IN THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

ORGANIZATION OF AMERICAN STATES

WASHINGTON, D.C. USA

Petition on behalf of

MOSTAFA SEYED MIRMEHDI
MOHSEN SEYED MIRMEHDI
MOJTABA SEYED MIRMEHDI
MOHAMMAD-REZA MIRMEHDI

— v. —

THE UNITED STATES OF AMERICA

Presented by

THE INTERNATIONAL HUMAN RIGHTS CLINIC OF
THE UNIVERSITY OF CALIFORNIA, LOS ANGELES
SCHOOL OF LAW

and by the undersigned, appearing as counsel for the Petitioners under the provisions of Article 23 of the Commission's Regulations

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I. INFORMATION ON THE VICTIM PETITIONERS

Names of petitioners:	Mostafa Seyed Mirmehdi, Mohsen Seyed Mirmehdi, Mojtaba Seyed Mirmehdi, and Mohammad-Reza Mirmehdi. ("The Mirmehdis" or "The Petitioners")

Name of victim:	Mostafa Seyed Mirmehdi
Sex of victim:	Male
Date of birth (day/month/year):	21/02/1959
Mailing address of victim:	18375 Ventura Blvd., Suite 238, Tarzana, CA 91356, USA
Telephone number of victim:	+1 (818) 326-5201
Email of the victim:	michaelmirmehdi@yahoo.com
Are the victims deprived of liberty?:	No

Name of victim:	Mohsen Seyed Mirmehdi
Sex of victim:	Male
Date of birth (day/month year):	6/2/1967
Mailing address of victim:	18445 Collins Street, unit 200, Tarzana, CA 91356, USA
Telephone number of victim:	+1 (818) 326-4592
Email of the victim:	mauricemirmehdi@yahoo.com
Are the victims deprived of liberty?:	No

Name of victim:	Mojtaba Seyed Mirmehdi
Sex of victim:	Male
Date of birth (day/month year):	10/10/1962
Mailing address of victim:	5400 Newcastle Ave., unit 39, Encino, CA 91316, USA
Telephone number of victim:	+1 (818) 764-4223 or +1 (818) 326–4748
Email of the victim:	Matthew_Mirmehdi@yahoo.com
Are the victims deprived of liberty?:	No

Name of victim:	Mohammad-Reza Mirmehdi
Sex of victim:	Male
Date of birth (day/month year):	13/5/1970
Mailing address of victim:	18375 Collins Street, unit 209, Tarzana, CA 91356, USA
Telephone number of victim:	+1 (818) 326-4898
Email of the victim:	moemybroker@yahoo.com
Are the victims deprived of liberty?:	No

Counsel for the Petitioners:	Paul L. Hoffman, Schonbrun DeSimone Seplow Harris & Hoffman, LLP
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II. INTRODUCTION AND SUMMARY

1. This petition is submitted by Mostafa Seyed Mirmehdi, Mohsen Seyed Mirmehdi, Mojtaba Seyed Mirmehdi and Mohammad-Reza Mirmehdi ("the Petitioners"). Between October 2001 and March 2005, the United States of America ("the State" or "the United States") unlawfully and arbitrarily detained the Petitioners based on their peaceful political activity and their nationality, falsifying evidence to keep them in detention. The Petitioners allege that in doing so the State violated Article I (Right to Liberty), Article II (Right to Equality Before the Law), Article IV (Right to Freedom of Expression), Article XVII (Right to Recognition of Juridical Personality), Article XVIII (Right to Civil Rights), Article XXI (Right of Assembly), Article XXII (Right of Association), Article XXV (Right of Protection from Arbitrary Arrest or Detention), and Article XXVI (Right to Due Process) ("the Rights Violations") of the American Declaration of the Rights and Duties of Man.

2. In 1999, the Petitioners had established themselves as hard working, law-abiding, members of their community in Los Angeles, California. Though not US citizens, Petitioners were lawful residents entitled to withholding of removal[1] because they could not return to Iran without risking torture and persecution. In early October 2001, State officials arrested the Petitioners based on the false allegation that they were members of a terrorist organization - an allegation based on a record to their attendance at a public demonstration. State officials falsely presented a list of attendees at this demonstration as a terrorist list before a court to secure the arbitrary detention of the Petitioners. The State arbitrarily detained the Petitioners for forty-one months. Over the course of their prolonged and unjustified detention, agents of the United States humiliated and abused the Petitioners, subjecting them to degrading treatment. During this entire

[1] In 1998 the Petitioners applied for political asylum in the United States. Unbeknownst to them, their attorney had

period, the agents of the United States who initiated the detention of the Petitioners knew that false evidence and recanted testimony were the only basis for this inhumane detention. The State's conduct therefore violated the Petitioners' rights under Articles I, IV, XVII, XVIII, XXI, XXII, XXV, and XXVI.

3. The United States also violated the Petitioners' rights under Article II by arbitrarily detaining the Petitioners because of their Iranian nationality and because of the political opinion it imputed to them. The State used the prolonged detention to attempt to coerce the Petitioners into assisting with the investigation of an Iranian political group. The State's coercion strategy persisted notwithstanding the Petitioners' consistent protests that they had no association with the Iranian group and the lack of evidence that the Petitioners were in any way associated with any terrorist group.

4. During their protracted and unjustified detention, the Petitioners repeatedly sought redress through the United States legal system. Notably, not one of the legal avenues utilized by the Petitioners was able to secure their liberty. Instead, it was the threat of media attention and the prospect of an official investigation into the brutal beating of Petitioner Mohammad Mirmehdi, that finally pressured the State to release the Petitioners from detention.

5. After their release, the Petitioners brought several claims against the United States and its agents, for violating their constitutional rights.[2] The Petitioners' claims as to the conditions of detention were subsequently litigated and settled. However, their claims for false imprisonment,

[2] The violations included unlawful detention; denial of medical care; excessive, unreasonable, and deliberately humiliating and punitive strip searches; inhumane detention conditions; interference with right to counsel; violation of the prohibition against cruel, inhuman, and degrading treatment or punishment; intimidation of witness/denial of due process; excessive force; false imprisonment; negligence; assault and battery; intentional infliction of emotional distress; and conspiracy to violate civil rights. Petitioners' First Amended Complaint 1-2, Jan. 30, 2007 [hereinafter FAC].

unlawful detention, and witness intimidation were dismissed by the Ninth Circuit Court of Appeals on the grounds that "immigrants' remedies for vindicating the rights which they possess under the Constitution are not coextensive with those offered to citizens."[3] For that reason, the Petitioners were not entitled to bring an action for damages.[4] The court affirmed denial of the Petitioners' claim of witness intimidation on grounds that the Petitioners were not deported, concluding that there was no injury resulting from the alleged intimidation.[5] Finally, denial of the Petitioners' claim of false imprisonment against the United States was affirmed on grounds that the United States government is immune from tort claims.[6] The Petitioners appealed the decision of the Ninth Circuit to the United States Supreme Court. The Supreme Court refused to hear the Petitioners' case, thus exhausting all domestic remedies as to the Petitioners' claims for false imprisonment, unlawful detention, witness intimidation and rights violation conspiracy.

6. To remedy the United States' violation of the American Declaration, the Petitioners respectfully request that this Honorable Commission declare this Petition admissible and that it grant all relief deemed appropriate and necessary upon adjudication of the merits, including declarative, injunctive, and compensatory relief.

[3] *Mirmehdi v. United States*, 689 F.3d 975, 981 (9th Cir. 2012) *cert. denied*, 133 S. Ct. 2336, 185 L. Ed. 2d 1063 (2013).
[4] *Id.* at 982-83.
[5] *Id.* at 983.
[6] *Id.* at 984-85.

III. FACTUAL ALLEGATIONS

A. Member State Of The OAS Against Which The Complaint Is Submitted And Authorities Responsible For The Facts Alleged

7. United States of America ("The United States" or "The State") is the member state against which the complaint is submitted. Additionally, FBI Special Agent Christopher Castillo and INS Special Agent J.A. MacDowell are authorities responsible for the Petitioners' violations.

B. The Petitioners' Experiences In Iran And Migration To The United States Of America

8. All four of the Mirmehdi brothers are citizens of Iran and productive residents of the United States, Los Angeles community. The Petitioners have always opposed to the Iranian government. Their family faced government persecution as a result of their political views, including accusations of being anti-revolutionaries and American spies. Mojtaba Seyed Mirmehdi ("Mojtaba") was detained without trial for three years, after being arrested by revolutionary guards at a pro-democracy demonstration. During his detention in Iran, Mojtaba was tortured and threatened with execution. Four of the Petitioners' cousins had previously been executed at the hands of the Iranian regime. Mohsen Seyed Mirmehdi's ("Mohsen") permission to attend university in Iran was withdrawn after he refused to fight for the new Islamic government against Iraq. For almost two years thereafter he hid in the family home in order to avoid recruitment into the army. In January 1989, Mohsen was unable to resist army recruitment any longer and briefly served in a low-ranking position.

9. Facing such severe persecution, the Petitioners migrated to the United States to flee further abuse, settling in Los Angeles, California. After fleeing to the US, the Petitioners continued

their dissent against the oppressive Iranian regime through peaceful political expression. This dissent is the sole reason for the Petitioners' arbitrary detention at the hands of the United States.

10. Mostafa Seyed Mirmehdi ("Michael") was the first to migrate to the United States, arriving on a student visa in 1978 to study Mechanical Engineering. After completing his studies, Michael remained in the United States because he feared persecution in Iran. In 1992, Mojtaba and Mohsen fled Iran to join Michael in Los Angeles. Finally, Mohammad-Reza Mirmehdi ("Mohammad") came to Los Angeles in October 1993. Today, all of the Petitioners are successful real estate brokers.

11. On June 20, 1997, the Petitioners attended a demonstration in Denver, Colorado organized by the National Council of Resistance in Iran ("NCRI"), an international umbrella group that claims to be the Iranian democratic "government in exile." As such, NCRI is supported by a broad range of prominent Iranian exiles and exile groups of diverse political beliefs. The purpose of the June 20 demonstration was to promote democracy in Iran and call attention to the abuses of the current regime. The demonstration was peaceful and lawful, with several members of the United States Congress in attendance, at least one of whom appeared as a speaker.

C. The Petitioners' Unlawful Detention And The False Evidence Against Them In Their Immigration And Asylum Proceedings

12. In 1998, the Petitioners applied individually for political asylum in the United States. Each of their asylum claims were denied; however, each brother was granted a stay of deportation to Iran under the United Nations Convention Against Torture and Section 241(b)(3) of the Immigration and Nationality Act.

13. Unbeknownst to the Petitioners, Bahram Tabatabai, the attorney who prepared and submitted their asylum applications, falsified certain details. In March 1999, the Immigration and Naturalization Service ("INS") arrested the Petitioners and charged them with immigration violations. The immigration judge determined that the Petitioners were not flight risks or threats to the community, and that they were did not pose a risk to national security. On August 24, 1999, Michael, Mojtaba, and Mohsen were released on bond. Mohammad was not released on bond until September 2000. As mentioned above, they were each granted withholding of removal to Iran under the United Nations Convention Against Torture and Section 241(b)(3) of the Immigration and Nationality Act, giving them legal right to remain in the United States.

14. The Petitioners were never charged with any crime in the United States and have never been involved in terrorism, terrorist organizations, or terrorist activity. Nonetheless, on October 2, 2001 – three weeks after the September 11 attacks – Agents of the United States revoked the Petitioners' bonds, arrested them, and initiated removal proceedings to have the Petitioners deported to Iran. The Petitioners filed for re-hearing of their bond determinations and requested political asylum in the United States. The only information offered to justify the bond revocation and arrest was a list of attendees from the July 20, 1997 NCRI demonstration, which the Agents of the State falsely presented as a terrorist cell form for the Mujahedin-e Khalq ("MEK"), referred to as the "L.A. Cell Form." Historically, the MEK came under the auspices of NCRI, and both groups received political support from the United States of America. However, months after the demonstration, on October 8, 1997, the MEK and NCRI (on the basis that it was an alias of the MEK) were designated Foreign Terrorist Organizations by the United States Secretary of State.

15. The "L.A. Cell Form" is one page of writing that United States FBI Agent Christopher Castillo removed from a larger document containing at least sixty pages of names and travel details of individuals who attended the demonstration. Agent Castillo knew that the document contained only administrative details of attendees and that the demonstration was constitutionally protected, but he purposefully modified the document to hide its true nature. Together with United States Immigration and Naturalization Service Agent J.A. MacDowell, Agent Castillo falsely declared the modified document to be a list of members of a terrorist cell. In subsequent legal proceedings against the Petitioners, Agents Castillo and MacDowell claimed that the "L.A. Cell Form" contained the names of MEK members, supporters, and associates. These State agents had no basis for this claim; in fact, they knew it to be false. Nonetheless, the State agents used their false allegations and the fabricated "L.A. Cell Form" to pressure Petitioners to provide information regarding the MEK to the FBI. However, as the Petitioners were not associated with the MEK, they did not have any information or knowledge to offer.

16. On December 10, 2001, the Petitioners received their first hearing on their motions to be released at the immigration court. Again, agents of the State relied on the demonstration attendance list to ensure the Petitioners' continued detention. During this hearing, Agent Castillo stated to the immigration judge that "it's easier to negotiate without bond." In addition to the false evidence, Agents Castillo and Agent MacDowell introduced recanted statements from the Petitioners' former asylum lawyer, Bahram Tabatabai, while preventing the lawyer himself from testifying.

17. In March 1999, Tabatabai was charged with filing fraudulent asylum claims. As part of his plea agreement, Tabatabai agreed to assist Agents Castillo and MacDowell with their investigations of the Mirmehdis by suggesting that the Petitioners were associated with the

MEK. However, on January 23, 2001 and again on June 19, 2001, Tabatabai recanted an earlier statement he made about the Petitioners and asserted that Agent Castillo and Agent MacDowell coerced that statement from him as part of his plea agreement. Despite being aware that Tabatabai had recanted his initial statement against the interest of the Petitioners, Agent Castillo relied on this testimony in the Petitioners' bond hearing on December 10, 2001.[7] Not only did Agent Castillo intentionally fail to inform the court of Tabatabai's recantation, he actively prevented Tabatabai from testifying by threatening to re-arrest and prosecute him. Castillo also intentionally misled the court by alleging that Tabatabai informed him that the Oklahoma cell of the MEK was formed by the Petitioners, though he knew this information was false.

18. In April 2002, the immigration judge relied upon Agent Castillo's false testimony and fabricated evidence to determine that the Petitioners' bonds should be revoked and their applications for asylum denied. In direct contradiction to the original bond determination, the immigration judge found, based upon Agent Castillo's false testimony and the fabricated LA Cell Form, that the Petitioners were "associated with a designated foreign terrorist organization and… posed a danger to persons or property." However, the immigration judge granted the Petitioners' request to withhold removal, based on information that they were likely to be tortured if removed to Iran. The immigration judge based this determination on a finding that "there is no evidence that they engaged in terrorist activities." Both the State and the Petitioners appealed the decision to the Board of Immigration Appeals ("BIA"), which affirmed on all counts, on August 20, 2004.

19. Both parties again appealed the BIA determinations to the Ninth Circuit Court of Appeals. In November 2004, the Ninth Circuit remanded to the lower court because of the conflicting rulings

[7] Castillo even later admitted in 2002 that he knew Tabatabai's statements had "no factual basis."

in the asylum and bond decisions. The court stated that the government owed the Petitioners a duty of consistent dealing, and thus the bond decisions should be reviewed for "sufficiency of the evidence…in light of the BIA's determination that there was no evidence connecting the Petitioners to terrorist activities." No decision was ever made on remand because the Petitioners were released from detention beforehand. This release was not based on any official legal determination, and the Petitioners received no remedy for their years during which their liberty and freedom was deprived.

D. Conditions Of The Petitioners' Detention

20. The conditions of the Petitioners' detention were cruel, inhuman, and punitive. The false allegations were used to justify detaining the Petitioners in prisons alongside dangerous and violent convicted felons. Prison guards told the Petitioners that this was an intentional decision to punish them.

21. Throughout their detention, the Petitioners were frequently subjected to periods of solitary confinement in cells measuring less than six by ten feet. Each of the Petitioners experienced segregation for periods of one week or more, and solitary confinement or physical abuse was threatened whenever they complained about detention conditions.

22. The United States prison guards physically assaulted the Petitioners, subjected them to extreme cold, frequent unjustified body cavity searches, and threatened them with pepper spray. Prison guards verbally abused and viciously insulted the Petitioners on account of their ethnicity, culture, religion, and nationality.

23. The prison guards further prevented the Petitioners from accessing basic medical treatment for acute injuries inflicted on the Petitioners, chronic back pain, eye and skin irritations or infections, as well as psychological problems. The Petitioners' access to basic hygiene, appropriate clothing, and food was severely compromised.[8]

24. Over the course of their detention, agents of the United States systematically prevented the Petitioners from communicating with their families in Iran, speaking freely with their legal counsel, or talking to the media. Furthermore, the United States agents frequently withheld legal documents from their attorneys, and the State transferred the Petitioners between detention centers for the purpose of government "forum shopping."

E. The Petitioners' Release From Detention

25. On February 3, 2005, the Petitioners were scheduled to be interviewed on ABC's popular news program, *Nightline*. However, on February 2, 2005, United States agents unexpectedly offered to release the Petitioners from detention. The Petitioners prepared for their release only to be confronted at the last moment by several conditions attached to their release. The conditions to be imposed by the State included not travelling more than thirty miles from their homes, not travelling by airplane, and not attending political rallies. The Petitioners declined the offer of a conditional release. State agents deemed them "uncooperative" and insisted on continuing the unlawful detention.

[8] Petitioners received a settlement for the allegations in this paragraph. However, Petitioners include the conditions of detention here to emphasize the seriousness of the arbitrary detention that they suffered.

26. On March 5, 2005, Mohammad was severely beaten by Officer M. Lopez at San Pedro Detention Center. Mohammad sustained injuries to his shoulder, back, neck, and face – resulting in a permanent facial disfigurement and continued pain and suffering. After the assault, several reporters and attorneys visited Mohammad in detention and noted the extent of his injuries. Mohammad was thereafter advised that the Attorney General would investigate Officer Lopez' assault. An employee from the Attorney General's office was scheduled to interview Mohammad in detention on March 17, 2005. On the day before this interview was scheduled to take place, the State again offered to the Petitioners a conditional release from prison. Once again, the Petitioners declined to accept the conditions the State sought to impose. This time, the State agreed to forgo the restrictions and the Petitioners were finally granted their liberty.

27. On March 16, 2005, after forty-one months of detention, the Petitioners were released from prison. Since his release, Mohammad has repeatedly requested access to the internal investigations regarding the assault he sustained from Officer Lopez. These requests have been denied.

F. Petitioners' Legal Proceedings: The Application For Asylum And Immigration Bond Proceedings; The *Habeas Corpus* Petition; And The Civil Tort Claims.

28. Following the Petitioners' initial arrest in 1999, and during their detention between October 2001 and March 2005, the Petitioners fiercely opposed the deprivation of their liberty through three legal mechanisms: an application for asylum and immigration bond proceedings[9], a *habeas corpus* petition, and a civil tort claims.

[9] *See infra* Part III.C.

29. In November 2002, the Mirmehdis filed *habeas corpus* petitions in federal district court, seeking release from their detention. On May 23, 2003, their petitions were denied. On appeal, the Ninth Circuit Court of Appeals remanded Mohammad's and Mohsen's petitions to the district court due to the inconsistency of the BIA bond and removal determinations. The circuit only affirmed the denials of Mostafa's and Mojtaba's petitions because they had failed to appeal their removal order. However, because Petitioners were finally released in March 2005, the Court held that there was no further ground to rule on the *habeas corpus* petitions. Thus, as with the immigration and asylum proceedings, no final determination was ever made on these claims.

30. On August 14, 2006, the Petitioners filed a civil complaint in the U.S. District Court for the Central District of California against the United States government and other defendants for actions that "betrayed basic American values and trampled on [the Petitioners'] constitutional rights."[10] The complaint alleged false imprisonment, unlawful detention, witness intimidation, and conspiracy to violate civil rights.[11] The court dismissed the claim against the United States for false imprisonment, the claim against State agent Castillo for intimidation of a witness, and the claims against State agents Castillo and MacDowell for unlawful detention and conspiracy to violate their civil rights.[12] On June 4, 2009, the Petitioners appealed these claims to the Ninth Circuit Court of Appeals which issued an opinion on August 30, 2011, affirming the dismissal of all of the Petitioners' claims.

31. The Ninth Circuit Court of Appeals affirmed the dismissal of the Petitioners' claims, on the grounds that "immigrants' remedies for vindicating the rights which they possess under the

[10] FAC ¶ 1.
[11] They also brought claims for denial of medical care; excessive and unreasonable searches; inhumane detention conditions; interference with right to counsel; violation of the prohibition against cruel, inhuman, and degrading treatment or punishment; excessive force; negligence; assault and battery; and intentional infliction of emotional distress, but those claims were settled with the State.
[12] *See Mirmehdi*, 689 F.3d at 980.

Constitution are not coextensive with those offered to citizens."[13] The court explained that to succeed in an action for wrongful detention against federal agents, there must not be "any alternative, existing process for protecting the plaintiffs' interests." They said that because the Petitioners could seek release through the immigration proceedings and their *habeas corpus* petitions, they were not entitled to any compensation. This was despite the fact that neither of those systems allowed for an award of monetary compensation.[14] The court affirmed denial of the Petitioners' claim of witness intimidation on grounds that the Petitioners had successfully avoided deportation despite the witness failing to testify, so they could not show any injury resulting from the alleged intimidation.[15] Finally, denial of the Petitioners' claim of false imprisonment against the United States was affirmed on grounds that the United States government is immune from tort claims, unless it waives that immunity, and the government has not done so for "discretionary functions" such as the decision to detain an alien pending resolution of immigration proceedings.[16]

32. The Petitioners filed for a rehearing within the Ninth Circuit, and opinion was issued affirming dismissal on June 7, 2012 and slightly amending the initial order with the clarification that the United States was immune from the false imprisonment claim under California state law, which provides for "absolute immunity for almost any statement made 'in any ... official proceeding authorized by law.'"[17].

[13] *Mirmehdi v. United States*, 662 F.3d 1073, 1079 (9th Cir. 2011).
[14] *Id.* at 1079-80.
[15] *Id.* at 1081.
[16] *Id.* at 1082.
[17] *Mirmehdi*, 689 F.3d at 985-86.

33. On October 22, 2012, Petitioners filed their final appeal to the United States Supreme Court. On May 13, 2013, the Supreme Court denied this petition, thereby declining to consider any of the outstanding issues and exhausting the Petitioners' final domestic forum for remedies.[18]

G. The Petitioners' Current Circumstances

34. The Petitioners have resided in Los Angeles, California since their release from detention in 2005. They are all hard-working real estate agents working in the San Fernando Valley area of California. As of November 2013, the Petitioners have not yet recovered from their traumatic experience in detention and continue to require treatment for the trauma they endured.

IV. THIS PETITION IS ADMISSIBLE UNDER THE COMMISSION'S RULES OF PROCEDURE

35. This petition is factually and legally sufficient in accordance with the provisions of Articles 22 to 29 of the Inter-American Commission's Rules of Procedure. The Petitioners meet all admissibility requirements set out in the Commission's Rules in Article 30 to 34.

A. The Commission Is Competent To Hear The Petitioners' Claims

36. The Commission is competent to examine the petition. As stated in the Introduction and Summary,[19] the Petitioners allege violations by State agents of Articles I, II, IV, XVII, XVIII, XXI, XXII, XXV, and XXVI of the American Declaration. The Commission has competence

[18] *Mirmehdi v. United States*, 133 S. Ct. 2336, 185 L. Ed. 2d 1063 (2013).
[19] *See infra* Part II.

over claims for victims "whose rights are protected under the American Declaration, the provisions of which the State is bound to respect in conformity with the OAS Charter, Article 20 of the Commission's Statute and Article 49 of the Commission's Rules of Procedure."[20] The United States signed both the Charter of the Organization of American States (OAS Charter) and the American Declaration in 1948. All of the rights violations alleged by the Petitioners occurred within the territory of the United States on or after October 2001, and the Petitioners were subject to the jurisdiction of the United States at all times during the traumatic events detailed in this petition. Therefore, the Commission has jurisdiction *ratione personae* and *loci*.

B. This Petition Does Not Create Any Duplication Of Proceedings

37. The violations by the United States denounced in this petition have not previously been submitted for examination by this Commission, and have not been submitted to any other similar international organization or human rights body. Consequently, there is no duplication of proceedings that bars admissibility under Article 33 of the Commission's Rules of Procedure.

C. Petitioners Have Properly Exhausted All Domestic Remedies

38. Petitioners have exhausted their domestic remedies in accordance with Article 31 of the Commission's Rules of Procedure."[21] On August 14, 2006, the Petitioners filed a civil complaint in the U.S. District Court for the Central District of California against the United States government and other defendants for actions that "betrayed basic American values and trampled

[20] Abdur'Rahman v. United States, Petition 136/02, Inter-Am. Comm'n H.R., Report No 39/03 ¶ 22 (2003).
[21] Graham v. United States, Case 11.193, Inter-Am. Comm'n H.R., Report No. 51/00 ¶ 55 (2000).

on [the Petitioners'] constitutional rights."[22] The court dismissed the claim against the United States for false imprisonment, the claim against State agent Castillo for intimidation of a witness, and the claims against State Agents Castillo and MacDowell for unlawful detention and conspiracy to violate their civil rights.[23] On June 4, 2009, the Petitioners appealed these claims to the Ninth Circuit Court of Appeals. On August 30, 2011, an opinion was issued affirming the dismissal of all of the Petitioners' claims. The Petitioners filed for a rehearing within the Ninth Circuit, and an amended opinion was issued affirming dismissal on June 7, 2012. On October 22, 2012, Petitioners filed their final appeal to the United States Supreme Court. On May 13, 2013, the Supreme Court denied this petition, thereby declining to consider any of the outstanding issues and exhausting the Petitioners' final domestic forum for remedies.[24] Petitioners seek here what they were denied below: a declaration that the arbitrary detention based on their attendance at a rally violated their rights.

D. This Petition Is Timely Under The Commission's Rules Of Procedure

39. Under Article 38.1 of the Commission's Rules of Procedure, a petition to the Commission should be lodged within six months of notification of the final ruling that comprises the exhaustion of domestic remedies. Since the Supreme Court denied the Petitioners' final domestic appeal on May 13, 2013, this petition is timely under Article 38.1.

[22] FAC ¶ 1.
[23] *Mirmehdi*, 689 F.3d at 980.
[24] *Mirmehdi v. United States*, 133 S. Ct. 2336, 185 L. Ed. 2d 1063 (2013).

V. VIOLATIONS OF THE PETITIONERS' RIGHTS PURSUANT TO THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN BY THE UNITED STATES

40. As addressed at the outset of this petition, the Mirmehdis are victims of numerous rights violations of the American Declaration of the Rights and Duties of Man, including Articles I, II, IV, XVII, XVIII, XXI, XXII, XXV, and XXVI. The nationality of the petitioners is immaterial:, "OAS Member States are obliged to guarantee the rights under the Declaration to all individuals falling within their authority and control."[25] As the Petitioners were under the United States' authority and control between October 2001 and March 2005, the United States had an obligation to guarantee their human rights pursuant to the Declaration.

A. The United States' Denial Of A Fair Trial To The Petitioners And Detention Of The Petitioners For Their Exercise Of Fundamental Freedoms Violated Their Right Of Protection From Arbitrary Arrest Under Article XXV.

41. The Petitioners' right of protection from arbitrary arrest or detention under Article XXV of the American Declaration was violated because their detention was premised on falsified information which tarnished their ability to have a fair trial. Article XXV provides that

> [n]o person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. No person may be deprived of liberty for non fulfillment of obligations of a purely civil character. Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

[25] Ferrer-Mazorra v. United States, Case 9903, Inter-Am. Comm'n H.R., Report No. 51/01 ¶ 180 (2001).

42. In relation to the right to be free of arbitrary detention, the Commission has "emphasize[d] that the notion of *fairness* is particularly fundamental to ensuring that a process for the deprivation of liberty is not rendered arbitrary contrary to Article XXV of the Declaration."[26] This requires that the judge be impartial, "that the detainee [be] given an opportunity to present evidence and to know and meet the claims of the opposing party," and also that "proceedings must at a minimum comply with the rules of procedural fairness."[27] The process by which the Petitioners were detained between October 2001 and March 2005 was anything but "fair." State agents Castillo and MacDowell undermined the procedures designed to prevent unlawful detention by intentionally submitting fabricated evidence to the judge. By claiming that an attendance list from a lawful political rally was in fact a list of terrorists, Agents Castillo and MacDowell prevented the judge from making a fair determination about whether the Petitioners' detention was necessary. Furthermore, it was unfair for the Petitioners to be detained for forty-one months on the grounds of danger to national security when the BIA found "no evidence connecting the Petitioners to terrorist activities."[28]

43. In Biscet v. Cuba, the Commission considered criteria adopted by the United Nations Working Group on Arbitrary Detention in determining whether a violation of article XXV took place.[29] Under this criteria, detention is considered arbitrary if it is based on the detainees' exercise of "fundamental rights such as freedom of thought, conscience, and expression, and the

[26] *Id.* ¶ 213 (emphasis added).
[27] *Id.*
[28] *Mirmehdi v. I.N.S.*, 113 F. App'x 739, 741 (9th Cir. 2004).
[29] Biscet v. Cuba, Case 12.476, Inter-Am. Comm'n H.R., Report No. 67/06 ¶ 131 (2006).

right to peaceful assembly and association."[30] Furthermore, detention may be considered arbitrary if the "right to an impartial trial" is not observed.[31]

44. The only information offered to justify the Petitioners' bond revocation was a list of attendees from the July 20, 1997 demonstration, which was claimed to be a terrorist cell form. However, the list had nothing to do with terrorism. The demonstration was a lawful political rally held by the NCRI, which, at the time of the rally, had no affiliation with the MEK. The Petitioners were simply exercising their rights to peacefully assemble and express themselves politically when they attended this rally. By using the Petitioners' presence at this rally as grounds for their detention, the United States infringed the Petitioners' exercise of fundamental rights. Furthermore, Petitioners were deprived of a fair and "impartial trial" due to the United States' use of false evidence and accusations against them. Under the criteria considered in Biscet, Petitioners' detention was therefore arbitrary.

B. The United States' Arbitrary Detention Of The Petitioners And Denial Of Justice Contrary To Due Process Standards Violated The Petitioners' Right To Liberty Under Article I.

45. The Petitioners' right to liberty protected by Article I of the American Declaration was violated because their detention was arbitrary. Article I of the Declaration provides that "[e]very human being has the right to life, liberty and the security of his person." This Commission has found that "the violation of the right to protection against arbitrary detention constitute as well a violation of Article I of the Declaration in detriment of every one of the victims."[32] Because the Petitioners' detention was arbitrary and violated Article XXV of the Declaration, their right to liberty protected by Article I was also violated.

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[30] *Id.* ¶ 137.
[31] *Id.* ¶ 144.
[32] *Id.* ¶ 160.

Additionally, in Teleguz v. United States, the Commission found a violation of Article I because a prosecutor's use of witness statements known to be false "amounted to a denial of justice contrary to [a] fair trial and due process standards."[33] Here, State agents presented evidence known to be false in order to secure the Petitioners' detention. Because such acts amount to a denial of justice and violate due process standards, Article I was violated.

C. The United States' Imprisonment And Mistreatment Of The Petitioners Based On Their Nationality And Political Views Violated Their Right Of Equality Before The Law Under Article II.

46. The United States blatantly and repeatedly violated the Petitioners' Article II rights when its agents subjected the Petitioners to differentiated and coercive treatment due to their Iranian nationality and presumed political views. Article II provides that "[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." This Commission has held that the Article II "principle of non-discrimination is the backbone of the universal and regional systems for the protection of human rights"[34] which "permeates the guarantee of all other rights and freedoms under domestic and international law."[35] The State violated Article II by imprisoning and mistreating the Petitioners based on their Iranian nationality, as well as their presumed political views.

47. The United States denied the Petitioners equality before the law due to their Iranian nationality. At the Petitioners' initial immigration hearing in 1999, the judge granted the Petitioners' bond, determining that they did not pose flight risks or threats to the community or

[33] Teleguz v. United States, Case 12.864, Inter-Am. Comm'n H.R., Report No. 53/13 ¶ 130 (2013).
[34] Lenahan (Gonzales) v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 ¶ 107 (2011).
[35] Maya Indigenous Communities v. Belize, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, ¶ 163 (2004)

national security. However, just three weeks after the September 11 attacks, the court revoked bond based on the list of attendees from the 1997 demonstration. This differential treatment under the law continued throughout Petitioners' imprisonment, as they were denied timely trials and kept in legal limbo to coerce them into cooperating with the FBI. This unfair treatment due to the Petitioners' nationality plainly violates Article II's protection of equality before the law.

48. Non-governmental actors found that the United States blatantly profiled Iranian nationals in the wake of September 11.[36] Petitioners are but four of the countless victims of this pattern and practice, instituted in explicit State policy. For example, Iranians were treated unequally after September 11 as part of the National Security Entry-Exit Registration System ("NSEERS"), which required selected individuals from twenty-four Arab and Muslim countries to be fingerprinted, photographed, and subject to interrogation under oath.[37] The Iranian-American Bar Association published a study in February 2004 of arrests and deportations under NSEERS.[38] It found that Iranian registrants were subjected to improper interrogation,[39] arbitrary detention,[40] demeaning and humiliating treatment,[41] poor detention conditions,[42] and lack of proper medical care[43] as a result of this policy.

[36] *See, e.g.*, Hilal Elver, *Ten Years After 9/11: Rethinking Counterterrorism*, 21 Transnat'l & Contemp. Probs. 119 (2012); Ty S. Wahab Twibell, *The Road to Internment: Special Registration and Other Human Rights Violations of Arabs and Muslims in the United States*, 29 Vt. L. Rev. 407 (2005); Thomas M. McDonnell, *Targeting the Foreign Born by Race and Nationality: Counter-Productive in the "War on Terrorism"?*, 16 Pace Int'l L. Rev. 19 (2004).
[37] McDonnell, *supra* note 36, at 30.
[38] IRANIAN AMERICAN BAR ASS'N, A REVIEW OF THE TREATMENT OF IRANIAN NATIONALS BY THE INS IN CONNECTION WITH THE IMPLEMENTATION OF NSEERS SPECIAL REGISTRATION PROGRAM (2004), *available at* http://www.iaba.us/wp-content/uploads/2011/11/NSEERSReport-Feb.-6-2004.pdf.
[39] *Id.* at 3.
[40] *Id.* at 3-4.
[41] *Id.* at 30.
[42] *Id.* at 4.
[43] *Id.* at 27-28.

49. The Commission has held that Article II also prohibits "discrimination based on political persuasion or some other factor."[44] In Biscet v. Cuba, this Commission held that when "victims [are] tried and convicted for their political opinions and their opposition to the government...this means discrimination was present."[45] The Petitioners were deprived of liberty due to their perceived political opinions and opposition to the Iranian regime, and in particular based on their attendance at a pro-democracy rally. The United States did not establish that Petitioners posed a threat to national security and did not convict them of any crime. The United States unjustifiably detained the Petitioners based solely on their political activity violating their rights under Article II.

50. The United States denied the Petitioners equal treatment under the law based on both their nationality and political views, in direct violation of Article II.

D. The United States' Punishment Of The Petitioners For Participating In A Political Demonstration Violated Their Right To Freedom Of Expression Under Article IV.

51. The United States violated the Petitioners' right to freedom of expression when it utilized evidence of the Petitioners' participation in a lawful and peaceful demonstration to justify their arrest and prolonged detention. Article IV of the American Declaration provides that "[e]very person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever."

52. The Commission has stated that Principle 1 of the IACHR's Declaration of Principles on Freedom of Expression, which provides that "[f]reedom of expression in all its forms and manifestations is a fundamental and inalienable right of all individuals," reflects the same notion

[44] Biscet v. Cuba, Report No. 67/06 ¶ 229.
[45] *Id.* ¶ 230.

as Article IV.[46] Moreover, the Commission has adopted the Inter-American Court of Human Rights determination that this right encompasses the "right and freedom to seek, receive and disseminate information and ideas of all types."[47] As such Article IV affords the Petitioners the right to freedom of expression, freedom of opinion and the right to disseminate and seek information by any means. The Petitioners' attendance at the 1997 demonstration constituted a form a form of expression, a means of disseminating an opinion and a means of seeking information, and therefore it was protected by Article IV.

53. In Biscet, the Commission determined that the petitioners were punished for political activism protected under Article IV, when the Cuban government issued them with criminal convictions for activities including publishing political articles and participating in political groups that the Cuban government had deemed "counterrevolutionary." Just as in the case of Biscet, the Petitioners were punished for political activism when they were arrested and detained based on evidence of their attendance at a demonstration. However unlike the case of Biscet, the opinions and ideas expressed by the Petitioners' were not even directed at the United States - rather the demonstration was in protest of activities in Iran.

54. In Biscet, the Commission determined that the Cuban government was in violation of Article IV when it issued criminal convictions against the petitioners. Similarly, the United States government acted in violation of Article IV when it arrested and detained the Petitioners on the basis of their political expression and exchanging of opinions. When the Petitioners attended the political demonstration in June 1997, they were merely engaging in conduct protected by their Article IV right. The punishment which ensued from that activity is particularly egregious given

[46] *Id.* ¶ 186.
[47] *Id*.

that participation in the demonstration was lawful and was in no way linked to any dangerous, illegal or terrorist activity. The effect of the State's action was to punish the Petitioners for exercising right to freedom of expression under Article IV, thus violating Article IV.

E. The United States' Use Of Fabricated Evidence And False Testimony, And The United States' Arbitrary Detention Of The Petitioners Violated The Petitioners' Civil Rights, And Rights To Fair Trial And Due Process Of Law Under Articles XVII, XVIII, And XXVI.

55. Despite the Petitioners' continued insistence that they had absolutely no connection to terrorist activities, and the State's lack of evidence to support the allegation that they were involved in terrorist activities, the United States detained the Petitioners on this basis, with the knowledge that the allegation was false. Before judicial bodies at every procedural level, the State repeatedly directed the court's attention to fabricated evidence and recanted testimony in order to maintain the Petitioners' detention. In each of those instances, the State knew the evidence was false, either because it was fabricated by an agent of the State or because it had been recanted prior to presentation. These actions, taken in order to maintain the Petitioners' detention for over forty months, violated the Petitioners' rights under Articles XVII, XVIII, and XXVI.

56. Article XVII provides that "[e]very person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights." Article XVIII states that "[e]very person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." Article XXVI ensures that "[e]very person accused of an offense has the right to be given an impartial

and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment."

57. The Commission has previously found violations by the United States of Articles XVIII and XXVI where the government presents evidence that is known to be false.[48] In Teleguz, the Commission found that the government presented evidence in a criminal trial that had no evidentiary support, which was purported to show the petitioner had committed previous crimes for which he was not charged. The Commission declared that "the State has the duty to disclose all exculpatory evidence in its possession as well as information favorable to the accused." Furthermore, the Commission has previously stated that "when the State apparatus leaves human rights violations unpunished and the victim's full enjoyment of human rights is not promptly restored, the State fails to comply with its positive duties under international human rights law."[49] A State will be found to have failed its international responsibility whenever "for any reason, the alleged victim is denied access to a judicial remedy."[50] The United States does not guarantee individuals in immigration proceedings the same evidentiary protections that criminal defendants are given.[51] Thus, under the Ninth Circuit's opinion, the State and federal law enforcement agents are immune from damage awards, even when they fabricate evidence to detain non-citizens for years. This is so even when the fabricated evidence undermines the other available procedures designed to prevent unlawful detention. As such, the state of the law allows for violations of the rights to recognition of civil rights, fair trial, and due process of law.

[48] Teleguz v. United States, Case 12.864, Inter-Am. Comm'n H.R., Report No. 53/13 ¶ 99 (2013).
[49] Lenahan (Gonzales) v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 ¶ 173 (2011).
[50] Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (Ser. A) No. 9, ¶ 9 (Oct. 6, 1987).
[51] DEBORAH E. ANKER, THE LAW OF ASYLUM IN THE UNITED STATES: A GUIDE TO ADMINISTRATIVE PRACTICE AND CASE LAW 100-01 (2d ed. 1991).

58. Just as the State in Teleguz violated the petitioner's Article XVIII and XXVI rights by presenting evidence it knew to be false, here the United States and its Agents utilized falsified evidence and recanted testimony against the Petitioners, in order to revoke their bonds and attempt to have them deported to Iran. Agent Castillo modified the demonstration attendance list and presented it to the immigration judge as a terrorist cell form, which the judge relied upon in agreeing to revoke the Petitioners' bonds. This completely misrepresented document remained the foundation of all adverse judgments issued by the various domestic courts against the Petitioners throughout their pursuit of remedies.

59. However, unlike the petitioner in Teleguz, who had a constitutional protection from falsified evidence, the Petitioners were never guaranteed the same protection in the proceedings resulting in their detention. The Petitioners were therefore denied any remedy based on a claim that such evidence had been used against them. By presenting fabricated evidence and testimony in the Petitioners' bond revocation hearings, the State violated the Petitioners' civil and procedural rights in court. Moreover, by threatening Tabatabai with re-arrest and prosecution if he testified on behalf of the Petitioners, Castillo and MacDowell prevented the Petitioners from asserting a full and legitimate defense. These Article XVII, XVIII, and XXVI violations of the Petitioners' civil rights, rights to fair trial, and due process of law led to the Petitioners' detention for over forty months and prevented them from having an impartial proceeding.

F. The United States' Arbitrary Detention Of The Petitioners Based On Their Peaceful Assembly At A Demonstration And Association With Like Minded Individuals Violated Their Rights Of Assembly And Their Right Of Association Under Article XXI And Article XXII.

60. The Unites States' arbitrary detention of the Petitioners on the basis of their attendance at a demonstration, violated their rights to assembly and their rights of association under the American Declaration. Article XXI of the American Declaration provides that "[e]very person has the right to assemble peaceably with others in a formal public meeting or an informal gathering, in connection with matters of common interest of any nature." Article XXII provides that "[e]very person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature."

61. The demonstration that the Petitioners attended in 1997 was a peaceable, public gathering relating to the policies and activities of the government of Iran. The Petitioners' attendance at that demonstration was a means for the Petitioners to associate with other individuals to promote their political opposition to Iran. As such the Petitioners' actions in attending the demonstration were protected by Article XXI. The Commission has stated that the right to assemble for political purposes and the right to affiliate with similarly motivated people are rights that are "interlinked."[52] As such, Petitioners' association with similarly minded people to promote their political objections to the Iranian government is also protected.

62. United States agents violated the Petitioners' right by punishing them for exercising their right. The State did this by misrepresenting evidence of the Petitioners' attendance at the gathering, in order to justify their protracted detention. The evidence relied upon to do this was

[52] Biscet v. Cuba, Report No. 67/06 ¶ 218.

the list of individuals who were expected to attend the demonstration - and this list was falsely presented to the court as a terrorist cell list. By relying on distorted and misrepresented evidence of the Petitioner's attendance at a peaceable and public demonstration in order to detain the Petitioners, the State effectively punished the Petitioners for exercising their rights and violated their right of assembly and their right of association.

VI. CONCLUSION

63. Due to the acts of agents of the United States, Petitioners' rights under the American Declaration have been violated, namely Articles I, II, IV, XVII, XVIII, XXI, XXII, XXV, and XXVI. It is clear that Petitioners' detention was arbitrary: the justification was the attendance list for a peaceful political rally, falsely presented to the court by the State agents as a list of terrorists. Furthermore, according to the domestic courts' opinions, immigrants are not entitled to recover any compensation nor entitled to a judicial declaration that their rights have been violated even when their constitutional rights have been clearly violated in an immigration proceeding. Federal law enforcement agents are immune from damage awards, even when they fabricate evidence to detain non-citizens for years; this is so even when the fabricated evidence undermines the other available procedures designed to prevent unlawful detention.

64. Petitioners ask that this Commission declare the admissibility of this petition and grant all relief deemed appropriate and necessary by the Commission upon adjudication of the merits, which may include:

1. Declaring the United States to be in violation of Articles I, II, IV, XVII, XVIII, XXI, XXII, XXV, and XXVI of the American Declaration;

2. Requiring the United States to adopt measures aimed at preventing similar violations from taking place, including, *inter alia*, ensuring aliens can obtain compensation when knowingly false testimony is presented to secure their detention; conducting internal investigations when credible claims of malfeasance and fabrication of evidence are used to secure people's detention; and educating agents of the State in procedural protections that must be afforded to non-citizens;
3. Requesting that the United States provide fair compensation to the Petitioners for having violated their rights, including for arbitrarily detaining Petitioners for nearly four years.

Date: November 12, 2013.

Respectfully submitted,

_____

PAUL HOFFMAN
Counsel for the Petitioners

VII. APPENDIX

I. First Amended Complaint for Damages and Declaratory Relief (Filed Jan. 30, 2007)

II. Second Amended Complaint for Damages (Filed Oct. 6, 2008)

III. Order from the United States Court of Appeals, Ninth Circuit (Filed Nov. 3, 2011)

IV. Petition for Rehearing and for Rehearing En Banc (Filed Jan. 6, 2012)

V. Order and Amended Opinion from the United States Court of Appeals, Ninth Circuit (Filed June 7, 2012)

VI. Petition for Writ of Certiorari (Filed Oct. 22, 2012)

VII. Denial of Petition for Writ of Certiorari (Filed May 13, 2013)

IN THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

ORGANIZATION OF AMERICAN STATES

WASHINGTON, D.C. USA

Petition on behalf of

MOSTAFA SEYED MIRMEHDI
MOHSEN SEYED MIRMEHDI
MOJTABA SEYED MIRMEHDI
MOHAMMAD-REZA MIRMEHDI

— v. —

THE UNITED STATES OF AMERICA

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MOHAMMAD MIRMEHDI, MOSTAFA MIRMEHDI, MOHSEN MIRMEHDI, and MOJTABA MIRMEHDI,

Plaintiffs,

vs.

JOHN ASHCROFT, an individual, ROBERT MUELLER, an individual, JAMES W. ZIGLAR, an individual, MICHAEL J. GARCIA, an individual, CITY OF SANTA ANA, CITY OF LAS VEGAS, MVM Inc., ARTURO SUBIA, an individual, PAUL SANTOS, an individual, CHIEF CORTES, an individual, VARGAS, an individual CHRISTOPHER CASTILLO, an individual, J.A. MACDOWELL, an individual, COLLINS, an individual, ESCOBAR, an individual, LEON, an individual, LUNA, an individual, PETERY, an individual, ISAACS, an individual, M. LOPEZ, an individual, D. BARNES, an individual, T. LOGAN, an individual, CAPTAIN GARZONE, an individual, UNITED STATES OF AMERICA, and John and Jane Does 1-10.

Defendants.

Case No: 06-5055 R (PJWx)

FIRST AMENDED COMPLAINT FOR DAMAGES AND DECLARATORY RELIEF

(1) Unlawful Detention: Violation of First, Fourth, and Fifth Amendments

(2) Denial of Medical Care: Violation of Fifth, Eighth and Fourteenth Amendments

(3) Excessive, Unreasonable, and Deliberately Humiliating and Punitive Strip Searches: Violation of Fourth, Fifth and Fourteenth Amendments

(4) Inhumane Detention Conditions: Violation of Fifth and Fourteenth Amendments

(5) Interference with Right to Counsel: Violation of Sixth and Fourteenth Amendments

(6) Violation of the Prohibition Against Cruel, Inhuman, and Degrading Treatment or Punishment: Alien Tort Statute (28 U.S.C. § 1350)

(7) Intimidation of Witness/Denial of Due Process: Violation of Fifth Amendment

(8) Excessive Force: Violation of Fourth, Fifth and Fourteenth Amendments

(9) Declaratory Judgment Act (28 U.S.C. §§ 2201 and 2202)

(10) False Imprisonment

(11) Negligence

(12) Assault and Battery

(13) Intentional Infliction of Emotional Distress, and

(14) Conspiracy To Violate Civil Rights: Violation Of 42 U.S.C. § 1985

JURY TRIAL DEMANDED

Plaintiffs Mohammad Mirmehdi, Mostafa Mirmehdi, Mohsen Mirmehdi, and Mojtaba Mirmehdi (collectively "Plaintiffs") by and through their attorneys, on information and belief, allege the following:

PRELIMINARY STATEMENT

1. Plaintiffs were detained by the United States government and its agents and employees because they attended, with hundreds of others, a peaceful, public demonstration against the government of Iran, sponsored in part by an organization which was subsequently determined to be a terrorist organization. For this exercise of First Amendment Rights, Plaintiffs spent 41 months in detention where they were subjected to punishment by being, *inter alia*, treated like criminals, subjected to humiliating and degrading treatment, and denied basic medical care. In taking these actions, the government and its agents and employees betrayed basic American values and trampled on Plaintiffs' constitutional rights.

2. Between October 2001 and March 2005, Plaintiffs Mohammad, Mohsen, Mostafa and Mojtaba Mirmehdi (the "Mirmehdis"), four hard-working, law-abiding members of the Los Angeles community, were imprisoned based upon the false allegation that they were members of a "terrorist organization." The United States government and its agents made false claims that Plaintiffs had "supported" and "associated with" the Mujahedin-e Khalq ("MEK"), a group opposed to the theocratic dictatorship in Iran. No reasonable person, faced with the evidence which was obtained by and available to the agents, could have believed such accusations. Indeed, the federal government and its agents made these claims and sought Plaintiffs' detention in punitive conditions to punish them and to put pressure on them to disclose information Plaintiffs simply did not possess.

3. In March 2005, Plaintiffs were ultimately released from detention. The government and its agents and officials never had a legitimate basis for continuing their detention. Had it not been for the intervention of the Court of Appeals for the Ninth Circuit in November 2004, Plaintiffs would still be imprisoned.

4. Although the Mirmehdis were officially charged with immigration violations, and alleged to be "security threats" on the evidence of their peaceful opposition to the Iranian government, it was clear throughout their imprisonment that the FBI had another objective in detaining them: compelling them to cooperate in future investigations of the MEK. The Mirmehdis, having never been involved in any way with the MEK or any other terrorist group, and having no knowledge of anyone who was, were unable to help with this project. Yet federal agents, including Defendant Christopher Castillo, persisted for years in efforts to force their cooperation through continued punitive detention, even after admitting that a crucial informant had been "just speculating" when he described the Mirmehdis as associates of the MEK. Castillo approached the Mirmehdis on no less than five occasions to demand their cooperation in exchange for freedom.

5. Although the Mirmehdis were detained on immigration charges, they were

housed in units reserved for hard-core criminals, in violation of applicable guidelines. As a result, the Mirmehdis were beaten and harassed by other prisoners. Government agencies and officials which were responsible for Plaintiffs' incarceration and safety were deliberately indifferent to the threat posed to Plaintiffs by these violent prisoners — indeed, they subjected Plaintiffs affirmatively and intentionally to that threat, for the acknowledged purposes of intimidation and punishment.

6. At times, the Mirmehdis were locked for days in isolation cells as small as six by 10 feet; at other times, they were kept in overcrowded pens with dozens of other detainees, where the Mirmehdis slept on the floor next to clogged and overflowing toilets.

7. Plaintiffs were routinely locked-down for up to 23 hours per day, affording them scant opportunity for exercise, recreation or even exposure to the light of day. The Mirmehdis were transferred between facilities and to court hearings in chains, handcuffs and leg irons; groped by guards during pat-downs after daily recreation breaks, and strip-searched after every visit from their attorneys. Defendant guards assaulted the Mirmehdis physically and subjected them to routine ethnic insults and prejudice, appearing to take the government's baseless insinuations of terrorism as truth.

8. The Defendants responsible for their incarceration and safety denied the Mirmehdis basic medical care, whether for routine or chronic illnesses, accidental injuries, or assaults by Defendants' employees or other detainees. These Defendants denied the Mirmehdis appropriate and nutritious food, basic hygiene items, and clothing and blankets appropriate to the temperature of the cells they were kept in. And when the Mirmehdis complained — either about the specific conduct of Defendants or of Defendants' employees, or about generally poor conditions in Defendants' facilities — the Mirmehdis were punished with even worse conditions (weeks-long solitary confinement, housing with violent offenders, extreme cold) and even more objectionable conduct (baseless disciplinary actions, punitive body cavity searches, and violent assault).

9. Meanwhile, the government and its agents and employees abused the immigration detention process at every turn. The Mirmehdis were dressed in red jumpsuits which marked them (falsely) as criminals in the eyes of judges, guards, and fellow inmates. In addition, the government and its agents persistently and illegally monitored the Mirmehdis' phone calls with their attorneys, notwithstanding the Mirmehdis' many written requests and objections.

10. The federal government and its agents and officials knew that the Mirmehdis' opposition to the Iranian regime was expressed solely in peaceful, constitutionally-protected ways and that there was no evidence linking them to membership in the MEK. Notwithstanding, the government and its agents manipulated the evidence in order to detain Plaintiffs under punitive conditions for 41 months with the full knowledge that there was no evidence justifying their detention.

11. Plaintiffs' claims based on their unlawful detention did not accrue until they were released from custody in March 2005 pursuant to the principles set forth in Heck v Humphry, 512 U.S. 477. Moreover, any claims which may have accrued during the time Plaintiffs were incarcerated were tolled pursuant to CCP Section 340.1 and pursuant to the doctrine of equitable tolling under both California and Federal law. In particular, to the extent that any of Plaintiffs' FTCA claims accrued prior to their release from custody in March 2005, such claims were equitably tolled pursuant to the principles set forth in Alvarez-Machain v United States, 107 F.3d 969 (9th Cir. 1997) *cert. denied* 522 U.S. 814.

JURISDICTION AND VENUE

12. This Court has subject matter jurisdiction under and by virtue of 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1343 (civil rights and equal protection), 28 U.S.C. § 1346 (Federal Tort Claims Act), 28 U.S.C. §§ 2201 and 2202 (the Declaratory Judgment Act), 42 U.S.C. § 1983, and 28 U.S.C. § 1350 (the Alien Tort Statute).

13. All claims against individual employees and agents of the United States of America in their individual capacity are brought pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971). All claims against any municipal governments, including defendants City of Santa Ana and City of Las Vegas, and their employees and agents are brought pursuant to 42 U.S.C. § 1983. All claims against the United States of America are brought pursuant to 28 U.S.C. § 1346 (Federal Tort Claims Act).

14. Venue is proper in the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1391 (b) in that a substantial part of the events giving rise to Plaintiffs' claims occurred in this District.

PARTIES

The Plaintiffs

MOSTAFA ("MICHAEL") SEYED MIRMEHDI

15. Plaintiff MOSTAFA SEYED MIRMEHDI, referred to in this complaint by his American name of "Michael", is a native and citizen of Iran. Michael came to the United States in January of 1978 on a student visa, planning to study Mechanical Engineering. From 1978 through 1981, he attended colleges in Texas and Oklahoma, but did not complete his degree.

16. While in college, Michael became involved with a student group called the Supporters of Muslim Students Society ("SMSS") in Norman, Oklahoma, which publicly opposed the Islamic regime of Iran. After the Revolution and the subsequent taking of American hostages in Iran in 1979, the atmosphere toward Iranians in Oklahoma soured. Michael began to fear for his safety; yet due to his involvement with the SMSS, he knew that it would be even more unsafe for him to return to Iran. As a result, in 1981, he moved to California, where he re-enrolled in college and started working in order to support himself.

17. Michael eventually discontinued his engineering studies, and in 1985

obtained a license to sell real estate, which he did, successfully, until his arrest in 1999. At the time of his arrest, he was residing in the Los Angeles area with his brothers Mohsen and Mohammad.

18. Michael applied for political asylum in 1998 through an attorney who, unknown to Michael, falsified details of his asylum application. Michael filed a new asylum application which was denied. However, he has been granted a stay of deportation ("withholding of removal") to Iran under the United Nations Convention Against Torture and § 241(b)(3) of the Immigration and Nationality Act, because a judge has found it "more likely than not that he would be tortured" if he were deported to Iran.

19. Michael has never been charged with or convicted of any crime, in the United States or any other country. He has never been involved with terrorism, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

MOHSEN SEYED MIRMEHDI

20. Plaintiff MOHSEN SEYED MIRMEHDI ("Mohsen") is a native and citizen of Iran. He came to the United States in 1992 in order to escape the repression of the Iranian dictatorship. After Mohsen's brother Michael moved to the United States in 1978, it became known among the family's neighbors in Iran that the Mirmehdis opposed Islamic rule, and over the next year, neighbors — Islamists and members of the Revolutionary Guard — would write on the walls of the Mirmehdi house, "Death to America," "Death to counterrevolutionaries," and "Death to Taghooti" (meaning those who liked the Shah). Soon after the Revolution in Iran, Mohsen's brother Mojtaba was arrested, tortured, and imprisoned for three years for participating in a pro-democracy demonstration.

21. Mohsen was recruited by the new Islamic government to fight in the front lines in the war against Iraq. He refused, and the authorities retaliated by withdrawing his permission to attend University. Unable to study, he worked in an ice cream store until, in 1986, the religious police threatened him for walking in public with his girlfriend, whose hair was showing. He then stayed at home for most of two years, in

order to avoid being arrested or drafted into the army. He relented and joined the army in January 1989, but was soon demoted for listening to Western music. His superiors would search his possessions to see what books he was reading and to what radio stations he was listening.

22. Mohsen traveled to the United States in October, 1992, along with his brother Mojtaba, and joined their older brother Michael who by this time had settled in the Los Angeles area. Mohsen studied English, insurance, and real estate, and obtained his real estate license in 1993. He then worked in real estate, as an agent to both buyers and sellers, until the time of his arrest in March, 1999.

23. Mohsen applied for political asylum in 1998 through an attorney who, unknown to Mohsen, falsified details of his asylum application. He later filed a new asylum application, which is currently pending on appeal. Meanwhile, he has been granted a stay of deportation ("withholding of removal") to Iran under the United Nations Convention Against Torture and § 241(b)(3) of the Immigration and Nationality Act, because a judge has found it "more likely than not that he would be tortured" if he were deported to Iran.

24. While in the United States, Mohsen has attended several demonstrations against the Iranian regime. These demonstrations were legal, peaceful, and permitted, and were attended by large and varied crowds including members of the United States Congress. Mohsen participated in them because he is a liberal person who supports freedom, democracy, and women's rights in Iran.

25. Mohsen has never been charged with or convicted of any crime in the United States or any other country. He has never been involved with terrorism, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

MOJTABA SEYED MIRMEHDI

26. Plaintiff MOJTABA SEYED MIRMEHDI ("Mojtaba") is a native and citizen of Iran. He came to the United States in 1992 in order to escape the repression of the Iranian dictatorship. In 1981, while living in Iran shortly after the Revolution,

Mojtaba was captured by revolutionary guards during a pro-democracy demonstration. He was held without trial for three years, tortured repeatedly and threatened with execution. Mojtaba's family (including the other Plaintiffs and their parents) were accused of being counterrevolutionaries, American spies, and aligned with Israel. Four of Mojtaba's cousins were executed for anti-regime activity. During Mojtaba's imprisonment, some of the family's neighbors, who were regime supporters, attacked and beat his father and coerced other neighbors to remove their names from a letter asking for Mojtaba's release. Even after his release, Mojtaba and his family remained under surveillance by authorities and regime-aligned vigilante groups, in danger of persecution, arrest, or worse.

27. Mojtaba traveled to the United States in October, 1992, with his brother Mohsen, and joined their older brother Michael who had settled in the Los Angeles area. Mojtaba studied English, construction, and insurance. In 1996 he obtained a license to sell life insurance, but he never did so, working in construction instead. Eventually, he bought several residential investment properties. He later completed a real estate licensing class, but failed the certification test. He planned to try again, but was arrested by the INS in March 1999, before he could do so.

28. Mojtaba applied for political asylum in 1998 through an attorney who, unknown to Mojtaba, falsified details of his asylum application. Mojtaba filed a new asylum application which was denied. However, he has been granted a stay of deportation ("withholding of removal") to Iran under the United Nations Convention Against Torture and § 241(b)(3) of the Immigration and Nationality Act, because a judge has found it "more likely than not that he would be tortured" if he were deported to Iran.

29. Mojtaba has never been charged with or convicted of any crime in the United States. He has never been involved with terrorism, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

MOHAMMAD-REZA MIRMEHDI

30. Plaintiff MOHAMMAD-REZA MIRMEHDI ("Mohammad") is a native and

citizen of Iran. He came to the United States in October of 1993, with the intention of joining his three older brothers Michael, Mojtaba, and Mohsen, and in order to escape the oppressive political and economic situation in Iran.

31. In Iran, Mohammad's permission to study at a university, which had initially been granted on the basis of his grades, was withdrawn by the authorities after a political and religious background check. Unable to attend University, his career potential and opportunities for full self-development were drastically limited.

32. Upon arrival in the United States, Mohammad enrolled in real estate courses, and earned his real estate licence in 1994. From 1995 until the time of his initial arrest in 1999, he practiced real estate as both a buyers' and sellers' agent, residing in Los Angeles with his brothers Mohsen and Michael.

33. Mohammad applied for political asylum in 1998 through an attorney who, unknown to Mohammad, falsified details of his asylum application. He later filed a new asylum application, which is currently pending on appeal. Meanwhile, he has been granted a stay of deportation ("withholding of removal") to Iran under the United Nations Convention Against Torture and § 241(b)(3) of the Immigration and Nationality Act, because a judge has found it "more likely than not that he would be tortured" if he were deported to Iran.

34. Mohammad has never been charged with or convicted of any crime in the United States or any other country. He has never been involved with terrorism, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

The Defendants

35. Liability of Defendant the UNITED STATES OF AMERICA is based on the Federal Tort Claims Act, 28 U.S.C. § 1346(b); 2671, et seq. ("FTCA") which provides that a suit against the United States of America shall be the remedy for the negligent and wrongful acts of federal employees taken within the scope of their office or employment.

36. Plaintiffs are informed and believe and thereon allege that the officers and employees of Immigration and Naturalization Service ("INS")[1] Immigration and Customs Enforcement ("ICE"), Federal Bureau of Investigation ("FBI") and other investigative or law enforcement officers referred to herein are federal officers who were empowered by law to screen individuals entering the United States from an international point of origin, execute searches, seize evidence, and/or make arrests for violations of federal law. Accordingly, the INS, ICE, FBI and Homeland Security officers referred to herein are investigative or law enforcement officers within the meaning of 28 U.S.C. § 2680(h).

37. Plaintiffs are informed and believe and thereon allege that the INS, ICE, FBI and Homeland Security officers referred to herein were acting within the scope of their office or employment during the events alleged in this complaint.

38. Plaintiffs have timely filed administrative claims with the appropriate federal agencies. Six months after filing their administrative claims, plaintiffs have not received a final disposition of their claims, which serves as a final denial of the claim. Pursuant to 28 U.S.C. § 2675(a), plaintiffs now bring this action against Defendant United States of America under the FTCA.

The Senior Federal Defendants

39. Defendant JOHN ASHCROFT was, at times relevant to this complaint, the Attorney General of the United States and was at all relevant times acting under color of federal law. As Attorney General, Defendant Ashcroft had ultimate responsibility for the implementation and enforcement of the immigration laws. He was, on information and belief, a principal architect of the guidelines and practices which were used by the Immigration and Naturalization Service ("INS") and Immigration and Customs Enforcement ("ICE") in deciding to arrest Plaintiffs and then to continue their detention for over 41 months. On information and belief, Defendant set in motion a series of acts

[1] The Immigration and Naturalization Service became the Bureau of Citizenship and Immigration Services within the Department of Homeland Security on March 1, 2003.

by others which Defendant knew or should reasonably have known would violate the rights of Plaintiffs and others. On information and belief, he also authorized, condoned, and/or ratified Plaintiffs' unlawful detention and the unreasonable and excessively harsh conditions under which Plaintiffs were detained. Defendant Ashcroft is being sued in his individual capacity.

40. Defendant ROBERT MUELLER is, and has been at all times relevant to this complaint, the Director of the Federal Bureau of Investigation ("FBI") and was at all relevant times acting under color of federal law. On information and belief, Defendant Mueller was instrumental in the adoption, promulgation and implementation of guidelines and practices which led to Plaintiffs being detained and to the unreasonable length of their detention. On information and belief, Defendant set in motion a series of acts by others which Defendant knew or should reasonably have known would violate the rights of Plaintiffs and others. On information and belief, he also authorized, condoned, and/or ratified Plaintiffs' unlawful detention and the unreasonable and excessively harsh conditions under which Plaintiffs were detained. Defendant Mueller is being sued in his individual capacity.

41. Defendant JAMES W. ZIGLAR is a former Commissioner of the INS. At times relevant to this complaint, Defendant Ziglar, acting as INS Commissioner, had immediate responsibility for the implementation and enforcement of the immigration laws. He was the INS's chief executive officer and was at all relevant times acting under color of federal law. On information and belief, Defendant Ziglar was instrumental in the adoption, promulgation, and implementation of the guidelines and practices which were used by the INS in deciding to arrest Plaintiffs and then to continue their detentions for up to 41 months. On information and belief, Defendant set in motion a series of acts by others which Defendant knew or should reasonably have known would violate the rights of Plaintiffs and others. On information and belief, he also authorized, condoned, and/or ratified Plaintiffs' unlawful detention and the unreasonable and excessively harsh conditions under which Plaintiffs were detained. Defendant Ziglar is being sued in his

individual capacity.

42. Defendant MICHAEL J. GARCIA is a former Commissioner of the INS and former Assistant Secretary of Homeland Security for ICE and was at all relevant times acting under color of federal law. In these roles, and at times relevant to this complaint, Defendant Garcia had immediate responsibility for the implementation and enforcement of the immigration laws. He was the chief executive officer of INS and later of ICE. On information and belief, Defendant Garcia was instrumental in the adoption, promulgation, and implementation of the guidelines and practices which were used by the INS in deciding to arrest Plaintiffs and then to continue their detention for over 41 months. On information and belief, Defendant set in motion a series of acts by others which Defendant knew or should reasonably have known would violate the rights of Plaintiffs and others. On information and belief, he also authorized, condoned, and/or ratified Plaintiffs' unlawful detention and the unreasonable and excessively harsh conditions under which Plaintiffs were detained. Defendant Garcia is being sued in his individual capacity.

The Municipal and Corporate Defendants

43. Defendant City of Santa Ana, California, located in Orange County, California, did, on information and belief, at all times relevant to this complaint, maintain the detention facility known as Santa Ana Jail, within which Defendants held the Plaintiffs. Based upon the principles set forth in Monell v. New York City Department of Social Services, (1978) 436 U.S. 658, Defendant is liable for injuries sustained by Plaintiffs which were caused by Defendant's unconstitutional policies, practices and customs, including, without limitation, failing to provide proper medical care to detainees such as Plaintiffs, failing to provide proper security for detainees such as Plaintiffs and failing to properly train and supervise their employees with respect to the rights of detainees such as Plaintiffs to be free from excessive force and their duties to provide medical care and security for detainees such as Plaintiffs.

44. Defendant City of Las Vegas, Nevada, located in Clark County, Nevada,

did, on information and belief, at all times relevant to this complaint, maintain the detention facility known as Las Vegas City Jail, where Defendants held the Plaintiffs. Based upon the principles set forth in Monell v. New York City Department of Social Services, (1978) 436 U.S. 658, Defendant is liable for injuries sustained by Plaintiffs which were caused by Defendant's unconstitutional policies, practices and customs, including, without limitation, failing to provide proper medical care to detainees such as Plaintiffs, failing to provide proper security for detainees such as Plaintiffs and failing to properly train and supervise their employees with respect to the rights of detainees such as Plaintiffs to be free from excessive force and their duties to provide medical care and security for detainees such as Plaintiffs.

45. On information and belief, Defendant MVM Inc. was, at all times relevant to this complaint, a privately held corporation with its headquarters in Vienna, Virginia. On information and belief, Defendant MVM Inc. was, at all times relevant to this complaint, the employer of various detention officers and other employees working at ICE's San Pedro Detention Center, including defendants herein named and was responsible for the operations of the San Pedro Detention Center and the supervision and training of its employees. Plaintiff is informed and believes and thereon alleges that in operating the San Pedro Detention Center, Defendant MVM, Inc. was acting as an agent of the United States and was acting under color of federal law. Plaintiffs are informed and believe and thereon allege that Defendant MVM maintained, fostered and condoned various unconstitutional policies, customs and practices which led to the denial of Plaintiffs' rights including, without limitation, failing to provide proper medical care to detainees such as Plaintiffs, failing to provide proper security for detainees such as Plaintiffs and failing to properly train and supervise their employees with respect to the rights of detainees such as Plaintiffs to be free from excessive force and their duties to provide medical care and security for detainees such as Plaintiffs.

The Jail Supervisor Defendants

46. On information and belief, at all times relevant to this complaint, Defendant

Arturo SUBIA was employed by United States Immigration and Customs Enforcement ("ICE") as the Officer In Charge, or most senior officer responsible for management and policy, at ICE's San Pedro Detention Center and was at all relevant times acting under color of federal law. Defendant SUBIA is being sued in his individual capacity.

47. On information and belief, at all times relevant to this complaint, Defendant Paul SANTOS was employed by United States Immigration and Customs Enforcement ("ICE") as the Assistant Officer In Charge, or second most senior officer responsible for management and policy, at ICE's San Pedro Detention Center and was at all relevant times acting under color of federal law. Defendant SANTOS is being sued in his individual capacity.

48. On information and belief, at all times relevant to this complaint, Defendant Chief CORTES was employed by ICE, and had management and policy responsibility for detainee operations at ICE's San Pedro Detention Center and was at all relevant times acting under color of federal law. Defendant CORTES is being sued in his individual capacity.

Individual Defendants

49. On information and belief, at all times relevant to this complaint, Defendant CHRISTOPHER CASTILLO was duly appointed and acting as a Special Agent for the United States Department of Justice, FBI, employed as such by the United States Department of Justice and was at all relevant times acting under color of federal law. Defendant CASTILLO is being sued in his individual capacity.

50. On information and belief, at all times relevant to this complaint, Defendant J.A. MACDOWELL was duly appointed and acting as a Special Agent for the United States Immigration and Naturalization Service (later ICE), employed as such by the United States Department of Justice (later Department of Homeland Security) and was at all relevant times acting under color of federal law. Defendant MACDOWELL is being sued in his individual capacity.

51. On information and belief, at all times relevant to this complaint, Defendant

COLLINS was employed as a doctor, medical officer, or administrative officer in charge of detainee medical matters at ICE's San Pedro Detention Center and was at all relevant times acting under color of federal law. Defendant COLLINS is being sued in his individual capacity.

52. On information and belief, at all times relevant to this complaint, Defendant ESCOBAR was employed by Defendant City of Santa Ana, California, or by a department, division, contractor or agent thereof, at the Santa Ana Jail and was at all relevant times acting under color of state law. Defendant ESCOBAR is being sued in his individual capacity.

53. On information and belief, at all times relevant to this complaint, Defendant LEON was employed by Defendant City of Santa Ana, California, or by a department, division, contractor or agent thereof, at the Santa Ana Jail and was at all relevant times acting under color of state law. Defendant LEON is being sued in his individual capacity.

54. On information and belief, at all times relevant to this complaint, Defendant LUNA was employed by Defendant City of Santa Ana, California, or by a department, division, contractor or agent thereof, at the Santa Ana Jail and was at all relevant times acting under color of state law. Defendant LUNA is being sued in his individual capacity.

55. On information and belief, at all times relevant to this complaint, Defendant PETERY was an agent of ICE and worked, with management and supervisory duties, at its San Pedro Detention Center and was at all relevant times acting under color of federal law. Defendant PETERY is being sued in his individual capacity.

56. On information and belief, at all times relevant to this complaint, Defendant ISAACS was an agent of ICE and worked, with management and supervisory duties, at its San Pedro Detention Center and was at all relevant times acting under color of federal law. Defendant ISAACS is being sued in his individual capacity.

57. On information and belief, at all times relevant to this complaint, Defendant M. LOPEZ was an agent of ICE and worked at its San Pedro Detention Center and was

at all relevant times acting under color of federal law. Defendant LOPEZ is being sued in his individual capacity.

58. On information and belief, at all times relevant to this complaint, Defendant D. BARNES was an employee of Defendant MVM Inc. and worked at ICE's San Pedro Detention Center and was at all relevant times acting under color of federal law. Defendant BARNES is being sued in her individual capacity.

59. On information and belief, at all times relevant to this complaint, Defendant T. LOGAN was an employee of Defendant MVM Inc. and worked at ICE's San Pedro Detention Center and was at all relevant times acting under color of federal law. Defendant LOGAN is being sued in his individual capacity.

60. On information and belief, at all times relevant to this complaint, Defendant Captain GARZONE was an employee of Defendant MVM Inc. and worked, with management and supervisory duties, at ICE's San Pedro Detention Center and was at all relevant times acting under color of federal law. Defendant GARZONE is being sued in his individual capacity.

61. Plaintiffs are ignorant of the true identities and capacities of defendants DOES 1-10 and for that reason sue those defendants by such fictitious names. Plaintiffs are informed and believe and thereon allege that each of the fictitiously named defendants is in some manner and to some extent liable for the injuries alleged in this Complaint. Plaintiffs will seek leave to amend this Complaint to allege the true identities and capacities of these factitiously named defendants when they are ascertained.

62. Plaintiffs are informed and believe thereon allege that each defendant is, and at all times mentioned was, the agent, employee, representative, successor and/or assignee of each other defendant. Each defendant, in doing the acts, or in omitting to act as alleged in this Complaint, was acting within the scope of his or her actual or apparent authority or the alleged acts and omissions of each defendant as agent subsequently were ratified and adopted by each other defendant as principal. All non-municipal, individual

defendants acted or failed to act in the face of an obligation to do otherwise and did so maliciously and with reckless disregard for Plaintiff's rights and thus are liable for punitive damages. Plaintiffs are informed and believe and thereon allege that all defendants, at all times relevant to the allegations herein, acted under the color of state and/or federal law.

63. All of the Defendants were acting under the color of official authority in engaging in the actions and omissions complained of herein.

Definitions of Groups of Defendants

64. Defendants ASHCROFT, MUELLER, ZIGLAR, and GARCIA are referred to collectively in this complaint as the "SENIOR FEDERAL DEFENDANTS."

65. Defendants ASHCROFT, MUELLER, ZIGLAR, GARCIA, CASTILLO, AND MACDOWELL are referred to collectively in this complaint as the "FEDERAL POLICY AND INVESTIGATING DEFENDANTS."

66. Defendants MVM Inc, GARZONE, BARNES and LOGAN are referred to collectively in this complaint as the "MVM DEFENDANTS."

67. Defendants SUBIA, SANTOS, and CORTES are referred to collectively in this complaint as the "JAIL SUPERVISOR DEFENDANTS."

68. Defendants CITY OF SANTA ANA, CALIFORNIA and CITY OF LAS VEGAS, NEVADA are referred to collectively in this complaint as the "MUNICIPALITY DEFENDANTS."

69. Defendants PETERY, ISAACS, SUBIA, SANTOS, M. LOPEZ and CORTES are referred to as the "ICE DEFENDANTS."

FACTS COMMON TO ALL CLAIMS

The Government's Case Against the Mirmehdis

70. In March, 1999, the four Mirmehdi brothers were arrested and charged with immigration violations. After being held for several months without court hearings, Michael, Mojtaba, and Mohsen were released on bond in late 1999 and Mohammad was

released in September 2000, based on a determination that the Mirmehdis were neither a flight risk nor a threat to the community or to national security. The Mirmehdis committed no offense and gave no reason for the refusal of bail at any time after their release. As of September 11, 2001, the Mirmehdis' administrative proceedings were still pending and they were living normally in the community.

71. Three weeks after the September 11, 2001 attacks, FEDERAL POLICY AND INVESTIGATING DEFENDANTS revoked Mirmehdis' bond, even though they had obtained no additional information to indicate that the brothers were poor flight risks, or risks to the community or to national security. Indeed, they had received no additional information whatsoever other than corroboration of the brothers' participation in constitutionally protected, peaceful political activities of which FEDERAL POLICY AND INVESTIGATING DEFENDANTS were previously aware.

72. All four brothers were re-arrested on October 2, 2001. FEDERAL POLICY AND INVESTIGATING DEFENDANTS caused Plaintiffs to be held in detention for the next 41 months based on claims that they were supporters of the terrorist organization, Mujahedin-e Khalq ("MEK"). These unsupported claims were built upon "evidence" which Defendants knew to be false and which Defendants knew did not justify the Mirmehdis' continued detention.

73. FEDERAL POLICY AND INVESTIGATING DEFENDANTS' "evidence" fell into three categories: 1) hearsay statements attributed to unreliable and unidentified informants; 2) a handwritten document, recording participants' travel to and from a political rally, which Defendants falsely claimed was a terrorist "cell list"; and 3) other evidence of the Mirmehdis' attendance at various legal and constitutionally-protected events held to protest the Iranian government. FEDERAL POLICY AND INVESTIGATING DEFENDANTS knew they had no evidence justifying the detention of Plaintiffs, but proceeded to seek their continued detention nonetheless.

74. On December 10, 2001 — after a post-arrest delay of nearly 70 days — the Mirmehdis received their first full hearing on their motions to be released on bond.

75. At the Mirmehdis' December 10 joint bond hearing, testimony was heard from one witness— Defendant Christopher Castillo. At the same hearing, Castillo openly admitted his desire that the Mirmehdis be held without bond in order to induce them to cooperate with the FBI in future investigations. Castillo had been assigned to the investigation of the Mirmehdi brothers at least as early as June 1997, and over the next four years, took significant action to encourage the prosecution of the Mirmehdis.

76. At the end of the December 10, 2001, bond hearing, and based upon the false and misleading testimony of Defendant Castillo, the immigration judge denied bond, stating that considering the totality of the circumstances, the Mirmehdis would pose a danger to persons or property if released. This erroneous finding of fact, which was deliberately and intentionally caused by false evidence presented by FEDERAL POLICY AND INVESTIGATING DEFENDANTS, became the basis on which the Mirmehdis were imprisoned for an additional thirty-nine months.

77. The first prong of the government's argument for detaining the Mirmehdis relied on hearsay statements alleged to have been made by the Mirmehdis' former asylum lawyer, Bahram "Ben" Tabatabai, a multiple drug addict and admitted forger. Mr. Tabatabai was arrested in March, 1999, on charges of filing fraudulent asylum claims, and later signed a plea agreement in which he promised to help Defendants Agents MacDowell and Castillo with their future investigations. Any statements which Tabatabai initially made to Government agents concerning the Mirmehdis were made in the context of this plea deal. Plaintiffs are informed and believe and thereon allege that from 1997 through 1999 Defendants Castillo and MacDowell were both members of an inter-agency task force that participated in an investigation called Operation Eastern Approach ("OEA") that was instrumental in the Plaintiffs' 1999 detention and in the investigation and arrest of Tabatabai. Plaintiffs are further informed and believe and thereon allege that even after the task force was disbanded in 1999, Castillo continued to work with MacDowell to investigate Plaintiffs and that both agents had dealings with Tabatabatai after his release from prison and that both agents continued to be involved in

Plaintiffs' case after Plaintiffs were arrested and detained in October 2001.

78. On June 27, 2000, Agent MacDowell interviewed Tabatabai in prison. Agent MacDowell's own written report of this interview clearly states that Tabatabai did not believe that Michael Mirmehdi was a member of the M.E.K.

79. Then on January 23, 2001, Tabatabai was deposed in the four Mirmehdis' asylum cases. In this deposition, Tabatabai testified that his confession to "helping terrorists" had been coerced by the government, and that an FBI cooperating witness would be "100 percent wrong" if he said that Tabatabai had ever told him that any of his clients were associated with the M.E.K.

80. Finally, on June 19, 2001, Tabatabai appeared for live testimony in Mohammad's asylum proceeding. At the hearing, Tabatabai once again stated that he had "made up the details" concerning the Mirmehdis. Tabatabai further stated that a cooperating witness, Hojjat Azimi, who had worked as an undercover informant for the FBI, "was the one who brainwashed me and tried to put in my mouth that they are M.E.K."

81. Notwithstanding all of the above, and subsequent thereto, Defendant Castillo falsely and deliberately asserted at the Mirmehdis' December 10, 2001, bond hearing, that Tabatabai had "named the four Mirmehdi brothers as M.E.K. members and supporters as part of the plea agreement."

82. Soon after this hearing, Defendant Castillo, on information and belief, intimidated and strong-armed Tabatabai so that he would not continue to appear as a witness for the Mirmehdis. On January 4, 2002, Tabatabai arrived at the courthouse to testify in a continuation of Mohammad's asylum proceedings. Before the hearing could begin, however, Defendant Castillo, on information and belief, confronted Tabatabai in the courthouse waiting room, and, on information and belief, threatened to re-arrest him and renew his prosecution. Defendant Castillo, thus, obstructed justice to prevent evidence discrediting his testimony from coming to light.

83. After being threatened by Defendant Castillo, Tabatabai left the courthouse

and subsequently disappeared, making him unavailable to rebut Defendant Castillo's hearsay misrepresentations of Tabatabai's earlier testimony.

84. Nevertheless, Defendant Castillo himself soon admitted knowing that Tabatabai's earlier statements did not provide reliable evidence that the Mirmehdis were affiliated with the MEK. On May 21, 2002, Defendant Castillo testified that he did not believe that Tabatabai was telling the truth, stating: "I think Tabatabai was just speculating. That's my opinion that Tabatabai's statements . . . have no factual basis."

85. Castillo also personally offered Tabatabai's testimony to the judge during the bond hearing with the full knowledge that it was false. Castillo testified that Tabatabai had informed him that "the four Mirmehdi brothers . . .had founded the Oklahoma cell." Castillo knew this to be false because Mohshen, Mojtaba, and Mohammad did not even arrive in the United States until ten years after Michael left Oklahoma to come to California. The judge at the bond hearing found this to be particularly important, notwithstanding the falsity of the statement.

86. Finally, with regard to Tabatabai, in an asylum hearing for Mohsen on May 23, 2002, Agent MacDowell testified that "only" one person, Yousef Hamidi, was named as a MEK member when Tabatabai was indicted for providing material support to a "terrorist." In addition, despite the above, MacDowell testified at the same hearing that he believed that Plaintiffs were associated with MEK, even though they were not named in Tabatabai's indictment. Plaintiffs are informed and believe and thereon allege that on at least one occasion after Tabatabai's release from custody MacDowell met with Tabatabai. Plaintiffs are further informed and believe and thereon allege that there was no reasonable basis for Castillo, MacDowell or any other federal agents to believe that Plaintiffs were involved with MEK.

87. Notwithstanding these admissions by both of the lead investigators in FEDERAL POLICY AND INVESTIGATING DEFENDANTS' case against Plaintiffs, Defendants continued to detain Plaintiffs for nearly 34 more months, until March 16, 2005, without justification.

88. The second piece of "evidence" against the Mirmehdis was a document referred to as the "L.A. cell form" dating from 1997. This was one page which Defendant Castillo admits he removed from a larger list containing at least 60 pages (which is approximately 500 names or more), along with other notations such as travel dates and airfares. No reasonable officer could have surmised, given the number of documents, the hundreds of names listed, and the travel details included in these pages, that the travel log listing the Mirmehdis' names was a "cell list." Both an expert witness in the Mirmehdis' asylum trial and the Mirmehdis' former attorney contend that there were at least 100 such pages. Moreover, the translated document excluded information, such as relevant dates and some information about attendees that tended to show that the document was not a "cell form."

89. This list was apparently created by the organizers of a legal and constitutionally-protected political rally in Colorado in 1997, and used to record the plans (including air travel schedules) of potential participants in that rally. The list was apparently retained, and later modified, for the further purpose of inviting participants to future rallies. It seems to have been, essentially, a travel log, and later a marketing list. There is no evidence that this document indicates membership in MEK in 1997 or at any subsequent time.

90. The rally, whose participants are recorded on the list, took place in Denver, Colorado, on June 20, 1997, where it was held in order to coincide with a G-8 convention which was taking place there. This rally was attended by several members of the United States Congress, at least one of whom appeared as a speaker, and was organized under the auspices of the National Council of Resistance in Iran (NCRI).

91. NCRI is an international umbrella group which claims to be the Iranian democratic "government in exile," and, as such, is supported by a broad range of prominent Iranian exiles and exile groups of diverse political beliefs. NCRI members are united by their shared opposition to the Iranian Islamic regime, and committed to democratic decision-making. Until at least October, 1999, NCRI maintained lobbying

offices in Washington, DC, and received widespread Congressional support.

92. Historically, the MEK was one among the many elements comprising the NCRI. During the 1980s and 1990s, the MEK engaged in armed struggle against the Iranian Islamic regime, and received political support from various elements of the U.S. government. However, as the Clinton Administration made overtures for closer ties with the Iranian regime during the late 1990s, the MEK, and later NCRI, were placed on the U.S. State Department's list of "terrorist" organizations.

93. The MEK was first designated as a Foreign Terrorist Organization ("FTO") by the Secretary of State on October 8, 1997, after the Colorado rally. On October 8, 1999, the Secretary re-designated the MEK as an FTO, and designated NCRI an "alias" of the MEK. These designations were renewed in October, 2001. At the time of the June 20, 1997 rally in Colorado, neither MEK nor NCRI had yet received even their initial designations as FTO's by the Secretary of State.

94. The "L.A. Cell Form" or travel log produced during the organization of this rally, containing the Mirmehdis' names along with hundreds of others, was allegedly discovered by the FBI during a raid of a private home (alleged to be an MEK "safe house") in Los Angeles in February, 2001. After the raid, the list was placed in storage for several months.

95. On September 10 and 11, 2001, Defendant Castillo was in Los Angeles with an FBI cooperating witness, reviewing the evidence (including the travel log) seized during the February raid. Castillo has stated that because he needed the cooperating witness to help him interpret the evidence, and because the witness was in a witness security program, September 10 was the soonest that the witness was available to join Castillo to help him review this evidence.

96. Defendant Castillo has stated that he first encountered and reviewed the travel log on September 11, 2001, as the terrorist attacks of that day were occurring. In Castillo's own words, "while we were going through [the evidence seized in the January raid], the events of 9-11 happened, and we figured that this was very important and we

needed to submit it to INS immediately, which we did. And then in October, the bond for the Mirmehdi brothers was revoked [by INS] based on this information. . . ." The Federal Policy and Investigating Defendants' use of this document to justify the Mirmehdis' detention was knowingly false and pretextual in nature. FEDERAL POLICY AND INVESTIGATING DEFENDANTS intended to detain the Mirmehdis to coerce them into providing information that the Mirmehdis simply did not have.

97. At the Mirmehdis' December 10, 2001, bond hearing, Defendant Castillo testified that the presence of the Mirmehdis' names on the travel log was evidence of their "support" of the MEK. Yet as the immigration judge in three of the brother's asylum cases wrote, in determining that they were not risks to national security, "[n]owhere on the cell list does it describe respondent as either a sympathizer, supporter or member of the MEK."

98. The same "L.A. cell form" which INS used as "new evidence" to revoke the brothers' bond, was also largely responsible for the nearly 70-day delay between their arrest and December 10, 2001, bond hearing. At the Mirmehdis' first scheduled bond hearing, on October 30, 2001, INS asked that the hearing be re-set in order to provide the Attorney General's office an opportunity to certify the Mirmehdis as aliens believed to be terrorists under the Patriot Act. To obtain this certification, INS provided the Attorney General's office a copy of the "cell form." Yet at the December 10 hearing, the INS testified that the Attorney General would not certify the case.

99. The government's misrepresentation of this document as a terrorist "cell form," at the December 10, 2001 bond hearing and thereafter, was based solely on Defendant Castillo's personal speculation and reported discussions with an unnamed, unidentified, cooperating witness, who, Castillo testified, told him that the list "contain[ed] the names of MEK members, MEK supporters, and MEK associates." On information and belief, the Mirmehdis contend that this "cooperating witness" never existed.

100. When asked at the Mirmehdi's bond hearing which one of the above three

categories the brothers fit into, Defendant Castillo opined that they were "supporters." When asked his grounds for believing this, he stated, "based on investigation." Yet from his subsequent testimony, it is quite clear that, as concerned the Mirmehdis, Castillo's "investigation" had uncovered (aside from the anonymous informant's allegations themselves) nothing more than the following: First, at some time prior to 1997, "one" of the Mirmehdi brothers (Castillo could not remember when or which brother), had been observed in the vicinity of an alleged MEK location. None of the brothers have ever knowingly been in the vicinity of an MEK location. Second, Castillo had personally observed one or two of the brothers (again, he could not remember which) at the very same June 20, 1997, legal, public demonstration described by the so-called "L.A. cell form." Third, Castillo claimed that FBI agents had, in a search of the Mirmehdis' property, discovered a single envelope in the garbage containing the name of another alleged MEK associate. Given the manifestly illegal character of the search, Castillo's mention of this evidence (which, in any case, he did not actually produce) was false and in bad faith.

101. Thus, there was no basis to detain the Mirmehdi brothers on these "facts," which amounted to nothing more than what the brothers freely admitted–that they had attended constitutionally-protected demonstrations against the government of Iran. Although these demonstrations were sponsored by an entity which would later be designated as an FTO, they were held before that designation was made, and were free and open to the public and attended by thousands of people. Such attendance at public demonstrations was not sufficient evidence to demonstrate "membership" or "material support" of a terrorist organization — the only possible justification for the Mirmehdis' continued detention.

102. While the record contains no evidence which could have justified detaining the Mirmehdis as threats to national security, it does clearly show that Defendant Castillo and other federal officials and agents wanted the Mirmehdis held without bond to pressure them to cooperate with the FBI's ongoing investigations of MEK activity in

cities other than Los Angeles. During the bond hearing, Agent Castillo explained this forthrightly to the judge, saying that "it's easier to negotiate if they're held without bond." The Mirmehdis, however, informed the FBI that they would be unable to cooperate, as they did not have any knowledge which could be helpful. Accordingly, Plaintiffs are informed and believe and thereon allege that Defendant Castillo and other federal officials and agents including Defendant MacDowell, acting intentionally and/or with deliberate indifference to Plaintiffs' rights, unreasonably caused the wrongful and unconstitutional detention of Plaintiffs and that these actions were ratified by and were the result of policies promulgated by the Senior Federal Defendants.

TIME IN PRISON

Punitive Nature of Detention

103. Although they never charged the Mirmehdis with a crime, the Defendants, and all of them, treated the Mirmehdis as criminals. All four Mirmehdi brothers were wrongfully imprisoned in all-criminal prisoner housing units, and treated as criminal detainees while housed in mixed-population units. The Mirmehdis were held for days at a time in solitary confinement in cells no larger than six by ten feet, allowing them just one hour per day outside of the cell for exercise.

104. When transferring the four Mirmehdi brothers to court hearings, or between housing units, Defendants at San Pedro and Santa Ana jails routinely bound their wrists and ankles with handcuffs and leg shackles. Defendants at San Pedro placed them in vans with no seats, purposefully making sharp turns and abrupt stops in order to cause the Mirmehdis to slam into each other or into the walls of the van, while driving hazardously and without regard to traffic laws, and setting the van air conditioning to full blast in order to further punish Plaintiffs. Defendants at San Pedro also forced the Mirmehdis to wear red jumpsuits, including during their court appearances. Defendants at both facilities told the Mirmehdis that their harsh treatment was because they were terrorists. Defendants' actions falsely marked the Mirmehdis as criminal detainees in the

eyes of judges, guards, and other detainees.

105. Mohammad and Mojtaba Mirmehdi were confined in all-criminal prisoner housing units, while Mohsen and Michael were held in segregation, at a minimum, for two weeks after their October 2, 2001 arrest. In 2002, all four Mirmehdis were held in segregation for one week. Then in 2003, all four Mirmehdis were held in all-criminal prisoner housing units for around two months at Las Vegas City Jail and ICE's San Pedro Detention Center. For the majority of the remainder of their time in detention, the Mirmehdis were held in mixed populations of immigration and criminal detainees.

106. During their time at Santa Ana Jail, Defendants prevented the Mirmehdis from speaking by telephone with their parents in Iran, causing them immense anxiety and psychological suffering.

107. On February 2, 2005, the federal government agreed to release the Mirmehdis subject to thirteen highly restrictive conditions. The Mirmehdis, however, refused to sign the conditional release form, believing that many of the conditions were unconstitutional. For instance, one of the conditions prohibited the Mirmehdis from traveling more than thirty miles from their home, which would have effectively impeded their ability to retain their jobs as real estate agents. Other conditions would have prohibited them from attending constitutionally protected demonstrations and traveling by airplane.

108. After choosing to challenge the release conditions, the Mirmehdis were deemed "uncooperative" and prevented from communicating with the media. On February 3, 2005, the Mirmehdis were scheduled to be interviewed on ABC's Nightline. ICE officials cancelled the interview, preventing the Mirmehdis from communicating their situation to the outside world, because the brothers were no longer "cooperative," stating "refusing to sign [their release orders] is not being cooperative." This was not the first time that the Mirmehdis had been denied access to the media. A Los Angeles Times reporter was denied a meeting after officials told him that the Mirmehdis were a threat to national security, and reporters from Dateline and the San Diego Union-Tribune were

also refused or denied interviews.

Retaliation and Punishment

109. Before and while confining the four Mirmehdi brothers in all-criminal housing units, or in mixed-population units alongside violent and dangerous criminal detainees, the Defendants responsible for Plaintiffs' confinement and safety and well being made clear to the Mirmehdis that these actions were for the purposes of punishment.

110. The Defendants responsible for Plaintiffs' confinement and safety and well being punished or sought to punish the four Mirmehdi brothers for complaining to jail personnel, whether about harassment, lack of medical care, generally poor conditions, or specific conduct of Defendants or other officers. In addition to confinement with dangerous criminals, Defendants' punishment of the Mirmehdis took other forms, including physical assault, solitary confinement, extended confinement in small cells, threats of pepper spray, and subjection to extreme cold.

111. The Mirmehdis were subjected to punitive and unnecessary patdowns and body cavity searches. On one occasion at the Santa Ana jail, Defendant JOHN DOE #1 made derogatory and humiliating remarks about Michael's anatomy after conducting a cavity search with a flashlight. On another occasion during a patdown, the same Defendant forcefully tore a plastic wristband from Michael's wrist casing bruising and lacerations. When Michael objected, Defendant told Michael that he was a terrorist, and that he should "shut up" and put his hands back on the wall.

112. On another occasion at Santa Ana jail, Defendant JOHN DOE #2 (a bald officer) sought to punish Mohammad by placing him in a cell with a detainee who was on suicide watch, and who in fact attempted suicide by severely cutting himself while he was housed in Mohammad's cell. Mohammad, who was just outside of his cell in the

dayroom when the detainee cut himself, returned to his cell to witness the detainee bleeding profusely from the self-inflicted cuts on his abdomen. Mohammad was terrified by the cellmate's behavior, and feared for his own safety. After removing the detainee for medical treatment, Defendants and government employees working at Santa Ana Jail then told Mohammad to clean up the detainee's blood. Mohammad was severely traumatized by this episode, and experienced cold sweats, anxiety, sleeplessness, uncontrollable shaking and panic attacks for approximately the next 3 days.

113. By threatening punishment, Defendants sought to intimidate the Mirmehdis into not availing themselves of Defendants' own administrative procedures for seeking relief from the dangerous and unhealthful conditions in which they were confined.

114. For instance, in October 2003, after the Mirmehdis had made various complaints about the conditions at ICE's San Pedro Detention Center, ICE DEFENDANTS abruptly transferred them for several weeks to Las Vegas City Jail, a criminal facility which was known for violence and harsher conditions, and where, in fact, Mohsen would be assaulted by a criminal detainee. ICE DEFENDANTS had previously threatened to use just such a transfer as punishment. On information and belief, at the time of the transfer, there were dozens of empty beds available in the very same San Pedro unit where the Mirmehdis had been held.

115. Then, in January, 2004, at San Pedro, Michael was threatened by a gang member. When he tried to report the threat, Captain Garzone and Officer Topete made fun of Michael's stutter. When Michael objected, the officers threatened to place him in segregation.

116. And in June, 2004, at San Pedro, after requesting to be seen by a doctor for several days following a back injury, Michael asked Captain Garzone to contact a supervisor regarding the absence of appropriate medical care. Captain Garzone responded by threatening Michael, saying that he would not contact the supervisor, and if Michael continued to complain about his pain, then Garzone would place him in segregation.

117. The punishment of the Mirmehdis took many forms. For instance, Michael suffered acute back injuries in 2002 and again in June 2004, after certain Defendants required him, despite Michael's repeated warnings and objections, to engage in activities which were dangerous for him given his chronic back problems. On the first occasion, Defendants and government employees and agents at Santa Ana jail required Michael, on pain of punishment, to lift a heavy sofa in order to vacuum underneath it as part of a cleaning detail. On the second, Defendants and government employees and agents at San Pedro required Michael to move all of his belongings and personal items, including his mattress, up a flight of stairs from one cell to another. For approximately two weeks following each of these incidents, Michael suffered severe pain and was unable to walk.

118. Threats of punishment and retaliation permeated every aspect of the Mirmehdis' detention, even routine trips to the doctor. In 2002, during transportation for a routine medical proceeding, Mojtaba complained to Defendant supervisor Petery that his cuffs were too tight. Petery responded by grabbing Mojtaba by the back of his collar, punching him in the back of his head 5 or 6 times, and then threatening to pepper-spray him if he complained again.

119. Mojtaba was also singled out for punishment due to his ethnicity. On or around November 29, 2002, after a verbal argument between Mojtaba and another detainee, Defendant Sergeant Escobar initiated a disciplinary proceeding against Mojtaba (but not the other party to the dispute), alleging, "these days, any word can be a serious threat," a reference to terrorism and to Mojtaba's Middle Eastern origins. As a result of Escobar's investigation, Mojtaba was placed in solitary confinement for two weeks, during which officer Grant punished Mojtaba further by denying him changes of clothing and sheets.

120. The Defendants responsible for Plaintiffs' confinement, safety and well being intentionally placed the Mirmehdis in dangerous detention conditions as a way to punish or retaliate against them. On November 2, 2003, at San Pedro, Mohammad was assaulted by fellow detainee Oumar Diallo, as a direct result of Defendants' deliberate

indifference to the dangers posed to Mohammad by Defendants' punishment tactics. The incident began as Mr. Diallo was arguing with another detainee about the television remote control and Mohammad was trying to calm Oumar down. Oumar pushed Mohammad sharply, straining his neck, and then punched him in the face. The blow was hard enough that Mohammad fell to the ground and hit his head on the floor. Afterwards, Mohammad was in pain and was dizzy. A nurse prescribed him painkillers, but Mohammad remained nauseous and unsteady and experienced blurred vision for hours. As a result of this assault, Mohammad suffered injuries to the face, head, and neck, and severe neck pain lasting for a week or longer.

121. Mohsen was also a victim of these tactics on or around October 15, 2003, when he was assaulted by his cellmate, despite repeated warnings to authorities that he believed that he was in danger. This attack occurred at Las Vegas City Jail, where, on information and belief, ICE Defendants had sent Mohsen for acknowledged purposes of intimidation and punishment, and confined him in a cell along with three violent convicted criminals. In the attack, Mohsen's cellmate hit Mohsen in the back of the head with the sharp edge of a coffee jar, causing Mohsen to black out and later to experience physical symptoms of head injury including headache, nausea, dizziness, disorientation, ringing in the ears, blurred vision, and weakness in his fingers. Mohsen continues to experience many of these symptoms to this day.

122. After Mohsen was attacked by his cellmate, the only medical treatment offered to him by Las Vegas City Jail medical staff was a single standard dose of Tylenol, which was not sufficient to relieve his pain, nausea, and other symptoms. Mohsen requested a stronger medication, but this was denied. After the initial dose he was not even given more Tylenol. Severe head pain persisted for several days.

123. When the Mirmehdis were transferred from Las Vegas City Jail back to ICE's San Pedro Detention Center, on information and belief, Defendant INS officer Isaacs told Mohsen and Michael they were criminals and demanded that they wear red jumpsuits (which, on information and belief, designated them as criminals).

Non-criminal detainees were, on information and belief, supposed to wear blue jumpsuits. When Mohsen protested, Defendant Isaacs threatened that he would send Mohsen to solitary confinement if Mohsen did not put on the red jumpsuit. Isaacs then sent Mohsen and Michael to be housed in, on information and belief, Pod 3, which was otherwise populated by criminal detainees. Mohsen and Michael remained there for approximately one month.

124. Then, on March 5, 2005, at San Pedro, Mohammad was violently assaulted by an agent of ICE when he questioned the abusive treatment of another detainee. Defendant officer M. Lopez assaulted Mohammad after Mohammad questioned officer Lopez about his treatment of detainee Abdel-Jabbar Hamdan, who was severely ill and whom Lopez was preventing from using the bathroom. Lopez approached Mohammad as if to handcuff him, then grabbed Mohammad's wrist with one hand while he struck Mohammad in the face with his other fist. Lopez then grabbed Mohammad's neck, slammed him against a door and began choking him. Both men fell to the floor, where Lopez sat astride Mohammad and continued to strike him about the face, head and neck with his fists and the handcuff. Another officer then ordered Mohammad to turn around in order to be cuffed, and Mohammad complied. Lopez then grabbed Mohammad's neck again and resumed choking him, then pressed his knee into Mohammad's back while yanking on Mohammad's left arm and shoulder, causing him severe pain and injury to his neck, left shoulder, and left arm which persist to this date. Lopez continued to apply severe pressure to Mohammad's shoulder, arm, and back, until another officer ordered Lopez to get up.

125. As a result of this attack by Officer M. Lopez, Mohammad suffered physical injuries to the shoulder, back, neck, and face, along with permanent facial disfigurement, with pain and treatment persisting to this date. On information and belief, several other officers were present during the entire incident, including Defendants D. Barnes and T. Logan, who were employed by Defendant MVM Inc. On information and belief, these officers failed to sound their body alarms, which, as a matter of standard procedure, they

should have done in order to alert other staff to respond to and intervene in an ongoing incident of violence. Rather, on information and belief, their only intervention during the several minutes during which officer Lopez continued to beat and choke Mohammad, was to try to prevent other detainees from witnessing the assault.

126. Mohsen, Michael, and Mojtaba were traumatized psychologically as a result of witnessing officer Lopez brutally assault their brother Mohammad. For several days after the beating, Mohsen, Michael, and Mojtaba were unable to eat or sleep. Mohsen was also unable to speak, having lost his voice screaming at officer Lopez to stop killing his brother.

127. On information and belief, ICE DEFENDANTS conducted an internal investigation of officer Lopez' beating of Mohammad, and obtained or produced documentation including photographs of Mohammad's injuries and a videotape of the beating. On information and belief, ICE DEFENDANTS refused to share this documentation or other results of their investigation with Mohammad or with outside investigators.

128. Following the beating by Officer Lopez, Defendants initially continued to punish Mohammad by placing him in solitary confinement for several days. During his one hour of free time per day, Mohammad was handcuffed and shackled. However, as attention from reporters and detainee rights advocates began to increase after the beating, Defendants released Mohammad and his brothers approximately 10 days later.

Interference with Legal Defense

129. Defendants at Santa Ana Jail, Las Vegas City Jail, and San Pedro Detention Center interfered with the four Mirmehdi brothers' legal defense by monitoring their conversations with their attorneys throughout their 41-month detention– notwithstanding the Mirmehdis' right to private consultations, which they asserted frequently and in writing. Defendants also interfered with the Mirmehdi's legal defense by denying and delaying their rightful access to legal papers. This interference caused the Mirmehdis to appear for a bond hearing without the needed paperwork, and on another occasion,

forced them to amend an appeal filing. These actions of Defendants had the effect of further prolonging the Mirmehdis' detention and causing them significant additional expense.

130. Defendants at Santa Ana Jail also interfered with the four Mirmehdi brothers' defense by maintaining a rotating split-shift schedule in which groups of detainees were, for days at a time, allowed their out-of-cell exercise and dayroom time only during non-business hours, preventing them from initiating telephone calls to their attorneys.

131. On or around October 23, ICE DEFENDANTS willfully and maliciously engaged in "forum shopping" when they transferred the four Mirmehdi brothers from Las Vegas City Jail, where they had a bond hearing scheduled for the following day, back to San Pedro Detention Center. On information and belief, ICE DEFENDANTS ordered and completed this transfer for the express purpose of ensuring that no immigration judge other than Judge Sitgraves, who had previously decided in favor of Defendants, would have the opportunity to rule on the Mirmehdi's case.

Verbal Abuse and Harassment

132. The Defendants responsible for Plaintiffs' confinement, safety and well being and their agents and employees consistently harassed Michael, at various times insulting his culture, religion and nationality; calling him "terrorist," "gay," and a "faggot"; mocking his stuttering; and insulting his anatomy during a cavity search.

133. For instance, on or around May 5, 2004, officer Perez told Michael and other detainees, "you all deserve to be deported!" And on or around October 8, 2004, while Michael was in the exercise yard, officer Montijo called him a "faggot" and the "gay brother."

Poor Conditions and Hygiene

134. The Defendants responsible for Plaintiffs' confinement, safety and well being housed the four Mirmehdi brothers in poor and unhealthful conditions, including in air-conditioned cells in the depth of winter, without adequate clothing or bedding. All

four brothers were often unable to sleep and were frequently ill. Michael also developed chronic joint pain from the cold temperatures which was exacerbated through the winters of 2001-02 and 2002-03, and his requests for an extra blanket or pain killers were repeatedly denied. When Mohsen and Mojtaba complained, Defendants sometimes punished them by placing them in even colder cells, with even less protection.

135. The Defendants responsible for Plaintiffs' confinement, safety and well being denied the four Mirmehdi brothers access to soap, and gave them a shampoo which caused itching and rash. They also failed to provide proper drainage in the detainees' showers, requiring the Mirmehdis to shower while standing in filthy ankle-deep water. As a result, both Mohsen and Michael developed chronic infections in their feet. Defendants also failed to provide for adequate cleaning of the detainees' showers, causing Mojtaba to contract a ringworm infection in his genital area.

136. Although Michael and Mohsen did not own glasses, and needed contact lenses to read or see, Defendants at San Pedro declined to provide, and would not allow Michael or Mohsen to purchase or receive, solutions for the proper cleaning and storage of his contact lenses. As a result, Michael and Mohsen developed frequent and painful infections of the eyes throughout their detention at Defendants' San Pedro facility. Additionally, around April, 2004, Defendants confiscated Mohsen's contact lenses outright, causing Mohsen to experience severe eyestrain and headaches until March 2005.

137. The food provided to the four Mirmehdi brothers by Defendants was often spoiled, unwholesome and inedible, leading the Mirmehdis, as well as other detainees, to throw it out rather than eat it. For example, in 2002, at Santa Ana jail, Mohsen, Mojtaba and other detainees were repeatedly given sodas clearly imprinted with an expiration date of approximately three years before. Further, although Michael had been a strict vegetarian for many years, and Defendants' own policies direct them to provide detainees with vegetarian meals, Defendants at Santa Ana jail and San Pedro refused to provide Michael vegetarian meals during four weeks in 2001 and three weeks in 2003.

During these times, Michael ate only those portions of the standard meals which had not contacted meat or egg, causing him to lose 25 pounds in 2001 and 10 pounds in 2003.

138. For several days at the beginning of his detention, Michael and Mohsen were held in a holding cell at an INS facility along with, on information and belief, up to 100 other detainees. Because of overcrowding in this holding cell, they were forced to sleep sitting up on the floor next to the cell's two open toilets. The water taps were not functioning and no soap was provided, making acceptable hygiene impossible and causing Mohsen to contract an influenza-like illness.

139. At Santa Ana Jail, all the linens, including sheets, towels, and uniforms, were laundered with harsh chemicals causing the Mirmehdis to develop skin rashes, which to this day have left Mohsen with a scar on his neck.

Denial of Medical Care

140. Mojtaba experienced repeated incidents of chest pain while detained. On January 28, 2002, he suffered a particularly serious pain, and requested medical attention. In response to his request, two officers, Defendants Luna and Leon, laughed at him and chatted casually with each other for approximately 45 minutes outside his cell, while Mojtaba screamed for help and began self-flagellating in an effort to relieve or distract himself from the pain. Eventually, after Mojtaba fell to the floor of his cell, he was shackled hand and foot and taken to a cold cell, where he was denied medication, advised to change his attitude, and left on the floor overnight without a blanket. Mojtaba suffered chest pain for several more days after this incident.

141. Defendants' denial of medical care left Mohsen in severe pain and unable to walk for over a week. On or around April, 2004, at San Pedro Detention Center, after Mohsen injured his ankle, Defendants ignored Mohsen's requests for medical care until, after two days, Defendants gave him a pair of old, worn-out crutches, in which flimsy plastic pins had been inserted in place of metal bolts. After two more days, one of these defective crutches broke, causing Mohsen to re-injure the ankle. Defendants then gave him a better crutch, but again denied treatment by a doctor. Finally, after another four

days, Mohsen was allowed to see the San Pedro medic, Dr. Collins. But when Mohsen complained to Dr. Collins about the delay in treatment, Dr. Collins angrily took away Mohsen's crutches; and when Mohsen objected to that, Dr. Collins called security to have Mohsen removed. Mohsen, still unable to walk due to the untreated ankle injury, was transported to his cell in a wheelchair, where he remained unable to walk without assistance for another week.

142. While in detention, Mohsen also developed astigmatism and posterior vitreous detachment (PVD), a disruptive and alarming condition which caused Mohsen to experience dark spots and bright flashes in his vision. He asked San Pedro officials to see an ophthalmologist, but Defendants forced him to wait 7 months before allowing him to do so, causing him unnecessary anxiety and fear of blindness. Mohsen is currently in treatment for this condition. Since his release, Mohsen has also developed cataracts in both of his eyes. On information and belief, unnecessary stress and malnutrition, both of which Mohsen experienced regularly while detained, can be significant factors in contributing to cataracts and PVD.

143. The Defendants responsible for Plaintiffs' confinement, safety and well being denied the four Mirmehdi brothers even the most basic medical treatment for a variety of injuries, conditions, and diseases, including the acute injuries sustained during assaults; infections of the eyes and skin due to poor hygiene conditions; diseases due to cold, flu, and malnutrition; teeth infections; and psychological problems like panic attacks, frequent nightmares, concentration and memory problems, depression, anxiety, and, in the case of Michael, acute back injuries and chronic back pain. As a result, all of their injuries were significantly prolonged and exacerbated.

Injuries and Damages

144. Thus, as a direct result of Defendants' acts and omissions as alleged herein, including the wrongful detention of Plaintiffs in degrading and unsafe facilities, the Mirmehdis have suffered the following injuries and damages:

Injuries and Damages for Mohammad Mirmehdi

145. As a direct result of Defendants' conduct, Mohammad suffered physical injuries and illness including: contusions, abrasions and lacerations of the face and head; musculoskeletal injuries of the back, neck, and shoulder; permanent facial disfigurement; infections of the eyes and skin due to poor hygiene; disease due to cold, flu, and malnutrition; stress-related gastritis; and persistent pain due to the worst of these injuries for a period of at least 17 months.

146. As a direct result of Defendants' denial of appropriate medical care, their holding him unlawfully imprisoned for over 41 months, and other actions described herein, Mohammad also suffered psychological injuries including: Post-Traumatic Stress Disorder, panic attacks; severe anxiety; nightmares, night sweats, and nighttime muscle spasms; sleeplessness; inability to concentrate; inability to recall information such as names, phone numbers, and simple spellings; and clinical depression; which began while he was unlawfully imprisoned by Defendants, and continue to this day.

147. In addition, due to Defendants' conduct described herein, Mohammad suffered economic damages in the form of lost income, loss of good credit, and permanent loss of earning potential resulting from damage to his professional reputation.

Injuries and Damages for Michael Mirmehdi

148. As a direct result of Defendants' conduct described herein, Michael suffered physical injuries and illnesses including, severe joint pain, acute and chronic back injuries, which caused him weeks of extreme pain and the inability to walk; untreated and chronic infections of the eyes and skin which persist to this day; illness due to malnutrition, causing him to lose 25 lbs; and exacerbation of all of these injuries and illnesses due to Defendants' denial of basic medical care.

149. As a direct result of Defendants' denial of appropriate medical and psychological care and of their holding him unlawfully imprisoned for over 41 months and other actions described herein, Michael also sustained psychological injuries including: extreme stuttering; frequent nightmares; frequent and severe headaches;

concentration and memory problems; grey hair; Post-Traumatic Stress Disorder; depression and anxiety; which began while Michael was imprisoned by Defendants, and continue to this day.

150. In addition, due to Defendants' conduct described herein, Michael suffered past and future damages including lost income and attorneys' fees, and permanent loss of earning potential resulting from damage to his professional reputation.

Injuries and Damages for Mojtaba Mirmehdi

151. As a direct result of Defendants' conduct described herein, Mojtaba suffered physical injuries and illnesses including head injuries inflicted by a prison officer; scalding by hot water due to negligence of prison personnel; chronic and untreated infections of the skin and scalp; chest pain and panic attacks; flu-like illness; and exacerbation of these injuries and illness due to Defendants' refusal to provide even basic medical care.

152. As a direct result of Defendants' denial of appropriate medical care and of their holding him unlawfully imprisoned for over 41 months and other actions described herein, Mojtaba also sustained psychological injuries including: frequent nightmares, night sweats, and nighttime muscle spasms; sleeplessness; bleeding of the nose while sleeping; tooth loss and damage; loss of hair; inability to concentrate; constant and irrational fear of being shot; frequent, disturbing, and involuntary mental images of graphic violence; obsessive/compulsive behavior; Post Traumatic Stress Disorder; anxiety, depression, and suicidal ideation; all of which began while Mojtaba was imprisoned by Defendants, and continue to this day.

153. In addition, due to Defendants' conduct described herein, Mojtaba suffered past and future damages including lost personal property; lost income and capital losses; attorneys' fees; and permanent loss of earning potential resulting from psychological injury and damage to his professional reputation. Finally, claimant suffered loss of companionship of his girlfriend and other friends.

Injuries and Damages for Mohsen Mirmehdi

154. As a direct result of Defendants' conduct described herein, Mohsen suffered physical injuries and illnesses including ankle dislocation, and continuing pain and risk of re-injury, due to denial of appropriate medical care; physical injury in an assault by a fellow detainee, caused by Defendants' deliberate indifference; posterior retinal detachment; eyestrain, double-vision, headaches, and astigmatism; vertigo; prematurely gray hair; untreated and chronic infections of the eyes and skin; severe and prolonged tooth pain and infection; and exacerbation of all of these injuries and illness due to Defendants' refusal to provide even basic medical care.

155. As a direct result of Defendants' denial of appropriate medical care and of their holding him unlawfully imprisoned for over 41 months and other actions described herein, Mohsen also sustained psychological injuries including: frequent nightmares; concentration and memory problems; sleeplessness; Post Traumatic Stress Disorder; hallucinations; depression and anxiety; bed-wetting; and suicidal ideation; all of which began while Mohsen was imprisoned by Defendants, and continue to this day.

156. In addition, due to Defendants' conduct described herein, Mohsen suffered past and future damages including lost income, capital losses, loss of good credit, loss of professional licensing fees, attorneys' fees, and permanent loss of earning potential resulting from damage to his professional reputation.

The Brothers' Appeals and Eventual Release

157. While the Mirmehdis were in jail, between October 2, 2001 and March 16, 2005, their legal cases proceeded along various tracks: reviews and appeals in immigration court of their applications for asylum; appeals in immigration court of the initial January, 2002 decision denying them bond; and, when those appeals were exhausted, the filing in November 2002 and appeal through October, 2004, of a habeas corpus petition in the federal courts.

158. During 2002, immigration judges overseeing the Mirmehdis' asylum cases granted all four of them withholding of removal to Iran. In each case, the judges denied the brothers' applications for asylum; yet in each case, the judges granted withholding of removal, after finding no credible evidence that any of the brothers was involved with terrorism or was in any way dangerous to national security.

159. In Mohammad's April 30, 2002, asylum decision, Immigration Judge Henry Ipema denounced, in scathing terms, the Government's witnesses and evidence and its vague and unsupported allegations of terrorism.

160. The government appealed Judge Ipema's decision in Mohammad's asylum case, which granted Mohammad withholding of removal. The government's appeal was rejected by the BIA on August 20, 2004. Mohammad subsequently appealed Judge Ipema's denial of asylum to the Ninth Circuit, and his appeal is still pending.

161. Michael, Mojtaba, and Mohsen received their asylum decisions on August 20, 2002, from Immigration Judge Rose Peters, who denied asylum but granted withholding of removal, finding the government's allegations of terrorism too vague to be credible. From Judge Peters' August 20, 2002 order, the INS appealed the withholding of removal, Mohsen subsequently appealed his denials of asylum. Mohsen's appeal for asylum was rejected by the BIA. However, on August 20, 2004, the BIA upheld the withholding decisions for Michael, Mojtaba, and Mohsen.

162. Mohsen subsequently appealed his denial of asylum to the U.S. District Court for the Central District of California. His asylum appeal is still pending.

163. The Mirmehdis' bond proceedings were conducted jointly for all four brothers, both in the initial hearings and in the BIA appeal. After Judge Sitgraves' January, 2002 decision denying bond, the brothers appealed to the BIA, which upheld Judge Sitgraves on June 13, 2002.

164. Next, the brothers filed habeas corpus petitions in the U.S. District Court for the Central District of California, which dismissed the petitions with prejudice on May 23, 2003. Finally, they appealed this dismissal to the U.S. Court of Appeals for the 9th

Circuit.

165. In its ruling on November 15, 2004, on the habeas petitions, the 9th Circuit found that the BIA owed the brothers a duty of consistent dealing, which it had violated by the conflicting rulings in its asylum and bond decisions. Accordingly, the 9th Circuit remanded, asking the district court for "review of the sufficiency of the evidence" in the brothers' bond determinations "in light of the BIA's decision finding no evidence connecting the Mirmehdis to terrorist activities."

166. Although the evidentiary problems in the bond process were largely the same for all four brothers, the 9th Circuit wrote that, as to Michael and Mojtaba, their appeal was moot, because they had not appealed the denial of their asylum applications, giving the Attorney General (at least, as to the statutory 90-day removal period beginning August 20, 2004) an "independent, superceding reason for detaining them."

167. In late 2004 and early 2005, the brothers received a series of letters from DHS stating that their detention would be continued due to "national security concerns," notwithstanding the fact that by this time, no reasonable government official could have decided that Plaintiffs' continued detention was justified.

168. On February 2, 2005, ICE agents offered to release the brothers but then, after they had changed into civilian clothes, gave them a list of 13 restrictive conditions of release, such as not traveling more than 30 miles from home, not attending political rallies, and not flying on airplanes. The brothers refused to sign, and remained in detention.

169. On March 5, 2005, Mohammad was severely beaten by Officer M. Lopez at San Pedro Detention Center. After the assault, Mohammad was visited in jail, and his injuries noted, by a series of reporters and attorneys. Mohammad was also informed that the Attorney General would look into the matter, presumably to investigate whether to charge Officer Lopez criminally. A person from the AG's office was scheduled to interview Mohammad on March 17, 2005.

170. On March 16, 2005, the day before this interview was scheduled, the

brothers were again served with a list of conditions for their release. They again refused to sign, but this time, they were released nevertheless.

FIRST CLAIM FOR RELIEF

(Unlawful Detention: First, Fourth, and Fifth Amendments)

All Plaintiffs Against Defendants Ashcroft, Mueller, Ziglar, Garcia, Castillo, MacDowell and Does 1-10

171. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

172. This claim is brought by all Plaintiffs against Defendants Ashcroft, Mueller, Ziglar, Garcia, Castillo, and MacDowell (the Federal Policy and Investigation Defendants) and Does 1 through 10 in their individual capacities pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

173. Defendants violated Plaintiffs' First, Fourth and Fifth Amendment rights by causing their wrongful detention for 41 months despite the fact that they knew there was no probable cause to believe that Plaintiffs were members of any terrorist organization or engaged in any "terrorist" activity.

174. In detaining Plaintiffs, initially and continuing their detention for 41 months, based on false allegations of connection to a terrorist organization, without any legitimate immigration law enforcement purpose, without evidence that Plaintiffs posed a danger or flight risk, or without charging Plaintiffs with any crime, Defendants acted unreasonably with deliberate indifference to Plaintiffs' constitutional rights and deliberately and intentionally caused Plaintiffs' imprisonment for coercive and improper purposes in violation of Plaintiffs' rights under the First, Fourth and Fifth Amendments to the United States Constitution, including Plaintiffs' rights to due process. The Senior Federal Defendants adopted unconstitutional policies and practices and set in motion a

series of events which directly led to the violation of Plaintiffs' constitutional rights and otherwise authorized, ratified and condoned the actions of their agents and employees in causing the unlawful detention of Plaintiffs and the violations of Plaintiffs' constitutional rights.

175. In detaining Plaintiffs based on false allegations that Plaintiffs were a threat to national security and subjecting them, based on these false allegations, to continued detention not accorded similarly situated non-citizens, Defendants, acting under color of federal law and their authority as federal officers, have singled out Plaintiffs based on their race, religion, and/or ethnic or national origin, and intentionally violated their rights under the Fifth Amendment to the United States Constitution to equal protection of the law. Further, to the extent that Plaintiffs' detention was based on their participation in a lawful public demonstration against the Iranian government, Defendants violated Plaintiffs' rights under the First Amendment.

176. Plaintiffs are informed and believe and thereon allege that the aforementioned acts of Defendants were done with malice, oppression and/or with reckless disregard of Plaintiffs' rights, thereby justifying the awarding of punitive and exemplary damages against those Defendants.

177. As a direct and proximate result of the acts and omissions of Defendants, and each of them, Plaintiffs were deprived of their rights under the federal Constitution United States and have suffered physical sickness and injuries, emotional distress, humiliation, embarrassment, pain and suffering, loss of earnings and earning capacity, medical and legal expenses and present and future monetary damages. Plaintiffs are entitled to compensatory and punitive damages in an amount to be determined at trial.

SECOND CLAIM FOR RELIEF

(Denial of Medical Care: Fifth, Eighth and Fourteenth Amendments)

178. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as set forth fully herein.

179. This claim is brought by all Plaintiffs against the Municipality Defendants, pursuant to 42 U.S.C. Section 1983, and against the Jail Supervisor Defendants, and Defendants COLLINS and MVM Inc. pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), and against Defendants Does 1 through 10. This claim is additionally brought by Plaintiff Mojtaba Mirmehdi against Defendants LUNA and LEON pursuant to 42 U.S.C. Section 1983; by Plaintiff Mohammad Mirmehdi against Defendants PETERY and ISAACS pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971) ; and by Plaintiff Michael Mirmehdi against Defendant GARZONE. pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

180. Defendants with deliberate disregard for any injury Plaintiffs would suffer, and deliberate indifference of Plaintiff's medical needs, deprived Plaintiffs of medical treatment for their serious medical needs.

181. Defendants violated Plaintiffs' rights by, among other things, displaying deliberate indifference to Plaintiffs' serious and urgent medical needs by failing to provide them with adequate medical attention, care and treatment. In denying Plaintiffs medical care for their serious injuries, Defendants, acting under color of law and their authority as federal and/or state officers, have with deliberate indifference to Plaintiff's medical needs, subjected Plaintiffs to unnecessary and wanton infliction of pain in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

182. Municipal Defendant's unconstitutional policies, practices and/or customs were a direct and legal cause of Plaintiff's damages, pain and suffering.

183. As a direct and proximate result of the acts and omissions of Defendants, and each of them, Plaintiffs were deprived of their rights under the Eighth and Fourteenth Amendments of the United States Constitution and of the laws of the United States and have suffered physical sickness and injuries, emotional distress, humiliation, embarrassment, pain and suffering, and loss of earnings and earning capacity, medical and legal expenses present and future monetary damages. Plaintiffs are entitled to

compensatory and punitive damages in an amount to be determined at trial.

184. Plaintiffs are informed and believe and thereon allege that the aforementioned acts of Defendants were willful, malicious, intentional, oppressive and despicable and/or were done in willful and conscious disregard of the rights, welfare and safety of Plaintiffs, thereby justifying the awarding of punitive and exemplary damages against all non-municipal Defendants.

THIRD CLAIM FOR RELIEF

(Excessive, Unreasonable, and Deliberately Humiliating and Punitive Strip Searches: Fourth, Fifth and Fourteenth Amendments)

185. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

186. This claim is brought by all Plaintiffs against the Municipality Defendants pursuant to 42 U.S.C. Section 1983, and against the Jail Supervisor Defendants, the ICE Defendants, the Senior Federal Defendants and Defendant MVM Inc. pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), and against Defendants Does 1 through 10. .

187. By subjecting Plaintiffs to excessive and unreasonable strip searches and cavity searches with no rational relation to a legitimate penological purpose, when Defendants had no reasonable suspicion or rational reason to justify a strip search, and conducting the searches in a deliberately humiliating manner that was not reasonably related to any legitimate penological purpose, said Defendants intentionally or recklessly violated Plaintiffs' Fourth, Fifth and Fourteenth Amendment rights.

188. Defendants acted with deliberate indifference to Plaintiff's rights in their supervision of abusive officers and guards, including those Defendants who subjected Plaintiffs to these punitive strip searches, and thereby violated Plaintiffs' right to be free from punishment under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

189. By subjecting Plaintiffs to strip searches and cavity searches so devoid of rational relation to any legitimate penological purpose that the searches' only possible purpose was punitive, abusive officer Defendants and Supervisor Defendants intentionally or recklessly violated Plaintiffs' rights to be free from punishment under the Due Process Clause of the Fifth and Fourteenth Amendment to the United States Constitution.

190. By subjecting Plaintiffs to excessive and unreasonable strip searches and cavity searches with no rational relation to a legitimate penological purpose when Defendants had no reasonable suspicion or rational reason to justify a strip search, and conducting the searches in a deliberately humiliating manner that was not reasonably related to any legitimate penological purpose, Defendants intentionally or recklessly violated Plaintiffs' rights to privacy and to be free from unreasonable searches, in violation of their rights under the Fourth Amendment to the United States Constitution.

191. By adopting, promulgating, and the implementing the policy and practice under which Plaintiffs were subjected to these punitive strip searches and cavity searches, the Senior Federal Defendants intentionally and recklessly violated Plaintiffs' right to be free from punishment under the Due Process Clause of the Fourth and Fifth Amendment to the United States Constitution.

192. Municipal Defendant's unconstitutional policies, practices and/or customs were a direct and legal cause of Plaintiff's damages, pain and suffering.

193. As a direct and proximate result of the acts and omissions of Defendants, and each of them, Plaintiffs were deprived of their rights under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution and of the laws of the United States and have suffered physical sickness and injuries, emotional distress, humiliation, embarrassment, pain and suffering, loss of earnings and earning capacity, medical and legal expenses and present and future monetary damages. Plaintiffs are entitled to compensatory and punitive damages in an amount to be determined at trial.

194. Plaintiffs are informed and believe and thereon allege that the

aforementioned acts of Defendants were willful, malicious, intentional, oppressive and despicable and/or were done in willful and conscious disregard of the rights, welfare and safety of Plaintiffs, thereby justifying the awarding of punitive and exemplary damages against all non-municipal Defendants.

FOURTH CLAIM FOR RELIEF

(Inhumane Detention Conditions: Fifth and Fourteenth Amendments)

195. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as set forth fully herein.

196. This claim is brought by all Plaintiffs against the Municipality Defendants pursuant to 42 U.S.C. Section 1983, and against the Jail Supervisor Defendants, and Defendants Collins, Petery, and MVM Inc pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971) and against Defendants Does 1 through 10. This claim is additionally brought by Plaintiff Mojtaba Mirmehdi against Defendants ESCOBAR, LUNA, and LEON pursuant to 42 U.S.C. Section 1983; by Plaintiff Mohsen, Michael, and Mohammad Mirmehdi against Defendant ISAACS pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), by Plaintiff Mohammad Mirmehdi against Defendants D. BARNES and T. LOGAN pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971) , and by Plaintiff Michael Mirmehdi against Defendant GARZONE pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

197. By subjecting Plaintiffs to the detention conditions alleged herein, Defendants intentionally deprived or acted with deliberate indifference to Plaintiffs' constitutional rights and deliberately and intentionally subjected Plaintiffs' to imprisonment, not for any just penological purpose, but for purposes of punishment and coercion.

198. By subjecting Plaintiffs to the detention conditions alleged herein,

Defendants, acting under color or law and their authority as federal officers, have singled out Plaintiffs based on their race, religion, and/or ethnic or national origin, and have engaged in selective mistreatment amounting to punishment in violation of their rights under the Fifth and Fourteenth Amendments to the United States Constitution to equal protection of the law.

199. Defendants, acting under color of law, have intentionally and with deliberate disregard for any injury Plaintiffs would suffer, subjected Plaintiffs to inhumane and degrading detention conditions without due process of law in violation of the Fifth and Fourteenth Amendment to the United States Constitution.

200. As a direct and proximate result of the acts and omissions of Defendants, and each of them, Plaintiffs were deprived of their rights under the Fifth and Fourteenth Amendments of the United States Constitution and of the laws of the United States and have suffered physical sickness and injuries, emotional distress, humiliation, embarrassment, pain and suffering, loss of earnings and earning capacity, medical and legal expenses and present and future monetary damages. Plaintiffs are entitled to compensatory and punitive damages in an amount to be determined at trial.

201. Plaintiffs are informed and believe and thereon allege that the aforementioned acts of Defendants were willful, malicious, intentional, oppressive and despicable and/or were done in willful, conscious and/or reckless disregard of the rights, welfare and safety of Plaintiffs, thereby justifying the awarding of punitive and exemplary damages against all non-municipal Defendants.

202. Municipal Defendants' unconstitutional policies, practices and/or customs were a direct and legal cause of Plaintiff's damages, pain and suffering.

FIFTH CLAIM FOR RELIEF

(Interference with Right to Counsel; Sixth and Fourteenth Amendments)

203. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

204. This claim is brought by all Plaintiffs against the Municipality Defendants pursuant to 42 U.S.C. Section 1983 and against the Jail Supervisor Defendants, the Senior Federal Defendants and Defendant MVM Inc. pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), and against Defendants Does 1 through 10.

205. By adopting, promulgating, and implementing the policy and practice under which Plaintiffs were prevented from engaging in confidential communications with their legal counsel and were denied access to documents necessary to prepare for their court hearings, Defendants intentionally and recklessly violated Plaintiffs' rights to obtain access to legal counsel and to petition the January 28, 2007January 28, 2007 courts for redress of their grievances, in violation of their rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

206. This complaint sets forth a claim for deprivation of civil rights for violation of the Fifth, Sixth and Fourteenth Amendment to the United States Constitution against Defendants/ In particular, by adopting, promulgating, and implementing the policy and practice under which Plaintiffs were prevented from engaging in confidential communications with their legal counsel and were denied access to documents necessary to prepare for their court hearings, Defendants intentionally and recklessly violated Plaintiffs' rights to obtain access to legal counsel and to petition the courts for redress of their grievances, in violation of their rights under the Fifth Amendment, Sixth and Fourteenth of the United States Constitution.

207. As a direct and proximate result of the acts and omissions of Defendants, and each of them, Plaintiffs were deprived of their rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and of the laws of the United States and have suffered damages, including physical sickness and injuries, emotional distress, humiliation, embarrassment, pain and suffering, loss of earnings and earning capacity, medical and legal expenses and present and future monetary damages. Plaintiffs are entitled to compensatory and punitive damages in an amount to be

determined at trial.

208. Municipal Defendants' unconstitutional policies, practices and/or customs were a direct and legal cause of Plaintiff's damages, pain and suffering.

209. Plaintiffs are informed and believe and thereon allege that the aforementioned acts of Defendants were willful, malicious, intentional, oppressive and despicable and/or were done in willful and conscious disregard of the rights, welfare and safety of Plaintiffs, thereby justifying the awarding of punitive and exemplary damages against all non-municipal Defendants.

SIXTH CLAIM FOR RELIEF

(Cruel, Inhuman, or Degrading Treatment or Punishment: Alien Tort Statute 28 U.S.C. § 1350)

210. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

211. This claim is brought by all Plaintiffs against the Municipality Defendants, the Jail Supervisor Defendants, and Defendants Collins, Petery, MVM Inc., and Defendants Does 1 through 10. This claim is additionally brought by Mojtaba against Defendants ESCOBAR, LUNA, and LEON; by Mohsen, Michael, and Mohammad against Defendant ISAACS, by Mohammad against Defendants D. BARNES and T. LOGAN, and by Michael against Defendant GARZONE.

212. The acts described herein had the intent and the effect of grossly humiliating and debasing the Plaintiffs, forcing them to act against their will and conscience, inciting fear and anguish, and breaking their physical and/or moral resistance.

213. The acts described herein constitute cruel, inhuman, or degrading treatment in violation of the law of nations under the Alien Tort Claims Act, 28 U.S.C. § 1350, in that the acts violated customary international law prohibiting cruel, inhuman, or degrading treatment as reflected, expressed, and defined in multilateral treaties and other

international instruments, international and domestic judicial decisions, and other authorities.

214. Defendants are liable for said conduct in that Defendants, acting under color of law and their authority as federal officers, directed, ordered, confirmed, ratified, and/or conspired to cause the cruel, inhuman or degrading treatment of Plaintiffs.

215. All Plaintiffs were forced to suffer severe physical and psychological abuse and agony and as a result have suffered damages, including physical sickness and injuries, emotional distress, humiliation, embarrassment, pain and suffering, loss of earnings and earning capacity, medical and legal expenses and present and future monetary damages. Plaintiffs are entitled to compensatory and punitive damages in an amount to be determined at trial.

. Plaintiffs are informed and believe and thereon allege that the aforementioned acts of Defendants were willful, malicious, intentional, oppressive and despicable and/or were done in willful and conscious disregard of the rights, welfare and safety of Plaintiffs, thereby justifying the awarding of punitive and exemplary damages against all non-municipal Defendants.

SEVENTH CLAIM FOR RELIEF

(Intimidation of Witness/Denial of Due Process: Fifth Amendment)

216. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

217. This claim is brought by all Plaintiffs against Defendant CHRISTOPHER CASTILLO and Does 1 through 10 pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), and against Defendants Does 1 through 10.

218. By intentionally and recklessly intimidating a witness so as to deny Plaintiffs the ability to rebut government testimony against them and to present favorable evidence in support of their claims, Defendant Castillo violated Plaintiffs' due process

rights as guaranteed by the Fifth Amendments to the United States Constitution, for which such officers are individually liable.

219. As a direct and proximate result of the acts of Defendant Castillo, Plaintiffs case was prejudiced and Plaintiffs were deprived of their rights under the Fifth Amendment of the United States Constitution and of the laws of the United States and have suffered damages, including physical sickness and injuries, emotional distress, humiliation, embarrassment, pain and suffering, loss of earnings and earning capacity, medical and legal expenses and present and future monetary damages. Plaintiffs are entitled to compensatory and punitive damages in an amount to be determined at trial.

220. Defendant Castillo's acts were a direct and legal cause of Plaintiffs' damages, pain and suffering.

221. Plaintiffs are informed and believe and thereon allege that the aforementioned acts of Defendant Castillo were willful, malicious, intentional, oppressive and despicable and/or were done in willful and conscious disregard of the rights, welfare and safety of Plaintiffs, thereby justifying the awarding of punitive and exemplary damages.

EIGHTH CLAIM FOR RELIEF

(Excessive Force — Mohammad Mirmehdi: Fourth, Fifth and Fourteenth Amendments)

222. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

223. Plaintiff Mohammad Mirmehdi brings this claim on his own behalf against Defendant M. LOPEZ, T. LOGAN, D. BARNES, and MVM Inc. pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), and against Defendants Does 1 through 10.

224. The intentional beatings of Plaintiff Mohammad Mirmehdi by these Defendants when Plaintiff was unarmed and did not pose a threat of death or grievous

bodily injury to Defendants or others, and when Defendants had no lawful authority to use deadly or non-deadly force against him, was without justification or provocation, was excessive, and was done with actual malice toward Plaintiff and with willful and wanton indifference to and deliberate disregard for the constitutional rights of Plaintiff.

225. The intentional beatings of Plaintiff Mohammad Mirmehdi by said Defendants violated Plaintiff's rights as guaranteed by the Fourth and Fifth Amendments to the United States Constitution, for which such officers are individually liable.

226. As a direct and proximate result of the acts and omissions of Defendants, Plaintiff was deprived of his rights under the Fourth and Fifth Amendments of the United States Constitution and of the laws of the United States and has sustained permanent physical and psychological injuries and incurred medical bills and other expenses. These injuries have caused and will continue to cause him great pain and suffering, both mental and physical. Plaintiff's damages include physical sickness and injuries, emotional distress, humiliation, embarrassment, pain and suffering, loss of earnings and earning capacity, medical and legal expenses and present and future monetary damages. Plaintiff is entitled to compensatory and punitive damages in an amount to be determined at trial.

227. Plaintiff is informed and believes and thereon alleges that the aforementioned acts of Defendants were willful, malicious, intentional, oppressive and despicable and/or were done in willful and conscious disregard of the rights, welfare and safety of Plaintiff, thereby justifying the awarding of punitive and exemplary damages against all Defendants.

NINTH CLAIM FOR RELIEF

(Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202)

228. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

229. Plaintiffs bring this claim against all Defendants.

230. Defendants denied Plaintiffs certain fundamental rights and protections

including, but not limited to, the right to be free from unlawful seizure, the right to due process under the law, the right to equal protection, the right to be provided with adequate medical care, the right to be free from excessive, unreasonable, and deliberately humiliating and punitive strip searches, the right to be free from inhumane detention conditions, the right to free from interference in obtaining access to their legal counsel.

231. Plaintiffs seek declaratory relief on grounds including, but not limited to the following:

232. U.S. Const. amend. IV provides:

233. 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.

234. State action subjecting an individual to prolonged detention based on false allegations of an alleged connection to a terrorist organization without any legitimate immigration law enforcement purpose, without criminal charges, and without evidence that said individual would pose a danger or a flight risk if released denies rights and protections afforded by U.S. Const. amend. IV.

235. State action which subjects individuals to excessive and unreasonable strip searches and cavity searches in a deliberately humiliating manner with no rational relation to a legitimate penological purpose and with no rational reason to justify a strip search denies rights and protections afforded by U.S. Const. amend. IV.

236. Because the Defendants' actions violate the Fourth Amendment of the United States Constitution, Plaintiffs are entitled to a judgment declaring such actions unconstitutional.

237. U.S. Const. amend. V provides:

238. No person shall be . . . be deprived of life, liberty, or property, without due process of law.

239. State action subjecting an individual to prolonged detention based on false

allegations of an alleged connection to a terrorist organization, without any legitimate immigration law enforcement purpose, without criminal charges, and without evidence that said individual would pose a danger or a flight risk if released denies rights and protections afforded by U.S. Const. amend. V.

240. State action subjecting individuals of Middle-Eastern decent to continued detention not accorded similarly situated non-citizens denies the right to equal protection under the law afforded by the U.S. Const. amend. V.

241. State action which subjects individuals to excessive and unreasonable strip searches and cavity searches in a deliberately humiliating manner with no rational relation to a legitimate penological purpose and with no rational reason to justify a strip search denies rights and protections afforded by U.S. Const. amend. V.

242. State action which intentionally and with deliberate disregard for any injury suffered, subjects immigration detainees to inhumane and degrading detention conditions denies rights and protections afforded by the U.S. Const. amend. V.

243. State action which prevents immigration detainees from engaging in confidential communications with their legal counsel and denies them access to documents necessary to prepare for their court denies rights and protections afforded by the U.S. Const. amend. V.

244. Because the Defendants' actions violate the Fifth Amendment of the United States Constitution, Plaintiffs are entitled to a judgment declaring such actions unconstitutional.

245. U.S. Const. amend. VIII provides:

246. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

247. State action which denies medical care for serious injuries with deliberate disregard for any injury an immigration detainee may suffer denies rights and protections afforded by the U.S. Const. amend. VIII.

248. Because the Defendants' actions violate the Eighth Amendment of the

United States Constitution, Plaintiffs are entitled to a judgment declaring such actions unconstitutional.

249. For reasons including but not limited to those stated herein, an actual dispute exists between Plaintiffs and the State, which parties have genuine and opposing interests, which interests are direct and substantial, and of which a judicial determination will be final and conclusive.

250. Plaintiffs are, therefore, entitled to a declaratory judgment that the State's denial of certain fundamental rights and protections including, but not limited to, the right to be free from unlawful seizure, the right to due process under the law, the right to equal protection, the right to be provided with adequate medical care, the right to be free from excessive, unreasonable, and deliberately humiliating and punitive strip searches, and the right to be free from inhumane detention, is unconstitutional, as well as such other and further relief as may follow from the entry of such a declaratory judgment.

TENTH CLAIM FOR RELIEF

(FTCA: False Imprisonment)

(By All Plaintiffs Against Defendant United States of America)

251. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

252. This count sets forth a claim for false imprisonment pursuant to the Federal Tort Claims Act against defendant United States of America based upon the unlawful acts and omissions of its employees, agents and officials, as alleged herein.

253. This FTCA claim by plaintiffs against the United States is based on the allegations herein that plaintiffs were improperly detained, imprisoned and confined, without probable cause or legal justification, by federal employees, agents and officials who were acting within the course and scope of their employment, and whose actions were not privileged.

254. The United States of America engaged in the acts alleged herein and/or

condoned, permitted, authorized, and/or ratified the conduct of its employees, subcontractors, and agents for this cause of action.

255. In detaining Plaintiffs initially and continuing their detention for 41 months, based on false allegations of a connection to a terrorist organization, without any legitimate immigration law enforcement purpose, without evidence that Plaintiffs posed a danger or flight risk, or without charging Plaintiffs with any crime, federal agents, employees and officials intentionally and unreasonable caused Plaintiffs' imprisonment for coercive and improper purposes.

256. Pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2675(a), the claims set forth herein were timely presented by the Plaintiffs to Immigrations Custom and Enforcement and the Federal Bureau of Investigation on June 8, 2006 and should be deemed denied by virtue of agency inaction.

257. As a result of the unlawful conduct described herein, Plaintiffs have suffered and continue to suffer damages, including, loss of earnings and earning capacity, medical and legal expenses, emotional distress, humiliation, embarrassment, pain and suffering, physical injuries and sickness, discomfort, fear, anxiety, depression, shock and other injuries. Plaintiffs are entitled to compensatory damages in an amount to be determined at trial.

ELEVENTH CLAIM FOR RELIEF

(FTCA: Negligence)

(By All Plaintiffs Against Defendant United States of America)

258. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

259. This court asserts a claim for negligence on behalf of all plaintiffs against the United States of America based on plaintiffs' allegations that federal agents, employees and officials, including Defendant MVM, Inc., while acting in the course and scope of their employment with the United States of America , owed a duty of care

towards plaintiffs to use reasonable care to prevent the violation of plaintiffs' rights and to provide for their physical safety and well being.[2]

260. As alleged herein agents, employees and officials of the United States of America, breached their duty of care towards plaintiffs and caused plaintiffs to suffer damages by, *inter alia*, 1) displaying indifference to Plaintiffs' serious and urgent medical needs by failing to provide them with adequate medical attention, care and treatment 2) failing to provide plaintiffs with adequate food, shelter and/or hygiene during plaintiffs' confinement 3) allowing Plaintiffs Mohammad and Mohsen Mirmehdi to be physically assaulted and battered by inmates who federal agents knew or should have known presented a danger to Plaintiffs' safety and 4) keeping Plaintiffs confined and imprisoned while ignoring evidence that would demonstrate that Plaintiffs had not engaged in any criminal activity and did not present any threats to persons within the United States.

261. The United States of America engaged in the acts alleged herein and/or condoned, permitted, authorized, and/or ratified the conduct of its employees, subcontractors, and agents for this cause of action.

262. Pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2675(a), the claims set forth herein were timely presented by the Plaintiffs to Immigrations Custom and Enforcement and the Federal Bureau of Investigation on June 8, 2006 and should be deemed denied by virtue of agency inaction.

263. As a result of the negligent acts and omissions, described herein, Plaintiffs have suffered and continue to suffer damages, including, loss of earnings and earning capacity, medical and legal expenses, emotional distress, humiliation, embarrassment,

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[2]Plaintiffs are informed and believe and thereon allege that at all relevant times, Defendant MVM was acting as an agent of the United States of America, and in the course and scope of employment as an agent of the United States and therefore, the United States is liable for the acts and omissions of MVM pursuant to the FTCA To the extent that Defendant MVM (and its agents and employees) were acting outside the course and scope of their agency and employment by the United States, Defendant MVM is liable under California law for the acts and omissions alleged herein.

pain and suffering, physical injuries and sickness, discomfort, fear, anxiety, depression, shock and other injuries.

TWELFTH CLAIM FOR RELIEF

(FTCA: Assault and Battery)

(By Plaintiff Mohammad Mirmehdi Against Defendant United States of America)

264. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

265. As alleged herein, federal agents, employees and/or officers including Defendant MVM, while acting in the course and scope of their employment committed acts which resulted in imminent apprehension of and harmful or offensive contact with plaintiff's person, to which plaintiff did not consent. Said imminent apprehension of and harmful or offensive contact caused injury, damage, loss, and/or harm to plaintiff as alleged herein. Plaintiff therefore asserts a claim for assault and battery against Defendant United States of America based upon the actions of its agents, employee and officers, as alleged herein which was the direct and legal cause of the damage to Plaintiff.[3]

266. As alleged herein, federal employee, agents and/or officials committed used unreasonable and excessive force against Plaintiff, without justification or legal cause.

267. The United States of America engaged in the acts alleged herein and/or condoned, permitted, authorized, and/or ratified the conduct of its employees, subcontractors, and agents for this cause of action.

[3]Plaintiffs are informed and believe and thereon allege that at all relevant times, Defendant MVM was acting as an agent of the United States of America, and in the course and scope of employment as an agent of the United States and therefore, the United States is liable for the acts and omissions of MVM pursuant to the FTCA To the extent that Defendant MVM (and its agents and employees) were acting outside the course and scope of their agency and employment by the United States, Defendant MVM is liable under California law for the acts and omissions alleged herein.

268. Pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2675(a), the claims set forth herein were timely presented by the Plaintiffs to Immigrations Custom and Enforcement and the Federal Bureau of Investigation on June 8, 2006 and should be deemed denied by virtue of agency inaction.

269. As a result of the unlawful conduct described herein, Plaintiff has suffered and continues to suffer damages, including, loss of earnings and earning capacity, medical and legal expenses, emotional distress, humiliation, embarrassment, pain and suffering, physical injuries and sickness, discomfort, fear, anxiety, depression, shock and other injuries. Plaintiffs are entitled to compensatory damages in an amount to be determined at trial.

THIRTEENTH CLAIM FOR RELIEF

(FTCA: Intentional Infliction of Emotional Distress)

(By All Plaintiffs Against Defendant United States of America)

270. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

271. From the time of their arrest to the time of their release from detention, agents, employees and officials of the United States including Defendant MVM, while acting within the course and scope of their employment, intentionally engaged in a sustained and relentless campaign to inflict emotional distress on Plaintiffs that included, but was not limited to, punitive strip searches and cavity searches, humiliating insults to Plaintiff's physical anatomy, threats of prolonged and permanent detention, and inhumane conditions of confinement.

272. Plaintiffs' claim for intentional infliction of emotional distress against the United States is based on the allegations that the acts and omissions described herein and committed by the above-referenced federal employees, agents and/or officials, including Defendant MVM, acting in the course and scope of their employment constitute extreme and outrageous conduct against Plaintiffs, and the acts complained of were not

privileged.[4]

273. The acts and omissions, as alleged herein, were intended to cause Plaintiffs serious emotional distress, or in the alternative, the acts and omissions were committed with a substantial certainty that they would cause Plaintiffs serious emotional distress.

274. The United States of America engaged in the acts alleged herein and/or condoned, permitted, authorized, and/or ratified the conduct of its employees, subcontractors, and agents for this cause of action.

275. Pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2675(a), the claims set forth herein were timely presented by the Plaintiffs to Immigrations Custom and Enforcement and the Federal Bureau of Investigation on June 8, 2006 and should be deemed denied by virtue of agency inaction.

276. As a result of the unlawful conduct described herein, Plaintiffs have suffered and continue to suffer severe emotional distress and other damages, including, loss of earnings and earning capacity, medical and legal expenses, humiliation, embarrassment, pain and suffering, physical injuries and sickness, discomfort, fear, anxiety, depression, shock and other injuries. Plaintiffs are entitled to compensatory damages in an amount to be determined at trial.

FOURTEENTH CLAIM FOR RELIEF

(Conspiracy To Violate Civil Rights In Violation of 42 U.S.C. § 1985)

(All Plaintiffs against Defendants Castillo, MacDowell and Does 1 through 10)

277. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

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[4]Plaintiffs are informed and believe and thereon allege that at all relevant times, Defendant MVM was acting as an agent of the United States of America, and in the course and scope of employment as an agent of the United States and therefore, the United States is liable for the acts and omissions of MVM pursuant to the FTCA To the extent that Defendant MVM (and its agents and employees) were acting outside the course and scope of their agency and employment by the United States, Defendant MVM is liable under California law for the acts and omissions alleged herein.

278. The acts of Defendants as alleged herein violated Plaintiff's civil rights pursuant to 42 U.S.C. §§ 1985(2) and (3) in that such acts were intended to deprive Plaintiff of their rights to equal protection of the law and were further intended to deter Plaintiffs from vindicating their rights under the law and to obstruct justice.

279. Plaintiffs are informed and believe and thereon allege that Defendants and others engaged in a conspiracy to obstruct justice and acted with specific intent to interfere with Plaintiffs' rights under federal civil rights statutes and other bases for redress and sought to prevent themselves from being subjected to criminal and civil liability.

280. Plaintiffs are informed and believe and thereon allege that these acts of Defendants were willful, malicious, intentional, oppressive, reckless and/or were done in willful and conscious disregard of the rights, welfare and safety of Plaintiffs, thereby justifying the awarding of punitive and exemplary damages in an amount to be determined at time of trial (except as to any government entity defendant).

281. As a result of the unlawful conduct of Defendants described herein, Plaintiffs have suffered and continueJanuary 30, 2007 to suffer damages, including, loss of earnings and earning capacity, medical and legal expenses, emotional distress, humiliation, embarrassment, pain and suffering, physical injuries and sickness, discomfort, fear, anxiety, depression, shock and other injuries. Plaintiffs are entitled to compensatory and punitive damages in an amount to be determined at trial.

PRAYER FOR RELIEF

Plaintiff respectfully requests that this Court grant the following relief:

A. Compensatory damages including, but not limited to, Plaintiffs' medical expenses, lost earnings, and damages for pain and suffering, in an amount to be determined at trial;

B. Punitive and exemplary damages in an amount to be determined at trial;

C. Declaratory relief, in the form of a declaration that each Plaintiffs' detention was unjustified, unconstitutional, unlawful, and without probable cause to believe that he had any involvement in or connection to terrorist activity;

E. Reasonable attorneys' fees and costs of suit; and

F. Such other relief as the Court deems just and proper.

Dated: January 30, 2007

SCHONBRUN DE SIMONE SEPLOW HARRIS & HOFFMAN LLP

By: _____

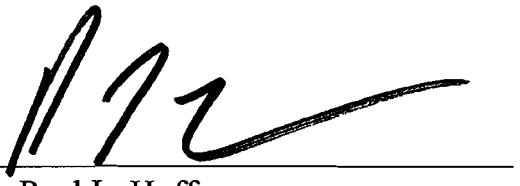
Paul Hoffman
Michael D. Seplow
Attorney for Plaintiffs

DEMAND FOR JURY

Plaintiffs hereby demand trial by jury on all issues.

Dated: January 30, 2007

SCHONBRUN DE SIMONE SEPLOW HARRIS & HOFFMAN LLP

By: 

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Attorney for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is 723 Ocean Front Walk, Venice, CA 90291.

On **January 30, 2007**, I served the foregoing document described as:

FIRST AMENDED COMPLAINT FOR DAMAGES AND DECLARATORY RELIEF

on all interested parties in this action by placing ___ an original or __X__ a true copy thereof enclosed in a sealed envelope addressed as follows:

Nina S. Pelletier
Timothy P. Garren
Peter D. Keisler
United States Department of Justice
Civil Division, Torts Branch
P.O. Box 7146
Ben Franklin Station
Washington, DC 20044-7146

Joseph W. Fletcher
Denah H. Hoard
20 Civic Center Plaza, M-29
P.O. Box 1988
Santa Ana, CA 97202

Phil Burns
Office of the City Attorney
City Hall, Ninth Floor
400 Stewart Avenue
Las Vegas, NV 89101

Bryan Garcia
Chapman, Glucksman & Dean
11900 West Olympic Blvd, Eighth Floor
Los Angeles, CA 90064

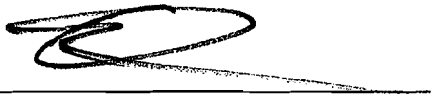
__X__ **[BY MAIL]** I caused such envelope to be deposited in the mail at Venice, California, with postage and fees thereon fully prepaid.

___ **[BY FEDERAL EXPRESS]** I caused such envelope to be delivered via federal express at Venice, California.

___ **[BY PERSONAL DELIVERY]** I caused the foregoing document to be personally served on the interested party.

___ **[BY FAX]** I transmitted the above document to the above facsimile.

__X__ **[FEDERAL]** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



Jedediah S. Ela

Paul L. Hoffman, SBN 071244
Michael D. Seplow, SBN 150183
Erwin Chemerinsky, Of Counsel
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MOHAMMAD MIRMEHDI, MOSTAFA MIRMEHDI, MOHSEN MIRMEHDI, and MOJTABA MIRMEHDI,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, CITY OF SANTA ANA,, MVM Inc. MYNOR ESCOBAR, KARINA LEON, PEDOR LUNA, MARIO LOPEZ and Does 1-10.

Defendants.

Case No: 06-5055 R (PJWx)

SECOND AMENDED COMPLAINT FOR DAMAGES

(1) Denial of Medical Care: Violation of Fifth, Eighth and Fourteenth Amendments

(2) Excessive, Unreasonable, and Deliberately Humiliating and Punitive Strip Searches: Violation of Fourth, Fifth and Fourteenth Amendments

(3) Inhumane Detention Conditions: Violation of Fifth and Fourteenth Amendments

(4) Interference with Right to Counsel: Violation of Sixth and Fourteenth Amendments

(5) Excessive Force: Violation of Fourth, Fifth and Fourteenth Amendments

(6) Negligence

(7) Assault and Battery

(8) Intentional Infliction of Emotional Distress, and

DEMAND FOR JURY TRIAL

Plaintiffs Mohammad Mirmehdi, Mostafa Mirmehdi, Mohsen Mirmehdi, and Mojtaba Mirmehdi (collectively "Plaintiffs") by and through their attorneys, on information and belief, allege the following[1]:

PRELIMINARY STATEMENT

1. Between October 2001 and March 2005, Plaintiffs Mohammad, Mohsen, Mostafa and Mojtaba Mirmehdi (the "Mirmehdis" or "Plaintiffs"), four hard-working, law-abiding members of the Los Angeles community, were imprisoned based upon the false allegation that they were members of a "terrorist organization."

2. Although the Mirmehdis were detained on immigration charges, they were housed in units reserved for hard-core criminals, in violation of applicable guidelines. As a result, the Mirmehdis were beaten and/or harassed by other prisoners. Those agencies and officials which were responsible for Plaintiffs' incarceration and safety acted negligently and/or with deliberate indifference to the threat posed to Plaintiffs by these violent prisoners — indeed, they subjected Plaintiffs affirmatively and intentionally to that threat, for the acknowledged purposes of intimidation and punishment.

3. At times, the Mirmehdis were locked for days in isolation cells as small as six by 10 feet; at other times, they were kept in overcrowded pens with dozens of other detainees, where the Mirmehdis slept on the floor next to clogged and overflowing

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[1] Pursuant to the Court's Ruling of September 22, 2008, Plaintiffs are filing this Second Amended Complaint. The Second Amended Complaint does not include claims or parties which were previously dismissed by the Court. Further, based on the Court's ruling dismissing Plaintiffs' claims under the Alien Tort Statute (28 U.S.C. § 1350) on the grounds that the statute is "simply jurisdictional" and does not create an independent cause of action, Plaintiffs have not included this claim in the Second Amended Complaint against the City of Santa Ana and its employee Defendants. In filing this Second Amended Complaint, Plaintiffs do not waive any rights on appeal with respect to the parties, claims and/or allegations which have been dismissed by the Court, including, without limitation, claims against any parties under the Alien Tort Statute.

toilets.

4. Plaintiffs were routinely locked-down for up to 23 hours per day, affording them scant opportunity for exercise, recreation or even exposure to the light of day. The Mirmehdis were transferred between facilities and to court hearings in chains, handcuffs and leg irons; groped by guards during pat-downs after daily recreation breaks, and strip-searched after every visit from their attorneys. Guards assaulted the Mirmehdis physically and subjected them to routine ethnic insults and prejudice, appearing to take the government's baseless insinuations of terrorism as truth.

5. The Defendants responsible for their incarceration and safety denied the Mirmehdis basic medical care, whether for routine or chronic illnesses, accidental injuries, or assaults by Defendants' employees or other detainees. These officials denied the Mirmehdis appropriate and nutritious food, basic hygiene items, and clothing and blankets appropriate to the temperature of the cells they were kept in. And when the Mirmehdis complained — either about the specific conduct of Defendants or their employees, or about generally poor conditions in Defendants' facilities — the Mirmehdis were punished with even worse conditions (weeks-long solitary confinement, housing with violent offenders, extreme cold) and even more objectionable conduct (baseless disciplinary actions, punitive body cavity searches, and violent assault).

6. Meanwhile, the government and its agents and employees abused the immigration detention process at every turn. The Mirmehdis were dressed in red jumpsuits which marked them (falsely) as criminals in the eyes of judges, guards, and fellow inmates. In addition, the government and its agents persistently and illegally monitored the Mirmehdis' phone calls with their attorneys, notwithstanding the Mirmehdis' many written requests and objections.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction under and by virtue of 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1343 (civil rights and equal

protection), 28 U.S.C. § 1346 (Federal Tort Claims Act). This Court as jurisdiction over Plaintiffs' supplemental claims under California law claims under 28 U.S.C. § 1367.

8. All claims against any individual employees and agents of the United States of America in their individual capacity are brought pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971). All claims against any municipal governments, including defendant City of Santa Ana, and its employees and agents are brought pursuant to 42 U.S.C. § 1983. All claims against the United States of America are brought pursuant to 28 U.S.C. § 1346 (Federal Tort Claims Act).

9. Venue is proper in the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1391 (b) in that a substantial part of the events giving rise to Plaintiffs' claims occurred in this District.

PARTIES

The Plaintiffs

MOSTAFA ("MICHAEL") SEYED MIRMEHDI

10. Plaintiff MOSTAFA SEYED MIRMEHDI, referred to in this complaint by his American name of "Michael", is a native and citizen of Iran. Michael came to the United States in January of 1978 on a student visa, planning to study Mechanical Engineering. From 1978 through 1981, he attended colleges in Texas and Oklahoma, but did not complete his degree.

11. While in college, Michael became involved with a student group called the Supporters of Muslim Students Society ("SMSS") in Norman, Oklahoma, which publicly opposed the Islamic regime of Iran. After the Revolution and the subsequent taking of American hostages in Iran in 1979, the atmosphere toward Iranians in Oklahoma soured. Michael began to fear for his safety; yet due to his involvement with the SMSS, he knew that it would be even more unsafe for him to return to Iran. As a result, in 1981, he moved to California, where he re-enrolled in college and started working in order to

support himself.

12. Michael eventually discontinued his engineering studies, and in 1985 obtained a license to sell real estate, which he did, successfully, until his arrest in 1999. At the time of his arrest, he was residing in the Los Angeles area with his brothers Mohsen and Mohammad.

13. Michael applied for political asylum in 1998 through an attorney who, unknown to Michael, falsified details of his asylum application. Michael filed a new asylum application which was denied. However, he has been granted a stay of deportation ("withholding of removal") to Iran under the United Nations Convention Against Torture and § 241(b)(3) of the Immigration and Nationality Act, because a judge has found it "more likely than not that he would be tortured" if he were deported to Iran.

14. Michael has never been charged with or convicted of any crime, in the United States or any other country. He has never been involved with terrorism, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

MOHSEN SEYED MIRMEHDI

15. Plaintiff MOHSEN SEYED MIRMEHDI ("Mohsen") is a native and citizen of Iran. He came to the United States in 1992 in order to escape the repression of the Iranian dictatorship. After Mohsen's brother Michael moved to the United States in 1978, it became known among the family's neighbors in Iran that the Mirmehdis opposed Islamic rule, and over the next year, neighbors — Islamists and members of the Revolutionary Guard — would write on the walls of the Mirmehdi house, "Death to America," "Death to counterrevolutionaries," and "Death to Taghooti" (meaning those who liked the Shah). Soon after the Revolution in Iran, Mohsen's brother Mojtaba was arrested, tortured, and imprisoned for three years for participating in a pro-democracy demonstration.

16. Mohsen was recruited by the new Islamic government to fight in the front lines in the war against Iraq. He refused, and the authorities retaliated by withdrawing his permission to attend University. Unable to study, he worked in an ice cream store

until, in 1986, the religious police threatened him for walking in public with his girlfriend, whose hair was showing. He then stayed at home for most of two years, in order to avoid being arrested or drafted into the army. He relented and joined the army in January 1989, but was soon demoted for listening to Western music. His superiors would search his possessions to see what books he was reading and to what radio stations he was listening.

17. Mohsen traveled to the United States in October, 1992, along with his brother Mojtaba, and joined their older brother Michael who by this time had settled in the Los Angeles area. Mohsen studied English, insurance, and real estate, and obtained his real estate license in 1993. He then worked in real estate, as an agent to both buyers and sellers, until the time of his arrest in March, 1999.

18. Mohsen applied for political asylum in 1998 through an attorney who, unknown to Mohsen, falsified details of his asylum application. He later filed a new asylum application, which is currently pending on appeal. Meanwhile, he has been granted a stay of deportation ("withholding of removal") to Iran under the United Nations Convention Against Torture and § 241(b)(3) of the Immigration and Nationality Act, because a judge has found it "more likely than not that he would be tortured" if he were deported to Iran.

19. While in the United States, Mohsen has attended several demonstrations against the Iranian regime. These demonstrations were legal, peaceful, and permitted, and were attended by large and varied crowds including members of the United States Congress. Mohsen participated in them because he is a liberal person who supports freedom, democracy, and women's rights in Iran.

20. Mohsen has never been charged with or convicted of any crime in the United States or any other country. He has never been involved with terrorism, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

MOJTABA SEYED MIRMEHDI

21. Plaintiff MOJTABA SEYED MIRMEHDI ("Mojtaba") is a native and citizen of Iran. He came to the United States in 1992 in order to escape the repression of the Iranian dictatorship. In 1981, while living in Iran shortly after the Revolution, Mojtaba was captured by revolutionary guards during a pro-democracy demonstration. He was held without trial for three years, tortured repeatedly and threatened with execution. Mojtaba's family (including the other Plaintiffs and their parents) were accused of being counterrevolutionaries, American spies, and aligned with Israel. Four of Mojtaba's cousins were executed for anti-regime activity. During Mojtaba's imprisonment, some of the family's neighbors, who were regime supporters, attacked and beat his father and coerced other neighbors to remove their names from a letter asking for Mojtaba's release. Even after his release, Mojtaba and his family remained under surveillance by authorities and regime-aligned vigilante groups, in danger of persecution, arrest, or worse.

22. Mojtaba traveled to the United States in October, 1992, with his brother Mohsen, and joined their older brother Michael who had settled in the Los Angeles area. Mojtaba studied English, construction, and insurance. In 1996 he obtained a license to sell life insurance, but he never did so, working in construction instead. Eventually, he bought several residential investment properties. He later completed a real estate licensing class, but failed the certification test. He planned to try again, but was arrested by the INS in March 1999, before he could do so.

23. Mojtaba applied for political asylum in 1998 through an attorney who, unknown to Mojtaba, falsified details of his asylum application. Mojtaba filed a new asylum application which was denied. However, he has been granted a stay of deportation ("withholding of removal") to Iran under the United Nations Convention Against Torture and § 241(b)(3) of the Immigration and Nationality Act, because a judge has found it "more likely than not that he would be tortured" if he were deported to Iran.

24. Mojtaba has never been charged with or convicted of any crime in the

United States. He has never been involved with terrorism, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

MOHAMMAD-REZA MIRMEHDI

25. Plaintiff MOHAMMAD-REZA MIRMEHDI ("Mohammad") is a native and citizen of Iran. He came to the United States in October of 1993, with the intention of joining his three older brothers Michael, Mojtaba, and Mohsen, and in order to escape the oppressive political and economic situation in Iran.

26. In Iran, Mohammad's permission to study at a university, which had initially been granted on the basis of his grades, was withdrawn by the authorities after a political and religious background check. Unable to attend University, his career potential and opportunities for full self-development were drastically limited.

27. Upon arrival in the United States, Mohammad enrolled in real estate courses, and earned his real estate licence in 1994. From 1995 until the time of his initial arrest in 1999, he practiced real estate as both a buyers' and sellers' agent, residing in Los Angeles with his brothers Mohsen and Michael.

28. Mohammad applied for political asylum in 1998 through an attorney who, unknown to Mohammad, falsified details of his asylum application. He later filed a new asylum application, which is currently pending on appeal. Meanwhile, he has been granted a stay of deportation ("withholding of removal") to Iran under the United Nations Convention Against Torture and § 241(b)(3) of the Immigration and Nationality Act, because a judge has found it "more likely than not that he would be tortured" if he were deported to Iran.

29. Mohammad has never been charged with or convicted of any crime in the United States or any other country. He has never been involved with terrorism, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

The Defendants

30. Liability of Defendant the UNITED STATES OF AMERICA is based on

the Federal Tort Claims Act, 28 U.S.C. § 1346(b); 2671, et seq. ("FTCA") which provides that a suit against the United States of America shall be the remedy for the negligent and wrongful acts of federal employees taken within the scope of their office or employment.

31. Plaintiffs are informed and believe and thereon allege that the officers and employees of Immigration and Naturalization Service ("INS")[2] and Immigration and Customs Enforcement ("ICE"), herein are investigative or law enforcement officers within the meaning of 28 U.S.C. § 2680(h). Plaintiffs are informed and believe and thereon allege that the INS, ICE and Homeland Security officers referred to herein were acting within the scope of their office or employment during the events alleged in this complaint.

32. Plaintiffs have timely filed administrative claims with the appropriate federal agencies. Pursuant to 28 U.S.C. § 2675(a), Plaintiffs now bring this action against Defendant United States of America under the FTCA.

The Municipal and Corporate Defendants

33. Defendant City of Santa Ana, California, located in Orange County, California, did, on information and belief, at all times relevant to this complaint, maintain the detention facility known as Santa Ana Jail, within which Defendants held the Plaintiffs. Based upon the principles set forth in Monell v. New York City Department of Social Services, (1978) 436 U.S. 658, Defendant is liable for injuries sustained by Plaintiffs which were caused by Defendant's unconstitutional policies, practices and customs, including, without limitation, failing to provide proper medical care to detainees such as Plaintiffs, failing to provide proper security for detainees such as Plaintiffs and/or failing to properly train and supervise their employees with respect to the rights of detainees such as Plaintiffs to be free from excessive force and their duties

[2] The Immigration and Naturalization Service became the Bureau of Citizenship and Immigration Services within the Department of Homeland Security on March 1, 2003.

to provide medical care and security for detainees such as Plaintiffs.[3]

34. On information and belief, Defendant MVM Inc. was, at all times relevant to this complaint, a privately held corporation with its headquarters in Vienna, Virginia. On information and belief, Defendant MVM Inc. was, at all times relevant to this complaint, the employer of various detention officers and other employees working at ICE's San Pedro Detention Center, and was responsible for the operations of the San Pedro Detention Center and the supervision and training of its employees. Plaintiffs are informed and believe and thereon allege that in operating the San Pedro Detention Center, Defendant MVM, Inc. was acting as an agent of the United States. Plaintiffs are informed and believe and thereon allege that Defendant MVM maintained, fostered and condoned various unlawful policies, customs and practices which led to the denial of Plaintiffs' rights including, without limitation, failing to provide proper medical care to detainees such as Plaintiffs, failing to provide proper security for detainees such as Plaintiffs and failing to properly train and supervise their employees with respect to the rights of detainees such as Plaintiffs to be free from excessive force and their duties to provide medical care and security for detainees such as Plaintiffs. This Court's jurisdiction over Defendant MVM, Inc. is based on 28 U.S.C. Section 1367 in that Plaintiffs' claims against MVM arise from the same operative facts as Plaintiffs' claims against Defendant United States and thus form part of the same case or controversy as Plaintiffs' claims against Defendant United States.

Individual Defendants

35. On information and belief, at all times relevant to this complaint, Defendant MYNOR ESCOBAR was employed by Defendant City of Santa Ana, California, or by a

[3] Plaintiffs' action against Defendant City of Las Vegas was transferred to the United States District Court for the District of Nevada. Plaintiffs contend that at all relevant times, Defendant City of Las Vegas and its employees and agents were acting as agents and/or employees of Defendant United States and therefore Defendant United States is liable under the FTCA for all torts committed against Plaintiffs by the City of Las Vegas and its employees and agents.

department, division, contractor or agent thereof, at the Santa Ana Jail and was at all relevant times acting under color of state law. Defendant ESCOBAR is being sued in his individual capacity.

36. On information and belief, at all times relevant to this complaint, Defendant KARINA LEON was employed by Defendant City of Santa Ana, California, or by a department, division, contractor or agent thereof, at the Santa Ana Jail and was at all relevant times acting under color of state law. Defendant LEON is being sued in her individual capacity.

37. On information and belief, at all times relevant to this complaint, Defendant PEDOR LUNA was employed by Defendant City of Santa Ana, California, or by a department, division, contractor or agent thereof, at the Santa Ana Jail and was at all relevant times acting under color of state law. Defendant LUNA is being sued in his individual capacity.

38. On information and belief, at all times relevant to this complaint, Defendant MARIO LOPEZ was an agent of ICE and worked at its San Pedro Detention Center and was at all relevant times acting under color of federal law. Defendant LOPEZ is being sued in his individual capacity.

39. Plaintiffs are ignorant of the true identities and capacities of defendants DOES 1-10 and for that reason sue those defendants by such fictitious names. Plaintiffs are informed and believe and thereon allege that each of the fictitiously named defendants is in some manner and to some extent liable for the injuries alleged in this Complaint. Plaintiffs will seek leave to amend this Complaint to allege the true identities and capacities of these factitiously named defendants when they are ascertained.

40. Plaintiffs are informed and believe thereon allege that each defendant is, and at all times mentioned was, the agent, employee, representative, successor and/or assignee of each other defendant. Each defendant, in doing the acts, or in omitting to act as alleged in this Complaint, was acting within the scope of his or her actual or apparent

authority or the alleged acts and omissions of each defendant as agent subsequently were ratified and adopted by each other defendant as principal. All non-municipal, individual defendants acted or failed to act in the face of an obligation to do otherwise and did so maliciously and with reckless disregard for Plaintiff's rights and thus are liable for punitive damages. Plaintiffs are informed and believe and thereon allege that all defendants, at all times relevant to the allegations herein, acted under the color of state and/or federal law.

41. All of the Defendants were acting under the color of official authority in engaging in the actions and omissions complained of herein.

FACTS COMMON TO ALL CLAIMS

TIME IN PRISON

Punitive Nature of Detention

42. Although the Plaintiffs were never charged with a crime, the Defendants, and all of them, and their agents and employees, treated the Mirmehdis as criminals. All four Mirmehdi brothers were wrongfully imprisoned in all-criminal prisoner housing units, and treated as criminal detainees while housed in mixed-population units. The Mirmehdis were held for days at a time in solitary confinement in cells no larger than six by ten feet, allowing them just one hour per day outside of the cell for exercise.

43. When transferring the four Mirmehdi brothers to court hearings, or between housing units, officials and agents at San Pedro and Santa Ana jails routinely bound their wrists and ankles with handcuffs and leg shackles. Defendants at San Pedro placed them in vans with no seats, making sharp turns and abrupt stops in order to cause the Mirmehdis to slam into each other or into the walls of the van, while driving hazardously and without regard to traffic laws, and setting the van air conditioning to full blast in order to further punish Plaintiffs. Officials at San Pedro also forced the Mirmehdis to wear red jumpsuits, including during their court appearances. Officials at both facilities told the Mirmehdis that their harsh treatment was because they were terrorists. These

actions falsely marked the Mirmehdis as criminal detainees in the eyes of judges, guards, and other detainees.

44. Mohammad and Mojtaba Mirmehdi were confined in all-criminal prisoner housing units, while Mohsen and Michael were held in segregation, at a minimum, for two weeks after their October 2, 2001 arrest. In 2002, all four Mirmehdis were held in segregation for one week. Then in 2003, all four Mirmehdis were held in all-criminal prisoner housing units for around two months at Las Vegas City Jail and ICE's San Pedro Detention Center. For the majority of the remainder of their time in detention, the Mirmehdis were held in mixed populations of immigration and criminal detainees.

45. During their time at Santa Ana Jail, officials and employees regularly prevented the Mirmehdis from speaking by telephone with their parents in Iran, causing them immense anxiety and psychological suffering.

46. On February 2, 2005, the federal government agreed to release the Mirmehdis subject to thirteen highly restrictive conditions. The Mirmehdis, however, refused to sign the conditional release form, believing that many of the conditions were unconstitutional. For instance, one of the conditions prohibited the Mirmehdis from traveling more than thirty miles from their home, which would have effectively impeded their ability to retain their jobs as real estate agents. Other conditions would have prohibited them from attending constitutionally protected demonstrations and traveling by airplane.

47. After choosing to challenge the release conditions, the Mirmehdis were deemed "uncooperative" and prevented from communicating with the media. On February 3, 2005, the Mirmehdis were scheduled to be interviewed on ABC's Nightline. ICE officials cancelled the interview, preventing the Mirmehdis from communicating their situation to the outside world, because the brothers were no longer "cooperative," stating "refusing to sign [their release orders] is not being cooperative." This was not the first time that the Mirmehdis had been denied access to the media. A Los Angeles Times reporter was denied a meeting after officials told him that the Mirmehdis were a threat to

national security, and reporters from Dateline and the San Diego Union-Tribune were also refused or denied interviews.

Retaliation and Punishment

48. Before and while confining the four Mirmehdi brothers in all-criminal housing units, or in mixed-population units alongside violent and dangerous criminal detainees, the officials and agents responsible for Plaintiffs' confinement and safety and well being made clear to the Mirmehdis that these actions were for the purposes of punishment.

49. The officials and agents responsible for Plaintiffs' confinement and safety and well being punished or sought to punish the four Mirmehdi brothers for complaining to jail personnel, whether about harassment, lack of medical care, generally poor conditions, or specific conduct of Defendants or other officers or agents. In addition to confinement with dangerous criminals, the punishment of the Mirmehdis took other forms, including physical assault, solitary confinement, extended confinement in small cells, threats of pepper spray, and subjection to extreme cold.

50. The Mirmehdis were subjected to punitive and unnecessary patdowns and body cavity searches. On one occasion at the Santa Ana jail, a jail officer made derogatory and humiliating remarks about Michael's anatomy after conducting a cavity search with a flashlight. On another occasion during a patdown, the same officer forcefully tore a plastic wristband from Michael's wrist casing bruising and lacerations. When Michael objected, the officer told Michael that he was a terrorist, and that he should "shut up" and put his hands back on the wall.

51. On another occasion at Santa Ana jail, a bald officer sought to punish Mohammad by placing him in a cell with a detainee who was on suicide watch, and who in fact attempted suicide by severely cutting himself while he was housed in Mohammad's cell. Mohammad, who was just outside of his cell in the dayroom when the detainee cut himself, returned to his cell to witness the detainee bleeding profusely

from the self-inflicted cuts on his abdomen. Mohammad was terrified by the cellmate's behavior, and feared for his own safety. After removing the detainee for medical treatment, Defendants and government employees working at Santa Ana Jail then told Mohammad to clean up the detainee's blood. Mohammad was severely traumatized by this episode, and experienced cold sweats, anxiety, sleeplessness, uncontrollable shaking and panic attacks for approximately the next 3 days.

52. By threatening punishment, Defendants sought to intimidate the Mirmehdis into not availing themselves of Defendants' own administrative procedures for seeking relief from the dangerous and unhealthful conditions in which they were confined.

53. For instance, in October 2003, after the Mirmehdis had made various complaints about the conditions at ICE's San Pedro Detention Center, ICE officials abruptly transferred them for several weeks to Las Vegas City Jail, a criminal facility which was known for violence and harsher conditions, and where, in fact, Mohsen would be assaulted by a criminal detainee. ICE officials had previously threatened to use just such a transfer as punishment. On information and belief, at the time of the transfer, there were dozens of empty beds available in the very same San Pedro unit where the Mirmehdis had been held.

54. Then, in January, 2004, at San Pedro, Michael was threatened by a gang member. When he tried to report the threat, Captain Garzone and Officer Topete, employees of MVM made fun of Michael's stutter. When Michael objected, the officers threatened to place him in segregation.

55. And in June, 2004, at San Pedro, after requesting to be seen by a doctor for several days following a back injury, Michael asked Captain Garzone to contact a supervisor regarding the absence of appropriate medical care. Captain Garzone responded by threatening Michael, saying that he would not contact the supervisor, and if Michael continued to complain about his pain, then Garzone would place him in segregation.

56. The punishment of the Mirmehdis took many forms. For instance, Michael

suffered acute back injuries in 2002 and again in June 2004, after certain Defendants required him, despite Michael's repeated warnings and objections, to engage in activities which were dangerous for him given his chronic back problems. On the first occasion, Defendants and government employees and agents at Santa Ana jail required Michael, on pain of punishment, to lift a heavy sofa in order to vacuum underneath it as part of a cleaning detail. On the second, Defendants and government employees and agents at San Pedro required Michael to move all of his belongings and personal items, including his mattress, up a flight of stairs from one cell to another. For approximately two weeks following each of these incidents, Michael suffered severe pain and was unable to walk.

57. Threats of punishment and retaliation permeated every aspect of the Mirmehdis' detention, even routine trips to the doctor. In 2002, during transportation for a routine medical proceeding, Mojtaba complained to ICE supervisor Petery that his cuffs were too tight. Petery responded by grabbing Mojtaba by the back of his collar, punching him in the back of his head 5 or 6 times, and then threatening to pepper-spray him if he complained again.

58. Mojtaba was also singled out for punishment due to his ethnicity. On or around November 29, 2002, after a verbal argument between Mojtaba and another detainee, Defendant Sergeant Escobar initiated a disciplinary proceeding against Mojtaba (but not the other party to the dispute), alleging, "these days, any word can be a serious threat," a reference to terrorism and to Mojtaba's Middle Eastern origins. As a result of Escobar's investigation, Mojtaba was placed in solitary confinement for two weeks, during which officer Grant punished Mojtaba further by denying him changes of clothing and sheets.

59. The Defendants responsible for Plaintiffs' confinement, safety and well being intentionally placed the Mirmehdis in dangerous detention conditions as a way to punish or retaliate against them. On November 2, 2003, at San Pedro, Mohammad was assaulted by fellow detainee Oumar Diallo, as a direct result of Defendants' deliberate indifference to the dangers posed to Mohammad by Defendants' punishment tactics. The

incident began as Mr. Diallo was arguing with another detainee about the television remote control and Mohammad was trying to calm Oumar down. Oumar pushed Mohammad sharply, straining his neck, and then punched him in the face. The blow was hard enough that Mohammad fell to the ground and hit his head on the floor. Afterwards, Mohammad was in pain and was dizzy. A nurse prescribed him painkillers, but Mohammad remained nauseous and unsteady and experienced blurred vision for hours. As a result of this assault, Mohammad suffered injuries to the face, head, and neck, and severe neck pain lasting for a week or longer.

60. Mohsen was also a victim of these tactics on or around October 15, 2003, when he was assaulted by his cellmate, despite repeated warnings to authorities that he believed that he was in danger. This attack occurred at Las Vegas City Jail, where, on information and belief, ICE Defendants had sent Mohsen for acknowledged purposes of intimidation and punishment, and confined him in a cell along with three violent convicted criminals. In the attack, Mohsen's cellmate hit Mohsen in the back of the head with the sharp edge of a coffee jar, causing Mohsen to black out and later to experience physical symptoms of head injury including headache, nausea, dizziness, disorientation, ringing in the ears, blurred vision, and weakness in his fingers. Mohsen continues to experience many of these symptoms to this day.

61. After Mohsen was attacked by his cellmate, the only medical treatment offered to him by Las Vegas City Jail medical staff was a single standard dose of Tylenol, which was not sufficient to relieve his pain, nausea, and other symptoms. Mohsen requested a stronger medication, but this was denied. After the initial dose he was not even given more Tylenol. Severe head pain persisted for several days.

62. When the Mirmehdis were transferred from Las Vegas City Jail back to ICE's San Pedro Detention Center, on information and belief, ICE officer Isaacs told Mohsen and Michael they were criminals and demanded that they wear red jumpsuits (which, on information and belief, designated them as criminals). Non-criminal detainees were, on information and belief, supposed to wear blue jumpsuits. When Mohsen

protested, officer Isaacs threatened that he would send Mohsen to solitary confinement if Mohsen did not put on the red jumpsuit. Isaacs then sent Mohsen and Michael to be housed in, on information and belief, Pod 3, which was otherwise populated by criminal detainees. Mohsen and Michael remained there for approximately one month.

63. Then, on March 5, 2005, at San Pedro, Mohammad was violently assaulted by an agent of ICE when he questioned the abusive treatment of another detainee. Defendant officer Mario Lopez assaulted Mohammad after Mohammad questioned officer Lopez about his treatment of detainee Abdel-Jabbar Hamdan, who was severely ill and whom Lopez was preventing from using the bathroom. Lopez approached Mohammad as if to handcuff him, then grabbed Mohammad's wrist with one hand while he struck Mohammad in the face with his other fist. Lopez then grabbed Mohammad's neck, slammed him against a door and began choking him. Both men fell to the floor, where Lopez sat astride Mohammad and continued to strike him about the face, head and neck with his fists and the handcuff. Another officer then ordered Mohammad to turn around in order to be cuffed, and Mohammad complied. Lopez then grabbed Mohammad's neck again and resumed choking him, then pressed his knee into Mohammad's back while yanking on Mohammad's left arm and shoulder, causing him severe pain and injury to his neck, left shoulder, and left arm which persist to this date. Lopez continued to apply severe pressure to Mohammad's shoulder, arm, and back, until another officer ordered Lopez to get up.

64. As a result of this attack by Officer Lopez, Mohammad suffered physical injuries to the shoulder, back, neck, and face, along with permanent facial disfigurement, with pain and treatment persisting to this date. On information and belief, several other officers were present during the entire incident, including D. Barnes and T. Logan, who were employed by Defendant MVM Inc. On information and belief, these officers failed to sound their body alarms, which, as a matter of standard procedure, they should have done in order to alert other staff to respond to and intervene in an ongoing incident of violence. Rather, on information and belief, their only intervention during the several

minutes during which officer Lopez continued to beat and choke Mohammad, was to try to prevent other detainees from witnessing the assault. Thus, agents and employees of MVM aided and abetted officer Lopez's assault and battery of Mohammad.

65. Mohsen, Michael, and Mojtaba were traumatized psychologically as a result of witnessing officer Lopez brutally assault their brother Mohammad. For several days after the beating, Mohsen, Michael, and Mojtaba were unable to eat or sleep. Mohsen was also unable to speak, having lost his voice screaming at officer Lopez to stop killing his brother.

66. On information and belief, ICE officials conducted an internal investigation of officer Lopez' beating of Mohammad, and obtained or produced documentation including photographs of Mohammad's injuries and a videotape of the beating. On information and belief, ICE officials refused to share this documentation or other results of their investigation with Mohammad or with outside investigators.

67. Following the beating by Officer Lopez, Defendants and their agents and employees initially continued to punish Mohammad by placing him in solitary confinement for several days. During his one hour of free time per day, Mohammad was handcuffed and shackled. However, as attention from reporters and detainee rights advocates began to increase after the beating, Mohammad and his brothers were released approximately 10 days later.

Interference with Legal Defense

68. Officials and agents at Santa Ana Jail, Las Vegas City Jail, and San Pedro Detention Center interfered with the four Mirmehdi brothers' legal defense by monitoring their conversations with their attorneys throughout their 41-month detention– notwithstanding the Mirmehdis' right to private consultations, which they asserted frequently and in writing. Defendants also interfered with the Mirmehdi's legal defense by denying and delaying their rightful access to legal papers. This interference caused the Mirmehdis to appear for a bond hearing without the needed paperwork, and on

another occasion, forced them to amend an appeal filing. These actions of Defendants had the effect of further prolonging the Mirmehdis' detention and causing them significant additional expense.

69. Officials and agents at Santa Ana Jail also interfered with the four Mirmehdi brothers' defense by maintaining a rotating split-shift schedule in which groups of detainees were, for days at a time, allowed their out-of-cell exercise and dayroom time only during non-business hours, preventing them from initiating telephone calls to their attorneys.

70. On or around October 23, ICE officials willfully and maliciously engaged in "forum shopping" when they transferred the four Mirmehdi brothers from Las Vegas City Jail, where they had a bond hearing scheduled for the following day, back to San Pedro Detention Center. On information and belief, ICE officials ordered and completed this transfer for the express purpose of ensuring that no immigration judge other than Judge Sitgraves, who had previously decided in favor of Defendants, would have the opportunity to rule on the Mirmehdi's case.

Verbal Abuse and Harassment

71. The Defendants, agents and officials responsible for Plaintiffs' confinement, safety and well being and their agents and employees consistently harassed Michael, at various times insulting his culture, religion and nationality; calling him "terrorist," "gay," and a "faggot"; mocking his stuttering; and insulting his anatomy during a cavity search.

72. For instance, on or around May 5, 2004, officer Perez told Michael and other detainees, "you all deserve to be deported!" And on or around October 8, 2004, while Michael was in the exercise yard, officer Montijo called him a "faggot" and the "gay brother."

Poor Conditions and Hygiene

73. The Defendants and officials responsible for Plaintiffs' confinement, safety

and well being housed the four Mirmehdi brothers in poor and unhealthful conditions, including in air-conditioned cells in the depth of winter, without adequate clothing or bedding. All four brothers were often unable to sleep and were frequently ill. Michael also developed chronic joint pain from the cold temperatures which was exacerbated through the winters of 2001-02 and 2002-03, and his requests for an extra blanket or pain killers were repeatedly denied. When Mohsen and Mojtaba complained, officers sometimes punished them by placing them in even colder cells, with even less protection.

74. The Defendants, agents and officials responsible for Plaintiffs' confinement, safety and well being denied the four Mirmehdi brothers access to soap, and gave them a shampoo which caused itching and rash. They also failed to provide proper drainage in the detainees' showers, requiring the Mirmehdis to shower while standing in filthy ankle-deep water. As a result, both Mohsen and Michael developed chronic infections in their feet. Defendants and their agents and employees also failed to provide for adequate cleaning of the detainees' showers, causing Mojtaba to contract a ringworm infection in his genital area.

75. Although Michael and Mohsen did not own glasses, and needed contact lenses to read or see, officials and agents at San Pedro declined to provide, and would not allow Michael or Mohsen to purchase or receive, solutions for the proper cleaning and storage of his contact lenses. As a result, Michael and Mohsen developed frequent and painful infections of the eyes throughout their detention at the San Pedro facility. Additionally, around April, 2004, ICE officials and agents confiscated Mohsen's contact lenses outright, causing Mohsen to experience severe eyestrain and headaches until March 2005.

76. The food provided to the four Mirmehdi brothers by Defendants and their agents and employees was often spoiled, unwholesome and inedible, leading the Mirmehdis, as well as other detainees, to throw it out rather than eat it. For example, in 2002, at Santa Ana jail, Mohsen, Mojtaba and other detainees were repeatedly given sodas clearly imprinted with an expiration date of approximately three years before.

Further, although Michael had been a strict vegetarian for many years, and Defendants' own policies direct them to provide detainees with vegetarian meals, Defendants, agents and officials at Santa Ana jail and San Pedro refused to provide Michael vegetarian meals during four weeks in 2001 and three weeks in 2003. During these times, Michael ate only those portions of the standard meals which had not contacted meat or egg, causing him to lose 25 pounds in 2001 and 10 pounds in 2003.

77. For several days at the beginning of his detention, Michael and Mohsen were held in a holding cell at an INS facility along with, on information and belief, up to 100 other detainees. Because of overcrowding in this holding cell, they were forced to sleep sitting up on the floor next to the cell's two open toilets. The water taps were not functioning and no soap was provided, making acceptable hygiene impossible and causing Mohsen to contract an influenza-like illness.

78. At Santa Ana Jail, all the linens, including sheets, towels, and uniforms, were laundered with harsh chemicals causing the Mirmehdis to develop skin rashes, which to this day have left Mohsen with a scar on his neck.

Denial of Medical Care

79. Mojtaba experienced repeated incidents of chest pain while detained. On January 28, 2002, he suffered a particularly serious pain, and requested medical attention. In response to his request, two officers, Defendants Luna and Leon, laughed at him and chatted casually with each other for approximately 45 minutes outside his cell, while Mojtaba screamed for help and began self-flagellating in an effort to relieve or distract himself from the pain. Eventually, after Mojtaba fell to the floor of his cell, he was shackled hand and foot and taken to a cold cell, where he was denied medication, advised to change his attitude, and left on the floor overnight without a blanket. Mojtaba suffered chest pain for several more days after this incident.

80. The denial of medical care by Defendants and their agents and employees left Mohsen in severe pain and unable to walk for over a week. On or around April,

2004, at San Pedro Detention Center, after Mohsen injured his ankle, Defendants and their agents and employees ignored Mohsen's requests for medical care until, after two days, he was given a pair of old, worn-out crutches, in which flimsy plastic pins had been inserted in place of metal bolts. After two more days, one of these defective crutches broke, causing Mohsen to re-injure the ankle. Defendants and their agents and employees then gave him a better crutch, but again denied treatment by a doctor. Finally, after another four days, Mohsen was allowed to see the San Pedro medic, Dr. Collins. But when Mohsen complained to Dr. Collins about the delay in treatment, Dr. Collins angrily took away Mohsen's crutches; and when Mohsen objected to that, Dr. Collins called security to have Mohsen removed. Mohsen, still unable to walk due to the untreated ankle injury, was transported to his cell in a wheelchair, where he remained unable to walk without assistance for another week.

81. While in detention, Mohsen also developed astigmatism and posterior vitreous detachment (PVD), a disruptive and alarming condition which caused Mohsen to experience dark spots and bright flashes in his vision. He asked San Pedro officials to see an ophthalmologist, but they forced him to wait 7 months before allowing him to do so, causing him unnecessary anxiety and fear of blindness. Mohsen is currently in treatment for this condition. Since his release, Mohsen has also developed cataracts in both of his eyes. On information and belief, unnecessary stress and malnutrition, both of which Mohsen experienced regularly while detained, can be significant factors in contributing to cataracts and PVD.

82. The Defendants, agents and officials responsible for Plaintiffs' confinement, safety and well being denied the four Mirmehdi brothers even the most basic medical treatment for a variety of injuries, conditions, and diseases, including the acute injuries sustained during assaults; infections of the eyes and skin due to poor hygiene conditions; diseases due to cold, flu, and malnutrition; teeth infections; and psychological problems like panic attacks, frequent nightmares, concentration and memory problems, depression, anxiety, and, in the case of Michael, acute back injuries

and chronic back pain. As a result, all of their injuries were significantly prolonged and exacerbated.

Injuries and Damages

83. Thus, as a direct result of the acts and omissions of Defendants and their agents and employees, as alleged herein, including the wrongful detention of Plaintiffs in degrading and unsafe facilities, the Mirmehdis have suffered the following injuries and damages:

Injuries and Damages for Mohammad Mirmehdi

84. As a direct result of the conduct of Defendants and their agents and employees, Mohammad suffered physical injuries and illness including: contusions, abrasions and lacerations of the face and head; musculoskeletal injuries of the back, neck, and shoulder; permanent facial disfigurement; infections of the eyes and skin due to poor hygiene; disease due to cold, flu, and malnutrition; stress-related gastritis; and persistent pain due to the worst of these injuries for a period of at least 17 months.

85. As a direct result of the denial, by Defendants and their agents and employees, of appropriate medical care, their holding him unlawfully imprisoned for over 41 months, and other actions described herein, Mohammad also suffered psychological injuries including: Post-Traumatic Stress Disorder, panic attacks; severe anxiety; nightmares, night sweats, and nighttime muscle spasms; sleeplessness; inability to concentrate; inability to recall information such as names, phone numbers, and simple spellings; and clinical depression; which began while he was unlawfully imprisoned and continue to this day.

86. In addition, due to the conduct of Defendants and their agents and employees described herein, Mohammad suffered economic damages, including medical expenses.

Injuries and Damages for Michael Mirmehdi

87. As a direct result of Defendants' conduct described herein, Michael suffered

physical injuries and illnesses including, severe joint pain, acute and chronic back injuries, which caused him weeks of extreme pain and the inability to walk; untreated and chronic infections of the eyes and skin which persist to this day; illness due to malnutrition, causing him to lose 25 lbs; and exacerbation of all of these injuries and illnesses due to Defendants' denial of basic medical care.

88. As a direct result of Defendants' denial of appropriate medical and psychological care and of their unlawful treatment of him during the 41 months and other actions described herein, Michael also sustained psychological injuries including: extreme stuttering; frequent nightmares; frequent and severe headaches; concentration and memory problems; grey hair; Post-Traumatic Stress Disorder; depression and anxiety; which began while Michael was imprisoned by Defendants, and continue to this day.

89. In addition, due to Defendants' conduct described herein, Michael suffered past and future damages including lost income and attorneys' fees, and permanent loss of earning potential resulting from damage to his professional reputation.

Injuries and Damages for Mojtaba Mirmehdi

90. As a direct result of the conduct of Defendants and their agents and employees described herein, Mojtaba suffered physical injuries and illnesses including head injuries inflicted by a prison officer; scalding by hot water due to negligence of prison personnel; chronic and untreated infections of the skin and scalp; chest pain and panic attacks; flu-like illness; and exacerbation of these injuries and illness due to Defendants' refusal to provide even basic medical care.

91. As a direct result of the denial of appropriate medical care and of their illegal treatment during the 41 months in detention and other actions of Defendants and their agents and employees described herein, Mojtaba also sustained psychological injuries including: frequent nightmares, night sweats, and nighttime muscle spasms; sleeplessness; bleeding of the nose while sleeping; tooth loss and damage; loss of hair;

inability to concentrate; constant and irrational fear of being shot; frequent, disturbing, and involuntary mental images of graphic violence; obsessive/compulsive behavior; Post Traumatic Stress Disorder; anxiety, depression, and suicidal ideation; all of which began while Mojtaba was imprisoned by Defendants, and continue to this day.

92. In addition, due to Defendants' conduct described herein, Mojtaba suffered past and future damages including lost personal property, medical bills, attorneys' fees; and t loss of earning potential resulting from psychological injury.

Injuries and Damages for Mohsen Mirmehdi

93. As a direct result of Defendants' conduct described herein, Mohsen suffered physical injuries and illnesses including ankle dislocation, and continuing pain and risk of re-injury, due to denial of appropriate medical care; physical injury in an assault by a fellow detainee, caused by Defendants' deliberate indifference; posterior retinal detachment; eyestrain, double-vision, headaches, and astigmatism; vertigo; prematurely gray hair; untreated and chronic infections of the eyes and skin; severe and prolonged tooth pain and infection; and exacerbation of all of these injuries and illness due to Defendants' refusal to provide even basic medical care.

94. As a direct result of the denial of appropriate medical care and of their unlawful treatment of him for over 41 months and other actions described herein of Defendants and their agents and employees, Mohsen also sustained psychological injuries including: frequent nightmares; concentration and memory problems; sleeplessness; Post Traumatic Stress Disorder; hallucinations; depression and anxiety; bed-wetting; and suicidal ideation; all of which began while Mohsen was imprisoned by Defendants, and continue to this day.

95. In addition, due to Defendants' conduct described herein, Mohsen suffered past and future damages including lost income, medical expenses, attorneys' fees, and permanent loss of earning potential.

96. On March 5, 2005, Mohammad was severely beaten by Officer M. Lopez at

San Pedro Detention Center. After the assault, Mohammad was visited in jail, and his injuries noted, by a series of reporters and attorneys. Mohammad was also informed that the office of the Attorney General ("AG") would look into the matter, presumably to investigate whether to charge Officer Lopez criminally. A person from the AG's office was scheduled to interview Mohammad on March 17, 2005.

97. On March 16, 2005, the day before this interview was scheduled, the brothers were again served with a list of conditions for their release. They again refused to sign, but this time, they were released nevertheless.

FIRST CLAIM FOR RELIEF

(Denial of Medical Care: Fifth, Eighth and Fourteenth Amendments)

98. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as set forth fully herein.

99. This claim is brought by all Plaintiffs against the City of Santa, pursuant to 42 U.S.C. Section 1983, and against Defendants Does 1 through 10. This claim is additionally brought by Plaintiff Mojtaba Mirmehdi against Defendants LUNA and LEON pursuant to 42 U.S.C. Section 1983;

100. Defendants with deliberate disregard for any injury Plaintiffs would suffer, and deliberate indifference of Plaintiff's medical needs, deprived Plaintiffs of medical treatment for their serious medical needs.

101. Defendants violated Plaintiffs' rights by, among other things, displaying deliberate indifference to Plaintiffs' serious and urgent medical needs by failing to provide them with adequate medical attention, care and treatment. In denying Plaintiffs medical care for their serious injuries, Defendants, acting under color of law and their authority as federal and/or state officers, have with deliberate indifference to Plaintiff's medical needs, subjected Plaintiffs to unnecessary and wanton infliction of pain in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

102. The City of Santa Ana's unconstitutional policies, practices and/or customs were a direct and legal cause of Plaintiff's damages, pain and suffering.

103. As a direct and proximate result of the acts and omissions of Defendants, and each of them, Plaintiffs were deprived of their rights under the Eighth and/or Fourteenth Amendments of the United States Constitution and of the laws of the United States and have suffered physical sickness and injuries, emotional distress, humiliation, embarrassment, pain and suffering, and loss of earnings and earning capacity, medical and legal expenses present and future monetary damages. Plaintiffs are entitled to compensatory and punitive damages in an amount to be determined at trial.

104. Plaintiffs are informed and believe and thereon allege that the aforementioned acts of Defendants were willful, malicious, intentional, oppressive and despicable and/or were done in willful and conscious disregard of the rights, welfare and safety of Plaintiffs, thereby justifying the awarding of punitive and exemplary damages against all non-municipal Defendants.

SECOND CLAIM FOR RELIEF

(Excessive, Unreasonable, and Deliberately Humiliating and Punitive Strip Searches: Fourth, Fifth and Fourteenth Amendments)

105. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

106. This claim is brought by all Plaintiffs against the City of Santa Ana pursuant to 42 U.S.C. Section 1983, 107. By subjecting Plaintiffs to excessive and unreasonable strip searches and cavity searches with no rational relation to a legitimate penological purpose, when Defendants had no reasonable suspicion or rational reason to justify a strip search, and conducting the searches in a deliberately humiliating manner that was not reasonably related to any legitimate penological purpose, said Defendants intentionally or recklessly violated Plaintiffs' Fourth, Fifth and Fourteenth Amendment rights.

108. Defendants acted with deliberate indifference to Plaintiff's rights in their supervision of abusive officers and guards, including those Defendants who subjected Plaintiffs to these punitive strip searches, and thereby violated Plaintiffs' right to be free from punishment under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

109. By subjecting Plaintiffs to strip searches and cavity searches so devoid of rational relation to any legitimate penological purpose that the searches' only possible purpose was punitive, abusive officer Defendants and Supervisor Defendants intentionally or recklessly violated Plaintiffs' rights to be free from punishment under the Due Process Clause of the Fifth and Fourteenth Amendment to the United States Constitution.

110. By subjecting Plaintiffs to excessive and unreasonable strip searches and cavity searches with no rational relation to a legitimate penological purpose when Defendants had no reasonable suspicion or rational reason to justify a strip search, and conducting the searches in a deliberately humiliating manner that was not reasonably related to any legitimate penological purpose, Defendants intentionally or recklessly violated Plaintiffs' rights to privacy and to be free from unreasonable searches, in violation of their rights under the Fourth and Fourteenth Amendments to the United States Constitution.

111. The City of Santa Ana's unconstitutional policies, practices and/or customs were a direct and legal cause of Plaintiff's damages, pain and suffering.

112. As a direct and proximate result of the acts and omissions of Defendants, and each of them, Plaintiffs were deprived of their rights under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution and of the laws of the United States and have suffered physical sickness and injuries, emotional distress, humiliation, embarrassment, pain and suffering, loss of earnings and earning capacity, medical and legal expenses and present and future monetary damages. Plaintiffs are entitled to compensatory and punitive damages in an amount to be determined at trial.

113. Plaintiffs are informed and believe and thereon allege that the aforementioned acts of Defendants were willful, malicious, intentional, oppressive and despicable and/or were done in willful and conscious disregard of the rights, welfare and safety of Plaintiffs, thereby justifying the awarding of punitive and exemplary damages against all non-municipal Defendants.

THIRD CLAIM FOR RELIEF

(Inhumane Detention Conditions: Fifth and Fourteenth Amendments)

114. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as set forth fully herein.

115. This claim is brought by all Plaintiffs against the City of Santa Ana pursuant to 42 U.S.C. Section 1983, and against Defendants Does 1 through 10. This claim is additionally brought by Plaintiff Mojtaba Mirmehdi against Defendants ESCOBAR, LUNA, and LEON pursuant to 42 U.S.C. Section 1983

116. By subjecting Plaintiffs to the detention conditions alleged herein, Defendants intentionally deprived or acted with deliberate indifference to Plaintiffs' constitutional rights and deliberately and intentionally subjected Plaintiffs' to imprisonment, not for any just penological purpose, but for purposes of punishment and coercion.

117. By subjecting Plaintiffs to the detention conditions alleged herein, Defendants, acting under color or law and their authority as federal officers, have singled out Plaintiffs based on their race, religion, and/or ethnic or national origin, and have engaged in selective mistreatment amounting to punishment in violation of their rights under the Fifth and Fourteenth Amendments to the United States Constitution to equal protection of the law.

118. Defendants, acting under color of law, have intentionally and with deliberate disregard for any injury Plaintiffs would suffer, subjected Plaintiffs to inhumane and degrading detention conditions without due process of law in violation of

the Fifth and Fourteenth Amendment to the United States Constitution.

119. As a direct and proximate result of the acts and omissions of Defendants, and each of them, Plaintiffs were deprived of their rights under the Fifth and Fourteenth Amendments of the United States Constitution and of the laws of the United States and have suffered physical sickness and injuries, emotional distress, humiliation, embarrassment, pain and suffering, loss of earnings and earning capacity, medical and legal expenses and present and future monetary damages. Plaintiffs are entitled to compensatory and punitive damages in an amount to be determined at trial.

120. Plaintiffs are informed and believe and thereon allege that the aforementioned acts of Defendants were willful, malicious, intentional, oppressive and despicable and/or were done in willful, conscious and/or reckless disregard of the rights, welfare and safety of Plaintiffs, thereby justifying the awarding of punitive and exemplary damages against all non-municipal Defendants.

121. The City of Santa Ana's unconstitutional policies, practices and/or customs were a direct and legal cause of Plaintiff's damages, pain and suffering.

FOURTH CLAIM FOR RELIEF

(Interference with Right to Counsel; Fifth

Sixth and Fourteenth Amendments)

122. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

123. This claim is brought by all Plaintiffs against the City of Santa Ana pursuant to 42 U.S.C. Section 1983 and against Defendants Does 1 through 10.

124. By adopting, promulgating, and implementing the policy and practice under which Plaintiffs were prevented from engaging in confidential communications with their legal counsel and were denied access to documents necessary to prepare for their court hearings, Defendants intentionally and recklessly violated Plaintiffs' rights to

obtain access to legal counsel and to petition the courts for redress of their grievances, in violation of their rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

125. This complaint sets forth a claim for deprivation of civil rights for violation of the Fifth, Sixth and Fourteenth Amendment to the United States Constitution against Defendants. In particular, by adopting, promulgating, and implementing the policy and practice under which Plaintiffs were prevented from engaging in confidential communications with their legal counsel and were denied access to documents necessary to prepare for their court hearings, Defendants intentionally and recklessly violated Plaintiffs' rights to obtain access to legal counsel and to petition the courts for redress of their grievances, in violation of their rights under the Fifth Amendment, Sixth and Fourteenth of the United States Constitution.

126. As a direct and proximate result of the acts and omissions of Defendants, and each of them, Plaintiffs were deprived of their rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and of the laws of the United States and have suffered damages, including physical sickness and injuries, emotional distress, humiliation, embarrassment, pain and suffering, loss of earnings and earning capacity, medical and legal expenses and present and future monetary damages. Plaintiffs are entitled to compensatory and punitive damages in an amount to be determined at trial.

127. The City of Santa Ana's unconstitutional policies, practices and/or customs were a direct and legal cause of Plaintiff's damages, pain and suffering.

128. Plaintiffs are informed and believe and thereon allege that the aforementioned acts of Defendants were willful, malicious, intentional, oppressive and despicable and/or were done in willful and conscious disregard of the rights, welfare and safety of Plaintiffs, thereby justifying the awarding of punitive and exemplary damages against all non-municipal Defendants.

FIFTH CLAIM FOR RELIEF

(Excessive Force — Mohammad Mirmehdi: Fourth, Fifth and Fourteenth Amendments)

129. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

130. Plaintiff Mohammad Mirmehdi brings this claim on his own behalf against Defendant MARIO LOPEZ. pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), and against Defendants Does 1 through 10.

131. The intentional beatings of Plaintiff Mohammad Mirmehdi by these Defendants when Plaintiff was unarmed and did not pose a threat of death or grievous bodily injury to Defendants or others, and when Defendants had no lawful authority to use deadly or non-deadly force against him, was without justification or provocation, was excessive, and was done with actual malice toward Plaintiff and with willful and wanton indifference to and deliberate disregard for the constitutional rights of Plaintiff.

132. The intentional beatings of Plaintiff Mohammad Mirmehdi by said Defendants violated Plaintiff's rights as guaranteed by the Fourth and Fifth Amendments to the United States Constitution, for which such officers are individually liable.

133. As a direct and proximate result of the acts and omissions of Defendants, Plaintiff was deprived of his rights under the Fourth and Fifth Amendments of the United States Constitution and of the laws of the United States and has sustained permanent physical and psychological injuries and incurred medical bills and other expenses. These injuries have caused and will continue to cause him great pain and suffering, both mental and physical. Plaintiff's damages include physical sickness and injuries, emotional distress, humiliation, embarrassment, pain and suffering, loss of earnings and earning capacity, medical and legal expenses and present and future monetary damages. Plaintiff is entitled to compensatory and punitive damages in an amount to be determined at trial.

134. Plaintiff is informed and believes and thereon alleges that the

aforementioned acts of Defendants were willful, malicious, intentional, oppressive and despicable and/or were done in willful and conscious disregard of the rights, welfare and safety of Plaintiff, thereby justifying the awarding of punitive and exemplary damages against all Defendants.

SIXTH CLAIM FOR RELIEF

(Negligence)

(By All Plaintiffs Against Defendants United States of America and MVM, Inc.)

135. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

136. This court asserts a claim for negligence on behalf of all plaintiffs against Defendants United States of America (under the FTCA) and Defendant MVM, Inc. (under California law) based on plaintiffs' allegations that agents, employees and officials of the United States and/or Defendant MVM, Inc. ("MVM") (including MVM employees and agents Garzone, Barnes and Logan), while acting in the course and scope of their employment with the United States of America and/or MVM , owed a duty of care towards plaintiffs to use reasonable care to prevent the violation of plaintiffs' rights and to provide for their physical safety and well being.[4]

137. As alleged herein agents, employees and officials of the United States of America and/or MVM, breached their duty of care towards plaintiffs and caused plaintiffs to suffer damages by, *inter alia*, 1) displaying indifference to Plaintiffs' serious and urgent medical needs by failing to provide them with adequate medical attention, care and treatment 2) failing to provide plaintiffs with adequate food, shelter and/or hygiene during plaintiffs' confinement 3) allowing Plaintiffs Mohammad and Mohsen

[4]Plaintiffs are informed and believe and thereon allege that at all relevant times, Defendant MVM and its employees were acting as agents and/or employees of the United States of America, and in the course and scope of employment as agents of the United States and therefore, the United States is liable for the acts and omissions of MVM and its employees and agents pursuant to the FTCA. In any event. Defendant MVM is independently liable under California law for the acts and omissions of itself and its agents and employees as alleged herein.

Mirmehdi to be physically assaulted and battered by inmates and/or ICE agents who they knew or should have known presented a danger to Plaintiffs' safety.

138. The United States of America and/or MVM engaged in the acts alleged herein and/or condoned, permitted, authorized, and/or ratified the conduct of its employees, subcontractors, and agents for this cause of action.

139. Pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2675(a), the claims set forth herein were timely presented by the Plaintiffs to Immigrations Custom and Enforcement.

140. As a result of the negligent acts and omissions, described herein, Plaintiffs have suffered and continue to suffer damages, including, loss of earnings and earning capacity, medical and legal expenses, emotional distress, humiliation, embarrassment, pain and suffering, physical injuries and sickness, discomfort, fear, anxiety, depression, shock and other injuries.

SEVENTH CLAIM FOR RELIEF

(Assault and Battery)

(By Plaintiff Mohammad Mirmehdi Against Defendants United States of America and MVM, Inc.)

141. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

142. As alleged herein, agents, employees and/or officers of Defendants United States and/or MVM, while acting in the course and scope of their employment committed acts which resulted in imminent apprehension of and harmful or offensive contact with plaintiff's person, to which plaintiff did not consent. Said imminent apprehension of and harmful or offensive contact caused injury, damage, loss, and/or harm to plaintiff as alleged herein. Plaintiff therefore asserts a claim for assault and battery against Defendants United States of America and MVM based upon the actions

of their agents, employee and officers (including MVM employees and agents Garzone, Barnes and Logan and ICE agent Lopez), as alleged herein which was the direct and legal cause of the damage to Plaintiff.[5]

143. As alleged herein, federal employee, agents and/or officials committed used unreasonable and excessive force against Plaintiff, without justification or legal cause.

144. Defendants United States of America and MVM engaged in the acts alleged herein and/or condoned, permitted, authorized, and/or ratified the conduct of its employees, subcontractors, and agents for this cause of action.

145. Pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2675(a), the claims set forth herein were timely presented by the Plaintiffs to Immigrations Custom and Enforcement

146. As a result of the unlawful conduct described herein, Plaintiff has suffered and continues to suffer damages, including, loss of earnings and earning capacity, medical and legal expenses, emotional distress, humiliation, embarrassment, pain and suffering, physical injuries and sickness, discomfort, fear, anxiety, depression, shock and other injuries. Plaintiffs are entitled to compensatory damages in an amount to be determined at trial.

EIGHTH CLAIM FOR RELIEF

(Intentional Infliction of Emotional Distress)

(By All Plaintiffs Against Defendant MVM, Inc.)

147. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

148. From the time of their arrest to the time of their release from detention, agents, employees and officials of Defendant MVM (including MVM employees and

[5]Plaintiffs are informed and believe and thereon allege that at all relevant times, Defendant MVM and its employees were acting as agents and/or employees of the United States of America, and in the course and scope of employment as agents of the United States and therefore, the United States is liable for the acts and omissions of MVM and its employees and agents pursuant to the FTCA. In any event. Defendant MVM is independently liable under California law for the acts and omissions of itself and its agents and employees as alleged herein.

agents Garzone, Barnes and Logan) while acting within the course and scope of their employment, intentionally engaged in a sustained and relentless campaign to inflict emotional distress on Plaintiffs that included, but was not limited to, punitive strip searches and cavity searches, humiliating insults to Plaintiff's physical anatomy, threats of prolonged and permanent detention, and inhumane conditions of confinement.

149. Plaintiffs' claim for intentional infliction of emotional distressis based on the allegations that the acts and omissions described herein including those committed by the above-referenced MVM employees, agents and/or officials, acting in the course and scope of their employment constitute extreme and outrageous conduct against Plaintiffs, and the acts complained of were not privileged.

150. The acts and omissions, as alleged herein, were intended to cause Plaintiffs serious emotional distress, or in the alternative, the acts and omissions were committed with a substantial certainty that they would cause Plaintiffs serious emotional distress.

151. Defendant MVM engaged in the acts alleged herein and/or condoned, permitted, authorized, and/or ratified the conduct of its employees, subcontractors, and agents for this cause of action.

152. As a result of the unlawful conduct described herein, Plaintiffs have suffered and continue to suffer severe emotional distress and other damages, including, loss of earnings and earning capacity, medical and legal expenses, humiliation, embarrassment, pain and suffering, physical injuries and sickness, discomfort, fear, anxiety, depression, shock and other injuries. Plaintiffs are entitled to compensatory damages in an amount to be determined at trial.

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court grant the following relief:

A. Compensatory damages including, but not limited to, Plaintiffs' medical

expenses, lost earnings, and damages for pain and suffering, in an amount to be determined at trial;

B. Punitive and exemplary damages in an amount to be determined at trial against the non-government entity Defendants;

C. Reasonable attorneys' fees and costs of suit; and

E. Such other relief as the Court deems just and proper.

Dated: October 6, 2008

SCHONBRUN DE SIMONE SEPLOW HARRIS & HOFFMAN LLP

By: _____
Paul Hoffman
Michael D. Seplow
Attorney for Plaintiffs

DEMAND FOR JURY

Plaintiffs hereby demand trial by jury on all issues.

Dated: October 6, 2008

SCHONBRUN DE SIMONE SEPLOW HARRIS & HOFFMAN LLP

By: _____

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Michael D. Seplow
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Attorney for Plaintiffs

Planned Parenthood Minnesota, North Dakota, South Dakota and Carol E. Ball, M.D., Appellees

v.

Mike Rounds, Governor, Marty J. Jackley, Attorney General, in their official capacities, et al., Appellants.

Christian Medical & Dental Associations, et al., Amici on Behalf of Appellant.

Planned Parenthood Minnesota, North Dakota, South Dakota and Carol E. Ball, Appellants

v.

Mike Rounds, Governor, et al., Appellees.

Family Research Council, et al., Amici on Behalf of Appellant

Eagle Forum Education and Legal Defense Fund, et al., Amici on Behalf of Appellee.

Nos. 09–3231, 09–3233, 09–3362.

United States Court of Appeals, Eighth Circuit.

Dec. 7, 2011.

Appeal from U.S. District Court of South Dakota–Sioux Falls (4:05–cv–04077–KES).

Prior report: 653 F.3d 662.

AMENDED ORDER

The court's order of December 5, 2011 granting rehearing en banc and vacating the court's opinion and judgment of September 2, 2011 is vacated.

The State Appellants'/Cross–Appellees' September 30, 2011 petition for rehearing en banc and the Alpha Center Appellants'/Cross–Appellees' petition for rehearing en banc are granted. Rehearing en banc is limited to the issue of whether the district court erred in enjoining the provisions of South Dakota Century Law 34–23A–10.1(1)(e)(ii) dealing with the suicide advisory. It is further ordered that Part II.C of the court's September 2, 2011 opinion is vacated. The court's September 2, 2011 judgment is also vacated.

The clerk is directed to set this case for oral argument at 10:00 a.m. on Monday, January 9, 2012 in St. Louis, Missouri. Counsel shall, within ten days, submit 30 additional copies of previously filed briefs and 8 additional copies of the appendix.

Mohammad MIRMEHDI; Mostafa Mirmehdi; Mohsen Mirmehdi; Mojtaba Mirmehdi, Plaintiffs–Appellants,

v.

UNITED STATES of America; Mario Lopez; John Ashcroft; Robert S. Mueller, III; James W. Ziglar; Michael Garcia, Esquire; Christopher Castillo; James MacDowell, Defendants–Appellees.

No. 09–55846.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 30, 2011.

Filed Nov. 3, 2011.

Background: Aliens not lawfully in United States filed action against United States seeking monetary damages on claim of constitutionally invalid detention, inhumane detention conditions, witness intimidation, and the intentional infliction of

emotional distress. The United States District Court for the Central District of California, Manuel L. Real, J., dismissed some claims and parties settled remaining claims. Plaintiffs appealed.

Holdings: The Court of Appeals, O'Scannlain, Circuit Judge, held that:

(1) *Bivens* did not provide remedy for aliens not lawfully in United States to sue federal agents for monetary damages for wrongful detention pending deportation;

(2) aliens had not been prejudiced by witness intimidation; and

(3) decision to detain alien pending resolution of immigration proceedings fell within discretionary function exception to waiver of sovereign immunity under Federal Tort Claims Act (FTCA).

Affirmed.

Silverman, Circuit Judge, filed concurring opinion.

1. United States ⚿50.10(3)

Bivens did not provide remedy for aliens not lawfully in United States to sue federal agents for monetary damages for wrongful detention pending deportation; although neither immigration system nor habeas provided monetary compensation for unlawful detention, doing so under *Bivens* would have been plainly inconsistent with Congress' authority in that field, given extensive remedial procedures available to and invoked by them and unique foreign policy considerations implicated in immigration context.

2. United States ⚿50.10(3)

Immigrants' remedies for vindicating the rights which they possess under the Constitution are not coextensive with those offered to citizens; therefore, deportation proceedings constitute the relevant environment of fact and law in which to decide whether to recognize a *Bivens* remedy.

3. United States ⚿50.10(3)

A court must consider whether an immigrant may bring a *Bivens* claim to vindicate certain constitutional rights separately from whether a citizen may bring such a *Bivens* claim because Congress has the ability to make rules as to aliens that would be unacceptable if applied to citizens.

4. United States ⚿50.3

The examination of the availability of a *Bivens* remedy requires a court to determine whether there is any alternative, existing process for protecting the plaintiffs' interests, and if there is such an alternative remedy, the inquiry stops; if there is not, a court asks whether there nevertheless are factors counseling hesitation before devising such an implied right of action.

5. United States ⚿50.3

So long as Congress' failure to provide money damages has not been inadvertent, courts should defer to its judgment, rather than providing a remedy under *Bivens*.

6. United States ⚿50.3

The complexity and comprehensiveness of an existing remedial system is a factor among a broad range of concerns counseling hesitation before allowing a *Bivens* remedy.

7. United States ⚿50.10(3)

Immigration issues that have the natural tendency to affect diplomacy, foreign policy, and the security of the nation counsel hesitation in extending *Bivens*.

8. Conspiracy ⚿7.5(2)

Aliens not lawfully in United States had not been prejudiced by witness intimidation, and thus did not have viable civil rights conspiracy claim, where witness tes-

timony would have helped aliens to establish that they were eligible for withholding of removal because they were not involved with any terrorist activities, but aliens were awarded withholding of removal even without that testimony. Immigration and Nationality Act, §§ 212(a)(3)(B)(i), 241(b)(3)(B), 8 U.S.C.A. §§ 1182(a)(3)(B)(i), 1231(b)(3)(B); 42 U.S.C.A. § 1985(2).

9. Aliens, Immigration, and Citizenship ⚿121

Alien unlawfully in United States did not have constitutional right to assert claim of selective enforcement of immigration laws.

10. Conspiracy ⚿7.5(1)

Allegations of witness intimidation will not suffice for a cause of action for civil rights conspiracy unless it can be shown the litigant was hampered in being able to present an effective case; this rule applies to both witness intimidation and conspiracy to intimidate a witness. 42 U.S.C.A. § 1985(2).

11. Evidence ⚿43(3)

Court of Appeals could take judicial notice of related habeas and immigration cases, as matters of public record, that had been referenced on face of complaint of aliens not lawfully in United States against United States seeking monetary damages on claim of witness intimidation. 42 U.S.C.A. § 1985(2); Fed.Rules Evid.Rule 201, 28 U.S.C.A.

12. United States ⚿78(12)

Decision to detain alien pending resolution of immigration proceedings fell within discretionary function exception to waiver of sovereign immunity under Federal Tort Claims Act (FTCA), since it was explicitly committed to discretion of Attorney General and implicated issues of foreign policy. 28 U.S.C.A. §§ 1346, 2680(a).

13. United States ⚿125(3)

United States, as a sovereign, may not be sued except insofar as it consents to be sued. 28 U.S.C.A. § 1346.

14. United States ⚿78(2)

Federal Tort Claims Act (FTCA) is subject to both procedural and substantive exceptions to sovereign immunity that must be strictly interpreted. 28 U.S.C.A. § 1346.

15. United States ⚿78(12)

Court of Appeals had to sua sponte consider applicability of discretionary function exception to waiver of sovereign immunity under Federal Tort Claims Act (FTCA), on claim for false imprisonment under California law, since claim affected its jurisdiction. 28 U.S.C.A. §§ 1346, 2680(a).

16. United States ⚿78(12)

To determine whether conduct falls within the discretionary function exception to the waiver of sovereign immunity under the Federal Tort Claims Act (FTCA), a court must first determine if the challenged conduct involves an element of judgment or choice and then if the conduct implements social, economic, or political policy considerations. 28 U.S.C.A. §§ 1346, 2680(a).

17. United States ⚿78(12)

On claim for false imprisonment under California law, discretionary function exception to waiver of sovereign immunity under Federal Tort Claims Act (FTCA) did not immunize conduct of federal officers from judicial review who made arrest at operational level. 28 U.S.C.A. §§ 1346, 2680(a).

18. Federal Civil Procedure ⚿833, 851, 1838

Requests for leave to amend should be granted with extreme liberality, particular-

ly when a complaint was filed before *Twombly* and fails for lack of sufficient factual content; however, a party is not entitled to an opportunity to amend his complaint if any potential amendment would be futile. Fed.Rules Civ.Proc.Rule 15, 28 U.S.C.A.

Paul L. Hoffman, Schonbrun DeSimone Seplow Harris Hoffman & Harrison LLP, Venice, CA, argued the cause and filed the briefs for the plaintiffs-appellants. With him on the briefs were Michael Seplow, Adrienne Quarry, and Victoria Don, Schonbrun DeSimone Seplow Harris Hoffman & Harrison LLP, Venice, CA.

Andrew D. Silverman, United States Department of Justice, Torts Branch, Civil Division, Washington, D.C., argued the cause and filed the briefs for the defendants-appellees. With him on the brief were Jeremy S. Brumbelow, Tony West, Timothy P. Garren, and Andrea W. McCarthy, Department of Justice, Civil Division, Washington, D.C.

Appeal from the United States District Court for the Central District of California, Manuel L. Real, District Judge, Presiding. D.C. No. 2:06–cv–05055–R–PJW.

Before: ARTHUR L. ALARCÓN, DIARMUID F. O'SCANNLAIN, and BARRY G. SILVERMAN, Circuit Judges.

Opinion by Judge O'SCANNLAIN; Concurrence by Judge SILVERMAN.

OPINION

O'SCANNLAIN, Circuit Judge:

We are asked to decide, among other things, whether an alien not lawfully in the United States may sue for monetary damages claiming constitutionally invalid detention.

I

Mohammad, Mostafa ("Michael"), Mohsen, and Mojtaba Mirmehdi (collectively the "Mirmehdis") are four citizens of Iran who came to the United States at various times, purportedly due to their long-standing opposition to that nation's theocratic regime. In 1978, Michael arrived on a student visa. Having abandoned the degree that earned him entry into the United States, he became a real estate agent in 1985. Mohsen, Mojtaba, and Mohammad joined Michael in California in the early 1990s. Mohsen and Mohammad also became real estate agents. Unable to pass the real estate licensing exam, Mojtaba worked in construction.

In 1998, the Mirmehdis applied for political asylum with the assistance of an attorney named Bahram Tabatabai. Tabatabai falsified certain details in the Mirmehdis' applications. After Tabatabai was arrested for immigration fraud in March 1999, he agreed to cooperate with federal authorities. As part of his plea bargain, Tabatabai spoke to Special Agents Christopher Castillo of the Federal Bureau of Investigation and J.A. MacDowell of the Immigration and Naturalization Service regarding their ongoing investigation of a terrorist group known as the Mujahedin-e Khalq ("MEK"). Though he later recanted, Tabatabai told Castillo and MacDowell that the Mirmehdis were supporters of the group, which was founded on an antipathy for the Iranian government.

Based on this information, agents arrested the Mirmehdis for immigration violations in March 1999. Michael, Mojtaba, and Mohsen were released on bond later that year; Mohammad was released in September 2000.

On October 2, 2001, immigration authorities revoked the Mirmehdis' bond, largely

based on a document known as the "L.A. Cell Form," a handwritten piece of paper that has become the subject of considerable litigation and is at the center of this case. The government has always maintained that the Form lists members, affiliates, and supporters of the MEK. During the Mirmehdis' bond revocation proceedings, Castillo testified that the FBI seized the document from an MEK facility and that a confidential informant told him of its significance.

The Mirmehdis have always denied their involvement in the MEK and allege that Castillo and MacDowell knew from the start that the document was really just a list of attendees at a rally hosted by the National Council of Resistance of Iran ("NCRI"). It is undisputed that the MEK was listed as a terrorist group in 1997 and is affiliated with the NCRI. But the Mirmehdis assert that they attended the rally *before* that classification occurred.

The Mirmehdis also assert that Castillo concocted evidence to convince immigration authorities to revoke their bond. They claim that the cooperating witness never existed and that Castillo unreasonably continued to rely upon Tabatabai, even after he recanted. Castillo's motive, the Mirmehdis contend, was to pressure them into giving up information about the MEK that they did not possess.

The Mirmehdis' assertions are not new. They raised them on direct appeal of their detention, during the merits proceeding related to their asylum applications, and in a federal petition for a writ of habeas corpus. Almost all such forms of relief were denied. The Mirmehdis were, however, granted withholding of removal because they had demonstrated a likelihood of mistreatment if removed to Iran, and because the government failed to establish that they were engaged in terrorist activity as defined by statute.

Their immigration proceedings at last final, the Mirmehdis were released from detention in March 2005. The Mirmehdis subsequently brought this suit naming as defendants: Attorney General John Ashcroft, FBI Director Robert Mueller, INS Commissioners James Ziglar and Michael Garcia, the City of Santa Ana, the City of Las Vegas, MVM, Inc., Castillo, MacDowell, several named prison guards, John Does 1–10, and the United States. They raised a number of claims including unlawful detention, inhumane detention conditions, witness intimidation, and the intentional infliction of emotional distress.

The district court dismissed almost all of the Mirmehdis' claims for either lack of personal jurisdiction or failure to state a cause of action. The parties later settled all claims except those against Castillo and MacDowell for unlawful detention and conspiracy to violate their civil rights, against Castillo for intimidation of a witness, and against the United States for false imprisonment. The district court entered a final judgment, and the Mirmehdis timely appealed the claims to which they did not stipulate.

II

[1] The Mirmehdis first appeal the dismissal of their claim against Castillo and MacDowell for wrongful detention under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).[1]

1. The district court dismissed these claims based on its conclusion that the Mirmehdis had no constitutional right not to be detained pending deportation proceedings. We do not reach this issue because, even assuming such a violation, we must still decide whether *Bivens* provides for a theory for recovery. *Wilkie v. Robbins*, 551 U.S. 537, 550, 127 S.Ct.

Whether such a claim presents a cognizable legal theory has been an open question in this circuit. *See Wong v. United States INS,* 373 F.3d 952, 961 (9th Cir.2004); *see also Sissoko v. Rocha,* 412 F.3d 1021, 1028 (9th Cir.2005), *withdrawn and replaced,* 509 F.3d 947 (9th Cir.2007).[2]

A

In the past, we have suggested that "federal courts have inherent authority to award damages to plaintiffs whose federal constitutional rights were violated by federal officials." *Papa v. INS,* 281 F.3d 1004, 1009 (9th Cir.2002). But as the Supreme Court has since reminded us, "any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee." *Wilkie v. Robbins,* 551 U.S. 537, 550, 127 S.Ct. 2588, 168 L.Ed.2d 389 (2007). Such a cause of action "is *not* an automatic entitlement *no matter what other means there may be* to vindicate a protected interest." *Id.* (emphasis added).

Indeed, "[i]n the 38 years since *Bivens,*" the Supreme Court has repeatedly rejected *Bivens* claims outside the context discussed in that specific case and has "extended it twice only: in the context of an employment discrimination claim in violation of the Due Process Clause, *Davis v. Passman,* 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979); and in the context of an Eighth Amendment violation by prison officials, [*Carlson v. Green,* 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980)]." *Arar v. Ashcroft,* 585 F.3d 559, 571 (2d Cir.2009) (en banc). The Supreme Court has refused to extend *Bivens* to: violations of federal employees' First Amendment rights by their employers, *Bush v. Lucas,* 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983); harms suffered incident to military service, *United States v. Stanley,* 483 U.S. 669, 107 S.Ct. 3054, 97 L.Ed.2d 550, (1987); denials of Social Security benefits, *Schweiker v. Chilicky,* 487 U.S. 412, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988); decisions by federal agencies, *FDIC v. Meyer,* 510 U.S. 471, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994); actions by private corporations operating under federal contracts, *Corr. Servs. Corp. v. Malesko,* 534 U.S. 61, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001); or retaliation by federal officials against private landowners, *Wilkie,* 551 U.S. at 562, 127 S.Ct. 2588.

The Court has also "recently and 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, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) (citing inter alia *Malesko,* 534 U.S. at 68, 122 S.Ct. 515). Such a decision implicates grave separation of powers concerns because the "creation of a private right of action raises [policy choices] beyond the mere consideration whether primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion." *Id.* For such reasons, the Court has instructed the fed-

2588, 168 L.Ed.2d 389 (2007); *see also Shaw v. Cal. Dep't of Alcoholic Beverage Control,* 788 F.2d 600, 603 (9th Cir.1986) ("We may affirm the judgment on any basis supported by the record even if the district court did not rely on that basis.").

2. The Mirmehdis argue that we have, in fact, recognized an immigrant's right to pursue a *Bivens* action citing *Papa,* 281 F.3d 1004. But because cases like *Papa* did not squarely present the issue, it remains open. *See Berry v. Hollander,* 925 F.2d 311, 314 & n. 3, 316 (9th Cir.1991) (concluding that no *Bivens* action exists for government employees despite previously allowing such claims).

eral courts to "respond[ ] cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker,* 487 U.S. at 421, 108 S.Ct. 2460.

It quickly becomes apparent, however, that this query has a logical predicate—whether we would *need* to extend *Bivens* in order for illegal immigrants to recover for unlawful detention during deportation proceedings. Only after answering in the affirmative, would we need to turn to the issue of whether we *ought* to extend *Bivens* to such a context. *Arar,* 585 F.3d at 572.

B

To answer this question requires us to enter by a narrow gate. Examining the availability of a *Bivens* remedy at a "high level of generality" would "invite claims in every sphere of legitimate governmental action" touching, however tangentially, on a constitutionally protected interest. *Wilkie,* 551 U.S. at 561, 127 S.Ct. 2588. Examining the question at too low a level of generality would invite never ending litigation because "every case has points of distinction." *Arar,* 585 F.3d at 572. As such, we join our sister circuit and "construe the word 'context' as it is commonly used in law: to reflect a potentially recurring scenario that has similar legal and factual components." *Id.*

[2, 3] Deportation proceedings are such a context, unique from other situations where an unlawful detention may arise. It is well established that immigrants' remedies for vindicating the rights which they possess under the Constitution are not coextensive with those offered to citizens. *See, e.g., Reno v. Am.–Arab Anti–Discrim. Comm.,* 525 U.S. 471, 488, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999) ("*AADC*") ("As a general matter . . . an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation."). Therefore, deportation proceedings constitute the relevant "environment of fact and law" in which to "decide whether to recognize a *Bivens* remedy." *Arar,* 585 F.3d at 572.[3]

C

[4] Having identified the appropriate context, we now must apply the Supreme Court's test from *Wilkie,* in which it "distilled its 35–year history of *Bivens* jurisprudence into a two-step analysis." *W. Radio Servs. Co. v. U.S. Forest Serv.,* 578 F.3d 1116, 1120 (9th Cir.2009). First we must "determine[ ] whether there is 'any alternative, existing process for protecting' the plaintiffs' interests." *Id.* If there is such an alternative remedy, our inquiry stops. If there is not, we proceed to the next step and "ask[ ] whether there nevertheless are 'factors counseling hesitation' before devising such an implied right of action." *Id.* The Mirmehdis' claim for unlawful detention founders at both obstacles.

The Mirmehdis could—and did—challenge their detention through not one but two different remedial systems. As the

3. By identifying this as the appropriate frame of reference, we do not hold that an illegal alien may never bring a *Bivens* claim. Instead, we merely recognize that because Congress has the ability to "make rules as to aliens that would be unacceptable if applied to citizens," *Demore v. Kim,* 538 U.S. 510, 521–22, 123 S.Ct. 1708, 155 L.Ed.2d 724 (2003) (citing inter alia *Reno v. Flores,* 507 U.S. 292, 305–06, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993) ("Thus, 'in the exercise of its broad power over immigration and naturalization,' Congress regularly makes rules that would be unacceptable if applied to citizens.")), we must consider whether an immigrant may bring a *Bivens* claim to vindicate certain constitutional rights separately from whether a citizen may bring such a *Bivens* claim.

Second Circuit stated: "Congress has established a substantial, comprehensive, and intricate remedial scheme in the context of immigration." *Arar,* 585 F.3d at 572. The availability of habeas is another remedy. *See Rauschenberg v. Williamson,* 785 F.2d 985, 987–88 (11th Cir.1986). The Mirmehdis took full advantage of both.

[5] 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. "Even where Congress has given plaintiffs no damages remedy for a constitutional violation, the Court has declined to create a right of action under *Bivens* when doing so 'would be plainly inconsistent with Congress' authority in th[e] field.'" *W. Radio Servs. Co.,* 578 F.3d at 1120 (quoting *Chappell v. Wallace,* 462 U.S. 296, 304, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983)). Indeed, "[s]o long as Congress' failure to provide money damages ... has not been inadvertent, courts should defer to its judgment." *Berry v. Hollander,* 925 F.2d 311, 314 (9th Cir.1991) (internal quotation marks omitted).

Congress's failure to include monetary relief can hardly be said to be inadvertent, given that despite multiple changes to the structure of appellate review in the Immigration and Nationality Act, Congress never created such a remedy. *See Schweiker,* 487 U.S. at 423, 425, 108 S.Ct. 2460 (1988) (considering "frequent and intense" congressional attention to "the design of a Government program [to] suggest[ ] that Congress has provided what it considers adequate remedial mechanisms for constitutional violations").

[6] The complexity and comprehensiveness of the existing remedial system is another factor among a broad range of concerns counseling hesitation before allowing a *Bivens* remedy. *Id.* at 423, 108 S.Ct. 2460; *see also Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 280, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997); *see also Saul v. United States,* 928 F.2d 829, 840 (9th Cir.1991) (considering the Civil Service Reform Act).

[7] Furthermore, immigration issues "have the natural tendency to affect diplomacy, foreign policy, and the security of the nation," which further "counsels hesitation" in extending *Bivens. Arar,* 585 F.3d at 574. As the Supreme Court has noted, concerns that always mitigate against "subjecting the prosecutor's motives and decisionmaking to outside inquiry" have particular force in the immigration context. *AADC,* 525 U.S. at 490, 119 S.Ct. 936 (internal quotation marks omitted). Rather than mere "disclosure of normal domestic law-enforcement priorities and techniques" such cases often involve "the disclosure of foreign-policy objectives and (as in this case) foreign intelligence products." *Id.* at 490–91, 119 S.Ct. 936.

Accordingly, we decline to extend *Bivens* to allow the Mirmehdis to sue federal agents for wrongful detention pending deportation given the extensive remedial procedures available to and invoked by them and the unique foreign policy considerations implicated in the immigration context.

III

[8, 9] The Mirmehdis next appeal the dismissal of their claims against Castillo for witness intimidation and against both Castillo and MacDowell for conspiracy to intimidate a witness pursuant to 42 U.S.C. § 1985(2),[4] arguing that the district court

4. To the extent that the Mirmehdis bring a separate claim for conspiracy selectively to

erred by failing to find prejudice. Specifically, they argue that but for Castillo's supposed threats, Tabatabai was ready, willing, and able to testify that they were not supporters of the MEK.

[10] But "[a]llegations of witness intimidation . . . will not suffice for a cause of action [under section 1985] unless it can be shown the litigant was hampered in being able to present an effective case." *David v. United States,* 820 F.2d 1038, 1040 (9th Cir.1987) (emphasis omitted). This rule applies to both witness intimidation and conspiracy to intimidate a witness. *Id.* at 1040; *see also Rutledge v. Ariz. Bd. of Regents,* 859 F.2d 732, 735–36 (9th Cir.1988).

[11] Even assuming that the Mirmehdis could have been prejudiced by the absence of a witness that the relevant fact finder had dismissed as not credible, the outcome of the Mirmehdis' immigration proceedings demonstrate that they were not so harmed.[5] According to the Mirmehdis, Tabatabai would have rebutted Castillo's testimony that they were involved with the MEK. As such, his testimony would have helped them to establish that they were eligible for withholding of removal because they were not involved with any terrorist activities as defined by 8 U.S.C. § 1182(a)(3)(B)(i). *See also* 8 U.S.C. § 1231(b)(3)(B). But the Mirmehdis were awarded withholding of removal even without Tabatabai's testimony. Therefore, they could not have been prejudiced by any alleged wrongdoing.[6]

IV

[12–15] The Mirmehdis also appeal the dismissal of their claim against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, arguing that they have stated a claim for false imprisonment under California law. We do not reach this contention because even if true, the Mirmehdis' claim still would fall outside our jurisdiction. "The United States, as a sovereign, may not be sued except insofar as it consents to be sued." *Rooney v. United States,* 634 F.2d 1238, 1241 (9th Cir.1980). The FTCA does waive that immunity for certain torts, but it is subject to both procedural and substantive exceptions which "must be strictly interpreted." *Id.* (citing *United States v. Sherwood,* 312 U.S. 584, 590, 61 S.Ct. 767, 85 L.Ed. 1058 (1941)). One such exception is that the United States may not be sued "based upon the exercise or performance or the failure to exercise or perform a discretionary function . . ., whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).[7]

enforce immigration laws, such a claim does not exist. The Supreme Court has stated that for reasons implicating the constitutional separation of powers, "an alien unlawfully in this country has no constitutional right to assert [a claim of] selective enforcement" of immigration laws. *AADC,* 525 U.S. at 488, 119 S.Ct. 936.

5. "When ruling on a Rule 12(b)(6) motion to dismiss, if a district court considers evidence outside the pleadings, it must normally convert the 12(b)(6) motion into a Rule 56 motion for summary judgment, and it must give the nonmoving party an opportunity to respond." *United States v. Ritchie,* 342 F.3d 903, 907 (9th Cir.2003). But because the Mirmehdis referred to their related habeas and immigration cases on the face of their complaint, we may take judicial notice of any matters of public record. *See Emrich v. Touche Ross & Co.,* 846 F.2d 1190, 1198 (9th Cir.1988).

6. We are not persuaded by the Mirmehdis' fallback argument that Tabatabai's testimony would have allowed them to reopen the bond determination because we see no evidence that they tried to do so, even after the IJ's initial decision in 2002.

7. Though neither party raised this exception, because the applicability of an FTCA exception affects our jurisdiction, we must consider

[16, 17] To determine whether conduct falls within this exception, we must first determine if the "challenged conduct involves an element of judgment or choice" and then if "the conduct implements social, economic or political policy considerations." *Nurse v. United States,* 226 F.3d 996, 1001 (9th Cir.2000) (citing *Berkovitz v. United States,* 486 U.S. 531, 536, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988)). Because the decision to detain an alien pending resolution of immigration proceedings is explicitly committed to the discretion of the Attorney General and implicates issues of foreign policy, it falls within this exception. *Cf. Medina v. United States,* 259 F.3d 220, 229 (4th Cir.2001) ("Even though the INS ultimately decided not to pursue the deportation of Medina, we are fully satisfied that the initial decision to initiate proceedings and arrest him was the type of agency conduct Congress intended to immunize in the discretionary function exception."); *Wright v. United States,* 719 F.2d 1032, 1035 (9th Cir.1983) ("The decision whether or not to prosecute a given individual is a discretionary function for which the United States is immune from liability.").[8]

V

[18] Finally, the Mirmehdis appeal the denial of their motion to amend their complaint, arguing that they should be allowed an opportunity to comply with the heightened pleading requirements of *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), and *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "[R]equests for leave [to amend] should be granted with 'extreme liberality,' " particularly when a complaint was filed before *Twombly* and fails for lack of sufficient factual content. *Moss v. U.S. Secret Serv.,* 572 F.3d 962, 972 (9th Cir.2009). However, a party is not entitled to an opportunity to amend his complaint if any potential amendment would be futile. *See, e.g., May Dep't Store v. Graphic Process Co.,* 637 F.2d 1211, 1216 (9th Cir.1980). As the Mirmehdis' woes are not caused by insufficient allegations of factual content, no potential amendments would change the outcome.

VI

For the forgoing reasons, the decision of the district court is

AFFIRMED.

SILVERMAN, Circuit Judge, concurring:

Although I concur in the opinion of the court, I write separately to emphasize that this case does not present the issue of whether illegal immigrants could *ever* bring a *Bivens* action. In fact, we have previously allowed an illegal immigrant to bring a *Bivens* action. *See Papa v. United States,* 281 F.3d 1004, 1010–11 (9th Cir. 2002) (holding that immigrant could bring *Bivens* action for alleged due process violations during immigration detention).

However, in *this* case, I agree with my colleagues that the plaintiffs lack an implied right of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). As Judge O'Scannlain aptly points out, the plaintiffs had available, and indeed availed them-

it sua sponte. *See Morris v. United States,* 521 F.2d 872, 875 & n. 1 (9th Cir.1975).

8. This does not immunize the conduct of the officers who made the arrest at an operational level from judicial review. *Wright,* 719 F.2d at 1035. But, for the reasons discussed above, the Mirmehdis have not stated a claim on those grounds.

selves of, the comprehensive immigration and habeas remedial mechanisms created by Congress, a factor that counsels against recognizing a *Bivens* action here. *See Kotarski v. Cooper*, 866 F.2d 311, 312 (9th Cir.1989). And the immigration context in which this case arose implicates sensitive issues of "diplomacy, foreign policy, and the security of the nation," further counseling against allowing a *Bivens* action. *See Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir.2009) (en banc). Thus, I agree that *Bivens* does not provide a cause of action for illegal immigrants claiming unlawful detention pending removal proceedings.

Juan Pablo GUTIERREZ, Petitioner,

v.

Eric H. HOLDER Jr., Attorney General, Respondent.

No. 06–71680.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 25, 2011.

Filed Nov. 7, 2011.

Background: Native and citizen of Mexico filed petition for review of Board of Immigration Appeals (BIA) order upholding immigration judge's (IJ) denial of his applications for registry, cancellation of removal, and voluntary departure.

Holdings: The Court of Appeals, Restani, Judge for the United States Court of International Trade, sitting by designation, held that:

(1) Court of Appeals lacked jurisdiction to review Attorney General's decision regarding alien's denial of registry;

(2) substantial evidence supported IJ's determination that applicant lacked good moral character;

(3) IJ's decision not to allow witnesses to testify telephonically did not violate due process; and

(4) IJ was permitted to draw adverse inference when alien invoked his right against self-incrimination.

Petition denied in part and dismissed in part.

1. Aliens, Immigration, and Citizenship ⚷398

Where Board of Immigration Appeals (BIA) does not express any disagreement with immigration judge's (IJ) reasoning or conclusions, Court of Appeals revisits both decisions and treat IJ's reasons as those of BIA.

2. Aliens, Immigration, and Citizenship ⚷385

Court of Appeals lacked jurisdiction to review Attorney General's decision regarding alien's denial of registry. Real ID Act of 2005, § 106(a)(1)(A), 8 U.S.C.A. § 1252(a)(2)(D); Immigration and Nationality Act, § 249, 8 U.S.C.A. § 1259.

3. Aliens, Immigration, and Citizenship ⚷385

Court of Appeals had jurisdiction to review immigration judge's (IJ) general finding of alien's lack of good moral character as reason for denying his application for registry. Immigration and Nationality Act, §§ 242(a)(2)(B)(ii), 249, 8 U.S.C.A. §§ 1252(a)(2)(B)(ii), 1259.

Nos. 09-55846

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MOHAMMAD MIRMEHDI, et al,

Plaintiffs and Appellants,

v.

UNITED STATES OF AMERICA, et al,

Defendants and Appellees

Appeal from United States District Court
for the Central District of California,
Case No. CV-06-05055-R-PJW
The Honorable Manuel Real, United States District Judge

PETITION FOR REHEARING AND FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs -Appellants Mohammad Mirmehdi, et al., certify that they are not a corporation and there is no publically held corporation that owns 10% or more of its stock.

Dated: January 6, 2012

By: s/ Paul L. Hoffman
Paul L. Hoffman
Attorney for Plaintiffs/Appellants

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INTRODUCTION

Plaintiffs-Appellants seek rehearing and rehearing *en banc* because the panel opinion conflicts with well-established circuit authority and poses a serious threat to the constitutional rights of non-citizens in our community. This case involves the wrongful detention of four Iranian brothers based on false evidence. The panel decision holds that non-citizens may be detained based on fabricated evidence without any remedy to compensate them for such wrongful detention.

Plaintiffs allege that Defendants, an ICE agent and an FBI agent, acted in concert to manufacture a false case against Plaintiffs in order to detain them to get information Plaintiffs did not possess about the Mujahadin-e-Khalq ("MEK"), a group engaged in armed opposition to the current Iranian regime. Plaintiffs do not challenge any immigration decision relating to admission, deportation, asylum, withholding or removal, or any other discretionary decision made by immigration officials.[1] Plaintiffs challenge the actions of these two non-policy-making law enforcement agents whose fabrication of evidence and false testimony to defend that fabrication caused Plaintiffs' wrongful detention and circumvented the

[1] Plaintiffs were granted withholding of deportation as a result of their immigration proceedings and continue to live in Southern California based on that status.

procedures Congress has established governing whether immigrants should be detained while their right to remain in this country is decided.

The panel's holding that no *Bivens* remedy is available for Plaintiffs' wrongful detention conflicts with *Papa v. United States,* 281 F.3d 1004, 1010-11 (9th Cir. 2002), in which this Court applied *Bivens v. Six Unknown Named* Agents *of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to constitutional claims brought by the family members of an undocumented alien against immigration officials whose actions allegedly caused his death in an immigration detention facility while he was in deportation proceedings. The panel decision also conflicts with *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997), a case in which this Court applied *Bivens* to constitutional claims, similar to Plaintiffs' claims in this case, based on the fabrication of evidence by federal law enforcement officials.

The panel sidestepped *Papa* and *Harris* by finding that the procedures available to Plaintiffs in immigration and habeas proceedings precluded a *Bivens* remedy. The panel did not address the gravamen of Plaintiffs' claims: that the actions of these two Defendants in fabricating the evidence upon which Plaintiffs' wrongful detention was based circumvented the very procedures that the panel found foreclosed a *Bivens* remedy. This Catch-22 underscores the need for *en*

banc review to determine whether *Bivens* claims are foreclosed if they arise in the "context" of immigration proceedings. This Court has not limited the availability of a *Bivens* remedy in this manner, nor should it do so now.

The panel also affirmed the dismissal of Plaintiffs' Federal Tort Claims Act ("FTCA") claims based on the discretionary function exception – a defense the United States did not raise and which had not been briefed or argued in this appeal. *See* Answering Brief, at 62-65. This portion of the panel's decision is also contrary to existing Ninth Circuit law for at least two reasons.

First, the panel's *sua sponte* finding that the discretionary function exception precludes Plaintiffs' claims is in direct conflict with this Court's decision in *Nurse v. United States*, 226 F.3d 996, 1001-02 (9th Cir. 2000). In *Nurse*, this Court overturned the dismissal of FTCA claims brought by a Canadian citizen against policy-making officials because it could not determine if the particular challenged actions were "discretionary." Moreover, the *Nurse* court, citing a long line of circuit precedents, rejected the application of the FTCA's "discretionary function" exception to claims of false imprisonment, invasion of privacy and negligence based on the actions of lower level government officials, like the officials whose actions are questioned in this case. *Id.* at 1002. The panel disregarded *Nurse* and this long line of precedents to affirm the dismissal of

Plaintiffs' FTCA claims on grounds that the United States did not, and could not, assert under established law. The panel also disregarded the potential waiver of sovereign immunity applicable to these Defendants under the FTCA's law enforcement proviso. 28 U.S.C. § 2680(h).

Second, under settled Ninth Circuit law, the discretionary function exception does not apply absent a finding that the underlying conduct was lawful. *See Galvin v. Hay*, 374 F. 3d 739, 758 (9th Cir. 2004). The panel's *sua sponte* treatment of the issue violates that rule by applying the "discretionary function" exception without determining whether or not the underlying conduct was lawful.

The panel opinion presents issues of "exceptional importance" and *en banc* review is essential to maintain the uniformity of this Court's decisions. Fed. R. App. P. 35(a)(2). *United States v. Burdeau*, 180 F. 3d 1091, 1092 (9th Cir. 1999) (Tashima, J., concurring). This case should be reheard or reheard *en banc* to avoid the damage the panel decision will do not only to this Court's precedents but to the rights of non-citizens living in this Circuit.

ARGUMENT

I. THE PANEL DECISION REJECTING PLAINTIFFS' *BIVENS* CLAIMS SHOULD BE REHEARD OR REHEARD *EN BANC* BECAUSE IT CONFLICTS WITH ESTABLISHED CIRCUIT PRECEDENT AND RAISES ISSUES OF EXCEPTIONAL IMPORTANCE.

Bivens is firmly rooted in the judicial principle that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bivens*, 403 U.S. at 392 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). For Plaintiffs, as was the case for the plaintiff in *Bivens* itself, it is "damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J. concurring).

Moreover, the purpose of the *Bivens* remedy "is to deter individual federal officers from committing constitutional violations." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). By depriving Plaintiffs of a *Bivens* remedy for such egregious misconduct, the panel creates the possibility of a law-free zone for law enforcement officials operating in the immigration context.

A. The Majority Opinion Conflicts With This Court's *Bivens* Jurisprudence and With the Decisions of Other Circuits.

The panel decision conflicts with Ninth Circuit precedent and the case law

of other Circuits by finding that a *Bivens* remedy is not available in the context of immigration proceedings. The panel disregarded the holding in *Papa v. United States*, 281 F. 3d. 1004, 1008-10 (9th Cir. 2002), which upheld the availability of a *Bivens* remedy in the immigration context. In *Papa*, the claim was brought by the children of a detainee who died in an immigration detention facility while his deportation proceedings were pending. *Id.* at 1008.

The panel decision seeks to avoid *Papa* by asserting that the issue of an immigrant's right to bring a *Bivens* action "remains open" despite *Papa*. *Slip Op.* at 11078 n.2.[2] The main ground the panel relies on to differentiate this case from *Papa* is the fact that "deportation proceedings" are "unique from other situations where an unlawful detention may arise." *Id*. at 11079. However, as was the case in *Papa*, Plaintiffs do not challenge any decision regarding admission or removal or any other immigration status. The existence of deportation proceedings has nothing to do with the claims of wrongful detention made by Plaintiffs and those proceedings should not prevent the assertion of these constitutional claims against

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[2] The panel also relies on *Berry v Hollander*, 925 F. 2d 311, 316 (9th Cir. 1991), to justify denying a *Bivens* claim "despite previously allowing such claims." *Slip. Op.* at 11078 n.2. However, the alternative statutory remedies in *Berry* do not compare to any available remedies in this case and Plaintiffs' claims involve the circumvention of existing procedures by the use of fabricated evidence.

these Defendants, just as the existence of deportation proceedings in *Papa* did not undermine the *Bivens* claims in that case. *See Arevalo v. Woods*, 811 F. 2d 487, 488 (9th Cir. 1987); *Velasquez v. Senko*, 813 F. 2d 1509 (9th Cir. 1987); *Guerra v. Sutton*, 783 F. 2d 1371, 1375-76 (9th Cir. 1986).[3]

The panel decision also conflicts with *Harris v. Roderick*, where this Court authorized a *Bivens* claim against federal agents who fabricated a false basis for the plaintiffs' arrest and indictment. 126 F.3d at 1198-99. The *Harris* court held that federal agents "functionally served as complaining witnesses who may be said to have initiated [plaintiff's] prosecution they are not entitled to absolute immunity for their false statements." *Id.* at 1198. Plaintiffs' claims are nearly identical to the *Bivens* claims in *Harris*. The panel apparently ignored *Harris* because immigrants in deportation proceedings do not have the same right to obtain compensation for the same kind of unconstitutional actions this Court deplored when committed against citizens in *Harris.*

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[3] The panel decision also departs from the decisions of other Circuit courts which have allowed *Bivens* actions in the immigration context. *See, e.g.*, *Martinez-Aguero v. Gonzalez*, 459 F. 3d 618, 625 (5th Cir. 2006) (non-citizen plaintiffs "may bring a *Bivens* claim for unlawful arrest and the excessive use of force [by an INS agent] under the Fourth Amendment"); *Franco-De Jerez v. Burgos*, 876 F. 2d 1038, 1039 (1st Cir. 1989) (upholding wrongful detention claim under Bivens made by a non-citizen plaintiff against the immigration inspector who arrested her); *Jasinski v Adams*, 781 F. 2d 843 (11th Cir. 1986) (*Bivens* claim against Border Patrol agents).

Defendants fabricated evidence by misrepresenting a one page travel log of participants attending a lawful public rally as a terrorist cell list and used this fabricated evidence to detain Plaintiffs for more than three years. Defendants "set the wheels of government in motion" and initiated and maintained Plaintiffs' 41-month wrongful detention by their fabrication of evidence and false testimony. *Wyatt v. Cole*, 504 U.S. 158, 164-165 (1992). This case falls squarely within *Harris* except for the fact that Plaintiffs were wrongfully detained in connection with immigration proceedings. This Court should not allow that disparity to stand when it comes to such fundamental rights.[4] Wrongful detention based on

[4] This Court has repeatedly held law enforcement officials who knowingly or recklessly give false testimony may be liable if their false testimony prevents a judicial officer from exercising independent judgment. *Galen v. County of Los Angeles*, 477 F.3d 652, 663-64 (9th Cir. 2007). *See also Awabdy v. City of Adelanto*, 368 F.3d 1062, 1067 (9th Cir. 2004) (state or local officials may be liable under § 1983 if they "improperly exerted pressure on the prosecutor, knowingly provided misinformation to him, concealed exculpatory evidence, or otherwise engaged in wrongful or bad faith conduct that was actively instrumental in causing the initiation of legal proceedings"). In *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001), this Court held there is a clearly established right "not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." *See also Zahrey v. Coffey*, 221 F.3d 342 (2nd Cir. 2000); *Limone v. Condon*, 372 F.3d 39, 44-45 (1st Cir. 2004) ("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.").

fabricated evidence advances no legitimate government objective and should be deterred for the same reasons this Court affirmed such claims in *Harris*.[5]

The panel found that a *Bivens* remedy should not be allowed because Plaintiffs had access to immigration and habeas proceedings to challenge the legitimacy of their detention. *Slip. Op.* at 11079-80. This reasoning is flawed.

First, there is no evidence that Congress intended either the Immigration and Nationality Act ("INA") or habeas corpus proceedings as the exclusive remedies for wrongful detention. The panel decision is the first to come to that conclusion.[6] Congress simply did not address damages remedies one way or the other in this context.

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[5] *See* Sameer Ahmed, *INA Section 242 (g): Immigration Agents, Immunity, and Damages Suites*, 119 Yale L. J. 625, 632-33 (2009) (discussing the limitations of immigration and habeas proceedings to redress the kinds of harms Plaintiffs allege in this case).

[6] The panel cites *Arar v. Ashcroft*, 585 F. 3d 559 (2d Cir. 2009)(*en banc*) in support of its holding that the INA constitutes a comprehensive scheme sufficient to preclude a *Bivens* remedy, but the *en banc* decision in Arar explicitly declined to reach that conclusion. *Id*. at 573. ("We recognize, however, that any reliance on the INA as an alternative remedial scheme presents difficulties. . . In the end, we need not decide whether an alternative remedial scheme was available"). The *Arar* panel's decision reaching that conclusion was withdrawn. *See id.* at 582 (Sack, J. dissenting) ("we welcome the [*en banc* majority's] decision . . . not to rely, in the Court's *Bivens* analysis, upon the INA's remedial scheme.")

Moreover, the scope of review in the context of immigration and habeas proceedings is highly circumscribed. Defendants' fabrication of evidence against Plaintiffs circumvented the purposes of these proceedings and should not be found to be a basis for eliminating a *Bivens* remedy to compensate Plaintiffs for wrongful detention caused by such unconstitutional actions.

II. THE PANEL DECISION REJECTING PLAINTIFFS' FTCA CLAIMS SHOULD BE REHEARD OR REHEARD *EN BANC* BECAUSE IT CONFLICTS WITH ESTABLISHED CIRCUIT PRECEDENT AND RAISES ISSUES OF EXCEPTIONAL IMPORTANCE.

The panel affirmed the district court's dismissal of Plaintiff's FTCA claims based on the discretionary function exception. *Slip. Op.* at 11081-82. The United States did not contend that this exception applied to Plaintiffs' claims and the panel's decision, issued without the benefit of briefing or argument, is in conflict with established Circuit authority, in particular the decisions in *Nurse* and *Galvin*.

Plaintiffs do not challenge a discretionary decision to revoke their bonds, as the panel misleadingly characterized their claims. Rather, Plaintiffs challenge Defendants' (an FBI agent and ICE agent) use of fabricated evidence to secure and maintain their wrongful detention. The actions of these agents were not "discretionary" in any sense of the word. The government agents whose actions forms the basis for Plaintiffs' FTCA claims had no discretion to fabricate evidence

to secure Plaintiffs' wrongful detention. Indeed, Defendants' wrongful actions made it impossible for the Attorney General's designee to exercise the discretion granted by law in a constitutional manner.[7]

The panel cites to cases concerning the discretion to initiate deportation proceedings against a given individual as being within this exception to the FTCA. Slip Op. at 11082. However, Plaintiffs never challenged the decision to initiate or maintain any proceedings against them in this action. Their FTCA claims pertain only to their wrongful detention based on the evidence fabricated by the two law enforcement Defendants. Deportation proceedings had been pending against Plaintiffs long before the acts which form the basis of Plaintiffs damages claims in this action.

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[7] In any event, the panel's conclusion that the claim challenging unlawful detention under the FTCA is barred because "the decision to detain an alien pending resolution of immigration proceedings is explicitly committed to the discretion of the Attorney General," *Slip Op.* at 11082, cannot be reconciled with several cases from this Court imposing legal constraints on the Attorney General's discretionary authority to detain non-citizens pending completion of their deportation cases. *See, e.g., Nadarajah v. Gonzales*, 443 F. 3d 1069 (9th Cir. 2006) (holding that Attorney General lacked statutory authority to detain asylum seeker for prolonged and indefinite period, and where evidence that detainee posed national security threat had been rejected); *Singh v. Holder*, 638 F. 3d 1196 (9th Cir. 2011) (recognizing various constitutional constraints on Attorney General's detention authority, including that prolonged detention must be supported by clear and convincing evidence).

In addition, the panel decision conflicts with this Court's precedents by ignoring the law enforcement proviso of the FTCA which exempts from the discretionary function exception conduct that violates the Constitution or federal law. 28 U.S.C. § 2680(h). Because federal officials have no discretion to violate federal law, the discretionary function exception cannot shield them from liability absent a prior determination that their conduct was lawful. As this Court described the rule, "[i]n general, governmental conduct cannot be discretionary if it violates a legal mandate . . . [T]he Constitution can limit the discretion of federal officials such that the FTCA's discretionary function exception will not apply." *Galvin v. Hay*, 374 F. 3d 739, 758 (9th Cir. 2004) (rejecting argument that discretionary function exception barred FTCA claim for individual false arrest). *See also Nurse v. United States*, 226 F. 3d 996, 1002 (9th Cir. 2000) (same for FTCA claim alleging promulgation of policies that led to pattern of unconstitutional detentions). Yet, the panel decision applies the discretionary function exception here without addressing Plaintiffs' claims that the underlying conduct was unconstitutional. *Galvin* and *Nurse* foreclose that analysis and the panel's holding.

Finally, the panel did not consider the provisions of 28 U.S.C. § 2680(h), the law enforcement proviso of the FTCA, in affirming the dismissal of Plaintiffs'

FTCA claims. Section 2680(h) waives sovereign immunity under the FTCA "with regard to acts or omissions of investigative or law enforcement officers" for "any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution."

If Section 2680(h) applies, the discretionary function exception does not bar a plaintiff's claim for relief.[8] These Defendants plainly meet the definition of law enforcement officers in § 2680(h). *See Medina v. United States*, 259 F.3d 220 (4th Cir. 2001); *Caban v. United States*, 728 F.2d 68, 72 (2d Cir. 1984). *See also* 8 U.S.C. § 1357 (powers of immigration officers).

This Court has exercised jurisdiction over cases involving misconduct by immigration officers under the FTCA.[9] Other circuits have allowed FTCA

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[8] See, e.g., *Nguyen v. United States,* 556 F.3d 1244, 1256-57 (11th Cir. 2009) (effecting "the plain meaning and clear purpose of the statutory language by concluding that sovereign immunity does not bar a claim that falls within the proviso to subsection (h), regardless of whether the acts giving rise to it involve a discretionary function"); *Sutton v. United States*, 819 F.2d 1289, 1297 (5th Cir. 1987) (concluding that the "discretionary function exception cannot be an absolute bar which one must clear to proceed under [the 28 U.S.C.] § 2680(h)" law enforcement proviso); *El Badrawi v. Dep't of Homeland Sec.*, 579 F. Supp. 2d 249, 275 (D. Conn. 2008) (non-citizen's claims of false arrest and false imprisonment by immigration officials were not jurisdictionally barred under 28 U.S.C. § 2680(a) because immigration officials never have discretion to violate the Constitution).

[9] *See, e.g., Xue Lu v. Powell*, 621 F.3d 944 (9th Cir. 2010) (Plaintiffs' FTCA claims against immigration agent who abused asylum seekers); *Vickers v. United*

claims in similar circumstances.[10] This case falls squarely within this established body of law.

The panel should not have affirmed the dismissal of Plaintiffs' FTCA claims based on the discretionary function exception without considering the application of section 2680(h) to Plaintiffs' claims and certainly should not have done so *sua sponte*.

States, 228 F.3d 944 (9th Cir. 2000) (summary judgment reversed where discretionary function exception did not apply to claim INS was negligent for failing to investigate shooting and question of facts remained as to whether INS' negligence in failing to investigate was cause of plaintiff's injury); *Rhoden v. United States*, 55 F.3d 428 (9th Cir. 1995) (FTCA action for false arrest and imprisonment against U.S. after plaintiff detained by INS); *Garcia v. United States*, 826 F.2d 806 (9th Cir. 1987) (FTCA action for damages resulting from shooting by immigration officer of bystander who interfered with arrest).

[10] *See, e.g., Nguyen v. United States*, 556 F.3d 1244 (11th Cir. 2009) (Federal agent lacked probable cause to arrest because affidavit supporting the warrant was based on a false statement. Drug Enforcement Agency was not shielded from FTCA liability under 28 U.S.C. § 2680(a) the discretionary act exception, because 28 U.S.C. § 2680(h) waived sovereign immunity for enumerated intentional torts committed by government agents); *Reynolds v. United States*, 549 F.3d 1108 (7th Cir. 2008) (court held employee stated malicious prosecution claim under the FTCA based on allegations federal investigators knowingly submitted false information to authorities and the discretionary function exception under 28 U.S.C. § 2680(a) of the FTCA did not apply because the allegations were separable from a decision to prosecute); *Medina v. United States*, 259 F.3d 220 (4th Cir. 2001) (FTCA suit against federal government claiming INS had plaintiff arrested without probable cause); *Caban v. United States*, 671 F.2d 1230 (2d Cir. 1982) (FTCA suit against INS for damages resulting from six-day detention of plaintiff by INS).

CONCLUSION

Plaintiffs' claims raise profound issues about the kind of country we are. This Court has found that the fabrication of evidence by FBI agents leading to false arrest and malicious prosecution states a *Bivens* claim. The panel rejects both a *Bivens* claim and relief under the FTCA for the same conduct. This Court should rehear this case *en banc* before this grave departure from this Court's cases is allowed to stand.

Dated: January 6, 2012

By: s/ Paul L. Hoffman
Paul L. Hoffman
Attorney for Petitioners

Certificate of Compliance Pursuant to
Circuit Rules 35-4 and 40-1

I certify that pursuant to Circuit Rule 35-4 and 40-1, the attached **PETITION FOR REHEARING AND FOR REHEARING EN BANC** is proportionately spaced, has a typeface of 14 points or more, contains 3,507 words, and does not exceed 15 pages.

Dated: January 6, 2012

By: s/ Paul L. Hoffman
Paul L. Hoffman

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2012, I electronically filed the foregoing **PETITION FOR REHEARING AND FOR REHEARING EN BANC** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

Jeremy S. Brumbelow
U.S. DEPT OF JUSTICE
Torts Branch, Civil Division 8116
1425 New York Ave., NW
Washington, DC 20005

Dated: January 6, 2012

BY: s/ Jonathan A. Cotton
JONATHAN A. COTTON

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOHAMMAD MIRMEHDI; MOSTAFA MIRMEHDI; MOHSEN MIRMEHDI; MOJTABA MIRMEHDI,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; MARIO LOPEZ; JOHN ASHCROFT; ROBERT S. MUELLER, III; JAMES W. ZIGLAR; MICHAEL GARCIA, Esquire; CHRISTOPHER CASTILLO; JAMES MACDOWELL,
Defendants-Appellees.

No. 09-55846

D.C. No. 2:06-cv-05055-R-PJW

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted
August 30, 2011—Pasadena, California

Filed November 3, 2011
Amended June 7, 2012

Before: Arthur L. Alarcón, Diarmuid F. O'Scannlain, and Barry G. Silverman, Circuit Judges.

Opinion by Judge O'Scannlain;
Concurrence by Judge Silverman

COUNSEL

Paul L. Hoffman, Schonbrun DeSimone Seplow Harris Hoffman & Harrison LLP, Venice, California, argued the cause and filed the briefs for the plaintiffs-appellants. With him on the briefs were Michael Seplow, Adrienne Quarry, and Victoria Don, Schonbrun DeSimone Seplow Harris Hoffman & Harrison LLP, Venice, California.

Andrew D. Silverman, United States Department of Justice, Torts Branch, Civil Division, Washington, D.C., argued the cause and filed the briefs for the defendants-appellees. With him on the brief were Jeremy S. Brumbelow, Tony West, Timothy P. Garren, and Andrea W. McCarthy, Department of Justice Civil Division, Washington, D.C.

ORDER

The opinion filed in this case on November 3, 2011, and reported at 662 F.3d 1073, is hereby amended. An amended opinion is filed concurrently with this order. With this amendment, the panel has unanimously voted to deny the petition for rehearing. Judges O'Scannlain and Silverman have voted to deny the suggestion for rehearing en banc, and Judge Alarcón has so recommended. The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the suggestion for rehearing en banc are DENIED. No subsequent petitions for rehearing or suggestions for rehearing en banc may be filed.

OPINION

O'SCANNLAIN, Circuit Judge:

We are asked to decide, among other things, whether an alien not lawfully in the United States may sue for monetary damages claiming constitutionally invalid detention.

I

Mohammad, Mostafa ("Michael"), Mohsen, and Mojtaba Mirmehdi (collectively the "Mirmehdis") are four citizens of Iran who came to the United States at various times, purportedly due to their long-standing opposition to that nation's theocratic regime. In 1978, Michael arrived on a student visa. Having abandoned the degree that earned him entry into the United States, he became a real estate agent in 1985. Mohsen, Mojtaba, and Mohammad joined Michael in California in the early 1990s. Mohsen and Mohammad also became real estate

agents. Unable to pass the real estate licensing exam, Mojtaba worked in construction.

In 1998, the Mirmehdis applied for political asylum with the assistance of an attorney named Bahram Tabatabai. Tabatabai falsified certain details in the Mirmehdis' applications. After Tabatabai was arrested for immigration fraud in March 1999, he agreed to cooperate with federal authorities. As part of his plea bargain, Tabatabai spoke to Special Agents Christopher Castillo of the Federal Bureau of Investigation and J.A. MacDowell of the Immigration and Naturalization Service regarding their ongoing investigation of a terrorist group known as the Mujahedin-e Khalq ("MEK"). Though he later recanted, Tabatabai told Castillo and MacDowell that the Mirmehdis were supporters of the group, which was founded on an antipathy for the Iranian government.

Based on this information, agents arrested the Mirmehdis for immigration violations in March 1999. Michael, Mojtaba, and Mohsen were released on bond later that year; Mohammad was released in September 2000.

On October 2, 2001, immigration authorities revoked the Mirmehdis' bond, largely based on a document known as the "L.A. Cell Form," a handwritten piece of paper that has become the subject of considerable litigation and is at the center of this case. The government has always maintained that the Form lists members, affiliates, and supporters of the MEK. During the Mirmehdis' bond revocation proceedings, Castillo testified to the immigration judge ("IJ") that the FBI seized the document from an MEK facility and that a confidential informant told him of its significance.

The Mirmehdis have always denied their involvement in the MEK and allege that Castillo and MacDowell knew from the start that the document was really just a list of attendees at a rally hosted by the National Council of Resistance of Iran ("NCRI"). It is undisputed that the MEK was listed as a ter-

rorist group in 1997 and is affiliated with the NCRI. But the Mirmehdis assert that they attended the rally *before* that classification occurred.

The Mirmehdis also assert that Castillo knowingly lied to convince the IJ to revoke their bond. They claim that the cooperating witness never existed and that Castillo's testimony before the IJ unreasonably continued to rely upon Tabatabai, even after he recanted. Castillo's motive, the Mirmehdis contend, was to pressure them into giving up information about the MEK that they did not possess.

The Mirmehdis' assertions are not new. They raised them on direct appeal of their detention, during the merits proceeding related to their asylum applications, and in a federal petition for a writ of habeas corpus. Almost all such forms of relief were denied. The Mirmehdis were, however, granted withholding of removal because they had demonstrated a likelihood of mistreatment if removed to Iran, and because the government failed to establish that they were engaged in terrorist activity as defined by statute.

Their immigration proceedings at last final, the Mirmedhis were released from detention in March 2005. The Mirmehdis subsequently brought this suit naming as defendants: Attorney General John Ashcroft, FBI Director Robert Mueller, INS Commissioners James Ziglar and Michael Garcia, the City of Santa Ana, the City of Las Vegas, MVM, Inc., Castillo, MacDowell, several named prison guards, John Does 1-10, and the United States. They raised a number of claims including unlawful detention, inhumane detention conditions, witness intimidation, and the intentional infliction of emotional distress.

The district court dismissed almost all of the Mirmehdis' claims for either lack of personal jurisdiction or failure to state a cause of action. The parties later settled all claims except those against Castillo and MacDowell for unlawful

detention and conspiracy to violate their civil rights, against Castillo for intimidation of a witness, and against the United States for false imprisonment. The district court entered a final judgment, and the Mirmehdis timely appealed the claims to which they did not stipulate.

II

[1] The Mirmehdis first appeal the dismissal of their claim against Castillo and MacDowell for wrongful detention under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).[1] Whether such a claim presents a cognizable legal theory has been an open question in this circuit. *See Wong v. United States INS*, 373 F.3d 952, 961 (9th Cir. 2004); *see also Sissoko v. Rocha*, 412 F.3d 1021, 1028 (9th Cir. 2005), *withdrawn and replaced*, 509 F.3d 947 (9th Cir. 2007).[2]

A

In the past, we have suggested that "federal courts have inherent authority to award damages to plaintiffs whose federal constitutional rights were violated by federal officials." *Papa v. INS*, 281 F.3d 1004, 1009 (9th Cir. 2002). But as the

[1]The district court dismissed these claims based on its conclusion that the Mirmehdis had no constitutional right not to be detained pending deportation proceedings. We do not reach this issue because, even assuming such a violation, we must still decide whether *Bivens* provides for a theory for recovery. *See Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); *see also Shaw v. Cal. Dep't of Alcoholic Beverage Control*, 788 F.2d 600, 603 (9th Cir. 1986) ("We may affirm the judgment on any basis supported by the record even if the district court did not rely on that basis.").

[2]The Mirmehdis argue that we have, in fact, recognized an immigrant's right to pursue a *Bivens* action citing *Papa*, 281 F.3d 1004. But because cases like *Papa* did not squarely present the issue, it remains open. *See Berry v. Hollander*, 925 F.2d 311, 314 & n.3, 316 (9th Cir. 1991) (concluding that no *Bivens* action exists for government employees despite previously allowing such claims).

Supreme Court has since reminded us, "any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). Such a cause of action "is *not* an automatic entitlement *no matter what other means there may be* to vindicate a protected interest." *Id.* (emphasis added).

[2] Indeed, "[i]n the . . . years since *Bivens*," the Supreme Court has repeatedly rejected *Bivens* claims outside the context discussed in that specific case and has "extended it twice only: in the context of an employment discrimination claim in violation of the Due Process Clause, *Davis v. Passman*, 442 U.S. 228 (1979); and in the context of an Eighth Amendment violation by [publicly employed] prison officials, [*Carlson v. Green*, 446 U.S. 14 (1980)]." *Arar v. Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc). The Supreme Court has refused to extend *Bivens* to: violations of federal employees' First Amendment rights by their employers, *Bush v. Lucas*, 462 U.S. 367 (1983); harms suffered incident to military service, *United States v. Stanley*, 483 U.S. 669, (1987); denials of Social Security benefits, *Schweiker v. Chilikcy*, 487 U.S. 412 (1988); decisions by federal agencies, *FDIC v. Meyer*, 510 U.S. 471 (1994); actions by private corporations operating under federal contracts, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); retaliation by federal officials against private landowners, *Wilkie*, 551 U.S. at 562; or Eighth Amendment claims against private contractors hired to administer public prisons, *Minneci v. Pollard*, 132 S. Ct. 617 (2012).

The Court has also "recently and 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) (citing inter alia *Malesko*, 534 U.S. at 68). Such a decision implicates grave separation of powers concerns because the "creation of a private right of action raises [policy choices] beyond the mere consideration whether primary conduct should be allowed or

not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion." *Id.* For such reasons, the Court has instructed the federal courts to "respond[ ] cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker*, 487 U.S. at 421.

It quickly becomes apparent, however, that this query has a logical predicate—whether we would *need* to extend *Bivens* in order for illegal immigrants to recover for unlawful detention during deportation proceedings. Only after answering in the affirmative, would we need to turn to the issue of whether we *ought* to extend *Bivens* to such a context. *Arar*, 585 F.3d at 572.

B

To answer this question requires us to enter by a narrow gate. Examining the availability of a *Bivens* remedy at a "high level of generality" would "invite claims in every sphere of legitimate governmental action" touching, however tangentially, on a constitutionally protected interest. *Wilkie*, 551 U.S. at 561. Examining the question at too low a level of generality would invite never ending litigation because "every case has points of distinction." *Arar*, 585 F.3d at 572. As such, we join our sister circuit and "construe the word 'context' as it is commonly used in law: to reflect a potentially recurring scenario that has similar legal and factual components." *Id.*

[3] Deportation proceedings are such a context, unique from other situations where an unlawful detention may arise. It is well established that immigrants' remedies for vindicating the rights which they possess under the Constitution are not coextensive with those offered to citizens. *See, e.g.*, *Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 488 (1999) ("*AADC*") ("As a general matter . . . an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation."). Therefore, deportation proceedings constitute the relevant "environ-

ment of fact and law" in which to "decide whether to recognize a *Bivens* remedy." *Arar*, 585 F3d at 572.[3]

C

[4] Having identified the appropriate context, we now must apply the Supreme Court's test from *Wilkie*, in which it "distilled its 35-year history of *Bivens* jurisprudence into a two-step analysis." *W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1120 (9th Cir. 2009). First we must "determine[ ] whether there is 'any alternative, existing process for protecting' the plaintiffs' interests." *Id.* If there is such an alternative remedy, our inquiry stops. If there is not, we proceed to the next step and "ask[ ] whether there nevertheless are 'factors counseling hesitation' before devising such an implied right of action." *Id.* The Mirmehdis' claim for unlawful detention founders at both obstacles.

[5] The Mirmehdis could—and did—challenge their detention through not one but two different remedial systems. As the Second Circuit stated: "Congress has established a substantial, comprehensive, and intricate remedial scheme in the context of immigration." *Arar*, 585 F.3d at 572. The availability of habeas is another remedy. *See Rauschenberg v. Williamson*, 785 F.2d 985, 987-88 (11th Cir. 1986). The Mirmehdis took full advantage of both.

[6] We are unpersuaded by the Mirmehdis' assertions they

[3]By identifying this as the appropriate frame of reference, we do not hold that an illegal alien may never bring a *Bivens* claim. Instead, we merely recognize that because Congress has the ability to "make rules as to aliens that would be unacceptable if applied to citizens," *Demoore v. Kim*, 538 U.S. 510, 521-22 (2003) (citing inter alia *Reno v. Flores*, 507 U.S. 292, 305-06 (1993) ("Thus, 'in the exercise of its broad power over immigration and naturalization,' Congress regularly makes rules that would be unacceptable if applied to citizens.")), we must consider whether an immigrant may bring a *Bivens* claim to vindicate certain constitutional rights separately from whether a citizen may bring such a *Bivens* claim.

are nonetheless entitled to a *Bivens* remedy because neither the immigration system nor habeas provides monetary compensation for unlawful detention. "Even where Congress has given plaintiffs no damages remedy for a constitutional violation, the Court has declined to create a right of action under *Bivens* when doing so 'would be plainly inconsistent with Congress' authority in th[e] field.' " *W. Radio Servs. Co.*, 578 F.3d at 1120 (quoting *Chappell v. Wallace*, 462 U.S. 296, 304 (1983)). Indeed, "[s]o long as Congress' failure to provide money damages . . . has not been inadvertent, courts should defer to its judgment." *Berry v. Hollander*, 925 F.2d 311, 314 (9th Cir. 1991) (internal quotation marks omitted).

Congress's failure to include monetary relief can hardly be said to be inadvertent, given that despite multiple changes to the structure of appellate review in the Immigration and Nationality Act, Congress never created such a remedy. *See Schweiker*, 487 U.S. at 423, 425 (1988) (considering "frequent and intense" congressional attention to "the design of a Government program [to] suggest[ ] that Congress has provided what it considers adequate remedial mechanisms for constitutional violations").

The complexity and comprehensiveness of the existing remedial system is another factor among a broad range of concerns counseling hesitation before allowing a *Bivens* remedy. *Id.* at 423; *see also Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 280 (1997); *see also Saul v. United States*, 928 F.2d 829, 840 (9th Cir. 1991) (considering the Civil Service Reform Act).

Furthermore, immigration issues "have the natural tendency to affect diplomacy, foreign policy, and the security of the nation," which further "counsels hesitation" in extending *Bivens*. *Arar*, 585 F.3d at 574. As the Supreme Court has noted, concerns that always mitigate against "subjecting the prosecutor's motives and decisionmaking to outside inquiry" have particular force in the immigration context. *AADC*, 525

U.S. at 490 (internal quotation marks omitted). Rather than mere "disclosure of normal domestic law-enforcement priorities and techniques" such cases often involve "the disclosure of foreign-policy objectives and (as in this case) foreign-intelligence products." *Id*. at 490-91.

[7] Accordingly, we decline to extend Bivens to allow the Mirmehdis to sue federal agents for wrongful detention pending deportation given the extensive remedial procedures available to and invoked by them and the unique foreign policy considerations implicated in the immigration context.

III

The Mirmehdis next appeal the dismissal of their claims against Castillo for witness intimidation and against both Castillo and MacDowell for conspiracy to intimidate a witness pursuant to 42 U.S.C. § 1985(2),[4] arguing that the district court erred by failing to find prejudice. Specifically, they argue that but for Castillo's supposed threats, Tabatabai was ready, willing, and able to testify that they were not supporters of the MEK.

[8] But "[a]llegations of witness intimidation . . . will not suffice for a cause of action [under section 1985] unless it can be shown the litigant was hampered in being able to present an effective case." *David v. United States*, 820 F.2d 1038, 1040 (9th Cir. 1987) (emphasis omitted). This rule applies to both witness intimidation and conspiracy to intimidate a witness. *Id.* at 1040; *see also Rutledge v. Ariz. Bd. of Regents*, 859 F.2d 732, 735-36 (9th Cir. 1988).

[4]To the extent that the Mirmehdis bring a separate claim for conspiracy selectively to enforce immigration laws, such a claim does not exist. The Supreme Court has stated that for reasons implicating the constitutional separation of powers, "an alien unlawfully in this country has no constitutional right to assert [a claim of] selective enforcement" of immigration laws. *AADC*, 525 U.S. at 488.

[9] Even assuming that the Mirmehdis could have been prejudiced by the absence of a witness that the relevant fact finder had dismissed as not credible, the outcome of the Mirmehdis' immigration proceedings demonstrate that they were not so harmed.[5] According to the Mirmehdis, Tabatabai would have rebutted Castillo's testimony that they were involved with the MEK. As such, his testimony would have helped them to establish that they were eligible for withholding of removal because they were not involved with any terrorist activities as defined by 8 U.S.C. § 1182(a)(3)(B)(i). *See also* 8 U.S.C. § 1231(b)(3)(B). But the Mirmehdis were awarded withholding of removal even without Tabatabai's testimony. Therefore, they could not have been prejudiced by any alleged wrongdoing.[6]

IV

The Mirmehdis also appeal the dismissal of their claim against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, arguing that they have stated a claim for false imprisonment under California law. "The United States, as a sovereign, may not be sued except insofar as it consents to be sued." *Rooney v. United States*, 634 F.2d 1238, 1241 (9th Cir. 1980). The FTCA does waive that immunity for certain torts, but it is subject to both procedural and substantive exceptions that "must be strictly interpreted." *Id.* (citing *United States v. Sherwood*, 312 U.S. 584, 590 (1941)).

[5]"When ruling on a Rule 12(b)(6) motion to dismiss, if a district court considers evidence outside the pleadings, it must normally convert the 12(b)(6) motion into a Rule 56 motion for summary judgment, and it must give the nonmoving party an opportunity to respond." *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003). But because the Mirmehdis referred to their related habeas and immigration cases on the face of their complaint, we may take judicial notice of any matters of public record. *See Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1198 (9th Cir. 1988).

[6]We are not persuaded by the Mirmehdis' fallback argument that Tabatabai's testimony would have allowed them to reopen the bond determination because we see no evidence that they tried to do so, even after the IJ's initial decision in 2002.

[10] One such exception is that the United States may not be sued "based upon the exercise or performance or the failure to exercise or perform a discretionary function . . . , whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).[7] To determine whether conduct falls within this exception, we must first determine whether the "challenged conduct involves an element of judgment or choice" and then whether "the conduct implements social, economic or political policy considerations." *Nurse v. United States*, 226 F.3d 996, 1001 (9th Cir. 2000) (citing *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). We must also determine whether the "complaint alleges that the policy-making defendants promulgated discriminatory, unconstitutional policies which they had no discretion to create." *Id.* at 1002. Because the decision to detain an alien pending resolution of immigration proceedings is explicitly committed to the discretion of the Attorney General and implicates issues of foreign policy, and because the Mirmehdis do not allege that this decision itself violated the Constitution, it falls within this exception. *Cf. Medina v. United States*, 259 F.3d 220, 229 (4th Cir. 2001) ("Even though the INS ultimately decided not to pursue the deportation of Medina, we are fully satisfied that the initial decision to initiate proceedings and arrest him was the type of agency conduct Congress intended to immunize in the discretionary function exception."); *Wright v. United States*, 719 F.2d 1032, 1035 (9th Cir. 1983) ("The decision whether or not to prosecute a given individual is a discretionary function for which the United States is immune from liability.").[8]

[7]Though neither party raised this exception, because the applicability of an FTCA exception affects our jurisdiction, we must consider it sua sponte. *See Morris v. United States*, 521 F.2d 872, 875 & n.1 (9th Cir. 1975).

[8]This does not immunize from judicial review the conduct of the officers who made the arrest at an operational level. *Wright*, 719 F.2d at 1035. But, for the reasons discussed above, the Mirmehdis have not stated a claim on those grounds.

The Mirmehdis assert that the United States is nonetheless liable because Officer Castillo's knowingly false testimony to the IJ itself constituted false imprisonment under California law.[9] This argument is unavailing under a second limitation imposed by the FTCA: the United States may not be held liable if the individual tortfeasor would be immune from suit. 28 U.S.C. § 2674; *see also Galvin v. Hay*, 374 F.3d 739, 758 (9th Cir. 2004) (affirming the dismissal of an FTCA claim when California law would have immunized the officers for claims of false arrest). California law would not permit recovery against an individual defendant for testimony given to an IJ in a bond revocation proceeding.

[11] California has a very broad "litigation privilege," which provides absolute immunity for almost any statement made "in any . . . . official proceeding authorized by law," as against any tort except for malicious prosecution. Cal. Civ. Code § 47(2). Designed to promote open communication in official proceedings, the privilege covers even those statements not made in a court or even in existing litigation; they can be specifically intended to cause investigators to institute charges. *Tiedemann v. Superior Court*, 148 Cal. Rptr. 242 (Cal. Ct. App. 1978) (allowing immunity for statements by a confidential informant to the IRS). All that is required is that the communication be "(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) . . . have some connection or logical relation to the action." *Sil-*

[9]It is unclear that this states a claim for false imprisonment under California law. As we have previously noted, California law allows false imprisonment claims "for arrests by officers . . . in two situations: when an arrest is made without a warrant, . . . and when an officer 'maliciously arrests and imprisons another by personally serving an arrest warrant issued solely on *information deliberately falsified by the arresting officer himself*.' " *Blaxland v. Commonwealth Dir. of Pub. Prosecutions*, 323 F.3d 1198, 1205 n.4 (2001) (emphasis added). There was a warrant here, and the Mirmehdis have never alleged that either Castillo or MacDowell participated in their actual arrests.

berg v. Anderson, 786 P.2d 365, 368-69 (Cal. 1990). A federal administrative hearing counts as a "quasi-judicial proceeding" if: "the administrative body is vested with discretion based upon investigation and consideration of evidentiary facts", that body may "hold hearings and decide the issue by the application of rules of law"; and that body has the power to affect "the personal or property rights of private persons." *Tiedemann*, 148 Cal. Reptr. at 247 (internal quotation marks omitted). Malice is irrelevant to this definition. *Silberg*, 786 P.2d at 368-69. Castillo's testimony falls within these parameters. As the Mirmehdis have not brought a claim for malicious prosecution, they have not stated a claim for relief under the FTCA.[10]

V

[12] Finally, the Mirmehdis appeal the denial of their motion to amend their complaint, arguing that they should be allowed an opportunity to comply with the heightened pleading requirements of *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). "[R]equests for leave [to amend] should be granted with 'extreme liberality,' " particularly when a complaint was filed before *Twombly* and fails for lack of sufficient factual content. *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009). However, a party is not entitled to an opportunity to amend his complaint if any potential amendment would be futile. *See, e.g.*, *May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211, 1216 (9th Cir. 1980). As the Mirmehdis' woes are not

[10]The United States asserts that this testimony would also be immune under federal law. The Supreme Court has stated that both lay and law enforcement witnesses are absolutely immune for live testimony given either at a trial or before a grand jury. *Malley v. Briggs*, 475 U.S. 335 (1986) (trial testimony); *Rehberg v. Palk*, 132 S. Ct. 1497, 1507 & n.1 (2012) (grand jury testimony) (distinguishing cases where law enforcement officers falsify affidavits for the purpose of obtaining an arrest). We see little distinction between this case and those, but we need not reach the issue because California law already provides immunity here.

caused by insufficient allegations of factual content, no potential amendments would change the outcome.

VI

For the forgoing reasons, the decision of the district court is

AFFIRMED.

SILVERMAN, Circuit Judge, concurring:

Although I concur in the opinion of the court, I write separately to emphasize that this case does not present the issue of whether illegal immigrants could *ever* bring a *Bivens* action. In fact, we have previously allowed an illegal immigrant to bring a *Bivens* action. *See Papa v. United States*, 281 F.3d 1004, 1010-11 (9th Cir. 2002) (holding that immigrant could bring *Bivens* action for alleged due process violations during immigration detention). However, in *this* case, I agree with my colleagues that the plaintiffs lack an implied right of action under *Bivens*.

12-522

OCT 22 2012

No.

IN THE

Supreme Court of the United States

MOHAMMAD MIRMEHDI; MOSTAFA MIRMEHDI;
MOHSEN MIRMEHDI; MOJTABA MIRMEHDI,

Petitioners,

v.

UNITED STATES OF AMERICA;
CHRISTOPHER CASTILLO; JAMES MACDOWELL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a), bars a claim for false imprisonment based on the fabrication of evidence by two low-level law enforcement agents within the meaning of 28 U.S.C. § 2680(h) whose acts violated the United States Constitution.

2. Whether immigrants may bring a *Bivens* damage action for unlawful detention against law enforcement agents who knowingly fabricated the basis for their arrest and detention.

PARTIES TO THE PROCEEDINGS

All parties or petitioners are listed in the caption and are individuals.

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Mohammad Mirmehdi, Mostafa Mirmehdi, Mohsen Mirmehdi and Mojtaba Mirmehdi respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The amended opinion of the Court of Appeals (Pet. App. 1a) is published at 662 F.3d 1073. The Court of Appeals' order denying rehearing and rehearing en banc is found at Pet. App. 3a. The Court of Appeals' original opinion filed November 3, 2011 is reproduced in Appendix B. Pet. App 21a. The judgment of the district court is reproduced at Appendix C. Pet. App. 40a. The Order dismissing the claims at issue in this Petition is reproduced at Appendix D. Pet. App. 43a.

JURISDICTION

The Court of Appeals filed its amended opinion and denied a timely petition for rehearing and rehearing en banc on June 7, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(I). Justice Kennedy granted an extension of time to file this petition to and including October 22, 2012.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions Involved

Fourth Amendment of the United States Constitution

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.

Fifth Amendment of the United States Constitution

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.

Statutes Involved

28 U.S.C § 2680(a), (h)

The provisions of this chapter and section 1346(b) of this title shall not apply to:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

...

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law

to execute searches, to seize evidence, or to make arrests for violations of Federal law.

Cal. Gov't Code § 820.4

A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment.

Cal. Gov't Code § 821.6

A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.

Cal. Civ. Code 43.55(a)

There shall be no liability on the part of, and no cause of action shall arise against, any peace officer who makes an arrest pursuant to a warrant of arrest regular upon its face if the peace officer in making the arrest acts without malice and in the reasonable belief that the person arrested is the one referred to in the warrant.

STATEMENT

Petitioners are four brothers who were wrongfully imprisoned for nearly three and a half years because of fabricated evidence and false statements used by Respondents Castillo and MacDowell to arrest and keep Petitioners in custody. Petitioners were arrested and detained after these federal law enforcement officials falsely accused them of ties to a group, the Mujahedin-e Khalq ("MEK"), a group opposed to the current Iranian regime.[1]

Petitioners alleged that Respondents knowingly used fabricated evidence, followed by false statements and testimony in subsequent immigration proceedings, that undermined the integrity of those proceedings, in order to keep Petitioners detained for 41 months for the purpose of coercing them into cooperating with the government about the MEK, issues they knew nothing about.

The Ninth Circuit foreclosed any remedy against Respondents Castillo or MacDowell or the United States under either a *Bivens* theory or under the Federal Tort Claims Act ("FTCA"). This ruling, which conflicts with the decisions of other Circuits in both contexts, if allowed to stand would allow law

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[1]The MEK was first designated as a terrorist organization in 1997, and was delisted as a terrorist organization on September 28, 2012. BBC News, *US Removes Iran Group MEK from Terror List*, Sept. 28, 2012, *available at* http://www.bbc.co.uk/news/world-us-canada-19767043.

enforcement agents to obtain the detention of immigrants based on false evidence without any remedy for such wrongful imprisonment.

A. Factual Background

In March 1999, Petitioners were arrested and charged with immigration violations which, unknown to them, had been committed by their immigration attorney in connection with their asylum applications. Petitioners' First Amended Complaint ("FAC"), Pet. App. 63a–70a, 82a–83a (¶¶ 18, 23, 28, 33, 70). Michael, Mojtaba, and Mohsen Mirmehdi were released on bond in late 1999 and Mohammad was released on bond in September 2000. Pet. App 82a–83a (FAC ¶ 70). Immigration judges determined that Petitioners were neither a flight risk nor a threat to the community or national security. *Id.*

While their immigration proceedings were pending Petitioners were arrested on October 2, 2001 and detained based on the false evidence supplied by Respondents Castillo and MacDowell. Pet. App. 83a (FAC ¶ 72). Respondents Castillo and MacDowell convinced the District Director to arrest and detain Petitioners on evidence which they knew to be false and which they knew did not justify Petitioners' detention. Pet. App. 83a–89a (FAC ¶¶ 72, 75, 77-82, 84, 86). Respondents used this false evidence to pressure Petitioners to provide information about the MEK (information that the brothers did not possess). Pet. App. 84a, 92a, 95a (FAC ¶75, 95, 102). Petitioners remained in

detention without a hearing of any kind for more than two months. Pet. App. 84a (FAC ¶ 74).

On December 10, 2001, Petitioners received their first hearing on their motions to be released. *Id.* At the December 10, 2001, hearing, Respondent Castillo provided the same knowingly false information to prevent Petitioners' release. Pet. App. 87a (FAC ¶¶ 81, 85). Based on the false evidence provided by Respondent Castillo that Petitioners were involved with the MEK, the immigration judge refused to release Petitioners on the grounds that they now posed a danger to the community. Pet. App. 85a (FAC ¶ 76).

The critical piece of fabricated evidence Respondents Castillo and MacDowell relied on to secure Petitioners' initial and continued detention, was a document referred to as the "L.A. Cell Form" dating from 1997. This was one page that Respondent Castillo had taken from a much larger document containing at least 60 pages of names, along with other notations such as travel dates and airfares. Pet. App. 89a (FAC ¶ 88). The list was created by the organizers of a legal and constitutionally-protected rally which took place in Denver, Colorado, on June 20, 1997, and was, in fact, a list of potential participants in the rally along with their travel schedules. Pet. App. 89a–90a (FAC ¶¶ 89, 90). The rally was attended by several members of Congress, at least one of whom appeared as a speaker, and was organized under the auspices of the National Council of Resistance in Iran ("NCRI"), an

international umbrella group which claims to be the Iranian democratic "government in exile." Pet. App.90a (FAC ¶¶ 90, 91).[2] At the time of the rally, neither the NCRI nor the MEK was designated as a Foreign Terrorist Organization. Pet. App. 91a (FAC ¶ 93). Petitioners' attendance at this lawful public rally could not possibly justify their detention in 2001.

Respondent Castillo knew that the list documented nothing more than attendance at constitutionally-protected demonstrations against the government of Iran– demonstrations that thousands of people had also attended. Pet. App. 84a, 92a, 101a–102a (FAC ¶¶ 73, 96, 101, 102). Nonetheless, Respondent Castillo modified the document by removing the pages containing travel information and used the presence of the Mirmehdis' names on the travel log as evidence of their "support" of the MEK in order to obtain their re-arrest and continuous detention for over three years. Pet. App. 89a, 92a–93a (FAC ¶¶ 88, 96, 98).

Respondents Castillo and MacDowell used these false statements and fabricated evidence to detain Petitioners because they wanted Petitioners held without bond to pressure them to cooperate with the FBI's ongoing investigations of MEK activity in

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[2]NCRI members are united by their shared opposition to the Iranian Islamic regime and commitment to a democratic Iran. Pet. App. 90a (FAC ¶ 91). Historically, the MEK was one among many elements comprising the NCRI.

other cities. During the bond hearing, Agent Castillo explained this to the judge, saying that "it's easier to negotiate if they're held without bond." Pet. App.95a (FAC ¶ 102). Petitioners' request to be released again on bond was denied based on Respondents' false evidence. Pet. App. 85a (FAC ¶ 76). Thus, Petitioners were kept in detention for 41 months despite Respondents' knowledge that there was no basis for this detention in order to put pressure on them to provide information they did not possess and based on Petitioners' attendance at a lawful public rally in opposition to the Iranian government.

B. Petitioners' Immigration Proceedings

In 2002, Petitioners were denied asylum but were granted withholding of deportation to Iran based on the fact that they would face torture in Iran. In each case, the immigration judges granted withholding of deportation after finding no credible evidence that any of the brothers was involved with terrorism or was in any way a threat to national security. Pet. App. 118a (FAC ¶ 158). The government appealed these grant of withholding of removal for each Petitioner to the Board of Immigration Appeals ("BIA"). These appeals were rejected on August 20, 2004. Petitioners appealed the denial of their bond applications but those decisions were upheld on appeal despite the findings in the withholding proceedings that Petitioners were not involved in terrorism and were not a threat to national security. These decisions were based on Respondents' false evidence.

Petitioners filed habeas corpus petitions in the United States District Court for the Central District of California to contest their continued detention. The District Judge dismissed the petitions with prejudice on May 23, 2003. Petitioners appealed the dismissal to the Ninth Circuit. Pet. App. 119a (FAC ¶ 164). On November 15, 2004, the Ninth Circuit found that the BIA owed the brothers a duty of consistent dealing, which it had violated by the conflicting rulings in its asylum and bond decisions. *Mirmehdi v. INS,* 113 F. App'x 739, 741 (9th Cir. 2004). Accordingly, it remanded the case to the District Court for "review of the sufficiency of the evidence" in Petitioners' bond determinations "in light of the BIA's decision finding no evidence connecting the Mirmehdis to terrorist activities." *Id.*; *see also* Pet. App. 120a (FAC ¶ 165). Petitioners were released from detention before these further proceedings were completed, rendering them moot.

On February 2, 2005, the day before the brothers were to be interviewed on Nightline about their plight, the government offered to release Petitioners. However, just as they were to be released, after Petitioners had changed into civilian clothes, the government insisted on restrictive conditions of release. Pet. App. 97a (FAC ¶ 107). These conditions included not traveling more than 30 miles from home, not attending political rallies, and not flying on airplanes. *Id.* Petitioners refused to sign the conditional release form, were deemed 'uncooperative', and remained in detention for another month despite the fact that there was never

any justification for their detention in the first place. Pet. App. 98a, 120a–121a. (FAC ¶¶ 108, 168, 170).

On March 16, 2005, the day before someone from the Attorney General's office was to interview Mohammad Mirmehdi regarding a beating he suffered in detention, Petitioners were again served with a list of conditions for their release. Pet. App. 120a–121a. (FAC ¶¶ 169–170). They again refused to sign, but this time Petitioners were released without restriction. *Id.*

C. Procedural History

The original Complaint in this case was filed on August 14, 2006. Plaintiffs filed the FAC on January 30, 2007. Before any discovery, the district court granted Respondents' motion to dismiss Petitioners' unlawful detention and false imprisonment claims, as well as other claims which are not the subject of this petition. Pet. App 44a–52a.

The district court dismissed Petitioners' claim for unlawful detention against these Respondents because in the court's view "Plaintiffs did not possess the right to be free from arrest and detention under the circumstances alleged in the amended complaint." Pet. App 46a.

The district court also dismissed Petitioners' cause of action against the United States for false imprisonment under the Federal Tort Claims Act

("FTCA") because of his view that "Plaintiffs' bond revocation and re-arrest were proper." Pet. App. 50a.

Petitioners' claims concerning the conditions of their detention were subsequently litigated and ultimately settled. After the settlement resolved all remaining claims, a final Judgment was entered. Pet. App. 41a–42a.

Plaintiffs timely appealed the grant of the motion to dismiss to the Ninth Circuit. The Ninth Circuit held that Petitioners' *Bivens* claims could not be recognized because of the statutory scheme in the Immigration and Nationality Act ("INA") and because of the existence of habeas corpus to challenge the legitimacy of their detention, even though neither stautory scheme provides for compensation for past wrongful detention. Pet. App. 29a–33a.

The Ninth Circuit also affirmed the dismissal of Petitioners' FTCA claims for false imprisonment because it found that the decision to detain Petitioners was within the discretionary function exception of the FTCA, even though Petitioners did not challenge any decision made in the immigration or habeas proceedings. Pet. App. 35a–37a. Petitioners' claims are based entirely on Respondent Castillo and Macdowell's knowing use of fabricated evidence to secure their initial and continued detention for the improper purpose of coercing their cooperation. The government never asserted that the discretionary function exception applied to Petitioners' claims but the panel determined it could

reach this issue because it concerned the Court's jurisdiction. Pet. App. 36a.

Plaintiffs timely filed a petition for rehearing and rehearing en banc, which was denied on June 7, 2012, Pet. App 2a–3a. The panel issued a slightly amended order on the same date. *Id.* Justice Kennedy granted Petitioners an extension to and including October 22, 2012, to file this Petition.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE SPLIT IN THE CIRCUITS OVER THE PROPER INTERPRETATION OF THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT.

The Ninth Circuit affirmed the district court's dismissal of Petitioners' FTCA claims based on the discretionary function exception. Petitioners challenge Respondents' use of fabricated evidence to secure and maintain their wrongful detention. The actions of these agents were not the kind of 'discretionary' acts contemplated by the discretionary function exception of the FTCA. Indeed, the United States never claimed that the discretionary function exception applied to Petitioners' claims. The law enforcement agents, Respondents Castillo and MacDowell, whose actions form the basis for Plaintiffs' FTCA claims had no discretion to fabricate evidence to secure Petitioners' wrongful detention.

Indeed, Respondents' wrongful actions undermined the ability of higher level officials to make the discretionary decisions assigned to them by Congress in a fair and constitutional manner. The Ninth Circuit's decision not only deprived Petitioners of a remedy, it also threatens the integrity of the procedures prescribed by Congress in this area.

A. There is a Split in the Circuits About the Proper Relationship Between the Discretionary Function Exception and the Law Enforcement Provision of the FTCA, Which Explicitly Allows Claims for False Imprisonment.

The Ninth Circuit's decision conflicts with decisions in other circuits by ignoring the law enforcement provision of the FTCA which exempts from the discretionary function exception conduct that violates the Constitution or federal law, 28 U.S.C. § 2680(h) (2006). § 2680(h) waives sovereign immunity under the FTCA "with regard to acts or omissions of investigative or law enforcement officers" for "any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." Plaintiffs here have brought a claim for false imprisonment, *see* Pet. App. 144a– 145a (FAC ¶¶ 251–57), and thus clearly fall within the provisions of § 2680(h). The circuits are divided as to whether § 2680(h) trumps the discretionary function exception, whether it should be harmonized with the exception, or whether the

discretionary function exception trumps § 2680(h). The court should decide this issue and resolve the circuit split.

The Eleventh and Fifth Circuits have both found that the § 2680(h) provision trumps the discretionary function provision. The Eleventh Circuit has held that "the plain meaning and clear purpose of the statutory language" mandates that "sovereign immunity does not bar a claim that falls within the proviso to subsection (h), regardless of whether the acts giving rise to it involve a discretionary function." *Nguyen v. United States*, 556 F.3d 1244, 1256–57 (11th Cir. 2009). That case is similar to this one in that it concerned a false arrest claim where "[a]ll of the evidence that law enforcement officers had then, as well as now, showed that he was guilty of no crime." *Id.* at 1248.

Similarly, the Fifth Circuit held that Congress demonstrated the clear intent to override § 2680(a) concerning malicious prosecution, false arrest, false imprisonment, and abuse of process when such acts were committed by law enforcement officials (as opposed to higher-level policy officials). *Sutton v. United States*, 819 F.2d 1289, 1294–95 (5th Cir. 1987) ("We may safely presume Congress knew that existing law provided that decisions on when, where, and how to investigate and whether to prosecute were considered discretionary at the time Congress amended § 2680(h).").

The Fifth Circuit further found that as actions for malicious prosecution, false arrest, and false imprisonment generally arose from discretionary decisions, to subject § 2680(h) to the discretionary function exception would render § 2680(h) superfluous. In that case, more specific pleadings and pre-trial discovery were necessary to determine which claims fell within § 2680(h). Thus, in both the Eleventh and Fifth Circuits, in contrast to the decision below, Petitioners' claims for false imprisonment and unlawful detention fall within § 2680(h) and would not be barred by the discretionary function exception.

The Second Circuit has harmonized the two provisions by restricting which actions fall within the discretionary function exception to "activities . . . that involve weighing important policy choices." *Caban v. United States*, 671 F.2d 1230, 1233–35 (2d Cir. 1982). In that case, the Second Circuit found that INS agents' lack of care in determining an objectively verifiable fact did not implicate any policy considerations that would bring their conduct under the discretionary function exception. *Id.* at 1233. The *Caban* court found that "the decision to detain someone at the border is not fraught with the need to balance competing policy considerations." *Id.* Thus, the court in *Caban* found that § 2680(a) has a limited scope that does not conflict with § 2680(h). Under the Second Circuit rule in *Caban*, the falsification of evidence to wrongfully detain Petitioners would not be found within Respondents' discretion and the

discretionary function exception would not apply, allowing Petitioners to bring their claims.

The Third Circuit, conversely, has narrowed § 2680(h) to apply only to actions by officers while conducting a search, seizure, or arrest. *Pooler v. United States*, 787 F.2d 868, 872 (3d Cir. 1986). In that case, the plaintiffs filed suit for false arrest under the FTCA, claiming that a Veteran's Administration police officer used deficient methods for initiating an arrest warrant by using an unreliable informant and not revealing the deficiencies to the prosecutor's office. *Id.* at 869. The Third Circuit ignored the explicitly mentioned causes of action– malicious prosecution, false arrest, false imprisonment, and abuse of process– that § 2680(h) includes, to focus only on harms conducted during search, seizure and arrest. It did so in order to harmonize the statute with § 2680(a), saying that in that way, the actions complained of (the *manner of execution* of a search, seizure, or arrest) could not help but be "operational" rather than discretionary. *Id.* at 872. In a case such as this one, then, the Third Circuit might find, though this is unclear, that false imprisonment based on presenting false evidence to the court would not fall within the scope of § 2680(h).

Finally, the D.C. Circuit, the Fourth Circuit, and a district court in the Tenth Circuit have held that although § 2680(h) came later in time than § 2680(a), § 2680(a) trumps § 2680(h) and § 2680(h) does not apply to any actions which are within the agents' discretion. *Gray v. Bell*, 712 F.2d 490, 508

(D.C. Cir. 1983); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001); *Crow v. United States*, 634 F. Supp. 1085, 1088 (D. Kan. 1986). In these circuits, Petitioners' case would turn on whether the acts themselves fell within the discretionary function exception, despite the fact that § 2680(h) clearly applies to them. Even in these circuits, as explained below, it is unclear whether the deliberate falsification of evidence would be found to be a discretionary policy decision within the scope of § 2680(a).

Thus, the Circuits have widely differing approaches to the question of whether or not to permit cases to proceed which involve both § 2680(h) and § 2680(a). This Court should grant certiorari in this case to resolve this issue so that there will be a uniform standard governing the relationship between these two provisions of the FTCA. As § 2680(h) is later in time than § 2680(a), the Court should hold that the approach of the Eleventh and Fifth Circuits is correct and § 2680(h) trumps § 2680(a).

B. This Court Should Resolve the Circuit Split on the Question of Whether Unconstitutional Acts Can Ever Fall Within a Federal Agent's Discretion.

Even if § 2680(a) applies to Respondents' falsification of evidence, a second circuit split exists on the question of whether unconstitutional acts such as these fall within the scope of § 2680(a). This Court has already held that where federal employees

do not follow regulations, they did not have the discretion to commit the acts at issue: "the acts complained of do not involve the *permissible* exercise of policy discretion." *Berkovitz v. United States*, 486 U.S. 531, 546 (1988)(emphasis added). Thus, conduct outside the bounds of the Constitution exceeds a federal agent's discretion.

The majority of circuits find that unconstitutional conduct is not within the scope of § 2680(a). The Second Circuit has found that the discretionary function exception does not apply where a federal official has behaved unconstitutionally. *Myers & Myers, Inc. v. U.S. Postal Serv.*, 527 F.2d 1252, 1261 (2d Cir. 1975) ("It is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority."). *See also Limone v. United States*, 271 F. Supp. 2d 345, 355 (D.Mass. 2003), *aff'd in part, remanded in part sub nom. Limone v. Condon*, 372 F.3d 39 (1st Cir. 2004).

Similarly, the Seventh Circuit held that an intentional presentation of false evidence was not within federal agents' discretion. *Reynolds v. United States*, 549 F.3d 1108, 1113-14 (7th Cir. 2008). ("[A] federal investigator's decision to lie under oath is separable from the discretionary decision to prosecute...[t]here can be no argument that perjury

is the sort of 'legislative [or] administrative decision[ ] grounded in social, economic, and political policy' that Congress sought to shield from 'second-guessing.'").

The Fourth Circuit also implied that allegations of unconstitutional conduct would not fall within the discretionary function exception. *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001) (noting that federal officials "do not possess discretion to violate constitutional rights or federal statutes."). In *Medina*, plaintiff alleged only violations of Virginia law. *Id.* at 223. Medina sued based on the decision to arrest him and subject him to immigration proceedings; that decision was based on a decision that a single assault and battery conviction constituted a "crime of moral turpitude." There, no unconstitutional conduct was alleged. *Id.* Here, the conduct complained of is clearly unconstitutional—manufacturing and presenting false evidence in order to detain Petitioners.

In contrast, in *Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983), the D.C. Circuit held that a prosecutor's allegedly unconstitutional acts were nevertheless protected by the discretionary function exception. The court noted that "Gray contends that he 'is not complaining of the initial decision which may have been made by one or more of the defendants to conduct a broad scale investigation of the FBI [, but, rather,] of the improper, tortious, and constitutionally defective manner in which that investigation was carried out.'" *Id.* at 515.

Nonetheless, the D.C. Circuit held that the alleged unconstitutional conduct of improper investigation and withholding of exculpatory evidence was too intertwined with the decision to prosecute. *Id.* at 515–16. Unconstitutionality itself is not sufficient in the D.C. Circuit to remove conduct from the scope ofa prosecutor's discretion. Similarly, in *Sutton*, the Fifth Circuit opined that even unconstitutional torts could fall within the discretionary function exception if the agents acted "in furtherance of national . . . policy." *Sutton*, 819 F.2d at 1296-97 (5th Cir. 1987).

As the D.C. Circuit, the Fifth Circuit, and now the Ninth Circuit have all failed to apply this Court's prior precedents which clearly show that unconstitutional conduct would fall outside the scope of § 2680(a), this Court should grant certiorari to resolve this conflict in the circuits.

C. California Civil Code 47(b) Does Not Preclude Plaintiffs' False Arrest and False Imprisonment Claims.

In its amended opinion the panel below noted that its FTCA decision would be the same even if it was wrong about the discretionary function exception because of state law immunity under California Civil Code § 47(b), another issue not briefed or argued by the parties in this appeal. Pet. App. 17a–19a. Because it was raised *sua sponte* on rehearing, Plaintiffs were never given an opportunity to brief or argue this ground. In fact, Civil Code § 47(b) does not protect the malicious conduct of law enforcement

officers. Where a law enforcement officer acts with malice in arresting and detaining an individual based on false evidence, a California plaintiff is entitled to bring a false imprisonment claim; immunity is no bar to such a claim.

The text of California Government Code §§ 821.6 and 820.4 make clear that the California legislature did not mean to bar plaintiffs from bringing claims of false imprisonment against law enforcement officers. *See* Cal. Gov't Code § 820.4 ("Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment.") Although § 821.6 protects law enforcement officers working within the scope of employment during an investigation, it will not shield them from claims of false imprisonment or false arrest. *Sullivan v. County of Los Angeles*, 12 Cal. 3d 710, 719 (1974).

Claims for false imprisonment can proceed under California law despite the fact that peace officers have immunity for false arrest claims. Under § 43.55, if an officer uses false information in an affidavit in order to obtain an arrest warrant, that officer is not immune from claims of false imprisonment upon execution of that warrant. In *McKay v. County of San Diego*, 111 Cal. App. 3d 251, 253–57 (Cal. Ct. App. 1980), the California Court of Appeals held an investigator liable for false imprisonment after the investigator submitted false information in order to obtain an arrest warrant, which he thereafter used to arrest the plaintiff. The

court found that the use of false information constituted malice, which took the immunity for false arrest out of the scope of Cal. Civ. Code § 43.55. *See also Laible v. Superior Court*, 157 Cal. App. 3d 44, 47, 53 (Cal. Ct. App. 1984) (withholding exculpatory evidence with deliberate or reckless disregard of plaintiffs' liberty interests constitutes malice); *Harden v. San Francisco Bay Area Transit Dist.*, 215 Cal. App. 3d 7, 16 n.5 (Cal. Ct. App. 1989) (liability for false statements made with intent to induce arrest).

The California cases cited by the Ninth Circuit were against private parties, not arresting officers; one was a defamation claim, *Tiedemann v. Superior Court*, 148 Cal. Rptr. 242 (Cal. Ct. App. 1978); the other was an action brought against an opposing party's attorney. *Silberg v. Andersen*, 786 P.2d 365, 368-69 (Cal. 1990). Here, Plaintiffs are suing the United States for the actions of law enforcement officers Castillo and MacDowell in unlawfully detaining and imprisoning Plaintiffs and creating and relying on false evidence; they are not suing private parties for simple communications in the course of litigation. Unlike in *Galvin v. Hay*, 374 F.3d 739, 758, Respondents Castillo and MacDowell knew that they were relying on false evidence and that the detention of Plaintiffs was unlawful. They were not acting reasonably; they acted with malice. Pet. App 83a–95a (FAC ¶¶ 71–89, 95–102).

Even where the lawsuit is against private parties and not law enforcement officers, the

California Supreme Court has held that § 47(b) applies narrowly to communications; it does not protect tortious conduct. *Kimmel v. Goland*, 51 Cal. 3d 202, 205 (1990). In *Marsh v. San Diego County*, 432 F. Supp. 2d 1035, 1056–1057 (S.D. Cal. 2006), the court held that the litigation privilege did not apply to Plaintiff's claim for intentional infliction of emotional distress when Defendants conspired to falsify evidence that resulted in deprivation of Plaintiff's constitutional rights and other damages.

Petitioners' claims are not barred by Cal. Civ. Code § 47(b), and Petitioners could have demonstrated this to the Panel below had there been briefing and argument on this issue. Thus, if this Court resolves the Circuit splits at issue in this Petition in Petitioners' favor, Petitioners' claims should be allowed to proceed in this case. This alternate ground is not a reason to avoid resolving the circuit splits described above.

II. This Court Should Resolve the Split Among Circuit Courts Concerning Whether the Immigration and Nationality Act or Habeas Proceedings Preclude a *Bivens* Claim For Wrongful Detention Based on the Fabrication of Evidence by Law Enforcement Agents.

A. Other Circuits Allow *Bivens* Claims For Constitutional Violations Notwithstanding the Immigration and Nationality Act or Habeas Proceedings.

Petitioners present constitutional claims of the most fundamental nature. The right not to be deprived of one's freedom based upon fabricated evidence by government officials is at the core of constitutional liberty and at the core of this court's *Bivens* precedents. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (Fourth Amendment); *Davis v. Passman,* 442 U.S. 228 (1979)(Fifth Amendment). They claim that Respondents' fabricated the evidence used to secure their arrest and detention without justification for 41 months. Imprisoning innocent men based on fabricated evidence violates core constitutional values no matter what the context. *See, e.g. Devereaux v. Abbey*, 263 F. 3d 1070, 1075 (9th Cir. 2001) ("[W]e find that the wrongfulness of charging someone on the basis of deliberately fabricated evidence is sufficiently obvious, and . . . that the right to be free from such charges is a constitutional right."); *see also Malley v Briggs*, 475 U.S. 335, 340-41 (1986).

The Ninth Circuit Panel held that Petitioners could not assert a *Bivens* claim because immigration proceedings and habeas proceedings were an adequate alternative remedial framework. However, neither the INA nor habeas proceedings are designed to address the kind of fabrication of evidence that undermined the immigration and habeas proceedings in this case, nor does either scheme provide for any remedies for wrongful imprisonment. For Petitioners, as was the case in *Bivens*, their remedy for the wrongful imprisonment they endured is "damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., Concurring).

The Ninth Circuit's decision is in conflict with decisions from other Circuits allowing such claims. For example, in *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 620 (5th Cir. 2006), the Fifth Circuit allowed such a cause of action, noting that the aliebn plaintiff was entitled to enforce her constitutional rights. Similarly, the First Circuit in *Franco de Jerez v. Burcos*, 876 F. 2d 1038, 1039 (1st Cir. 1989) permitted *Bivens* claims based on unlawful detention.

The gravamen of Petitioners' claims is that Respondents circumvented the protections offered by asylum and habeas proceedings by use of false and fabricated evidence against Petitioners. This case alleges harms independent of the asylum decision and would be permitted in the First or Fifth Circuits.

Moreover, Ninth Circuit prior precedent allows Bivens claims to proceed notwithstanding

immigration proceedings. *Papa v. United States*, 281 F. 3d 1004, 1011 (9th Cir. 2002). Petitioners' claims are nearly identical to the claims upheld in *Harris v. Roderick*, 126 F.3d 1189, 1198-99 (9th Cir 1997), a non-immigration case involving *Bivens* claims based on the falsification of evidence by law enforcement agents. The existence of immigration proceedings should not preclude damage claims that do not challenge any decisions made in those proceedings.

B. The INA is Not An Adequate Alternative Remedy.

1. This Court's Past Precedent Makes Clear that the INA is Not an Adequate Alternative Remedy.

The INA is not an adequate alternative remedy to a *Bivens* action in these circumstances because it does not provide, nor was it intended to provide, any redress for law enforcement actions that undermine the very integrity of the procedures Congress has put in place for the fair processing of issues relating to immigrants.

In *Carlson v. Green*, 446 U.S. 14 (1980), this Court made clear that an alternative remedy must provide the same *type* of remedy that a *Bivens* action would provide. Because the FTCA did not provide plaintiffs the same *kind* of protection of their constitutional rights that plaintiffs could rely on in a *Bivens* action (punitive damages, the right to recover

against individuals, a jury trial, and uniform protection of constitutional rights), the FTCA did not constitute an alternative remedy which would weigh against *Bivens* liability. *Carlson*, 446 U.S. at 20-23.

Although subsequent cases have examined fewer factors than *Carlson*, they have still emphasized that an alternative remedy must be a substantive one. For example, in *Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988), this Court found that Congress had comprehensively regulated the remedy for the wrongful termination of benefits, and had provided administrative remedies that allowed for the full restoration of lost benefits, a monetary remedy. The Court found that special factors counseled hesitation because "Congress chose specific forms and levels of protection for the rights of persons." *Id.* at 426. Here, however, the INA contains no remedy for persons who have had false and fabricated evidence used to detain them for months.

The INA, as an alternative remedy, falls far short of even the level of protection found in the FTCA, providing no damages, jury trial, or right to recover against individuals. Unlike *Schweiker*, the INA does not provide for monetary relief. The Ninth Circuit's decision that the voluntary release of Plaintiffs pursuant to the INA after three and a half years of unjustified confinement was equivalent to a *Bivens* remedy is clearly unwarranted under existing Supreme Court case law; this Court should hear this

case in order to clarify that the INA is not an alternative which forecloses a *Bivens* remedy.

2. No Other Lower Court Has Held that the INA Constitutes an Adequate Alternative Remedy for Constitutional Violations Which Are Not Dependent on the Outcome of Immigration Proceedings.

The decision in this case stands alone in finding that the INA was an adequate alternative remedy that foreclosed the *Bivens* claims. In the case the Ninth Circuit relied on, *Arar v. Ashcroft*, 585 F. 3d 559, 572 (2d Cir. 2009), Pet. App 12a, the Second Circuit specifically declined to opine on the issue because Arar was "prevented from seeking any meaningful review and relief through the INA processes." *Id.* at 573. The *Arar* court stated "[i]n the end, we need not decide whether an alternate remedial scheme was available." *Id.*

No other circuit court has ruled that the INA is an adequate alternative remedy for immigrants who are unlawfully detained. The INA does not address the issues involved in Petitioners' *Bivens* claims.

Several district courts have specifically held that the INA does not constitute an adequate alternative remedy for the illegal arrests of immigrants. The INA does not constitute an

adequate alternative remedy as the INA provisions are "merely regulatory, defining the Attorney General's powers and duties . . . and do not mention or provide any means of redress for constitutional violations." *Cesar v. Achim*, 542 F. Supp. 2d 897, 900 (E.D. Wis. 2008). The only potential remedy before an immigration judge is " the suppression of any evidence obtained from their allegedly illegal arrests." *Diaz-Bernal v. Myers*, 758 F.Supp.2d 106, 123 (D.Conn. 2010) (allowing Fourth and Fifth Amendment claims for equal protection and unlawful search and seizure based on immigration raids that the plaintiffs alleged were discriminatory). The lack of a damages remedy under the INA meant that plaintiffs in *Diaz-Bernal* could proceed with their *Bivens* claim. *Id.*

Where a plaintiff is already released, that may also be a factor in holding that the INA is not an adequate alternative remedy. In *Argueta v. Immigration & Customs Enforcement*, 2009 WL 1307236, at *19 (D.N.J. May 7, 2009), the court found that Argueta "is simply a lawful resident who was detained for 36 hours and then released" and so she could not "even be involved in the administrative process outlined in the INA." For the same reason, the INA provides no remedy for Petitioners here.

In contrast, where a plaintiff seeks to bring claims based purely on the outcome of an administrative proceeding, the INA may constitute an adequate alternative remedy. In *Omoniyi v. Dept. of Homeland Sec.*, 2012 WL 892197, at *10 (S.D.N.Y.

Mar. 13, 2012), a district court found that a plaintiff was not entitled to bring a *Bivens* claim for damages based on a previous denial of U.S. citizenship, although she was denied employment when her citizenship was denied. Unlike *Omoniyi*, Petitioners' claims have nothing to do with the outcome of their immigration proceedings. They do not challenge their denial of asylum or any other decision made in their immigration proceedings. The result of those proceedings is that Petitioners are lawfully residing in the United States and have resumed the place in the Los Angeles community they occupied before their long wrongful detention. Petitioners complain that these law enforcement agents used false evidence to detain them while they went through immigration proceedings in order to coerce them, not that the outcome of the immigration proceedings on the merits was unjust.

C. For the Same Reasons, Habeas Corpus is Not an Alternative Remedy

No other circuit court has found that habeas proceedings bar a *Bivens* remedy in any remotely similar context.[3] The entire purpose of habeas proceedings is to determine the legality of a person's detention, not to award compensation. *See Preiser v.*

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[3] In *Rauschenberg v. Williamson*, 785 F. 2d 985, 987-88 (11th Cir. 1986), the plaintiff was denied a *Bivens* claim based on the imposition of an unconstitutional condition on his parole because the Court found that the Parole Commission and Reorganization Act of 1978 specifically addressed the issue.

Rodriguez, 411 U.S. 475, 494 (1973) ("In the case of a damages claim, habeas corpus is not an appropriate or available federal remedy."). Additionally, Respondents' actions undermined the legitimacy of Petitioners' habeas proceedings.

D. The Immigration Context Does Not Constitute a Special Factor Counseling Hesitation.

The Circuit courts have generally held that aliens can bring claims based on constitutional violations; the fact that the case arises in the context of immigration does not in and of itself constitute a special factor counseling hesitation. The First Circuit has held that immigrants may bring *Bivens* claims based on constitutional violations during their detention. In *Franco de Jerez v. Burgos*, 876 F.2d at 1042, an alien brought a claim with respect to nine days when she was held incommunicado at the Puerto Rico Emigration building by INS agents. The court found that Ms. Franco could bring a claim for the denial of the right to counsel. *Id.* at 1043. The court did not find that Ms. Franco was precluded from bringing her *Bivens* claims because she was an alien or because her case was related to immigration. Similarly, the Ninth Circuit had previously held that claims for deliberate indifference could be brought by immigrants being held in immigration detention. *Papa v. United States*, 281 F.3d 1004, 1011 (9th Cir. 2002).

As discussed above, the INA is not a comprehensive remedial scheme that forecloses

consideration of the *Bivens* claim. While the INA "is comprehensive in terms of regulating the in-flow and out-flow of aliens, it is not comprehensive in terms of providing a remedy for conduct such as is alleged here." *Khorrami v. Rolince*, 493 F. Supp. 2d 1061, 1073-74 (N.D. Ill. 2007) (allowing plaintiff's Fifth Amendment claim to proceed); *MacDonald v. United States*, 2011 WL 6783327 (S.D. Cal. Dec. 23, 2011) (*Bivens* claim available to Canadian Native American who was illegally deported).

The Fifth Circuit has held that "aliens stopped at the border have a constitutional right to be free from false imprisonment and the use of excessive force by law enforcement personnel." *Martinez-Aguero v. Gonzalez*, 459 F.3d at 620 (allowing *Bivens* claims under the Fourth and Fifth Amendment for excessive force, false imprisonment, and wrongful arrest).

Congress has never suggested that §1983 actions or *Bivens* actions should be barred. *Argueta*, 2009 WL 1307236 at *19. Special factors do not counsel hesitation where the constitutional harms alleged are independent from the decision whether or not to remove them. *Diaz-Bernal*, 758 F. Supp. 2d at 129; *Martinez-Aguero*, 459 F.3d at 621; *see also Lynch v. Cannatella*, 810 F. 2d 1363, 1374 (5th Cir. 1987) (allowing alien plaintiffs to bring a §1983 claim based on the Fourteenth Amendment).

Moreover, the fact that Petitioners were detained due to national security concerns is not a

special factor counseling hesitation. In *Khorrami,* the plaintiff, an airline employee of Iranian origin and a lawful resident of the United States, was arrested and detained for over three months immediately following September 11, 2001. *Khorrami*, 493 F. Supp. 2d at 1064-65. He brought a procedural due process claim based on the filing of false evidence against him. *Id.* at 1071-72. The district court found that national security concerns did not counsel hesitation in determining whether an alien's right to procedural due process had been violated. *Id.* at 1073. ("If the national security concerns failed to compel the Supreme Court to defer in *Hamdi v. Rumsfeld,* 542 U.S. 507 . . . (2004), then the clearly less significant issues presented here also fail to warrant a finding of nonjusticiability.").

Unlike *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009), Petitioners here do not challenge a policy promulgated by the government or a specific and novel practice like extraordinary rendition. Instead, Petitioners bring claims based on established law: namely, that immigrants within the United States should not be subject to prolonged arbitrary detention based on false evidence presented by law enforcement agents to justify their detention. This case does not raise the concerns found in *Arar* about constitutional separation of powers, limited institutional competence of the judiciary, or foreign affairs concerns. *See id.* at 575–76.

Petitioners were not sent abroad to be held in a foreign prison; rather, they were held in detention

in Los Angeles for three and a half years. The examination of whether such detention is proper falls under the core competence of the Judiciary. The Court in *Zadvydas v. Davis*, 533 U.S. 678, 700-01 (2001), already balanced the separation of powers concerns at issue here by according a presumption of reasonableness to six months' detention for an alien subject to an order of removal. The immigrants in this case were held for two years after they were granted withholding of removal and should never have been rearrested and detained for 41 months to begin with. They would not have been rearrested or detained in this way had it not been for the false evidence and statements of Respondents Castillo and MacDowell.

III. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT TO THE RIGHTS OF NON-CITIZENS IN IMMIGRATION PROCEEDINGS.

Under the Ninth Circuit's opinion, federal law enforcement agents are immune from damage awards under either a *Bivens* theory or the FTCA, even when they fabricate evidence to detain non-citizens for years. This is so even when the fabricated evidence undermines the other available procedures designed to prevent unlawful detention. In such circumstances only damages can redress such injuries and deter future abuses.

The Ninth Circuit decision places immigrants in this country at risk of false imprisonment without

a remedy based on the fabrication of evidence by law enforcement officials. The decision is in conflict with the decisions of other Circuits both with respect to Petitioners' *Bivens* claims and their claims under the FTCA. The Petition should be granted so that there are uniform national standards governing access to the courts to redress such egregious violations either directly under the Constitution or pursuant to remedies provided by Congress in the FTCA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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1

Ricky Lee ALLSHOUSE, Jr., petitioner, v. PENNSYLVANIA.

No. 11–1407.

May 13, 2013.

Case below, 614 Pa. 229, 36 A.3d 163.

Petition for writ of certiorari to the Supreme Court of Pennsylvania, Western District, denied.

2

Juan Daniel CANO, petitioner, v. TEXAS.

No. 12–5813.

May 13, 2013.

Case below, 369 S.W.3d 532.

Petition for writ of certiorari to the Court of Appeals of Texas, Seventh District, denied.

3

Otis HARRIS, III, petitioner, v. UNITED STATES.

No. 12–6111.

May 13, 2013.

Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

4

D.W. NEVEN, Warden, et al., petitioners, v. Christopher Noel WENTZELL.

No. 12–352.

May 13, 2013.

Case below, 674 F.3d 1124.

Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

5

Vijay K. CHHABRA, petitioner, v. Eric H. HOLDER, Jr., Attorney General.

No. 12–411.

May 13, 2013.

Case below, 444 Fed.Appx. 493.

Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

6

Mohammad MIRMEHDI, et al., petitioners, v. UNITED STATES, et al.

No. 12–522.

May 13, 2013.

Case below, 689 F.3d 975.

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.