remedy in any case arising in the immigration context. After all, if this case in which Alvarez alleges that Munoz knew that the government had no country that would accept him—implicates the Executive's power to control and conduct foreign relations, then special factors would counsel hesitation in virtually all immigration cases.

b. Workability of Cause of Action

The majority also concludes that special factors counsel hesitation because Alvarez's claim is doctrinally novel and would be difficult to administer. Although the workability of a cause of action may indeed be a special factor counseling hesitation, *see*

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[26] The Court recognized that in cases involving "terrorism or other special circumstances," "special arguments might be made for . . . heightened deference to the judgments of the political branches with respect to matters of national security." *Zadvydas*, 533 U.S. at 696. But here the government makes no argument that judicial review of Alvarez's continued detention would implicate national security concerns.

Wilkie, 551 U.S. at 555-56, I fail to see how Alvarez's claim, alleging that he was deprived due process when Munoz purposefully denied him meaningful review as required by the regulations, would be unworkable. In fact, his particular claim is neither doctrinally novel nor difficult to administer. First, I disagree that Alvarez's allegation that he was denied meaningful review of his ongoing detention raises a novel claim. His resembles a classic procedural due process claim, alleging that a government official failed to provide meaningful review as required under a law or policy. *See, e.g., Williams v. Hobbs*, 662 F.3d 994, 1008-09 (8th Cir. 2011) (explaining that inmate failed to receive due process, even though process set forth in policy was adequate, when the review actually provided by prison officials was not meaningful); *Ryan v. Ill. Dep't of Children & Family Servs*., 185 F.3d 751, 761-62 (7th Cir. 1999) (reversing grant of summary judgment on procedural due process claim based on plaintiffs' evidence showing that hearing was a "sham" because decisionmakers had already made up their minds); *see also Zinermon v. Burch*, 494 U.S. 113, 125 (1990) ("The Due Process clause also encompasses . . . a guarantee of fair procedure."); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring) (explaining that due process requires that procedures provided must "not [be] a sham or a pretense" (internal quotation marks omitted)).

The majority suggests that Alvarez's claim is different from other procedural due process claims because a court would have to examine ICE's motivation for continuing his detention. Even though a factfinder ultimately would have to determine whether Munoz knew that Alvarez could not be removed to Spain, I fail to see why this inquiry makes

Alvarez's cause of action any different from any other claim based on an intentional deprivation of due process much less unworkable. The majority offers no compelling explanation.

The majority further asserts that Alvarez's claim would require us to examine ICE's motivation for continuing the detention of "every other alien who may be detained past the statutory 90-day period." Maj. Op. at 38. Again, I disagree. Alvarez makes no claim that ICE or Munoz had a policy or practice of performing sham 180-day reviews to continue to detain aliens; why then would a court need to consider the reasons why ICE continued to detain other aliens beyond the 180-day review?

Second, I cannot agree with the majority's assertion that Alvarez's claim would be difficult to administer. The majority suggests that because ICE has discretion to abandon removal proceedings at any time, it would be particularly difficult to understand ICE's motivations for continuing a detention beyond the 180-day period. These two things are like apples and oranges: discretion to abandon removal proceedings altogether and discretion to continue detention after a final order of removal are two very different things. Further, as the majority concedes, Alvarez "does not allege that ICE should have exercised its discretion [to abandon removal proceedings] and released him." *Id.* at 25. Rather, Alvarez alleges that after the 180-day review, ICE denied him due process by failing to release him when it was required to do so because his removal was not reasonably foreseeable. *See Zadvydas*, 533 U.S. at 699-700; 8 C.F.R. §§ 241.4(i)(7), 241.13(c). Accordingly, I think that the Attorney General's discretion to abandon removal proceedings poses no problem in this case.

The majority worries that recognizing a *Bivens* remedy "would likely lead to widespread litigation" from aliens challenging their continued detention, Maj. Op. at 39, but I believe their concerns are overstated. Recognizing a *Bivens* remedy in this case would open the courthouse doors only to claims from aliens who: (1) were subject to a final order of removal, (2) were still detained at the end of the 90-day removal period, (3) had their detention continued at the 90-day review, (4) had their detention continued at the 180-day review, and (5) can state a plausible claim that the ICE official performing the 180-day review knew that the alien could not be removed in the reasonably foreseeable future. It is hard to believe this group of aliens is so large that they would flood the courts with litigation.[27] In any event, even assuming the majority is correct that a large group of aliens can plausibly allege that they received sham 180-day reviews, the concern that federal courts may have to address these plausible claims of serious constitutional violations hardly provides a compelling reason to refrain from hearing such claims.

I also remain unpersuaded by the majority's contention that recognizing a *Bivens* remedy here

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[27] Indeed, the available data suggests this group of aliens is relatively small. In 2006, the government detained a total of 8,690 aliens nationwide after a final order of removal was entered. Only 1,725 of those aliens were detained 90 days after their final order was entered. *See* Office of Inspector General, ICE's Compliance with Detention Limits for Aliens with a Final Order of Removal from the United States 11 (2007). The *Bivens* remedy I would recognize in this case would be available to only a subset of the latter group of aliens. And perhaps if a *Bivens* remedy were available to aliens whom ICE intentionally unlawfully detained, the existence of such a remedy would have a deterrent effect, reducing the numbers further.

would "chill ICE officials from engaging in robust enforcement of this country's immigration laws." *Id.* at 39. Because the *Bivens* remedy I would recognize here would apply only to claims against those ICE officials who intentionally deny an alien a meaningful 180-day review, I fail to see how the prospect of the narrow judicial review I am proposing would chill ICE officials from performing their legitimate duties.

In sum, I cannot agree with the majority's special factors analysis. Because I would hold that the alternative, existing processes were inadequate, and special factors do not counsel hesitation, I would extend Alvarez a *Bivens* remedy.

B. *Heck v. Humphrey*

The district court dismissed Alvarez's claims against all defendants, including Munoz, on the alternative ground that "the 'favorable termination rule' imposed by *Heck*" barred his claims. Order at 16 (Doc. 58). In *Heck*, the Supreme Court recognized:

> [T]o recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

Heck, 512 U.S. at 486-87 (footnote omitted). Accordingly, the Court imposed a favorable-termination requirement, barring a damages action that "would necessarily imply the invalidity of [a] conviction or

sentence . . . unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 487. We previously explained that the favorable termination requirement is inapplicable when "federal habeas corpus is not available." *Harden v. Pataki*, 320 F.3d 1289, 1299 (11th Cir. 2003);[28] *see also Spencer v. Kemna*, 523 U.S. 1, 21 (1998) (Souter, J., concurring) ("[A] former prisoner, no longer 'in custody,' may bring a[n]. . . action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy.").[29]

Although Alvarez seeks damages arising from his unconstitutional continued detention, he cannot demonstrate that his detention has been declared invalid because the habeas court never issued a writ that called into question his detention. Nonetheless, I would hold that the favorable-termination requirement is inapplicable because under the facts of this case federal habeas review was unavailable to Alvarez. Alvarez diligently petitioned for a writ of habeas corpus; indeed, the district court scheduled a hearing on his petition. But the government's decision to release him just two business days before the hearing (quite possibly in an attempt to avoid judicial

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[28] We have in unpublished decisions suggested that this analysis in *Harden* was dicta. *See, e.g., Vickers v. Donahue*, 137 F. App'x 285, 288-90 (11th Cir. 2005) (unpublished). Even if the discussion in *Harden* is non-binding, however, the Court should adopt *Harden's* well-reasoned analysis.

[29] We have never addressed whether *Heck's* rule applies to aliens who challenge their immigration detention as unconstitutional. I assume for purposes of my analysis that *Heck* can apply to such claims.

review of the unconstitutional detention) mooted his habeas petition challenging his detention[30] and made it impossible for him to obtain habeas relief that called into question his ongoing detention. Given this unique (and frankly troubling) procedural history, it would be illogical and unjust to hold that Alvarez's claim against Munoz is barred because he failed to obtain habeas relief. Accordingly, I would hold that the district court erred in dismissing Alvarez's claim against Munoz as barred under *Heck*.

C. Qualified Immunity

The district court held in the alternative that Alvarez's claims were properly dismissed because all the defendants, including Munoz, were entitled to qualified immunity. I disagree with the district court's analysis because it failed to consider that Alvarez's procedural due process claim included the plausible allegation that Munoz intentionally deprived him of meaningful review.

A government official asserting a qualified immunity defense bears the initial burden of showing "he was acting within his discretionary authority."[31] *Skop v. City of Atlanta*, 485 F.3d 1130, 1136 (11th Cir. 2007). After the official makes this showing, the burden shifts to the plaintiff to show that "(1) the defendant

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[30] *See Dawson v. Scott*, 50 F.3d 884, 886 n.2 (11th Cir. 1995). Alvarez continued to seek habeas relief by challenging the conditions of release imposed by the government, which he contended restricted his freedom of action or movement, but his challenge did not address his lengthy detention. *See Alvarez v. Holder*, 454 F. App'x 769, 772-73 (11th Cir. 2011) (unpublished).

[31] Alvarez does not challenge the district court's conclusion that each defendant was carrying out a discretionary function at the time of the alleged constitutional violations.

violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004). Binding decisions of the Supreme Court may clearly establish a right. *See McClish v. Nugent*, 483 F.3d 1231, 1237 (11th Cir. 2007). The clearly-established requirement "ensures that officers will not be liable for damages unless they had "fair warning" that their conduct violated the law." *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

Alvarez has stated a claim that Munoz violated his Fifth Amendment right to procedural due process by intentionally depriving Alvarez of meaningful review.[32] A procedural due process claim has three elements "(1) a deprivation of a constitutionally-protected liberty or property interest; (2) [government] action; and (3) constitutionally-inadequate process." *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003). The only element at issue here is whether Alvarez received constitutionally inadequate process. As discussed in part in Section II-A above, Alvarez has pled sufficient facts to allege that he received

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[32] Alvarez also brought a Fourth Amendment claim against Munoz. But the Fourth Amendment claim fails because ICE had probable cause to detain him when it lodged the immigration detainer. The Supreme Court has explained that a challenge to continued detention is better understood as a Fifth Amendment due process claim than as a Fourth Amendment illegal seizure claim. *See Baker v. McCollan*, 443 U.S. 137, 144 (1979) (recognizing that there is a due process violation when a person is "detained indefinitely in the face of repeated protests of innocence even though the warrant under which he was arrested and detained met the standards of the Fourth Amendment")

constitutionally inadequate process when Munoz performed a sham review.

Further, Alvarez's constitutional right was clearly established at the time that Munoz performed the sham 180-day review. Although due process may be "a flexible concept that varies with the particular circumstances of each case," we have recognized that it is "clear that the government must provide" review "in a meaningful manner." *Id.* at 1232-33 (internal quotation marks omitted); *see Zinermon*, 494 U.S. at 125 (due process requires "a guarantee of fair procedure"); *McKinney v. Pate*, 20 F.3d 1550, 1561 (11th Cir. 1994) (en banc) ("It is axiomatic that, in general, the Constitution requires that the state provide fair procedures and an impartial decisionmaker before infringing on a person's interest in life, liberty, or property."). Given this precedent, it can hardly be argued that Munoz lacked fair warning that performing a sham 180-day review would violate Alvarez's due process rights.

D. Statute of Limitations

The district court also dismissed Alvarez's claims on the alternative ground that they were barred by the statute of limitations. Alvarez's cause of action against Munoz accrued on or around October 14, 2009 when he received Munoz's decision to continue his detention—because at that point he knew or had reason to know of his injury.[33] *See Mullinax v.*

[33] Alvarez argues that his claim did not accrue until we issued a decision regarding his habeas claim. *See Alvarez v. Holder*, 454 F. App'x 769 (11th Cir. 2011) (unpublished). Alvarez wrongly assumes that our decision on his habeas claim held his detention unconstitutional. But we never addressed the legality of his

McElhenney, 817 F.2d 711, 716 (11th Cir. 1987). Alvarez sued Munoz less than four years later. Because it is unclear from the face of the complaint which state has the most significant relationship to Alvarez's claim, it is impossible to determine at the motion to dismiss stage which state's statute of limitations applies and thus whether Alvarez's claim was timely. Accordingly, the district court erred in dismissing the claim against Munoz on statute of limitations grounds.

"A Rule 12(b)(6) dismissal on statute of limitations grounds is appropriate if it is apparent from the face of the complaint that the claim is time-barred." *Gonsalvez v. Celebrity Cruises Inc.*, 750 F.3d 1195, 1197 (11th Cir. 2013) (internal quotation marks omitted). Because "[a] statute of limitations bar is an affirmative defense, . . . plaintiff[s] [are] not required to negate" the affirmative defense in their complaint. *La Grasta v. First Union Sec., Inc*., 358 F.3d 840, 845 (11th Cir. 2004) (alterations in original and internal quotation marks omitted). The district court's statute of limitations analysis is flawed because it failed to consider whether it was apparent from the face of the complaint that the claim was time-barred.

The statute of limitations for Alvarez's *Bivens* action is "the state limitation period applicable to personal injury actions" in the state where the suit was filed. *Kelly v. Serna*, 87 F.3d 1235, 1238 (11th Cir. 1996). Alvarez filed suit in Florida, so Florida law determines the limitation period. Florida courts generally apply a four-year statute of limitations to personal injury actions. Fla. Stat. § 95.11(3). But if a cause of action

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immigration detention, only the conditions of his supervised release. *Id.*

arose in another state with a shorter statute of limitations, Florida law requires use of the shorter statute of limitations. *Id.* § 95.10 ("When the cause of action arose in another state or territory of the United States, . . . and its laws forbid the maintenance of the action because of lapse of time, no action shall be maintained in this state."). The purpose of this statute "is to discourage `forum shopping' and the filing of lawsuits in Florida that have already been barred in the jurisdiction where the cause of action arose." *Celotex Corp. v. Meehan*, 523 So. 2d 141, 143 (Fla. 1988).

Under Florida law, a cause of action arises in the state with the most significant relationship to the action. *Id.* at 144. Florida courts "presume[] that the law of the place of the injury will apply"; if, however, "another state has a more `significant relationship' to the particular issue, that state's law should be applied." *McNeil v. CSX Transp., Inc.*, 832 So. 2d 227, 229 (Fla. Dist. Ct. App. 2002). To decide which state has the most significant relationship, Florida courts consider the following criteria:

(a) the place where the injury occurred,

(b) the place where the conduct causing injury occurred,

(c) the domicil[e], residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

Celotex, 523 So. 2d at 144. (quoting Restatement (Second) of Conflict of Laws § 145(2) (1971)).

In this case, whether Alvarez's claim against Munoz is barred depends on where his cause of action arose. Munoz claims that Alvarez's cause of action arose in Georgia and is barred by Georgia's two-year statute of limitations. *See* O.C.G.A. § 9-3-33. Alvarez claims that it is unclear from the face of the complaint which state's law governs his claim and that it is possible that Florida's four-year statute of limitations applies, making his claim timely. Applying the significant factors test, I agree with Alvarez that it is not apparent from the face of his complaint which state had the most significant relationship to his cause of action against Munoz and thus whether his claim was barred.

Alvarez's complaint shows that both Florida and Georgia had a relationship to Alvarez's cause of action. Alvarez has alleged that his injury occurred in Georgia where he was detained and that Florida was his state of residence for over 50 years. But the complaint is silent about other contacts relevant to the significant-relationship analysis, including where Munoz resided; where Munoz's conduct causing Alvarez's injury occurred, for example, where Munoz made the decision to continue Alvarez's detention; and the place where the parties' relationship was centered. Because I cannot conclude from the face of the complaint that Alvarez's claim necessarily is time-barred, dismissal on statute of limitations grounds was error at this stage of the proceeding.

III. Conclusion

The allegations in this case are disturbing. They suggest that an ICE official ignored the law, intentionally deprived Alvarez of meaningful review, and knowingly made false statements to keep him in custody when the law required him to be released. The

majority's analysis in this case is also troubling. To deny a *Bivens* remedy, the majority seems to cast aside the motion to dismiss standard by ignoring Alvarez's well-pled allegation that Munoz purposefully denied him meaningful review under the existing regulations and procedures. After properly applying the motion to dismiss standard and crediting Alvarez's plausible allegations, I would recognize that Alvarez has a *Bivens* remedy for his due process claim against Munoz. I would also hold that the district court erred in its alternative conclusions that *Heck v. Humphrey*, qualified immunity, and the statute of limitations barred Alvarez's claim. I dissent because I would allow Alvarez's claim against Munoz to proceed.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed September 13, 2016]

No. 14-14611-BB

SANTIAGO ALVAREZ,

Plaintiff-Appellant,

versus

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FELICIA SKINNER, Field Office Director, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, MICHAEL GLADISH Office of Detention and Removal, Atlanta District, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT JUAN CARLOS MUNOZ, UNITED STATES ATTORNEY, ROBERT EMERY, UNITED STATES ATTORNEY, SHEETUL S. WALL, UNITED STATES OF AMERICA,

Defendants-Appellees,

UNIDENTIFIED OFFICIALS AND/OR AGENTS OF DEPARTMENT OF HOMELAND SECURITY, *et al*.,

Defendants.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: MARCUS, WILLIAM PRYOR, and JILL PRYOR, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en Banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE
ORD-42

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed May 19, 2014]

Case No. 13-21286-CIV-DIMITROULEAS

SANTIAGO ALVAREZ,

Plaintiff,

vs.

FELICIA SKINNER, MICHAEL GLADISH, JUAN C. MUNOZ, ROBERT EMERY, AND SHEETUL S. WALL,

Defendants.

ORDER GRANTING INDIVIDUAL DEFENDANTS' MOTIONS TO DISMISS

THIS CAUSE is before the Court on Individual Defendants, Felicia Skinner, Michael Gladish, Juan C. Munoz, Robert Emery, and Sheetul S. Wall's Motion to Dismiss [DE 34]. The Court has considered the Motion, Plaintiff, Santiago Alvarez's Response [DE 47], Defendants' Reply [DE 51], the arguments by counsel at the May 16, 2014 hearing, and is otherwise fully advised in the premises.

I. BACKGROUND

Plaintiff Santiago Alvarez ("Plaintiff" or "Alvarez") commenced this action on April 11, 2013. [DE 1]. On December 10, 2013, Plaintiff filed an Amended Complaint against Defendants alleging violations of, *inter alia*, the Fourth and Fifth Amendments of the United States Constitution stemming from his detention in

the custody of the U.S. Immigration and Customs Agency ("ICE"). *See* [DE 30]. According to the allegations of the Amended Complaint:

Plaintiff is a Cuban national who was admitted to the United States as a lawful permanent resident in 1959. Am. Comp. ¶¶ 14, 16. During the years 1960-1968, Plaintiff held various positions in the United States Central Intelligence Agency and military. ¶¶ 18-21. Plaintiff became a successful businessman, respected community leader, and humanitarian. ¶¶ 25-29. Plaintiff has resided primarily in Miami Dade County, Florida since 1959. ¶ 29.

In 1990, Plaintiff was convicted of aggravated assault and aggravated battery with a gun. ¶ 31. After a trip abroad, on December 19, 2003, Plaintiff sought admission to the United States as a lawful permanent resident. ¶ 34. Due to his 1990 conviction, Plaintiff's admission was denied by Immigration and Customs Enforcement ("ICE"), which deferred his inspection and paroled him into the United States. ¶ 34. In 2006, Plaintiff pleaded guilty to federal criminal charges, including conspiracy to unlawfully possess machine guns and a grenade launcher. ¶¶ 35-36; *United States v. Alvarez*, No. 05-cr-60307-Cohn (S.D. Fla.). Plaintiff was originally sentenced to 46 months' imprisonment, but that sentence was reduced to 30 months at a subsequent reduction of sentencing hearing under Fed. R. Crim. P. 35, which resulted from a negotiated anonymous turnover of certain weapons.¶¶ 36-40.

During the plea negotiations in the Florida conspiracy weapons case, Plaintiff's attorneys raised concerns regarding the impact a guilty plea would have on his immigration status. Plaintiff's attorneys were assured by the Department of Justice that Cubans, especially

Cubans like Plaintiff, which were well-known opponents of Fidel Castro's regime, would not be deported to Cuba. ¶ 41. Nevertheless, because the nature of the offenses to which Plaintiff pled guilty in September, 2006, would subject him to deportability after completion of his sentence under a final order of removal, which would permit ICE to detain him for a reasonable amount of time (while looking for a third country), the Government agreed in the plea agreement "to utilize its best efforts with officials of [ICE] to reach a definitive understanding of [Mr. Alvarez's] immigration status and the effect of this case on his immigration status." ¶ 43. Local ICE representatives were, during the plea negotiations and thereafter, fully informed of the material commitment made to Plaintiff in the plea agreement – to make a decision within a reasonable period of time regarding Plaintiff's immigration status. ¶ 44.

In 2007, three months before Plaintiff was to be released to a halfway house to complete his federal prison sentence, ICE lodged an immigration detainer with the Federal Bureau of Prisons. ¶ 46. In October 2007, Plaintiff filed a § 2255 motion in the Southern District of Florida to lift the immigration detainer, arguing that the Government breached the plea agreement by failing to secure a particular resolution of his immigration status. ¶ 47. *See Alvarez v. United States*, no. 07-cv-61573-Cohn. In that proceeding, ICE completely disavowed being bound by any "immigration commitment" to Plaintiff. ¶ 47. On November 19, 2007, the magistrate judge held a hearing which included testimony by Robert Emery, then Deputy Chief Counsel of ICE's Miami Office. ¶ 48. *See Alvarez v. United States*, no. 07-cv-61573-Cohn, at [DE 20]. The magistrate judge recommended Plaintiff's motion to lift the immigration detainer be denied, noting that

Plaintiff previously made sworn statements to the court that he understood that his guilty plea could result in his deportation. *See Alvarez v. United States*, no. 07-cv-61573-Cohn, at [DE 22], p. 8. The magistrate judge also concluded that "[t]he evidence shows that the Government did all that [Plaintiff] reasonably could have expected on his behalf," including arranging a meeting with ICE officials to allow Plaintiff's counsel to make their case for lifting the immigration detainer. *Id.* at p. 24. Finally, the magistrate judge noted that the decision to keep Plaintiff detained was made by ICE and was "a determination that lies within that agency's discretion." *Id.* at 25. Following a hearing before the district judge on Plaintiff's objections to the magistrate judge's report and recommendations, the district court adopted the magistrate judge's report and recommendation, denied Plaintiff's § 2255 motion, and Plaintiff continued serving his sentence in prison. *See Alvarez v. United States*, no. 07-cv-61573-Cohn, at [DE 30].

While still serving his 30 month sentence, the Department of Justice (through the U.S. Attorney's Office in the Western District of El Paso, Texas) summoned Plaintiff to appear before the grand jury empanelled in the United States District Court for the Western District of El Paso, Texas (the "El Paso Case"). ¶ 50. Through the grand jury subpoena, the Government sought Plaintiff to support its position that he assisted Luis Posada Carilles' entry into the United States. ¶ 50. Plaintiff committed another felony—he refused to testify in the grand jury proceeding in the Western District of Texas. Am. Comp. ¶ 50, 52. Plaintiff was subsequently convicted of obstruction of justice and sentenced on February 8, 2008 to an additional 10 months in prison. ¶ 52; *United States v. Santiago Alvarez*, No. EP-07-CR-88

(W.D. Tex). After an extensive jury trial, Luis Posada Carilles was eventually found not guilty. ¶ 53.

While Plaintiff was serving his additional prison sentence, his attorneys attempted to negotiate with ICE counsel Emery over Plaintiff's immigration status. ¶¶ 55-59. Plaintiff's attorneys offered to stipulate to Plaintiff's removal from the United States, with the goal of starting the 90-day statutory removal period as close as possible to November 25, 2008, when Plaintiff was scheduled to complete his prison sentence and was expected to be taken into physical custody by ICE. ¶ 60. After months of negotiations, the parties were unable to agree to the terms of a stipulation, and approximately one week prior to Plaintiff's scheduled release from prison in the El Paso case, Emery withdrew ICE's offer to enter into a removal stipulation. ¶ 61.

Plaintiff's removal proceedings concluded on January 22, 2009, when an immigration judge entered a written Final Order of Removal, finding Plaintiff removable and ordering him removed to Cuba. ¶ 65. After the removal order was issued, Plaintiff's attorneys requested that ICE Atlanta Field Office Director Felicia Skinner expedite the 90-day removal review process, highlighting the fact that Plaintiff could not be removed to Cuba because he would assuredly be "dead on arrival" and that his removal to a third country was not a practical reality. ¶ 65. Skinner declined to do so and on April 22, 2009, the last day of the removal period, issued Plaintiff First Decision to Continue to Detention, explaining her decision to continue his detention.¶¶ 66-67. Specifically, Skinner stated that "presently there is no reason to believe that your removal will not take place within the reasonably foreseeable future." ¶ 67. Skinner also noted that ICE

believed that he posed a danger to the community and also posed a significant flight risk. ¶ 67.

After eight months in ICE's exclusive custody since November 25, 2008, and six months after having accepted his Final Order of Removal on January 22, 2009, ICE and the Department of Homeland Security were no closer to having Plaintiff deported to Cuba or removed to a third country than they were on November 25, 2008. ¶ 74. Plaintiff remained detained, and on July 28, 2009, he filed a § 2241 petition for habeas corpus in the United States District Court for the Middle District of Georgia where Plaintiff was being detained, contending his continued detention by ICE was unconstitutional. ¶ 76; *Alvarez v. Holder, et al.*, No. 09-cv-89 (M.D. Ga.). On September 17, 2009, the government sought an extension of time to respond to Plaintiff's petition. ¶ 81. That motion, filed by Assistant United States Attorney Sheetul Wall, stated ICE was no longer seeking Plaintiff's removal to Cuba, but explained that due to recent changes in Spanish law, ICE determined that Plaintiff may be eligible for Spanish citizenship. ¶¶ 82-86. The motion was supported by a declaration by ICE Supervisory Detention and Deportation Officer Michael Gladish. ¶ 82.

The court immediately granted the government's motion for an extension, but Plaintiff filed a motion for reconsideration, alleging that the government's motion contained several misstatements and that the true purpose of the government's motion was to indefinitely detain him without due process, arguing that the prospect of Spanish citizenship for Plaintiff was a ruse. ¶¶ 85-87. The court rescinded its order granting the government's motion for an extension and set a hearing for October 26, 2009. ¶ 88.

Prior to that hearing, on October 14, 2009, Acting Case Management Unit Chief Juan Munoz executed a "Second Decision to Continue Detention," stating that ICE and the Department of Homeland Security were working with the government of Spain to secure Plaintiff's deportation to Spain and that his removal was "reasonably foreseeable" in the future. ¶ 90.

On October 21, 2009, only seven days after Defendant Munoz issued his Second Decision to Continue Detention based upon the imminence of Plaintiff's removal to Spain, and only two business days before the scheduled evidentiary hearings, Plaintiff was abruptly notified of his release and was quickly released from ICE custody that day. ¶ 92.

On October 22, 2009, the government filed a motion to dismiss the habeas proceeding for lack of jurisdiction, arguing that the case was moot. ¶ 94. The Federal District Court for the Middle District of Georgia nevertheless proceeded on October 26, 2009 to conduct an evidentiary hearing. ¶ 95. The court, after holding a hearing, denied the government's motion to dismiss, finding that it retained jurisdiction because the order releasing Plaintiff contained 20 conditions that constructively detained him. *See Alvarez v. Holder, et al.*, No. 09-cv-89 (M.D. Ga.)., [DE 26] at pp. 6-8. The court granted Plaintiff's petition for habeas corpus, striking several of the conditions of release as unconstitutional. *Id.* at pp. 6-10. Subsequently, on November 9, 2009, the court reinstated a condition of no-contact with specified parties. *See Alvarez v. Holder, et al.*, No. 09-cv-89 (M.D. Ga.)., [DE 29].

The government appealed the decision to the Eleventh Circuit Court of Appeals. *See Alvarez v. Holder*, 454 Fed. Appx. 769 (11th Cir. Dec. 14, 2011). Plaintiff cross-appealed. The government argued that

no jurisdiction existed to hear the case and that the court was wrong to strike any condition of release, and Plaintiff argued that the remaining conditions on his release were also unconstitutional. *See id.* The Eleventh Circuit affirmed in part and reversed in part, holding that the district court retained jurisdiction to hear the habeas petition but that all of the original conditions of release were proper. *See id.*

Plaintiff commenced the instant litigation on April 11, 2013. [DE 1]. On December 10, 2013, Plaintiff filed an Amended Complaint. [DE 30]. In this lawsuit, Plaintiff sues five government officials in their individual capacities for damages relating to his immigration detention. Plaintiff's remaining claims against the individual Defendants[1] seek damages directly under the Constitution. *See* [DE 30] at Counts I-III.

The individual Defendants move to dismiss the Amended Complaint on several independent grounds. First, Defendants argue that this Court lacks subject matter jurisdiction over all of Plaintiff's claims. Second, Defendants argue that all of Plaintiff's claims are barred by the statute of limitations. Third, Defendants

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[1] Plaintiff had sought damages under 42 U.S.C. § 1985. *See* [DE 30] at Count V. However, in his Response, Plaintiff concedes that he has failed to state a cause of action under Section 1985 and that claim is considered withdrawn. *See* [DE 47] at p. 20.

Plaintiff had also sought damages against the individual Defendants under Florida common law. *See* [DE 30] at Counts IV, VI, VII, and VIII. Pursuant to 28 U.S.C. § 2679(d)(1), the United States has been substituted as the sole defendant on the Florida-law claims. [DE's 32, 33]. The United States has filed a Motion to Dismiss [DE 35], which shall be addressed separately.

argue that this Court should not create a *Bivens*[2] remedy for Plaintiff's constitutional claims. Fourth, Defendants argue that they are entitled to qualified immunity on Plaintiff's constitutional claims. Fifth, Defendants argue that Defendants Emery and Wall are entitled to absolute immunity on all of Plaintiff's claims. Defendants also argue – but this issue has not yet been briefed – that this Court lacks personal jurisdiction over Defendants Skinner, Gladish, Munoz, and Wall, and that venue in this district is improper.[3]

II. DISCUSSION

1. Whether this Court lacks subject matter jurisdiction over all of Plaintiff's claims

First, Defendants argue that this Court lacks subject matter jurisdiction over all of Plaintiff's claims. Specifically, Defendants argue that each of Plaintiff's claims is barred by the Immigration and Nationality Act, which prohibits federal courts from exercising subject-matter jurisdiction over "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 chapter." 8 U.S.C. § 1252(g). The Supreme Court has determined that Section 1252(g) applies to "three discrete actions that

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[2] *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

[3] No request to transfer venue to Georgia was made in this action. On March 31, 2014, the Court granted a joint motion to stay briefing on, consideration of, and ruling on the personal jurisdiction and venue issues raised by the Individual Defendant's Motion to Dismiss. *See* [DE 46]. Based on the Court's rulings in this Order, it appears that the issues of venue and personal jurisdiction may be moot.

the Attorney General may take: [the] 'decision or action' to '*commence* proceedings, *adjudicate cases*, or *execute* removal orders.'" *Reno v. American-Arab Anti-Discrimination Comm.* ("AADC"), 525 U.S. 471, 482 (1999) (emphasis in original). Reinforcing this limitation, the Court stated that it "is implausible that the mention of three discrete events along the way to deportation was a shorthand way of referring to all claims arising from deportation proceedings." *Id.* *See also Evangelical Lutheran Church in Am. v. I.N.S.*, 288 F.Supp. 2d 32, 43 (D.D.C. 2003) ("Because those three terms are to be read narrowly and precisely, Section 1252(g) does not proscribe review over even the generality of deportation natters, much less other collateral decisions, which may be reached on the path to such action.") (internal citations omitted). Nevertheless, so long as the challenged conduct falls within one of these three areas, Section 1252(g) bars the claim. *Reno,* 525 U.S. at 482; *see also Gupta v. McGahey*, 709 F.3d 1062 (11th Cir. 2013) (applying Section 1252(g) to bar *Bivens* claims against ICE agents) ("Securing an alien while awaiting a removal determination constitutes an action taken to commence proceedings."), *r'hrg en banc denied*, 737 F.3d 694, 695 (11th Cir. 2013).

Here, Defendants contend that all of Plaintiff's claims arise from either the decision to initiate removal proceedings or the execution of his removal order. *See Belleri v. United States*, No. 9:10-cv-81527 (S.D. Fla. Jan. 17, 2012) [DE 104] at p. 4 (holding that this Court lacked jurisdiction under Section 1252(g) because all claims "are based on an illegal detention, false imprisonment, malicious prosecution, abuse of process and negligence, all emanating from the commencement of removal proceedings against Belleri, adjudicating his case, and executing a removal order.").

Plaintiff responds that he is neither challenging the Attorney General's decision to initiate proceedings, nor alleging that the challenged action in any way relates to the decision to initiate removal proceedings. Plaintiff also contends that other two clauses of Section 1252(g) are likewise not implicated here because prolonging Plaintiff's detention was not necessary for the adjudication of Plaintiff's removal proceedings or execution of the removal order. Plaintiff argues that the connection between Defendants' conduct and the three discrete actions referred to in § 1252(g) is too attenuated to strip this Court of jurisdiction.

First, Defendants argue that Plaintiff cannot proceed with his challenge to ICE's decision to proceed with removal proceedings instead of agreeing to a stipulated order of removal. The Court agrees. This claim challenges ICE's discretionary decision to place him into removal proceedings and thus fits squarely within the first of the statute's jurisdictional bars. *See, e.g., De La Teja v. U.S.*, 321 F. 3d 1357, 1365 (11th Cir. 2003) ("To the extent that De La Teja's claim . . challenges the INS's decision to commence proceedings against him, the district court did not have jurisdiction to hear that challenge."). Accordingly, all of Plaintiff's claims against Defendant Emery for failing to enter into a stipulated removal order with Plaintiff's attorneys are clearly barred by § 1252(g).

Moreover, the Court agrees with Defendants that this Court lacks jurisdiction over all of Plaintiff's claims related to ICE's actions of taking him into custody and detaining him during his removal proceedings. The phrase "arising from" in Section 1252(g) includes claims connected "directly and immediately with a 'decision or action' . . . to 'commence proceedings.'" *Humphries v. Various Fed. USINS Emps.*, 164 F.3d

936, 943 (5th Cir. 1999); *see Foster v. Townsley*, 243 F.3d 210, 213 n.2 (5th Cir. 2001) ("AADC does not change this court's interpretation in *Humphries* of 'arising from' in § 1252(g)"). Accordingly, when confronted with *Bivens* or FTCA claims brought by aliens like Plaintiff who challenge their arrest and detention by immigration authorities, courts have held Section 1252(g) bars these claims as "arising from" decisions or actions to commence proceedings. *See, e.g., Gupta*, 709 F.3d at 1065 (holding that Section 1252(g) precluded jurisdiction over an alien's *Bivens* claims alleging that ICE agents "illegally procured an arrest warrant, that the agents illegally arrested him, and that the agents illegally detained him")[4]; *Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir. 2007) (holding that Section 1252(g) barred Fourth Amendment claim for false arrest against the immigration officer who ordered the alien's detention); *Khorrami v. Rolince*, 493 F. Supp. 2d 1061, 1068 (N.D. Ill. 2007) ("Since I find that Plaintiff's Fourth Amendment claim (the arrest/detention portion) "arises from" the decision to commence removal proceedings, I find that § 1252(g) divests this Court of subject-matter jurisdiction to hear it."). Likewise, Plaintiff's challenges of his placement into removal proceedings, his detention during removal proceedings, and the government's conduct in detaining him while it sought to execute his removal order are barred.

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[4] To the extent Plaintiff relies on cases from other jurisdictions that declined to apply section 1252(g) to bar claims related to arrest and detention prior to removal proceedings, he fails to explain how those cases reconcile with the Eleventh Circuit's decision in *Gupta,* which applied section 1252(g) to bar precisely those types of claims.

Finally, Plaintiff's claims regarding Defendants' actions after he was ordered removed also are barred by section 1252(g) because those actions, and ICE's detention of Plaintiff during that time, all arise from ICE's attempts to execute Plaintiff's removal order. After Plaintiff was ordered removed, ICE had the authority to detain him for 90 days. 8 U.S.C. § 1231(a)(1)(A), (a)(2). The statute states that this 90-day period is designed to facilitate ICE's execution of the removal order. 8 U.S.C. § 1230(a)(1)(A). After that period, ICE has the further authority to detain an alien who has been ordered removed if he is determined "to be a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. § 1231(a)(6). Here, although Plaintiff disputes that he posed any risk to the community, that determination is exactly the type of action that arises from ICE's discretionary authority to execute a removal order. *See Gupta*, 709 F.3d at 1065 ("These [challenged] actions were taken in an effort to secure Gupta and prevent potential danger to Disney World while he awaited a determination of his removal").

Plaintiff's allegations of misconduct go directly to the conduct of the defendants in taking the actions enumerated in section 1252(g). Because Plaintiff is seeking to impose liability on Defendants for their abuse or manipulation of their discretionary authority related to those enumerated actions, his claims are barred by section 1252(g). Accordingly, the Court must dismiss this case for lack of subject matter jurisdiction.

2. Whether Plaintiff's claims are barred by the statute of limitations

In the alternative, even if this case was not subject to dismissal for lack of subject matter jurisdiction, Defendants argue that this case must be dismissed

because Plaintiff's constitutional claims are barred by Georgia's two-year statute of limitations, which applies in this case. This Court agrees.

The Eleventh Circuit has consistently held that a *Bivens* action is subject to the same statute of limitations governing actions brought pursuant to 42 U.S.C. § 1983. *See, e.g., Moore v. Federal Bureau of Prisons*, 2014 WL 241768, at *1 (11th Cir. Jan. 23, 2014); *Kelly v. Serna*, 87 F. 3d 1235, 1238 (11th Cir. 1996). In a federal civil rights action, the statute of limitations is determined by the forum state's laws. *See Kelly*, 87 F.3d at 1238; *Steven v. McKillop*, 198 F. App'x 816, 818 (11th Cir. 2006) (applying Florida law to a *Bivens* claim). Thus, Florida law determines the statute of limitations in Plaintiff's *Bivens* action. However, as the Seventh Circuit explained:

> The Supreme Court concluded in *Wilson v. Garcia*, 471 U.S. 261 (1985), that federal courts must use the periods of limitations adopted by the states for personal-injury suits. . . . *Wilson* directs federal courts to use a period derived from state law. Usually that means the state in which the federal court sits. But the Supreme Court **did not** hold that the forum state's statute is the right one when the injury occurred elsewhere.

Malone v. Corr. Corp. of Am., 553 F.3d 540, 542 (7th Cir. 2009) (emphasis added).

Under Florida law, if a claim filed in Florida arose in another state with a shorter statute of limitations, Florida's borrowing statute, section 95.10, Florida Statutes, requires the use of the shorter limitations period. *See* Fla. Stat. § 95.10 ("[w]hen the cause of action arose in another state or territory of the United

States, or in a foreign country, and its laws forbid the maintenance of the action because of lapse of time, no action shall be maintained in this state").[5] To determine where a cause of action arose, Florida courts examine which state has the most "significant relationship"[6] to the case. *Digioia v. H. Koch & Sons, Div. of Wickes Mfg. Co.*, 944 F.2d 809, 813 (11th Cir. 1991) (affirming district court holding that the cause of action arose in California and, applying Florida's borrowing statute, held that California's one-year statute of limitations barred action). The first Restatement factor, where the injury occurred, is usually dispositive. *See Digioia*, 944 F.2d at 813 ("In most tort actions the cause is said to have arisen in the forum where the injury occurred."); *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980) ("The state where the injury occurred would, under most circumstances, be the decisive consideration").

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[5] Plaintiff does not cite cases that discuss Florida's borrowing statute, much less a case declining to apply that statute in a *Bivens* action. Rather, in arguing that the Florida four-year statute of limitations should apply, Plaintiff relies upon cases where claims arose in Florida and where courts applied Florida's four-year statute of limitations. *See Chappell v. Rich*, 340 F.3d 1279 (11th Cir. 2003).

[6] Specifically, "Florida follows the approach outlined in the Restatement (second) of Conflicts of Laws § 145(2) and weighs the following factors: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered." *Jaisinghani v. Capital Cities/ABC, Inc.*, 973 F. Supp. 1450, 1452 (S.D. Fla. 1997) (applying these factors to hold that claims filed in Florida arose in a different state and were time-barred under Florida's borrowing statute) *aff'd*, 149 F.3d 1195 (11th Cir. 1998).

Here, based upon the allegations of the Amended Complaint, the events giving rise to Plaintiff's claims arose in Georgia, not Florida. The only event that occurred in Florida was Plaintiff's criminal proceedings, but those proceedings did not give rise to the claims in this lawsuit, which focus on Plaintiff's purportedly unlawful immigration detention in Georgia. In this case, Plaintiff describes his injury as being "deprived of his freedom and liberty" from November 25, 2008, to October 21, 2009. During that entire period, Plaintiff was detained in Georgia. Plaintiff argues that prior to his detention he previously resided in Florida and thus that he was injured in Florida by not being able to return there sooner.[7] Plaintiff does not dispute that immediately prior to his immigration detention, he was serving his federal prison sentence in Georgia, not living in Florida. Plaintiff also does not dispute that his immigration detention took place entirely in Georgia, or that it was in Georgia where Defendants Skinner, Gladish, and Wall allegedly made false statements to prolong his detention there. The heart of Plaintiff's claims involves what happened during his immigration proceedings and detention in Georgia. Georgia has the most significant relationship to this case, as that is where Plaintiff's allegedly wrongful detention occurred.

Moreover, public policy also favors applying Georgia's statute of limitations, as the purpose of Florida's borrowing statute is to "prevent forum shopping" and to preclude litigation in Florida that would be barred in the jurisdiction where the cause of action arose.

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[7] Plaintiff's counsel conceded at the hearing that he had no case law to support this position. The Court finds that the injury occurred in Georgia, where Plaintiff allegedly suffered an unnecessarily prolonged immigration detention.

See Jaisinghani, 973 F. Supp. at 1452. As the Seventh Circuit aptly explained, state borrowing statutes should apply to federal civil rights claims because "[o]therwise every § 1983 plaintiff in the country could file suit in whichever of the 50 states has the longest statute of limitations, wait for the inevitable transfer under 28 U.S.C. § 1404(a), and then demand that the original state's statute of limitations travel with the suit." *Malone*, 553 F.3d at 543.

Therefore, although Plaintiff filed this suit in Florida, which has a four-year statute of limitations, his cause of action occurred in Georgia, which has a two-year statute of limitations. *Compare* Fla. Stat. § 95.11(3) with Ga. Code Ann. § 9-3-33.

The issue of when Plaintiff's civil rights action under *Bivens* arose is a matter of federal law. *Wilson v. Garcia*, 471 U.S. 261, 268-71 (1985); *Uboh v. Reno*, 141 F.3d 1000, 1002 (11th Cir. 1998); *Rozar v. Mullis*, 85 F.3d 556, 561 (11th Cir. 1996). In general, a cause of action accrues, and thus starts the clock running for statute of limitation purposes, when the plaintiff knew or had reason to know of the injury that forms the basis for the action and who has inflicted the injury. *See Chappell v. Rich*, 340 F.3d 1279, 1283 (11th Cir. 2003). Here, Defendants argue that Plaintiff knew of his alleged injuries and who caused them as early as 2007 and as late as 2009, yet he waited until April 11, 2013, to file this lawsuit—well beyond Georgia's two-year statute of limitations.

In response, Plaintiff argues that, because Plaintiff's constitutional claims implicate the validity of the ICE officials' investigation and his detainment, pursuant to *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), Plaintiff's *Bivens* claims for damages did not begin to accrue until he "successfully" challenged the

propriety of his immigration detention by ICE in the habeas proceeding[8]. Thus, Plaintiff contends that he could not bring his *Bivens* damage claims until the Middle District of Georgia issued the writ of habeas corpus regarding his immigration detainment on October 26, 2009. Accordingly, Plaintiff argues that the clock for statute of limitations purposes started on October 26, 2009.

Nonetheless, even accepting Plaintiff's argument that his claims did not begin to accrue until October 26, 2009[9], all of his claims would still be barred under

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[8] Although *Heck* was a civil rights action under Section 1983 challenging a criminal conviction, federal courts have repeatedly applied its rationale and conclusion to *Bivens* actions challenging immigration-related detentions. *See, e.g., Cohen v. Clemens*, 321 Fed. Appx. 739, 741-42 (10th Cir. 2009) (applying *Heck* to bar alien detainee's *Bivens* claims against ICE officials alleging Fifth Amendment due process violations, including alleged falsification of immigration forms, which resulted in unlawful detention in immigration custody) ("Because Cohen would need to prove that his detention was unlawful in order to receive an award of damages for that detention, the district court correctly concluded that Heck applied to bar Cohen's *Bivens* action"); *Ousmane v. ICE*, 2011 WL 2470677, at *3 (W.D. Wash. May 23, 2011) (*Heck* applied to bar alien detainee's *Bivens* claims alleging due process violations and unlawful detention by ICE officials) ("Thus, Heck bars Plaintiff's claims for damages because they implicate the validity of the ICE investigation and his continued detention. Plaintiff's claims for damages in this action will not accrue under *Heck*, unless or until he prevails in his immigration proceedings or he is granted habeas relief pursuant to 28 U.S.C. § 2241."); *Kulakov v. INS, USA*, 2007 WL 1360728, at *1 (W.D.N.Y. May 7, 2007) (applying Heck to detainee's Bivens action against ICE officials seeking damages for alleged illegal detention pending removal); *Calix-Chavarria v. Gonzalez*, 2006 WL 1751783, at *2 (M.D. Pa. June 22, 2006) (same).

[9] Although the argument has not been raised in this case, there could be an argument that Plaintiff could not bring his *Bivens*

Georgia's two-year statute of limitations. Accordingly, Plaintiff's claims are barred by the statute of limitations.

3. Whether Heck bars Plaintiff's current claims because he never prevailed in overturning the basis for his immigration detention

If Plaintiff were to prevail on his claim for damages in this case, this would "necessarily imply the invalidity" of his detention. *Heck*, 512 U.S. at 487. *See Cohen v. Clemens*, 321 F. App'x 739, 741 (10th Cir. 2009) (affirming dismissal of *Bivens* claims alleging improper detention by ICE officials because "success on those claims would necessarily imply the invalidity of [the plaintiff's] detention"). Thus, *Heck* bars Plaintiff's claims for damages because they implicate the validity of the ICE investigation and his continued detention. *See, e.g.*, *Ousmane v. ICE*, 2011 WL 2470677, at *3 (W.D. Wash. May 23, 2011) ("Plaintiff's claims for damages in this action will not accrue under *Heck*, unless or until he prevails in his immigration proceedings or he is granted habeas relief pursuant to 28 U.S.C. § 2241.").

Judge Cohn denied Plaintiff's § 2255 motion, which raised several of the issues claims in the instant case regarding the government's actions as they related to the immigration detainer and the immigration-related representations by the government in Plaintiff's plea

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damage claims until the Eleventh Circuit issued its order in *Alvarez v. Holder*, 454 Fed. Appx. 769 (11th Cir. Dec. 14, 2011). However, that position would ultimately fail, as the Eleventh Circuit reversed the Middle District of Georgia's holding, and Plaintiff cannot be said to have successfully challenged the propriety of his immigration detention by ICE for purposes of *Heck*. *See* Section 3, *infra*.

agreement. *See Alvarez v. United States*, no. 07-cv-61573-Cohn, at [DE's 22, 30]. Although the Middle District of Georgia granted Plaintiff's § 2241 habeas petition, that order was issued after Plaintiff had already been released from ICE custody, and it struck down the conditions imposed on his release. *See Alvarez v. Holder, et al.*, No. 09-cv-89 (M.D. Ga.)., [DE 26]. Moreover, the Eleventh Circuit reversed that holding, concluding that all of the conditions were constitutional. *See Alvarez v. Holder*, 454 Fed. Appx. 769 (11th Cir. Dec. 14, 2011). Therefore, Plaintiff cannot be said to have successfully challenged the propriety of his immigration detention by ICE.

To the extent Plaintiff may argue that *Heck* does not bar a damages action where the plaintiff is no longer detained, the Court rejects that argument. The Court acknowledges the split in circuits on this issue. *See Domotor v. Wennet*, 630 F.Supp.2d 1368, 1375-1379 (S.D. Fla. Jun 30, 2009) (discussing circuit split and the Eleventh Circuit's position). However, unless and until the Eleventh Circuit definitively rules otherwise, this Court finds the "favorable termination rule" imposed by *Heck* to bar Plaintiff's claims where, as here, he is no longer detained.

4. Whether this Court should create a Bivens remedy for Plaintiff's Constitutional claims

In the alternative, even if this case was not subject to dismissal for lack of subject matter jurisdiction or as barred by Georgia's two-year statute of limitations, Defendants argue that this Court should not create a *Bivens* remedy for money damages against federal officers in their individual capacities for Plaintiff's Constitutional claims. This Court agrees.

Under *Bivens*, an individual may bring a cause of action "against a federal agent who, while acting under the color of federal law, has violated the constitutional rights of [the] individual." *Hardison v. Cohen*, 375 F.3d 1262, 1264 (11th Cir. 2004). In *Bivens*, the Supreme Court held that in a search and seizure Fourth Amendment case, the federal Constitution provides an independent limit on federal power regardless of whether corollary state remedies exist. This judicially crafted remedy for federal constitutional violations exists unless "special factors counseling hesitation in the absence of affirmative action by Congress" indicate otherwise. *Bivens*, 403 U.S. at 396. However, the Supreme Court has emphasized that a damages remedy "is not an automatic entitlement . . . and in most instances we have found a *Bivens* remedy unjustified." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); *see also Robinson v. Sherrod*, 631 F.3d 839, 842 (7th Cir. 2011) ("*Bivens* is under a cloud, because it is based on a concept of federal common law no longer in favor in the courts: the concept that for every right conferred by federal law the federal courts can create a remedy above and beyond the remedies created by the Constitution, statutes, or regulations").

In the Eleventh Circuit, "[d]amages can be obtained in a *Bivens* action when (1) the plaintiff has no alternative means of obtaining redress and (2) no special factors counseling hesitation are present." *Al-Sharif v. U.S.*, 296 Fed.Appx. 740 (11th Cir. 2008) (quoting *Hardison*, 375 F.3d at 1264).

"When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, [the Supreme Court has] not created additional *Bivens*

remedies." *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). For example, in *Al-Sharif*, the Eleventh Circuit held that "the availability of adequate statutory avenues for relief forecloses a *Bivens* action against individual IRS agents for alleged constitutional violations with respect to the collection and assessment of taxes." 296 Fed.Appx. at 741.

Moreover, when federal law is at issue, it makes no difference whether money damages are available. *See Chilicky*, 487 U.S. at 425. *See also Dotson v. Griesa*, 398 F.3d 156, 166-67 (2nd Cir. 2005) ("*Chilicky* made clear that it is the overall comprehensiveness of the statutory scheme at issue, not the adequacy of the particular remedies afforded, that counsels judicial caution implying *Bivens* actions."). A statutory remedy does not need to provide "complete relief" to replace a *Bivens* action; it must only provide "meaningful safeguards or remedies for the rights of persons situated" in the plaintiff's position. *Chilicky*, 487 U.S. at 425; *see also Bush v. Lucas*, 462 U.S. 367, 372, 388–90 (1983) (holding that a statutory remedy of Civil Service Reform Act precluded *Bivens* even though Congress provided a less than complete remedy); *Holly v. Scott*, 434 F.3d 287, 290 (4th Cir. 2006) ("[N]either the absence nor the incompleteness of [a statutory] scheme represents an invitation for a court to step in to correct what it may perceive as an injustice toward an individual litigant.").[10] In *Chilicky*, the Supreme

[10] Plaintiff's reliance on *Minneci v. Pollard*, 132 S. Ct. 617 (2012) is unavailing. In *Minneci*, the central question was "whether, in general, *state tort law* remedies provide roughly similar incentives for potential defendants to comply with the Eighth Amendment while also providing roughly similar compensation to victims of violations." 132 S. Ct. at 625 (emphasis added). Here, however, it is not that state tort law provided an alternative remedy to Plaintiff. Rather, federal law—the

Court declined to allow a *Bivens* action for alleged denial of social security benefits even though federal law did not provide for damages. *Id.* at 420. The Court reasoned that where a damages remedy has not "been included in the elaborate remedial scheme designed by Congress," it was not the place of the judiciary to alter the plan crafted by Congress by implying a right of action for damages directly against federal officials in their individual capacity. *Id.* at 414, 428-429. *See Mirmehdi v. United States*, 689 F.3d 975, 982 (9th Cir. 2012) ("We are unpersuaded by the Mirmehdis' assertions they are nonetheless entitled to a *Bivens* remedy because neither the immigration system nor habeas provides monetary compensation for unlawful detention.").

The Immigration and Nationality Act, which governed Plaintiff's detention, represents precisely the type of comprehensive statutory scheme[11] that both

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Immigration and Nationality Act—counsels against inferring a *Bivens* remedy.

[11] For aliens in removal proceedings, Congress has delineated the types of remedies available, 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, 1229, 1229a, and 1229b. In addition, Congress has broadly provided that all aliens are subject to detention during and after their removal proceedings, and has specifically provided for the mandatory detention of criminal aliens. *See* 8 U.S.C. §§ 1225, 1226(a), 1226(c), 1231(a). Finally, the Act allows an alien who wishes to challenge the legality of his or her detention to seek 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; *see also Demore v. Kim*, 538 U.S. 510, 516-17 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 687-88 (2001). Additionally, in implementing the Act and the constitutional limitations established by the courts, the Department of Homeland Security has promulgated regulations that provide detailed procedures for determining how long

the Supreme Court and the Eleventh Circuit have found to preclude *Bivens* remedies. *See, e.g.*, *Sharma v. Drug Enforcement Agency*, 511 F. App'x 898, 903 (11th Cir. 2013) (Controlled Substances Act); *Miller v. U.S. Dep't of Agr. Farm Servs. Agency*, 143 F.3d 1413, 1416 (11th Cir. 1998) (Administrative Procedures Act); *Rauschenberg v. Williamson*, 785 F.2d 985, 987 (11th Cir. 1986) (comprehensive nature of the Parole Commission and Reorganization Act, combined with the opportunity to seek habeas corpus relief, precluded *Bivens* remedy). In fact, the Supreme Court has characterized the Immigration and Nationality Act as "the comprehensive federal statutory scheme for regulation of immigration and naturalization." *De Canas v. Bica*, 424 U.S. 351, 353 (1976). The Ninth Circuit has rejected *Bivens* claims in the immigration context based on the existing remedial systems. *See Mirmehdi v. United States*, 689 F.3d 975, 982 (9th Cir. 2012) (declining to allow a *Bivens* action by an alien challenging his immigration detention in part because of "[t]he complexity and comprehensiveness of the existing remedial system"), *cert. denied*, 133 S. Ct. 2336 (2013); *Zundel v. Holder*, 687 F.3d 271, 279 (6th Cir. 2012) ("Through her *Bivens* claim, Mrs. Zundel essentially seeks to circumvent the administrative process governing the U.S. immigration system and receive damages for what she claims is her husband's unlawful deportation").

Here, Plaintiff had multiple opportunities in which he could—and did—challenge his immigration detention. In this case, the alternative remedies are not just theoretical—Plaintiff took full advantage of them. First, Plaintiff sought relief under 28 U.S.C. § 2255,

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an alien may be detained after he is ordered removed. *See* 8 C.F.R. § 241.4; 66 Fed. Reg. 56967, 56969 (Nov. 21, 2001).

asking the judge in his criminal proceedings to lift his immigration detainer. *See Alvarez v. United States*, no. 07-cv-61573-Cohn. Second, Plaintiff appeared before an immigration judge in his removal proceedings and was given an opportunity to contest the charges against him. *See* [DE 30] at ¶¶ 63, 65. Third, after the immigration judge ordered that he be removed and his detention continue, Plaintiff sought discretionary release from ICE. *See* [DE 30] at ¶ 65; 8 C.F.R. § 1236.1(c)(6). Fourth, the ICE Field Office Director conducted a post-order custody review to determine if Plaintiff should be detained beyond the 90-day initial period. *See* [DE 30] at ¶¶ 66-67. Fifth, the ICE Headquarters Post-Order Detention Unit conducted a review to determine if Plaintiff should be detained beyond 180 days. *See* [DE 30] at ¶ 90. Finally, to contest ICE's decision to keep him detained, Plaintiff filed a habeas corpus petition in federal district court, alleging that his detention was unconstitutional. *See Alvarez v. Holder, et al.*, No. 09-cv-89 (M.D. Ga.).

Like the plaintiffs in *Mirmedhi*, Plaintiff "could—and did—challenge their detention through not one but two different remedial systems," in immigration court and through a habeas petition. *Mirmedhi*, 689 F.3d at 982. Plaintiff "took full advantage of both." *Id.* The Court finds that a *Bivens* remedy is precluded in this case based upon the alternative, existing processes and remedies provided by the Immigration and Nationality Act and the habeas proceedings.

Having failed the first requirement for creating a *Bivens* remedy, the Court need not address the second requirement of special factors counseling hesitation. *See Hardison*, 375 F.3d at 1264. Nevertheless, the Court notes that "immigration issues 'have the natural tendency to affect diplomacy, foreign policy, and the

security of the nation,' which further 'counsels hesitation' in extending *Bivens*." *Mirmedhi*, 689 F.3d at 982 (quoting *Arar v. Ashcroft*, 585 F.3d 559, 574 (2nd Cir. 2009). *See also Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (stating that immigration matters "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Additionally, this case in particular presents special factors counseling hesitation, as it involves sensitive foreign policy considerations regarding the removal of a high-profile foreign national who was convicted of aggravated felonies.

5. Whether all the individual Defendants are entitled to qualified immunity

In the alternative, even if this case was not subject to dismissal for lack of subject matter jurisdiction, Defendants argue that this case must be dismissed because the individual Defendants are entitled to qualified immunity. This Court agrees.

Qualified immunity creates "breathing room to make reasonable mistaken judgments" and shields "'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). As the Eleventh Circuit has explained the framework for analysis of qualified immunity:

> The doctrine of qualified immunity provides that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223 (2009). "[Q]ualified immunity is a privilege that provides 'an *immunity from suit* rather than a mere defense to liability.'" *Bates v. Harvey,* 518 F.3d 1233, 1242 (11th Cir.2008) (quoting *Saucier v. Katz*, 533 U.S. 194, 200–01 (2001)). For this reason, the Supreme Court instructs courts to resolve "immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). To invoke qualified immunity, the official first must establish that he was acting within the scope of his discretionary authority. *Bates*, 518 F.3d at 1242. The burden then shifts to the plaintiff to overcome the defense of qualified immunity. *Id.*

Case v. Eslinger, 555 F.3d 1317 (11th Cir. 2009).

As a threshold matter, then, this Court must determine whether the individual Defendants were carrying out discretionary functions when they allegedly violated Plaintiff's constitutional rights. Actions are "discretionary functions" when they "are of a type that fell within the employee's job responsibilities" as shown by "(a) performing a legitimate job-related function (that is, pursuing a job-related goal), (b) through means that were within his power to utilize." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1265 (11th Cir. 2004). A court should evaluate the

general nature of the defendant's conduct, rather than focusing on the specifics. *Id.* at 1266. Here, Defendants were performing legitimate and authorized functions when they allegedly took actions to prolong Plaintiff's immigration detention.[12] Plaintiff's response appears to concede that the individual Defendants were carrying out discretionary functions with regard to the actions at issue in this case.

If a defendant successfully demonstrates that he was performing a discretionary function, the burden shifts to the plaintiff to show (1) that the plaintiff's allegations, if true, establish a constitutional violation, and (2) that the constitutional violation was clearly established at the time of the alleged actions, *Keating v. City of Miami*, 598 F.3d 753, 762 (11th Cir. 2010). The Court has discretion to decide which prong of the qualified immunity analysis to address first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Courts may grant qualified immunity on the ground that a purported right was not "clearly established" by prior case law. *Id.* Thus, the burden shifts to Plaintiff to establish that his complaint plausibly alleges that each of these defendants violated a clearly established constitutional right. *See Holloman ex rel. Holloman*, 370 F.3d at 1264.

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[12] At the May 16, 2014 hearing, Plaintiff's counsel explained that Plaintiff was not in fact eligible for Spanish citizenship in 2009 under a 2007 Spanish law because, even though it was true that Plaintiff's grandfather was born in Spain, he left Spain for Cuba too early to qualify. The Court notes that, assuming the accuracy of those statements, there is no allegation that an individual Defendant had a definitive understanding of that nuance of a relatively new Spanish law and the underlying facts related thereto at all times during Plaintiff's immigration detention.

Upon consideration of the allegations in the Amended Complaint, Plaintiff cannot meet this standard for any of his constitutional claims. Plaintiff does not contest that at all relevant times he was in the United States in violation of immigration laws and regulations. Indeed, he concedes that ICE had the statutory authority to detain him. Plaintiff has not sufficiently alleged a violation of any clearly established Fourth or Fifth Amendment right by any Defendant. Plaintiff broadly argues that the individual Defendants are not entitled to qualified immunity based on a general notion that it is difficult to perceive that lying is not prohibited. However, this kind of broad generalization regarding the constitutional rights in question cannot suffice to overcome qualified immunity. "[Q]ualified immunity's 'clearly established' test does not operate at a high level of generality . . . ." *Doe v. Braddy*, 673 F.3d 1313, 1319 (11th Cir. 2012). "[T]he right allegedly violated must be established, 'not as a broad general proposition,' . . . but in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official . . . ." *Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)). Moreover, Plaintiff cannot proceed with his conspiracy claim in Count I, because he has failed to establish an actionable wrong to support the conspiracy, nor has he alleged sufficient facts to demonstrate that the Defendants reached an understanding to deny Plaintiff his rights.

6. Whether Defendants Emery and Wall are entitled to absolute immunity

Finally, Defendants argue that the claims against Defendants Emery and Wall must be dismissed because these Defendants are entitled to absolute immunity

because they were acting as advocates for the government in administrative or judicial proceedings. This Court agrees.

Functions entitled to absolute immunity are those that are "intimately associated with the judicial process." *Hart v. Hodges*, 587 F.3d 1288, 1295 (11th Cir. 2009) (citing *Van de Kamp v. Goldstein*, 555 U.S. 335, 343 (2009)), and the official seeking absolute immunity "bears the burden of showing that such immunity is justified for the function in question." *Burns v. Reed*, 500 U.S. 478, 486 (1991).

Based upon Plaintiff's allegations, Defendant Emery is alleged to have testified falsely in court and then to have declined to stipulate to Plaintiff's removal, which led to immigration charges being filed in court. *See* [DE 30] at ¶¶ 47-48, 60-62. Defendant Wall is likewise accused of filing a false affidavit in court. *See id.* at ¶¶ 84-85. Far from avoiding judicial scrutiny, Defendants Emery and Wall invited it with their actions. Therefore, because all of the alleged conduct attributed to Defendants Emery and Wall was intimately associated with the judicial process, they are entitled to absolute immunity. *See Hart*, 587 F.3d at 1298 ("As we repeatedly have stated, the determination of absolute prosecutorial immunity depends on the nature of the function performed, not whether the prosecutor performed that function incorrectly or even with dishonesty, such as presenting perjured testimony in court.").

III. CONCLUSION

Based upon the foregoing reasons, nearly all of which are independent grounds for dismissal of this action as to the Individual Defendants, the Individual

Defendants' Motion to Dismiss [DE 34] is hereby GRANTED.

On or before May 26, 2014, the parties shall brief the effect of this Order on any issues remaining in the above-styled action.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 16th day of May, 2014.

/s/ William P. Dimitrouleas
William P. Dimitrouleas
United States District Judge

Copies to:
Counsel of record

APPENDIX D

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

[Filed December 10, 2013]

Case No.: 13-cv-21286

SANTIAGO ALVAREZ,

Plaintiff,

v.

FELICIA SKINNER, MICHAEL GLADISH, JUAN C. MUNOZ, ROBERT EMERY, and SHEETUL S. WALL,

Defendants.

AMENDED COMPLAINT

Plaintiff, SANTIAGO ALVAREZ, by and through his undersigned counsel, hereby sues Defendants, FELICIA SKINNER, individually; MICHAEL GLADISH, individually; JUAN C. MUNOZ, individually; ROBERT EMERY, individually; and SHEETUL S. WALL, individually (collectively, or any combination of whom hereinafter being referred to as the "Defendants"), stating as follows:

JURISDICTION AND VENUE

1. This action primarily arises from violations of the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution as well as violations of Florida common law.

2. The jurisdiction of this Court is based upon 28 U.S.C. § 1331 and § 1343, which confer jurisdiction on

federal courts to remedy the deprivation of constitutionally protected rights and on 42 U.S.C. §1985, which confers jurisdiction on federal courts to prevent and remedy the deprivation of civil rights.

3. This Court also has supplemental jurisdiction over the Florida based common law claims asserted herein under 28 U.S.C. § 1367(a).

4. The Defendants are all subject to personal jurisdiction in Florida because they knew or reasonably should have known that their violations of Mr. Alvarez's constitutional and civil rights and intentional tortuous actions, all designed to prolong Mr. Alvarez's detention and enjoyment of his freedom and liberty, would have their effect in Miami-Dade County, Florida where Mr. Alvarez has permanently resided for the past 53 years. But for the Defendants' transgressions, Mr. Alvarez would have been released from detention and would have earlier enjoyed his freedom and liberty in Miami-Dade County, Florida. The Defendants, therefore, had to reasonably expect being answerable for the intended effect of their actions in Florida.

5. The venue of this action also properly lies in the United States District Court for the Southern District of Florida because Miami-Dade County, Florida is where Santiago Alvarez has permanently resided for the past 53 years and it is where he would have been released earlier to enjoy his freedom and liberty, but for the constitutional transgressions and intentional tortious actions of the Defendants, as described below.

6. All conditions precedent to the bringing of this action have been performed or satisfied, or have been excused prior to the institution of this action.

PARTIES

7. Plaintiff, Santiago Alvarez ("Mr. Alvarez"), is a resident of Miami-Dade County, Florida, and otherwise sui juris.

8. Defendant, Felicia Skinner ("Skinner"), at all material times, was the U.S. Immigration and Customs Enforcement Field Office Director of the Office of Detention and Removal, which is a government entity and an agency of the United States.

9. Defendant, Michael Gladish ("Gladish"), at all material times, was the Supervisory Detention and Deportation Officer at the Stewart Detention Facility and an employee and agent of the Department of Homeland Security U.S. Immigration and Customs Enforcement, which is a government entity and an agency of the United States.

10. Defendant, Juan C. Munoz ("Munoz"), at all material times, was the Acting HQCMU Chief for the U.S. Immigration and Customs Enforcement, which is a government entity and an agency of the United States.

11. Defendant, Robert Emery ("Attorney Emery"), at all material times, was an Assistant United States Attorney.

12. Defendant, Sheetul S. Wall ("Attorney Wall"), at all material times, was an Assistant United States Attorney, which is a government entity and an agency of the United States.

13. Santiago Alvarez reserves the right to sue the presently unknown and unidentified department heads, officials and/or agents of (a) U.S. Immigration and Customs Enforcement, (b) The U.S. Department of Homeland Security, (c) The U.S. Department of

Justice and (d) The United States Attorney General who, upon information and belief, acted beyond the scope of their authority and duties and were responsible for, or through whom, Mr. Alvarez was deprived of his freedom and liberty through his prolonged detention. Mr. Alvarez will supplement this Amended Complaint to name said individuals once they have been identified through discovery.

BACKGROUND FACTS

Alvarez's Allegiance, Ties and Permanency to This Country

14. Santiago Alvarez is a 71 year old Cuban national who had strong political roots in Cuba. At different times, his father served as governor and senator of the Province of Matanzas.

15. Fleeing the political and economic persecution of Fidel Castro's controlled Cuba in favor of democracy, Mr. Alvarez and his family left Cuba in 1959.

16. On October 20, 1959, Mr. Alvarez and his family were admitted to the United States as lawful permanent residents.

17. Shortly after being admitted into the United States, Mr. Alvarez demonstrated his allegiance and service to the United States.

18. Mr. Alvarez's service to the United States began when he was recruited and served under the Central Intelligence Agency ("CIA") from the latter months of 1960 through mid-1961. Both he and his father were recruited by the CIA to participate in the failed Bay of Pigs invasion.

19. In 1962, Mr. Alvarez enlisted in the U.S. Army ("Army") and received extensive military training by

the Army and the CIA for the possible invasion of Cuba.

20. After his military service to this country and the Bay of Pigs invasion, the United States continued to train and use Mr. Alvarez's services in the national interest. From 1963 to 1965, Mr. Alvarez again served this country though various CIA sponsored missions and operations.

21. Mr. Alvarez was an Army reservist for an additional five years until his Honorable Discharge in 1968.

22. After his years of dedication to and deployment by the United States during the last seven of his first nine years in this country, Mr. Alvarez settled in Miami, Florida where, together with his wife, Vivian Perez Alvarez, they raised their son and daughter.

23. Mr. Alvarez's story is the embodiment of the American dream.

24. Coming to the United States with only his aspirations and desire to live in a free country, having been stripped of all possessions and belongings, Mr. Alvarez worked his way up from sweeping floors and washing dishes to becoming a developer and real estate entrepreneur.

25. After many years of hard work and personal sacrifice, Mr. Alvarez eventually became a highly respected and successful businessman.

26. His success and good fortune allowed Mr. Alvarez to be a humanitarian both in this country and abroad.

27. Mr. Alvarez's humanitarianism ranged from raising funds to build homes in earthquake stricken El Salvador, to taking convoys of trucks to Hurricane

Katrina stricken New Orleans in the midst of the violence and riots.

28. Mr. Alvarez also focused his humanitarianism on his native Cuba by actively pursuing his goal of democratic change in his homeland. He raised funds to purchase satellite communication capabilities for certain churches, meeting centers, and homes in Cuba with the purpose of exposing Cuban citizens to democratic free thought, ideas, and speech.

29. Besides his proven allegiance to the United States and his humanitarian good works in this country, Mr. Alvarez also established his permanency in the United States and to the South Florida community. He has resided in Miami Dade County, Florida for the past 53 years since 1959.

30. Mr. Alvarez's two American-born children were raised by him and his wife in South Florida. The Alvarezes' five grandchildren also have been raised in South Florida.

31. Over the course of his 53 years in this country, Mr. Alvarez established his businesses in the South Florida area where he became a community leader and earned widespread popular support and respect.

Alvarez's Immigration Problems

32. After 31 years of leading a model life in the United States, Mr. Alvarez was charged with aggravated assault and aggravated battery with a gun arising from a confrontation with a repossession agent who had (without any notice to Mr. Alvarez) mistakenly removed Mr. Alvarez's car from the Alvarezes' family home at night while they were asleep.

33. Mr. Alvarez pled *nolo contendere* and was sentenced in 1990 to six months of community service to

be served on weekends followed up by five years of probation, which eventually was reduced due to his good conduct.

34. After a trip abroad, on December 19, 2003, Mr. Alvarez sought admission to the United States as a lawful permanent resident. Due to his 1990 conviction, Mr. Alvarez's admission was denied by Immigration and Customs Enforcement, which deferred his inspection and paroled him into the United States.

35. In November, 2005, Mr. Alvarez was arrested and charged in the United States District Court for the Southern District of Florida with possessing illegal weapons allegedly stored for the benefit of anti-Castro activities outside of the United States.

36. Mr. Alvarez, as a result of plea negotiations, ultimately pled guilty to conspiracy to possess some of the illegal weapons on September 11, 2006, and was sentenced to 46 months of imprisonment on November 14, 2006.

37. The observations and statements made by the Federal District Court Judge, who knew Mr. Alvarez well, having presided over the proceedings, and the Assistant U.S. Attorney prosecuting the case leave no doubt that, despite the seriousness of the offense, Mr. Alvarez was never a flight risk or a danger to his community.

38. During the sentencing hearing, the Honorable Judge Cohn stated, "We have two gentlemen (Mr. Alvarez and his co defendant) who, by all accounts, are compassionate, benevolent, and patriotic, not only to Cuba but to the United States."

39. At a subsequent reduction of sentencing hearing under Federal Rule of Criminal Procedure 35,

which resulted from a negotiated anonymous turnover of certain weapons, the Assistant U.S. Attorney stated: "It is the Government's position that the turning of these weapons makes our community a safer place to be."

40. Judge Cohn reduced Mr. Alvarez's sentence from 46 months to 30 months, again noting the widespread community support for Mr. Alvarez and that his actions, while violative of the law, were altruistically motivated.

41. During the plea negotiations in the Florida conspiracy weapons case, Mr. Alvarez's attorneys raised concerns regarding the impact a guilty plea would have on his immigration status. Mr. Alvarez's attorneys were assured by the Department of Justice that Cubans, especially Cubans like Mr. Alvarez, which were well-known opponents of Fidel Castro's regime, would not be deported to Cuba.

42. The Government's initial representations that it would not seek to deport Mr. Alvarez was grounded on the reality that there was no repatriation agreement with Cuba and the reality that the United States would not hand him over to Fidel Castro for persecution and torture in Cuba. Fidel Castro had, in the recent past, singled out Mr. Alvarez in several virulent speeches accusing him of planning and carrying out hostile acts in Cuba.

43. Nevertheless, because the nature of the offenses to which Mr. Alvarez pled guilty in September, 2006, would subject him to deportability after completion of his sentence under a final order of removal, which would permit ICE to detain him for a reasonable amount of time (while looking for a third country), the Government agreed in the plea agreement "to utilize

its best efforts with officials of [ICE] to reach a definitive understanding of [Mr. Alvarez's] immigration status and the effect of this case on his immigration status."

44. Local ICE representatives were, during the plea negotiations and thereafter, fully informed of the material commitment made to Mr. Alvarez in the plea agreement – to make a decision within a reasonable period of time regarding Mr. Alvarez's immigration status.

45. Later on, Mr. Alvarez learned that the commitment made to him was a hollow promise as neither the Department of Justice nor ICE did anything to make a decision regarding Mr. Alvarez's immigration status.

46. In late August, 2007, only three months shy of Mr. Alvarez's placement in a halfway house facility (scheduled on or about November 5, 2007), ICE lodged an immigration detainer against Mr. Alvarez, thereby frustrating his expectation that he would spend the last few months of his sentence in home confinement.

47. When Mr. Alvarez filed his motion in the Florida weapons conspiracy case to lift the immigration detainer in October, 2007, ICE completely disavowed being bound by any "immigration commitment" to Mr. Alvarez.

48. The discussion between Magistrate Judge Seltzer and ICE's Deputy Chief Counsel, Robert Emery, foretold what Mr. Alvarez was to expect from ICE and the "best efforts" commitment made to him regarding making an expeditious decision as to his deportability to a third country. The exchange between Magistrate Judge Seltzer and ICE's Chief Deputy Counsel was as follows:

The Court: Mr. Emery, although this may be a collateral issue on the instant motion, for my own edification I'm just curious. If in fact the Defendant can not be deported back to Cuba, why is it that you would keep him in custody for several months if there is no way he's going to be able to be deported?

Mr. Emery: Judge, under INA, under Section 241, I will get the USC cite in a second, said if you can't remove an alien to the country where he is a native citizen of, then we have the opportunity to remove that alien to a third country.

The Court: But realistically, is there any country that's going to take this gentleman?

Mr. Emery: Judge, it is premature at this point. That's why the Supreme Court affords us, and Congress affords us, at least ninety days once you have a final order of removal to look at these issues.

The Court: Has there been any Cuban national deported to a third country?

Mr. Emery: I can't answer that Judge. I don't know.

The Court: It does – and again, I won't – I don't want to put the cart before the horse, maybe it is a collateral issue, but it does smack of unnecessarily punitive if at the end of the day you are going to cut him loose and you're going to say "well, there is no place we could deport him."

49. Defendant, Attorney Emery, presumably with other currently unknown individuals believed to be

government officials and/or agents, knew that there was no potential "third country" to which Mr. Alvarez would be removed and that the representations of a "third country" were knowingly and unjustifiably made solely to prolong Mr. Alvarez's detainment and to keep him from enjoying his freedom in Florida.

50. During the same time frame that Mr. Alvarez had been subject to an immigration detainer and challenges were made regarding the commitment made to determine his "immigration status", the Department of Justice (through the U.S. Attorney's Office in the Western District of El Paso, Texas), before he could complete his 30 month sentence, summoned Mr. Alvarez to appear before the grand jury empanelled in the United States District Court for the Western District of El Paso, Texas (the "El Paso Case"). Through the grand jury subpoena, the Government sought Mr. Alvarez to support its position that he assisted Luis Posada Carilles' entry into the United States.

51. In both the conspiracy to possess weapons and obstruction of justice cases, Mr. Alvarez steadfastly maintained, providing information and other evidence to the Government, that the confidential informant was working with Cuban intelligence.

52. Fearing, however, a perjury trap, Mr. Alvarez refused to testify and was charged with obstruction of justice in the El Paso Case, to which he pled guilty and was sentenced on February 8, 2008, to an additional ten months of imprisonment.

53. After an extensive jury trial, Luis Posada Carilles was eventually found not guilty by a jury of his peers.

54. After Mr. Alvarez completed his two prison sentences and Mr. Carilles was found not guilty, the confidential informant returned to Cuba being rewarded by the Cuban communist regime with a private home and private car.

The Signs and Manifestations of the Bad Faith and Vindictive Actions Against Alvarez

55. Realizing that the commitment made to Mr. Alvarez in paragraph 11 of the plea agreement meant nothing to the persons who made or approved the commitment, Mr. Alvarez's immigration attorneys took proactive steps, while Mr. Alvarez was serving his sentence in the El Paso Case, to reach some form of agreement with ICE to minimize ICE's physical detention of Mr. Alvarez after completing his El Paso sentence.

56. First, on or about May, 2008, Mr. Alvarez's immigration attorneys proposed to Defendant, Attorney Emery, to accept a final order of removal in return for a stipulation to a grant of deferral of removal to Cuba pursuant to the Convention Against Torture ("CAT").

57. Attorney Emery, who had recently claimed not to be able to answer the question posed by Magistrate Judge Seltzer regarding whether Cubans in Mr. Alvarez's position were being removed to third countries, rejected Mr. Alvarez's proposal to stipulate to relief under CAT.

58. Attorney Emery represented that protection under CAT was not necessary because Cuban nationals like Mr. Alvarez were not being physically deported to Cuba.

59. Thereafter, prior to Mr. Alvarez's scheduled release from his El Paso imprisonment on November 25, 2008, Mr. Alvarez's immigration attorneys attempted to enter into a stipulated final order of removal through Attorney Emery.

60. Again, the objective of reaching a stipulated order of final removal before Mr. Alvarez's release from prison was to start ICE's 90 day statutory removal review period as close as possible to November 25, 2008, when Mr. Alvarez was expected to be taken into physical custody by ICE.

61. After months of discussions and negotiations, Defendant, Attorney Emery, arbitrarily withdrew his offer to enter into a removal stipulation just one week prior to Mr. Alvarez's scheduled release from his prison term in the El Paso case.

62. The known and calculated effect of Attorney Emery's unexpected withdrawal of the removal stipulation was that Mr. Alvarez was taken into ICE's custody on November 25, 2008, without a stipulated order of removal and ICE's 90-day statutory removal review period not yet triggered.

63. Mr. Alvarez, instead of having a final order of removal in place sometime after November 25, 2008, and before December 31, 2008, which should have resulted in Mr. Alvarez's release from ICE's physical detention by no later than March 31, 2009, had to wait until January 22, 2009, to accept a Final Order of Removal to Cuba.

64. Mr. Alvarez's 90-day removal period to Cuba or to a third country, the first option being known not to be a humane possibility and the second option not to be a realistic or a practical reality, began on

January 22, 2009 (and not on November 25, 2008), and ended on April 22, 2009.

65. Immediately after his Final Order of Removal on January 22, 2009, Mr. Alvarez, through his immigration attorneys, requested Defendant, Skinner, to expedite the 90-day removal review process highlighting the fact that Mr. Alvarez could not be removed to Cuba because he would assuredly be "dead on arrival" and that his removal to a third country was not a practical reality. Mr. Alvarez's plea to Skinner was supported by ample documentation demonstrating that Mr. Alvarez was not a "flight risk" or a danger to the community.

66. Defendant, Skinner, deliberately chose to ignore what she already knew – Mr. Alvarez would not be removed to Cuba or to a third country – and, in bad faith, waited until the last day of the removal period on April 22, 2009, to serve Mr. Alvarez with the "First Decision to Continue Detention" she executed.

67. Defendant, Skinner's decision to continue Mr. Alvarez's physical detention, which, upon information and belief, was effectuated and carried out with the assistance of other currently unknown officials and agents of the involved governmental agencies, was laden with two bad faith and false premises. It was based on the knowingly false premise advanced by Skinner that "presently there is no reason to believe that your removal will not take place within the reasonably foreseeable future." It also was based on what Skinner knew not to be true: "You pose a danger to the community and/or the safety of persons and also pose a significant flight risk."

68. In her First Decision to Continue Detention on April 22, 2009, Defendant, Skinner, stated that "if [Mr.

Alvarez] has not been released or removed by the United States by July 21, 2009, jurisdiction of the custody decision . . . will be transferred to the Headquarters Case Management Unit."

69. July 21, 2009 came and went without ICE doing anything to secure Mr. Alvarez's removal from the United States.

70. The only known action ICE and/or the Department of Homeland Security took, during the period of April 22, 2009 to July 21, 2009, was to attempt to take opportunistic advantage over the concerns Mr. Alvarez raised to them of public statements and rumors at that time of a change in U.S. Immigration Policy. The rumored policy change was that Cuban nationals, like Alvarez, who previously had not been considered deportable to Cuba, were now being deported.

71. When Mr. Alvarez's immigration attorneys raised this issue to Attorney Emery and to representatives of ICE and the Department of Homeland Security requesting confirmation regarding the validity of these public statements, they refused to either confirm or deny their accuracy.

72. Not surprisingly, presently unknown department heads, officers or agents of ICE and the Department of Homeland Security rejected the proposal of Mr. Alvarez's immigration attorneys to "open up" his Final Order of Removal to allow Mr. Alvarez to seek relief under CAT – in order to be able to protect himself against removal to Cuba where he would be subject to persecution, torture, and most likely a firing squad – on the condition that the 90-day removal review clock not be turned back and that Mr. Alvarez

receive credit for the time he had already been in ICE's custody.

73. ICE and/or The Department of Homeland Security, acting through and at the direction and instruction of currently unknown and unidentified Defendants, instead proposed, with the deliberate purpose of preying on Mr. Alvarez's concerns regarding his deportability to Cuba, that Mr. Alvarez to agree to have his Final Order of Removal vacated to re-start the 90-day removal review period.

74. After eight months in ICE's exclusive custody since November 25, 2008, and six months after having accepted his Final Order of Removal on January 22, 2009, ICE and the Department of Homeland Security were no closer to having Mr. Alvarez deported to Cuba or removed to a third country than they were on November 25, 2008.

75. Mr. Alvarez's repeated requests for his freedom were rejected by Defendant, Skinner, and other suspected Defendants, presumably individuals, acting beyond the scope of their authority, as department heads, officers, or agents of ICE and the Department of Homeland Security ostensibly because and based on their knowingly false position that he was a flight risk and posed a danger to the community.

The Habeas Proceedings and Alvarez's
Unconstitutionally Prolonged
and Unlawful Detention

76. On July 28, 2009, Mr. Alvarez filed a Petition for Habeas Corpus Relief in the United States District Court for the Middle District of Georgia where Mr. Alvarez was being detained.

77. When Mr. Alvarez sought his physical release, liberty and freedom on July 28, 2009, twenty-two months had passed since presently unknown department heads, officers, or agents of the Department of Justice and ICE acting beyond the scope of their authority, had committed in bad faith to reach a definitive understanding regarding his immigration status. Nine months had also passed since November 25, 2008, when ICE took him into physical custody after Defendant, Attorney Emery, undermined his efforts to have a stipulated order of removal secured by that date.

78. The actions or purposeful inaction of the known and presently unknown Defendants, prior to Mr. Alvarez's habeas proceedings, were deliberate and motivated by a common purpose: to prolong Mr. Alvarez's physical detention and deprive him of the enjoyment of his freedom and liberty in Florida in violation of his constitutional and other fundamental rights.

79. The persistent efforts and bad faith actions of the known and unknown Defendants to deprive Mr. Alvarez of his freedom and liberty continued into Mr. Alvarez's habeas proceedings.

80. The day following Mr. Alvarez's habeas petition, the Federal District Court for the Middle District of Georgia ordered ICE and the Department of Homeland Security to file their answer, together with the record and transcripts of the proceedings, by September 28, 2009.

81. Since the objective was to deprive Mr. Alvarez of his freedom and liberty, the bad faith decision was made by presently unknown Defendants (presumably department heads, officers, or agents of ICE and the

Department of Homeland Security) to wait 49 days, up to the September 28, 2009 deadline, to file a bad faith motion to further extend the time by almost three months, to file the Court-ordered answer, together with the record and the transcripts of the proceedings.

82. The motion was "supported" by the Declaration of Defendant, Gladish, who then worked for ICE, and who made the false statement that ICE "is no longer pursuing Alvarez's removal to Cuba," when, in fact, his removal to Cuba was never a humane possibility, and the knowingly false statement that Mr. Alvarez's removal to Spain was a realistic and foreseeable option in the reasonably foreseeable future based upon Mr. Alvarez's eligibility for Spanish citizenship.

83. Defendant, Attorney Wall, made the same false statements in the bad faith motion for extension she filed to delay the Federal District Court for the Middle District of Georgia's review of the constitutionality of Mr. Alvarez's continued detention, and thereby, delay his freedom and liberty.

84. Defendants, Attorney Wall and Gladish, acting on their own or at the direction of unknown Defendants made these false assertions, and filed the fraudulent motion, with the purpose of having the Federal District Court for the Middle District of Georgia to act upon them by granting the extension and thus, continue to prolong judicial inquiry into and review of the constitutionality of the deprivation of Mr. Alvarez's freedom and liberty.

85. The Federal District Court, relying upon the facial "candor" of the motion for extension and the false Declaration, immediately granted the extension until December 10, 2009.

86. Mr. Alvarez unmasked the falsehood of the motion for extension and the supporting Declaration by filing a motion for reconsideration, with documentation establishing that he was never eligible for Spanish citizenship under the "recent change in Spanish law" referred to by Attorney Wall in her motion and by Gladish in his Declaration." In fact, Mr. Alvarez was knowingly misled regarding the feasibility of his application for Spanish citizenship; being only provided with a partial application conveniently leaving out the remaining pages which would have made it clear that he was never eligible for Spanish citizenship.

87. Even after being given an opportunity to recant their false oaths and false statements in the habeas proceedings, Gladish and Attorney Wall, acting on their own or at the direction or assistance of unknown Defendants, persisted in their efforts to unconstitutionally deprive Mr. Alvarez of his freedom and liberty by advancing the ruse of Mr. Alvarez's Spanish citizenship.

88. On October 9, 2009, the Federal District Court entered two orders: the first order scheduled for hearing on October 26, 2009 ". . . for factual development and consideration," Mr. Alvarez's claim that ICE's and the Department of Homeland Security's claim of Mr. Alvarez's future Spanish citizenship were false; and the second order rescinded the 60-day extension to answer and ordered ICE and the Department of Homeland Security to appear on October 26, 2009, to argue the merits of Mr. Alvarez's constitutional claim.

89. The efforts to continue to prolong Mr. Alvarez's freedom and liberty through whatever means, even if false, continued.

90. On October 14, 2009, the farce of Mr. Alvarez's removal to Spain was further perpetuated when Defendant, Munoz, served Mr. Alvarez with the "Second" Decision to Continue Detention he executed, this time claiming that ICE and the Department of Homeland Security were working with the government of Spain to secure Mr. Alvarez's deportation to Spain and that his removal was "reasonably foreseeable" in the future. The underlying false premise of Mr. Alvarez's foreseeable removal to Spain was his eligibility for Spanish citizenship. Defendant Munoz's Second Decision to Continue Detention was, upon information and belief, effectuated and carried out with the assistance of other presently unknown Defendants.

91. The known and unknown Defendants who made the statements of Mr. Alvarez's eligibility for Spanish citizenship and removal to Spain knew the statements not to be true and only made them to continue to detain and deprive Mr. Alvarez of his freedom and liberty.

92. Only seven days after Defendant, Munoz, issued his Second Decision to Continue Detention based upon the "imminence" of Mr. Alvarez's removal to Spain, and only two business days before the scheduled evidentiary hearings, Mr. Alvarez was abruptly notified of his release on October 21, 2009, and was quickly released that day. ICE Officer Louis, who notified Mr. Alvarez of his immediate release, later testified in the *habeas* proceedings that Mr. Alvarez protested his release because he wanted "his day in Court" to expose the lies regarding his removal to Spain. Mr. Alvarez was instructed to leave that day and was "rushed out" of the detention center before his family and lawyers were even notified of his release

and plans could be made to secure his transportation to his home in Miami, Florida.

93. Mr. Alvarez's abrupt and unexpected release to the public at large occurred just a few months after Defendant, Skinner's "First Decision to Continue Detention" on April 22, 2009, and completely belied Skinner's claim that Mr. Alvarez was a "flight risk" and a "dangerous person".

94. To avoid the complete unraveling of their ruse of Mr. Alvarez's removal to Spain and with the specific intent to prevent the truth from finally coming out, presently unknown Defendants, presumably representatives of ICE, the Department of Homeland Security, and the Department of Justice, waited until October 22, 2009, at 6:30 p.m. to have their attorney file a motion to dismiss claiming that Mr. Alvarez's habeas petition was moot and that the Federal District Court for the Middle District of Georgia was without jurisdiction to proceed with the evidentiary hearings.

95. The Federal District Court for the Middle District of Georgia nevertheless proceeded on October 26, 2009, and after conducting an evidentiary hearing entered its Order determining that Mr. Alvarez was not a flight risk or a threat to the community as Defendant, Skinner, had claimed in her First Decision to Continue Detention to justify prolonging Mr. Alvarez's freedom and liberty past April 22, 2009.

96. The Federal District Court also granted Mr. Alvarez's *habeas* petition.

97. ICE and the Department of Homeland Security appealed the Order to the Eleventh Circuit Court of Appeals, which affirmed the Federal District Court's determination of jurisdiction and grant of habeas relief to Mr. Alvarez.

98. The Federal District Court found that Skinner's decision to continue to detain Mr. Alvarez past April 22, 2009, ostensibly because he posed a flight risk and was a danger to the community was not a legitimate determination. This finding is *res judicata*.

99. Each of the Defendants involved in the actions described above – both those who are now specifically named and those which will be named once discovery is conducted – acted outside and beyond the scope of the authority granted to him/her and with the specific intent to cause harm to Mr. Alvarez, to violate Mr. Alvarez's constitutional and civil rights, and to cause the other violations of Florida common law as set forth herein. Moreover, each of the Defendants involved in the actions described above – both those who are now specifically named and those which will be named once discovery is conducted – acted with improper or wrongful motives or in reckless disregard of Mr. Alvarez's rights.

Potential Defendants Who Could Be
Specifically Named During or After Discovery

100. While Mr. Alvarez has named as Defendants those specific individuals currently known to him to be directly involved in the unlawful and unconstitutional activities described herein, it is clear that there were others involved who are accountable to Mr. Alvarez for their actions. In fact, based upon the nature of the actions described herein, it is presumed that department heads, directors and supervisors of one or more of the governmental agencies named herein directed, had direct personal involvement, or participated in the offensive actions of the named Defendants.

COUNT I

CONSPIRACY TO PROLONG
ALVAREZ'S RELEASE AND TO VIOLATE
HIS FUNDAMENTAL RIGHT TO
FREEDOM AND LIBERTY

101. Plaintiff, Santiago Alvarez, repeats and realleges the allegations of paragraphs 1 through 100 as if fully set forth herein.

102. A conspiracy was entered into by any one or combination of the Defendants and presumably other Defendants whose identities are presently unknown.

103. The purpose of the conspiracy was to prolong Mr. Alvarez's freedom and liberty for as long as possible.

104. The acts in furtherance of the conspiracy may date back to shortly after September 11, 2006, when certain representatives of the Department of Justice, after "consulting" with ICE, misled Mr. Alvarez to enter into the plea agreement in the Florida weapons conspiracy case by convincing him that a good faith best effort would be undertaken to determine his immigration status.

105. Since Mr. Alvarez was not a U.S. Citizen, the charges to which he pled guilty were known at the time to subject him to removal-deportation; thus, a determination of Mr. Alvarez's immigration status would have no meaning unless it meant finding a third-country to which he could be removed.

106. Despite the "best efforts" commitment made to Mr. Alvarez, in keeping with their desired objective of prolonging Mr. Alvarez's immigration problems as much as possible, no effort was made to find a third-country for removal.

107. In furtherance of the conspiracy to aggravate the immigration consequences of Mr. Alvarez's conviction and to prolong his freedom and liberty, Defendant, Attorney Emery, misled Mr. Alvarez's immigration attorneys to believe that a stipulated final order of removal would be reached on or about November 25, 2008, the date Mr. Alvarez was to have completed his sentence in the El Paso case and was to be taken into ICE's exclusive custody.

108. The stipulated final order of removal, however, was in bad faith withdrawn by Attorney Emery just one week before November 25, 2008.

109. By not having a stipulated final order of removal in place, the objective of the conspiracy was furthered; it delayed ICE's 90-day statutory removal period to theoretically find a third-country which would accept Mr. Alvarez (which certain known and also certain presently unknown department heads, directors and/or officials of ICE, the Department of Homeland Security, and the Department of Justice knew in advance was not a realistic possibility).

110. A stipulated final order of removal by November 25, 2008, or shortly thereafter, would have resulted in Mr. Alvarez's release from ICE's custody by no later than March 31, 2009, had certain known and also certain presently unknown department heads, directors and/or officials of ICE, the Department of Homeland Security, and the Department of Justice not acted in bad faith. Instead, he was unlawfully and improperly detained and his freedom and liberty were delayed until October 21, 2009.

111. Because of the purposeful actions of certain known and also certain presently unknown department heads, directors and/or officials of ICE, the

Department of Homeland Security and the Department of Justice, all beyond the scope of their authority and official duties in furtherance of the conspiracy, Mr. Alvarez had to wait until January 22, 2009, to accept his final order of removal; thereby delaying again his freedom and liberty to April 22, 2009.

112. Instead of releasing Mr. Alvarez, at the end of the statutory review removal period, Defendant, Skinner, and Defendant, Munoz, acting alone or with certain presently unknown department heads, directors and/or officials of ICE, the Department of Homeland Security and the Department of Justice, fabricated a pretextual reason to prolong his freedom and liberty: Mr. Alvarez posed a flight risk and a danger to the community.

113. The Federal District Court for the Middle District of Georgia, made the *res judicata* finding that there was no valid basis for this determination.

114. The determination that Mr. Alvarez posed a flight risk and was a danger to the community was squarely at odds with Mr. Alvarez's service, dedication and permanent ties to this country, as summarized in paragraphs 14 to 31 above, and was squarely at odds with the observations made by the Federal District Court in the Florida weapons conspiracy case, as noted in paragraphs 37 to 40 above.

115. Yet Defendants, Skinner and Munoz, presumably with presently unknown department heads, directors and/or officials of ICE, the Department of Homeland Security and the Department of Justice conceived this baseless claim to "justify" not giving Mr. Alvarez his freedom and liberty on April 22, 2009, and continuing his unlawful detention.

116. The acts taken in furtherance of the objective of the conspiracy included deliberately not discharging the statutory duty to seek a third-country to which to remove Mr. Alvarez.

117. After Mr. Alvarez had to file his petition for habeas relief seeking judicial reprieve from the illegal and unconstitutional deprivation of his freedom and liberty, the conspiracy continued.

118. In furtherance of the conspiracy, Defendant, Attorney Wall, was directed to file (just a few days before the Court-ordered deadline), a baseless motion supported by the false Declaration of ICE's representative, Defendant, Gladish, seeking an extension of close to four additional months to respond to the *habeas* petition.

119. The motion and the Declaration made the false claim that efforts were being made to remove Mr. Alvarez to Spain, ostensibly based upon a recent change in the laws of Spain which made him eligible for Spanish citizenship.

120. In fact, efforts were not being made to remove Mr. Alvarez to Spain and Mr. Alvarez was not eligible for Spanish citizenship.

121. The false claims of Mr. Alvarez's reasonably foreseeable removal to Spain were made in furtherance of the conspiracy to continue to prolong Mr. Alvarez's physical detention in violation of his fundamental right to his freedom and liberty.

122. The objective of the conspiracy was achieved: Mr. Alvarez was "falsely imprisoned" and deprived of his freedom and liberty since as long as from November 25, 2008, and for no less than from April 23, 2009. Mr. Alvarez was suddenly released on October

21, 2019, only because the conspiracy to deprive him of his freedom and liberty was about to be exposed at the evidentiary hearing scheduled on October 26, 2009.

123. Mr. Alvarez's loss of his liberty and freedom, in violation of his fundamental and constitutional rights, resulted in the loss of his enjoyment of life, the loss of economic and productive opportunities, and emotional and mental anguish.

124. The Defendants responsible for the damages and losses suffered by Mr. Alvarez also include the presently unknown department heads, executives, officers and functionaries of ICE, the Department of Homeland Security, and the Department of Justice who, individually, or in concert with each other, directed, orchestrated, supervised or carried out the overt acts of the conspiracy beyond the scope of their authority and official duties.

125. The acts of the individuals who acted under the "color of law" and "color of authority" for ICE, the Department of Homeland Security, and the Department of Justice would not have been implemented without the complicity of or knowledge of heads of these governmental agencies or branches, for which they are accountable.

126. Each of the Defendants who is found to have deprived Mr. Alvarez of his freedom and liberty is liable and accountable to Mr. Alvarez for all injuries and damages proximately caused thereby, including the following:

a) the loss of his enjoyment of life;

b) the loss of his physical liberty;

c) the loss of his earning capacity;

d) his emotional and mental anguish and distress; and

e) the attorney's fees and costs paid by him.

For the reasons set forth above, Plaintiff, Santiago Alvarez, demands a judgment for compensatory and punitive damages against all of the Defendants found to have proximately caused Mr. Alvarez's injuries and losses, for any other relief available under the law, and demands a trial by jury of all issues so triable.

COUNT II

VIOLATION OF ALVAREZ'S FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEIZURE

127. Plaintiff, Santiago Alvarez, repeats and realleges the allegations of paragraphs 1 through 100 as if fully set forth herein.

128. The Fourth Amendment to the Constitution of the United States provides as follows:

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

129. The Fourth Amendment to the Constitution guaranteed Mr. Alvarez's right not to be subject to the unreasonable seizure of his person.

130. The Defendants named or described above, either by deliberate inaction or through their overt actions, did everything possible, prior to the filing of

his habeas petition, to prolong ICE's physical detention of Mr. Alvarez and deprive him of his freedom and liberty through whatever means.

131. The Defendants' efforts also included Attorney Wall filing a false motion and Gladish filing a false Declaration in the *habeas* proceedings in order to further delay judicial inquiry into and consideration of the constitutionality of the continued deprivation of Mr. Alvarez's freedom and liberty.

132. Through their deliberate and bad faith actions, the Defendants caused Mr. Alvarez to be falsely imprisoned and deprived of his freedom and liberty since as long as from November 25, 2008, and certainly, since no less than from April 23, 2009, to October 21, 2009. Mr. Alvarez was suddenly released on October 21, 2009, only to avoid judicial inquiry at the evidentiary hearing scheduled on October 26, 2009, which would have uncovered deprivation of Mr. Alvarez's freedom and liberty.

133. Mr. Alvarez's loss of liberty and freedom at the hands of the Defendants constituted the unreasonable seizure of his person protected by the Fourth Amendment of the Constitution.

134. The Defendants' violation of Mr. Alvarez's Fourth Amendment right against the unreasonable seizure of his person is actionable and 28 U.S.C §1343(a) confers jurisdiction on this Court to remedy Mr. Alvarez's claims.

135. Each of the Defendants, who is found to have deprived Mr. Alvarez of his freedom and liberty, is liable and accountable to Mr. Alvarez for all injuries and damages proximately caused thereby, including the following:

a) the loss of his enjoyment of life;

b) the loss of his physical liberty;

c) the loss of his earning capacity;

d) his emotional and mental anguish and distress; and

e) the attorney's fees and costs paid by him.

For the reasons set forth above, Plaintiff, Santiago Alvarez, demands a judgment for compensatory and punitive damages against all of the Defendants found to have proximately caused Mr. Alvarez's injuries and losses, for any other relief available under the law, and demands a trial by jury for all issues so triable by right.

COUNT III

VIOLATION OF ALVAREZ'S FIFTH AMENDMENT RIGHT TO DUE PROCESS AND LIBERTY

136. Plaintiff, Santiago Alvarez, repeats and realleges the allegations of paragraphs 1 through 100 as if fully set forth herein.

137. The Fifth Amendment to the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without

> due process of law; nor shall private property be taken for public use, without just compensation.

138. Under the Fifth Amendment, Mr. Alvarez was protected against the deprivation of his life and liberty without due process of law.

139. The named Defendants, acting alone or presumably together with presently unknown Defendants, either by deliberate inaction or through their overt actions, did everything possible, through whatever means, to prolong ICE's physical detention of Mr. Alvarez and deprive him of his liberty and freedom without due process of law in violation of Mr. Alvarez's rights under the Fifth Amendment to the Constitution.

140. The Defendants' efforts also included Attorney Wall filing a false motion and Gladish a false Declaration in the *habeas* proceedings to delay Mr. Alvarez's due process right to judicial inquiry into and consideration of the constitutionality of the continued deprivation of his freedom and liberty.

141. By depriving Mr. Alvarez of the due process rights guaranteed to him by the Fifth Amendment to the Constitution, Mr. Alvarez suffered the loss of his liberty and freedom since as long as from November 25, 2008, and certainly, since no less than from April 23, 2009, through October 21, 2009.

142. The Defendants' violation of Mr. Alvarez's Fifth Amendment right not to be deprived of his liberty and freedom without due process of law is actionable and 28 U.S.C. § 1343(a) confers jurisdiction on this Court to remedy Mr. Alvarez's claims.

143. Each of the Defendants, who is found to have deprived Mr. Alvarez of his freedom and liberty, is liable and accountable to Mr. Alvarez for all injuries and damages proximately caused thereby, including the following:

a) the loss his of enjoyment of life;

b) the loss of his physical liberty;

c) the loss of his earning capacity;

d) his emotional and mental anguish and distress; and

e) the attorney's fees and costs paid by him.

For the reasons set forth above, Plaintiff, Santiago Alvarez, demands a judgment for compensatory and punitive damages against all of the Defendants found to have proximately caused Mr. Alvarez's injuries and losses, for any other relief available under the law, and demands a trial by jury for all issues so triable by right.

COUNT IV

FRAUD IN IMMIGRATION PROCEEDINGS AND UPON COURT

144. Plaintiff, Santiago Alvarez, repeats and realleges the allegations of paragraphs 1 through 100 as if fully set forth herein.

145. In order to justify ICE's continued detention of Mr. Alvarez, Defendants, Skinner, Gladish, Munoz, and Attorney Wall presumably with certain presently unknown Defendants believed to be department heads, executives, officials or functionaries of ICE and the Department of Homeland Security, fabricated the false claim that Mr. Alvarez posed a flight risk and was a danger to the community.

146. These Defendants also presented the knowingly false claims that they were actively pursuing Mr. Alvarez's removal to Cuba.

147. By making these false claims, these Defendants caused Mr. Alvarez to be deprived of his freedom and liberty past April 22, 2009.

148. At the behest of some or all of these Defendants, the Department of Justice, through the U.S. Attorneys Office in the Middle District of Georgia, caused to be filed, through Defendants, Attorney Wall and Gladish, pleadings in the *habeas* proceedings containing knowingly false statements.

149. A false motion was filed by Attorney Wall to extend the final hearing on the adjudication of Mr. Alvarez's claims that his continued detention by ICE was in violation of his constitutional rights.

150. The filed motion was supported by the Declaration of Gladish who, under oath, falsely asserted that due to a recent change in the laws of Spain, Mr. Alvarez was eligible for Spanish citizenship and that ICE and the Department of Homeland Security were in active negotiations with Spain to remove Mr. Alvarez to that country.

151. The false claims and assertions made by the presently known and unknown Defendants caused the continued deprivation of Mr. Alvarez's freedom and liberty.

152. As a result of the false claims, assertions, and false oaths filed by these Defendants, Mr. Alvarez suffered the loss of his liberty and freedom since as long as from November 25, 2008, and certainly since no less than from April 23, 2009, to October 21, 2009.

153. The Defendants' actions, which resulted in the deprivation of Mr. Alvarez's liberty and freedom, are actionable.

154. Each of the Defendants, who is found to have deprived Mr. Alvarez of his freedom and liberty, is liable and accountable to Mr. Alvarez for all injuries and damages proximately caused thereby, including the following:

a) the loss of enjoyment of life;

b) the loss of his physical liberty;

c) the loss of his earning capacity;

d) his emotional and mental anguish and distress; and

e) the attorney's fees and costs paid by him.

For the reasons set forth above, Plaintiff, Santiago Alvarez, demands a judgment for compensatory and punitive damages against all of the Defendants found to have proximately caused Mr. Alvarez's injuries and losses, for any other relief available under the law, and demands a trial by jury for all issues so triable by right.

COUNT V

DEPRIVATION OF ALVAREZ'S FREEDOM AND LIBERTY BECAUSE OF HIS POLITICAL BELIEFS

155. This is an action brought pursuant to 42 U.S.C. §1985 seeking redress for the punitive and vindictive actions taken against Plaintiff, Santiago Alvarez, because of his political beliefs.

156. Over the past 53 years, Plaintiff, Santiago Alvarez, has been a staunch opponent of the

communist regime in Cuba and has advocated and promoted democratic change in Cuba.

157. Forming an integral part of his political views and opinions regarding democratic change in Cuba, Santiago Alvarez also has actively supported opponents of the Castro regime with similar views and beliefs.

158. Mr. Alvarez's support for the opponents of the communist regime in Cuba has included providing monetary and other economic assistance to those persecuted in Cuba, abroad, and here in this country because of their political beliefs and philosophy regarding the communist regime in Cuba.

159. Mr. Alvarez's political beliefs and support for others who share or have common political beliefs regarding the need for democratic change in Cuba has been rejected and has been the source of angst by certain presently suspected individuals and others to be identified later with differing views and political beliefs.

160. These individuals, in retaliation of and with a vindictive purpose directed to Mr. Alvarez because of his political beliefs and support for others sharing those beliefs, have worked together or with the common purpose of punishing Mr. Alvarez for his political beliefs.

161. By taking the actions described herein with the intention of making it difficult for Mr. Alvarez to regain his freedom and liberty, Mr. Alvarez has been injured and has suffered damages.

162. The punitive actions taken against Mr. Alvarez included to Mr. Alvarez's present knowledge and belief, the following:

a. The false and misleading commitment made to him that his immigration status would be promptly determined;

b. The false and misleading commitment made to him that a final order of removal would be entered into by November 25, 2009;

c. The false claim made that he posed a fight risk and was a danger to the community to improperly justify his continued detention past the statutory 90-day removal period;

d. The false motion filed to delay the *habeas* proceedings misstating that his removal to Spain was reasonably foreseeable in light of a recent change in the laws of Spain, which made him eligible for Spanish citizenship;

e. The false affidavit filed in the *habeas* proceedings reiterating the same false statements made in the motion; and

f. The false statement made in the "Second Decision to Continue his Detention" that his removal to Spain was reasonably foreseeable.

163. Defendants, Skinner, Munoz, Gladish, Attorney Wall, and Attorney Emery were involved or participated in any one or combination of the punitive actions described above presumably together with other presently unknown Defendants.

For the reasons set forth above, Plaintiff, Santiago Alvarez, demands a judgment for compensatory and punitive damages against all of the Defendants found to have proximately caused Mr. Alvarez's injuries and

losses, for any other relief available under the law, and demands a trial by jury for all issues so triable by right

COUNT VI

CLAIMS FOR FALSE IMPRISONMENT

164. Plaintiff, Santiago Alvarez, repeats and realleges the allegations of paragraphs 1 through 100 as if fully set forth herein bringing this supplemental claim for false imprisonment under the substantive law of Florida.

165. The Defendants specifically named above, and those who will be named once discovery is conducted (who are believed to be the presently unknown department heads, executives, officials and functionaries of ICE, the Department of Homeland Security, the Department of Justice and the United States Attorney General) have, acting beyond the scope of their authority and duties, directed or made the false claims, false statements and false oaths described as described above, which caused or continued Mr. Alvarez's false imprisonment.

166. The Defendants who are found to have conspired, as alleged in Count I, to aggravate the immigration consequences of Mr. Alvarez as well as to prolong his unlawful detention are liable to Mr. Alvarez for his false imprisonment and the deprivation of his freedom and liberty.

167. These Defendants, directly or indirectly, procured the continued unlawful detention of Mr. Alvarez and prevented his earlier release to enjoy his freedom and liberty in Florida.

168. These Defendants caused the continued unlawful restraint of Mr. Alvarez against his will.

169. These Defendants took such actions, without legal authority or color of authority resulting in the unreasonable and unwarranted detention of Mr. Alvarez and the delay of his freedom and liberty.

170. Each of the Defendants, who is found to have caused the false imprisonment of Mr. Alvarez and deprived Mr. Alvarez of his freedom and liberty, is liable and accountable to Mr. Alvarez for all injuries and damages proximately caused thereby, including the following:

a) the loss his of enjoyment of life;

b) the loss of his physical liberty;

c) the loss of his earning capacity;

d) his emotional and mental anguish and distress; and

e) the attorney's fees and costs paid by him.

For the reasons set forth above, Plaintiff, Santiago Alvarez, demands a judgment for compensatory and punitive damages against all of the Defendants found to have proximately caused Mr. Alvarez's injuries and losses, for any other relief available under the law, and demands a trial by jury for all issues so triable by right.

COUNT VII

CLAIMS FOR MALICIOUS PROSECUTION

171. Plaintiff, Santiago Alvarez, repeats and realleges the allegations of paragraphs 1 through 100 as if fully set forth herein bringing this supplemental claim for malicious prosecution under the substantive law of Florida.

172. Defendants, Skinner, Munoz, Gladish and Attorney Wall, and those who will be named once identified through discovery who maliciously prosecuted Santiago Alvarez by acting beyond the scope of their authority and duties, directing, causing to be asserted or asserting the knowingly false claims that Mr. Alvarez posed a flight risk and was a danger to the community (as well as that they were seeking to deport Mr. Alvarez to Cuba and then to Spain) in order to continue to deprive Mr. Alvarez of his freedom and liberty after April 22, 2009.

173. These Defendants acted with malice to cause the continuation of Mr. Alvarez's removal immigration proceedings, his detention, and to delay the enjoyment of his freedom and liberty in Florida.

174. These Defendants did not have probable cause to claim that they were seeking to deport Mr. Alvarez to Cuba and that Mr. Alvarez posed a flight risk or was a danger to the community.

175. These Defendants furthered their malicious prosecution of Mr. Alvarez by later claiming that they were pursuing Mr. Alvarez's removal to Spain based upon a change in the immigration laws of that country, which made Mr. Alvarez eligible for Spanish citizenship. These false and/or misleading claims were made in order to delay the judicial adjudication of Mr. Alvarez's constitutional claims.

176. The fact that Mr. Alvarez was released on October 21, 2009, just before the Federal District Court for the Middle District of Georgia was going to inquire into the factual basis for the claims made by these Defendants as to Mr. Alvarez's reasonably foreseeable removal to Spain, belies all of the false

claims made by these Defendants in their malicious prosecution of Mr. Alvarez.

177. Mr. Alvarez was never being deported to Cuba, was not a danger to his community, and was not being removed to Spain.

178. Each of the Defendants, who is found to have maliciously prosecuted Mr. Alvarez and caused the loss of his freedom and liberty, is liable and accountable to Mr. Alvarez for all injuries and damages proximately caused thereby, including the following:

a) the loss his of enjoyment of life;

b) the loss of his physical liberty;

c) the loss of his earning capacity;

d) his emotional and mental anguish and distress; and

e) the attorney's fees and costs paid by him.

For the reasons set forth above, Plaintiff, Santiago Alvarez, demands a judgment for compensatory and punitive damages against all of the Defendants found to have proximately caused Mr. Alvarez's injuries and losses, for any other relief available under the law, and demands a trial by jury for all issues so triable by right.

COUNT VIII

CLAIMS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

179. Plaintiff, Santiago Alvarez, repeats and realleges the allegations of paragraphs 1 through 100 as if fully set forth herein bringing this supplemental claim for intentional infliction of emotional distress under the substantive law of Florida.

180. The conduct of the Defendants was extreme and outrageous and was intentional and/or done recklessly.

181. The above-mentioned acts were beyond the bounds of human decency, let alone the confines of the law, and were virtually certain to, and did in fact, result in Santiago Alvarez's emotional distress.

182. As a direct and proximate result of the acts of the Defendants, Plaintiff, Santiago Alvarez, has suffered severe physical, mental and emotional injuries and the loss of his enjoyment of life as heretofore alleged.

183. Based upon the foregoing, the Defendants' actions caused Santiago Alvarez to suffer great humiliation, embarrassment, and mental suffering.

For the reasons set forth above, Plaintiff, Santiago Alvarez, demands a judgment for compensatory and punitive damages against all of the Defendants found to have proximately caused Mr. Alvarez's injuries and losses, for any other relief available under the law, and demands a trial by jury for all issues so triable by right.

JURY TRIAL

Plaintiff, Santiago Alvarez, demands a jury trial on issues so triable.

DATED: December 10, 2013

Respectfully submitted,

/s/ Juan C. Zorrilla, Esq.
JUAN C. ZORRILLA, ESQ.
Fla. Bar No. 381403

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

[Filed October 30, 2009]

Case No. 4:09-CV-89 GMF

SANTIAGO ALVAREZ,

Petitioner,

v.

MICHAEL SWINTON, Warden, Stewart Detention Center MICHAEL GLADISH, Officer in Charge U.S. Immigration and Customs Enforcement, ("ICE") Office of Detention and Removal Stewart Detention Center, FELICIA SKINNER, ICE Field Office Director Office of Detention and Removal, Atlanta District, JAMES T. HAYES, Jr., Director of Office of Detention and Removal, U.S. Immigration and Customs Enforcement, JOHN T. MORTON, Assistant Secretary U.S. Immigration and Customs Enforcement, JANET NAPOLITANO, Secretary Department of Homeland Security, ERIC H. HOLDER, JR., United States Attorney General,

Respondents.

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28 U.S.C. § 2241

Habeas Corpus Petition

ORDER

Petitioner Alvarez filed in this court the above styled Petition for *Writ of Habeas Corpus* on July 28, 2009, with eight (8) Exhibits attached. He was at that time in the custody of the named Respondents and under Immigration and Customs Enforcement agency Removal Order to Cuba. Petitioner Alvarez is 68 years of age and has enjoyed legal resident status as a Cuban national exile, living in Miami, Florida, United States of America since 1959. The Stewart Detention Center where Petitioner Alvarez was in custody is in the Middle District of Georgia for the United States District Courts and jurisdiction over this matter was not at issue at the time this Petition was filed.

On March 21, 1990, Petitioner Alvarez was indicted in Miami, Dade County, Florida, for the commission of Aggravated Assault and Battery involving the use of a firearm under Florida law. Ironically, he was prosecuted by Janet Reno, then State Attorney for the Eleventh Judicial Circuit of Florida. Alvarez pleaded guilty to the charged offenses, and finding that, "It appearing to the satisfaction of the Court that you, . . . , are not likely again to engage in the criminal course of conduct, and the ends of justice and the welfare of society do not require that you should presently suffer the penalty authorized by law," the Court sentenced him to a term of probation and six months of community service on weekends with the Metro Tree Service. He served his sentence, including the probation portion thereof, and was not detained or taken into any federal immigration service custody at any time in regard thereto. Petitioner Alvarez continued to reside in the United States as a legal resident alien.

In November 2005, Petitioner Alvarez was indicted in the United States District Court for the Southern

District of Florida for Conspiracy to possess prohibited firearms. Alvarez pleaded guilty to the conspiracy, asserting that he was involved in the anti-Castro underground movement for a free and democratic Cuba. Nonetheless, Petitioner Alvarez was sentenced on November 14, 2006, to a term of 46 months imprisonment which was later reduced by the Court to 30 months pursuant to a Government Motion under Rule 35 for reduction of sentence upon valuable assistance to the Government. A detainer was placed upon Petitioner Alvarez by the Immigration and Customs Enforcement agency (hereinafter ICE) in August 2007, prior to his release to a half-way house and the completion of the federal sentence he was then serving for the above stated conspiracy.

On November 25, 2008, Petitioner Alvarez was released into ICE custody exclusively and was incarcerated at the Stewart Detention Center. ICE held a video teleconference regarding Petitioner's alien status, and on January 22, 2009, issued a Final Order of Removal to Cuba. There is no dispute in the record that at all times all parties hereto knew that Petitioner Alvarez was not removable to Cuba, that there was no repatriation agreement between Cuba and the United States, and that Petitioner's removal to Cuba would not be in the reasonably foreseeable future. Nonetheless, repeated requests that Petitioner Alvarez be released after January 22, 2009, were denied.

On April 22, 2009, Respondent Felicia Skinner, Field Director, Atlanta, GA, issued DECISION TO CONTINUE DETENTION, stating that:

> ICE is attempting to facilitate your removal from the United States, and presently there is no reason to believe that your removal will

> not take place within the reasonably foreseeable future. In addition, you are an aggravated felon who has previously obstructed justice, which leads ICE to believe that you pose a danger to the community and/or the safety of persons and also pose a significant risk of flight. Accordingly, you are to remain in ICE custody pending your removal from the United States. *See, e.g.,* 8 C.F.R. § 241.4(h)(3). . . . .
>
> If you have not been released or removed from the United States by July 21, 2009, jurisdiction of the custody decision in your case will be transferred to the Headquarters Case Management Unit (HQCMU), 500 12th Street S.W., Washington, DC 2004. HQCMU will make a final determination regarding your custody.

Petitioner Alvarez remained in detention at Stewart Detention Center. July 21, 2009, came and went, and ICE had accomplished nothing in regard to Alvarez's removal, release, or transfer to HQCMU. On July 28, 2009, Petitioner Alvarez filed the present Petition for *Writ of Habeas Corpus* involved here, having continuously been under ICE custody and detention since November 25, 2008, and subject to Removal Order to Cuba since January 22, 2009.

The United States Supreme Court held in *Zadvydas v. Davis,* 533 U.S. 678, 688, 121 S.Ct. 2491, 2498 the following:

> [P]rovision 8 U.S.C. § 1252(a)(2)(B)(ii) (1994 ed., Supp. V), says that "no court shall have jurisdiction to review" decisions "specified . . .

> to be in the discretion of the Attorney General."

Petitioner Alvarez, like Zadvydas, does not seek review of the Attorney General's exercise of discretion; rather, he challenges the extent of the Attorney General's authority under the post-removal-period detention statute. And the extent of that authority is not a matter of discretion. *See*, *e.g.*, § 1226(e) (applicable to certain detention-related decisions *in period preceding entry* of final removal order); § 1231(a)(4)(D). *Id.* The Supreme Court added, "We conclude that § 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention." *Id.* The *Zadvydas* Court added:

> A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "deprive" any "person . . . of . . . liberty . . . without due process of law. Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that the Clause protects. *See Foucha v. Louisiana,* 504 U.S. 712, 80, 112 S.Ct. 1780 (1992). And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, see *United States v. Salerno,* 481 U.S. 739, 746, 107 S.Ct. 2095 (1987), or in certain special and "narrow" nonpunitive "circumstances," *Foucha, supra,* at 80, 112 S.Ct. 1780*,* where

> special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint." *Kansas v. Hendricks,* 521 U.S. 346, 356, 117 S.Ct. 2072 (1997).
>
> The proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect. There is no sufficiently strong special justification here for indefinite civil detention – at least as administered under this statute. . . .
>
> [B]y definition the first justification-preventing flight risk – is weak or nonexistent where removal seems a remote possibility at best. As this Court said in *Jackson v. Indiana,* 406 U.S. 715, 92 S.Ct. 1854 (1972), where detention's goal is no longer practically attainable, detention no longer "bears a reasonable relation to the purpose for which the individual [was] commited." *Id.* at 738, 92 S.Ct. 1845. . . .
>
> [W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections.

Id. at 689-691, 121 S.Ct. at 2498-99.

On July 29, 2009, this court ordered Respondents to file responsive pleadings to Alvarez's Petition for *Writ of Habeas Corpus* within sixty (60) days*, i.e.,* no later than September 28, 2009. All parties filed full consent for a United States Magistrate Judge to try the case to conclusion pursuant to 28 U.S.C. § 636, *et seq*. On September 17, 2009, Respondents filed a Motion for Extension of Time to File Responsive Pleadings. Said

Motion was denied except to the extent Respondents were allowed by the denial order until October 26, 2009, to file their responsive pleadings – October 26, 2009, also being the date set by the court for hearing "to argue their position in regard to the merit of Petitioner's Petition For Writ of Habeas Corpus at 10:30 a.m. on that date." (Doc. 13). Respondents have not yet filed responsive pleadings in this action.

On October 22, 2009, at 6:30 p.m., Respondents electronically filed RESPONDENTS' MOTION TO DISMISS PETITION FOR A WRIT OF HABEAS CORPUS AND TO VACATE OCTOBER 26 HEARING AND MEMORANDUM OF LAW. In said Motion, Respondents advised the court that, "On October 21, 2009, ICE officials released Alvarez from custody. Because Alvarez is no longer in custody and has received the relief he sought from this court the case is now moot." Respondents also proffered in this Motion that, the case being moot, the court had no jurisdiction in the matter and the October 26, 2009, hearing to be held on the second business day after the court was apprised of the Motion should be cancelled.

The hearing was held and Respondents were first required to produce admissible evidence of Petitioner's release. At the hearing, Anthony Louis, a non-Respondent Stewart Detention Center ICE custodian testified that he had received on October 21, 2009, an Order of Supervision directed to Petitioner Alvarez and providing that, "Because ICE has not effected your deportation or removal during the period prescribed by law, it is ordered that you be placed under supervision and permitted to be at large under [twenty] following conditions." Thereby, ICE had tacitly admitted by the withdrawal of its Decision To Continue Detention that its determination that Petitioner

Alvarez was a threat to the community and a flight risk was no longer a valid determination, and obviously no basis for illegal indefinite detention. Wherefore, Petitioner Alvarez's Petition for *Writ of Habeas Corpus* is hereby granted retroactively to October 21, 2009, with the following additional terms.

The Order of Release contained twenty (20) conditions of release constituting a constructive detention depriving Alvarez of his liberty and due process right thereto under the 5th Amendment to the Constitution of United States. For example, the third of the twenty conditions of release included in the Order of Supervision provided:

That you do not travel beyond 50 miles of your residence without advanced, written permission from ICE.

This condition was issued in the face of the hearing on Alvarez's Petition for *Writ of Habeas Corpus,* then pending for hearing on the following Monday, October 26, 2009, in the United States District Court in Columbus, Georgia, a distance of more than 800 miles from Petitioner's residence in Miami, Florida, and would therefore, deny Petitioner his constitutional right to access to the courts and the assistance of counsel guaranteed by the 5th and 6th Amendments to the United States Constitution to which he was entitled. Condition three is also in violation of the reasonableness provision of 8 U.S.C. § 1231(a)(3)(D), which states that:

> If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney

> General. The regulations shall include provisions requiring the alien – to obey *reasonable* written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien. (emphasis added).

This restriction, issued two business days before the hearing on Alvarez's Petition for *Writ of Habeas Corpus* and effectively denying him time to obtain the requisite advanced, written permission from ICE for access to the court where his action was to be heard and where his counsel were located for said hearing, fails the reasonableness requirement of the statute and is otherwise unconstitutional for lack of due process of law in violation of the 5th Amendment. Condition three is stricken as an additional term of the grant of Petitioner's *Writ of Habeas Corpus.*

In an effort to assuage the court's concern for Petitioner Alvarez's tenuous position in attending his own habeas corpus hearing, ICE provided the court with the following:

The Federal Respondents in this matter hereby stipulate to the following:

> 1. Petitioner, Mr. Santiago Alvarez will not incur any adverse consequences by Immigration and Customs Enforcement for any violations of the conditions of his release (contained in the Order of Supervision dated October 21, 2009) in order to attend the hearing on his petition for a writ of habeas corpus on October 26, 2009, in this Court.
>
> and;
>
> 2. Immigration and Customs Enforcement will not interfere with Mr. Alvarez's ability to

> attend any future hearing(s) in this matter upon advance notice as required in Mr. Alvarez's Order of Supervision.
>
> This 26th day of October 2009.
>
> S/Joshua E. Braunstein
> Assistant Director
> Civil Division
> United States Dept. of Justice

(Doc. 22).

The eleventh condition of Petitioner Alvarez's Order of Supervision, provides:

> That you do not have any verbal, written, or physical contact or association, direct or indirect, *except as permitted by court order*, with Luis Posadas-Carriles, Ernesto Abreu, Osvaldo Mitat, Ruben Lopez-Castro, Jose Pujol, Gelberto Abascal, Generoso Bringas, Kedwardo Coloma, Pedro Lopez, Sixto Reinaldo Aquit, and Orlando ("Landy") Gonzalez. (emphasis added).

This condition is likewise unconstitutionally vague, unenforceable, gives no definition of any of the conduct to be prohibited, fails to define essential terms of the condition, such as "direct and indirect" and "court order", fails to specify any reasonable cause for this prohibition as to any individual named, and moreover denies Petitioner Alvarez any due process of law before or after the fact of such indefinite prohibition, in violation of his 5th Amendment right to due process of law, with the one exception being Osvaldo Mitat who is identified from the undisputed pleadings in this case by this court as having been Petitioner's co-defendant in a criminal offenses and therefore a

convicted felon with whom Petitioner may not associate by law. Condition eleven is also stricken as an additional term of the grant of Petitioner's *Writ of Habeas Corpus* and this court order will permit such associations upon identification of the individuals named in said condition, just to illustrate how vague and unconstitutional this condition is in this case.

Condition seventeen provides:

> That you will make good faith and timely efforts to obtain a travel document to effectuate your removal from the United States and will comply with any request by ICE to assist with these efforts.

This condition likewise is too vague and indefinite to be constitutional. Moreover, 8 U.S.C. § 1231(b)(2) specifies to the contrary as follows:

(A) Selection of country by alien

> Except as otherwise described in this paragraph –
>
> (i) any alien not described in paragraph (1) who has been ordered removed *may* designate one country to which the alien wants to be removed, and
>
> (ii) the Attorney General shall remove the alien to the country the alien so designates.

Nowhere in this removal statute is the burden of effecting removal to an available country placed upon the Petitioner. To the contrary, the burden by this statute is placed directly upon the Attorney General. Condition seventeen therefore denies Petitioner Alvarez the due process of law to which he is entitled

by the 5th Amendment to the United States Constitution. Condition seventeen is therefore stricken as an additional term of the grant of Petitioner's *Writ of Habeas Corpus.*

Condition twenty states, "At any time ICE may modify certain terms and conditions of the order of supervision based on changed circumstances." This condition of release is likewise unconstitutionally vague, indefinite, totally arbitrary, and lacks the due process of law guaranteed to the Petitioner by the 5th Amendment to the Constitution of the United States. Condition twenty istherefore stricken as an additional term of the grant of Petitioner's *Writ of Habeas Corpus.*

SO ORDERED this 30th day of October 2009.

S/G. MALLON FAIRCLOTH
UNITED STATES MAGISTRATE JUDGE

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

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

The Fifth Amendment to the U.S. Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8 U.S.C. § 1252(g) provides:

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other *habeas corpus* provision, and sections 1361 and 1651 of such title, 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 this chapter.