APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 18-1451

MYNOR ABDIEL TUN-COS; JOSÉ PAJARITO SAPUT; LUIS VELASQUEZ PERDOMO; EDER AGUILAR ARITAS; EDUARDO MONTANO FERNÁNDEZ; PEDRO VELASQUEZ PERDOMO; JOSÉ CÁRCAMO; NELSON CALLEJAS PEÑA; GERMÁN VELASQUEZ PERDOMO,

Plaintiffs - Appellees,

v.

B. PERROTTE, ICE Agent; T. OSBORNE, ICE Agent; D. HUN YIM, ICE Agent;

P. MANNEH, ICE Agent; A. NICHOLS, ICE Agent,

Defendants - Appellants.

CHRIS BURBANK; SETH M. M. STODDER; MEGAN H. MACK; MARGO SCHLANGER; PAUL W. VIRTUE; LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW,

Amici Supporting Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony John Trenga, District Judge. (1:17-cv-00943-AJT-TCB)

Argued: December 11, 2018

Decided: April 26, 2019

Before NIEMEYER and QUATTLEBAUM, Circuit Judges, and DUNCAN, Senior Circuit Judge.

Reversed and remanded with instructions by published opinion. Judge Niemeyer wrote the opinion, in which Judge Quattlebaum and Senior Judge Duncan joined.

ARGUED: Anne Murphy, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. David Meir Zionts, COVINGTON & BURLING LLP, Washington, D.C., for Appellees. **ON BRIEF:** Chad A. Readler, Acting Assistant Attorney General, Mary Hampton Mason, Senior Trial Counsel, Paul E. Werner, Trial Attorney, Torts Branch, Barbara L. Herwig, H. Thomas Byron III, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; G. Zachary Terwilliger, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellants. Daniel E. Johnson, Mark H. Lynch, José E.

Arvelo, Brandon H. Johnson, Daniel T. Grant, Michelle S. Willauer, COVINGTON & BURLING LLP, Washington, D.C.; Simon Y. Sandoval-Moshenberg, Nicholas C. Marritz, Hallie N. Ryan, LEGAL AID JUSTICE CENTER, Falls Church, Virginia, for Appellees. Jon M. Greenbaum, Myesha Braden, Samuel Weiss, Michael Huggins, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, Washington, D.C.; Shira A. Scheindlin, New York, New York; Caitlin Bellis, UNIVERSITY OF CALIFORNIA IRVINE SCHOOL OF LAW – IMMIGRANT RIGHT CLINIC, Irvine, California, for Amicus Lawyer's Committee for Civil Rights Under Law. Nicolas G. Keller, New York, New York, Matthew E. Price, JENNER & BLOCK LLP, Washington, D.C., for Amici Chris Burbank, Seth M. M. Stodder, Megan H. Mack, Margo Schlanger, and Paul Virtue.

NIEMEYER, Circuit Judge:

Nine Latino men, who lived in areas of Northern Virginia that were home to many residents of Latino ethnicity, commenced this action against several Immigration and Customs Enforcement ("ICE") agents. They seek money damages to redress the ICE agents' alleged violations of their rights under the Fourth and Fifth Amendments, alleging that the ICE agents (1) stopped and detained them without a reasonable, articulable suspicion of unlawful activity; (2) invaded their homes without a warrant, consent, or probable cause; and (3) seized them illegally. To state a cause of action for damages, they rely on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which held that the victim of a

Fourth Amendment violation by federal officers had an implied constitutional claim for damages.

The ICE agents filed a motion to dismiss, challenging the plaintiffs' reliance on *Bivens* and also asserting qualified immunity. While the district court assumed that the plaintiffs' action presents a "'modest extension' in a 'new context' for the application of a *Bivens* remedy," it denied the ICE agents' motion, concluding that a *Bivens* remedy "should be recognized in this case." It also denied the ICE agents qualified immunity.

Applying the Supreme Court's recent jurisprudence on *Bivens* actions, we reverse, concluding that a *Bivens* remedy is not available in the circumstances of this case. Where there is no statute authorizing a claim for money damages, "it is a significant step under separation-of-powers principles" for a court to impose damages liability on federal officials. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017). In such cases, "[t]he question is who should decide whether to provide for a damages remedy, Congress or the courts?" *Id.* at 1857 (cleaned up). "The answer most often will be Congress." *Id.* Indeed, in the course of repeatedly declining to provide a *Bivens* remedy in recent years, the Supreme Court has now made clear that "extend[ing] *Bivens* liability to any new context or new category of defendants" is highly "disfavored." *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (cleaned up). We thus conclude that, because the plaintiffs seek to extend *Bivens* liability to a context the Supreme Court has yet to recognize and there are "special factors counselling hesitation in the absence of affirmative action by Congress," *Abbasi*, 137 S. Ct. at 1857 (cleaned up), the plaintiffs' action for damages should

be dismissed. Therefore, we reverse the district court's order denying the ICE agents' motion to dismiss and remand with instructions to dismiss the plaintiffs' action.

I

In their complaint, the plaintiffs challenge the legality of stops, detentions, and home invasions that they experienced on February 8 and February 17, 2017.

As alleged in the complaint, on February 8, ICE agents stopped one of the plaintiffs as he was leaving his home and asked if he knew a man in a photo that the agents showed him. When the plaintiff denied knowing the man, the agents demanded that the plaintiff take them into his home. The agents then collected all of the other persons in the home, asked them the same question, and received the same response. They then arrested six residents and took them to an ICE facility in Lorton, Virginia. After ten hours, the agents released the six on bond. Removal proceedings under the Immigration and Nationality Act ("INA") were then initiated against those six, who are now plaintiffs in this action.

On February 17, ICE agents blocked a car with four Latino men in it as they were pulling out of a parking space, demanding that they provide identification. The ICE agents then showed the detained men photos of two men, whom one of the detained men recognized. The agents then directed the detained men to go to their apartment, where the agents arrested and frisked two of them and took them to an ICE facility in Fairfax, Virginia. After they were released, removal proceedings under the INA were initiated against

those two men, who are also now plaintiffs in this action.

In their initial complaint for damages, the two plaintiffs arrested on February 17 alleged violations of the Fourth and Fifth Amendments. They also asserted that the arrests on that date "did not occur in a vacuum," citing a recent Executive Order which "was represented by the Trump administration as an effort to 'take the shackles off' ICE agents in their enforcement activities." (Citation omitted). As the complaint alleged:

> ICE agents across the country have been encouraged to stop individuals without reasonable suspicion, pursuant to the Trump Administration's efforts to "take the shackles off" ICE agents to free them from "what they went through in the last administration." In contrast to the Obama Administration's immigration enforcement policies and practices, which discouraged ICE agents from stopping individuals absent reasonable suspicion that the individuals had violated federal law, . . . [the] Executive Order and implementing guidance from [the Department of Homeland Security] have encouraged a broader set of enforcement policies that "no longer will exempt classes or categories of removable aliens from potential enforcement."

(Citations omitted). The initial complaint also alleged that "[u]nder the Obama Administration, ICE agents carried out immigration arrests at [the same apartment complex] multiple times a year, but generally arrested only those persons whom they had come

to arrest . . . [and] generally did not engage in collateral arrests of third persons." They alleged that under the Trump Administration, by contrast, " ICE agents have dramatically increased the number and scope of enforcement actions" at the apartment complex and that "[t]hese enforcement actions have included numerous collateral arrests," including the arrests of the two plaintiffs.

Several months later, the plaintiffs filed an amended complaint, which added the events that occurred on February 8, 2017, and the additional seven plaintiffs involved in those events, one of whom was a U.S. citizen. The amended complaint again alleged claims for the unreasonable searches and seizures of the plaintiffs, in violation of the Fourth Amendment, and equal protection claims under the Fifth Amendment. It also eliminated all references to the Trump Administration's immigration enforcement policy. In both complaints, the plaintiffs demanded compensatory and punitive damages, relying on *Bivens*.

The ICE agents filed a motion to dismiss on the ground that a *Bivens* action is not available in the context of this case. The agents also asserted qualified immunity.

The district court rejected both arguments and denied the motion. First, the court concluded that the plaintiffs stated "cognizable *Bivens* claims, as those claims were against persons properly considered federal law enforcement officers under circumstances that sufficiently approximated those within the recognized contours of that remedy." Applying the framework articulated by the Supreme Court in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), the court first

assessed whether the case arose in a "new *Bivens C*ontext," noting that "[t]he alleged conduct in this case ha[d] the recognizable substance of Fourth Amendment violations" but that the agents "[were] ICE agents, rather than traditional law enforcement officers, . . . and were purporting to operate under a different 'statutory or other legal mandate' than the officials referenced in *Abbasi*." (Quoting *Abbasi*, 137 S. Ct. at 1860). For those reasons, the court "assumed that this case present[ed] a 'modest extension' in a 'new context' for the application of a *Bivens* remedy" and therefore went on to evaluate whether "special factors" counseled against extending *Bivens* by inquiring "whether '(1) Congress ha[d] not already provided an exclusive statutory remedy; (2) there [were] no special factors counselling hesitation in the absence of the affirmative action by Congress; and (3) there [was] no explicit Congressional declaration that money damages not be awarded.'" (Quoting *Hall v. Clinton*, 235 F.3d 202, 204 (4th Cir. 2000)).

After noting that the ICE agents "d[id] not contend that Congress ha[d] already provided an exclusive statutory remedy . . . or that there [was] an 'explicit Congressional declaration that money damages not be awarded,'" the district court concluded that the issue "reduce[d] to whether any 'special factors' counsel[ed] against extending an implied right of action within the context of this case." The court then reasoned that the plaintiffs "are not challenging an entity's policy" but are rather "claiming straightforward violations of their Fourth and Fifth Amendment rights based on [the ICE agents'] conduct." And while ICE agents, rather than traditional federal law enforcement officers, were involved, the court concluded

that the agents "nevertheless fall within the broad category of federal law enforcement officers, whose conduct raises the same issues and concerns as in *Bivens*." As for the ICE agents' argument that "Congress's intent to preclude a *Bivens* damages remedy [could] be found in its failure to provide for an explicit remedy in the [INA] while otherwise 'aggressively' legislating in the immigration area," the court reasoned that while that argument would have force if Congress had provided a lesser remedy for this sort of violation, "Congress has provided *no remedy whatsoever*." (Emphasis added). The court concluded that "Congress's silence in this context does not reliably reflect any Congressional intent to preclude a *Bivens* damage remedy, particularly given the longstanding judicial recognition of a *Bivens* remedy for the types of Fourth and Fifth Amendment claims asserted in this case." The court thus ultimately concluded that "there [were] no special factors that would counsel against [allowing] a *Bivens* remedy for Plaintiffs' claims" and accordingly allowed the plaintiffs to pursue their *Bivens* claims against the ICE agents.

The district court also rejected the ICE agents' claim of qualified immunity. The ICE agents asserted that the complaint failed to allege "with the required specificity" the involvement of each ICE agent. The court disagreed, concluding that the plaintiffs "alleged at this stage each [ICE agent's] involvement with a sufficient level of factual specificity to give 'fair notice' of the claims asserted against each individual and the conduct relied on for those claims," and that, as such, the ICE agents "are not entitled to qualified immunity on the ground that the plaintiffs have failed to state with specificity each [ICE agent's] involvement."

(Quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007)).

From the district court's order dated April 5, 2018, denying their motion, the ICE agents filed this interlocutory appeal. *See Wilkie v. Robbins*, 551 U.S. 537, 549 n.4 (2007).

II

At its core, the plaintiffs' complaint alleges that ICE agents, in the context of enforcing the INA, violated their Fourth Amendment rights in stopping them, detaining them, and entering their home, and their Fifth Amendment rights in discriminating against them based on their ethnicity. They seek money damages under *Bivens*.

Such conduct, if engaged in by *state* officials, could give rise to a cause of action under 42 U.S.C. § 1983. But § 1983 does not provide a cause of action against *federal* officials, and there is no analogous statute imposing damages liability on federal officials. In 1971, however, the Supreme Court decided *Bivens*, holding that, even absent statutory authorization, a man who had alleged that federal narcotics officers had searched his apartment and arrested him for alleged narcotics violations without a warrant or probable cause and that the officers had used unreasonable force in so doing could sue those officers on an implied claim for money damages under the Fourth Amendment. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389–98 (1971).

In the decade following *Bivens*, the Court decided two other cases in which it held that, notwithstanding the lack of a statutory cause of action, an implied damages remedy was available to

redress certain constitutional violations. In the first, *Davis v. Passman*, 442 U.S. 228 (1979), the Court held that the equal protection component of the Fifth Amendment's Due Process Clause provided a damages remedy for an administrative assistant who alleged that a Congressman fired her because she was a woman. *See id.* at 248–49. And in the second, *Carlson v. Green*, 446 U.S. 14 (1980), the Court held that the Eighth Amendment's Cruel and Unusual Punishments Clause provided a damages remedy for the estate of a prisoner who died due to the alleged failure of federal jailers to treat his asthma. *See id.* at 19.

In the almost 40 years since *Carlson*, however, the Court has declined to countenance *Bivens* actions in *any* additional context. *See Chappell v. Wallace*, 462 U.S. 296, 297 (1983) (refusing to recognize a *Bivens* remedy where enlisted servicemen alleged that their officers discriminated against them based on race); *Bush v. Lucas*, 462 U.S. 367, 390 (1983) (refusing to recognize a *Bivens* remedy where a federal employee alleged that his supervisor violated his First Amendment rights); *United States v. Stanley*, 483 U.S. 669, 671–72 (1987) (refusing to recognize a *Bivens* remedy where a serviceman alleged that military officers violated his substantive due process rights); *Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988) (refusing to recognize a *Bivens* remedy for alleged violations of procedural due process by Social Security officials); *FDIC v. Meyer*, 510 U.S. 471, 473–74 (1994) (refusing to recognize a *Bivens* remedy where an employee alleged that he was wrongfully terminated by a federal agency in violation of due process); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001) (refusing to recognize a *Bivens* remedy where a prisoner alleged that a

private prison operator violated his Eighth Amendment rights); *Wilkie*, 551 U.S. at 541 (refusing to recognize a *Bivens* remedy where a landowner alleged that officials from the Bureau of Land Management violated the Due Process Clause); *Minneci v. Pollard*, 565 U.S. 118, 120 (2012) (refusing to recognize a *Bivens* remedy where prisoners alleged that guards at a privately operated federal prison violated their Eighth Amendment rights).

The Court's most recent guidance on the continued availability of *Bivens* actions came in *Ziglar v. Abbasi*, where the Court expressed open hostility to expanding *Bivens* liability and noted that "in light of the changes to the Court's general approach to recognizing implied damages remedies, it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today." 137 S. Ct. at 1856. The plaintiffs in *Abbasi* — aliens who were detained and held in the aftermath of the September 11 terrorist attacks — brought an action against certain executive officials and the wardens of the facility in which they were held, alleging Fourth and Fifth Amendment violations premised on the harsh conditions of their confinement and alleged abuse by prison guards. *Id.* at 1851–53. The Court held that no *Bivens* remedy was available for the conditions-of-confinement claims and accordingly concluded that those claims should be dismissed. *See id.* at 1858–63. And it remanded the prisoner abuse claims, holding that the lower court had erred in concluding that such claims arose in the same context as *Carlson* and had therefore failed to engage in the proper analysis. *See id.* at 1865. The *Abbasi* Court explained its outlook by noting that when *Bivens*, *Davis*, and *Carlson* were

decided, "the Court followed a different approach to recognizing implied causes of action than it follows now." *Id*. at 1855. More expansively, it stated:

> [I]n light of the changes to the Courts' general approach to recognizing implied damages remedies, it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today. To be sure, no congressional enactment has disapproved of these decisions. And it must be understood that this opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and- seizure context in which it arose. *Bivens* does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward. The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.
>
> Given the notable change in the Courts' approach to recognizing implied causes of action, however, the Court has made clear that expanding the *Bivens* remedy is now a "disfavored" judicial *activity*. *Iqbal*, 556 U.S., at 675. This is in accord with the Courts' observation that it has "consistently refused to extend *Bivens* to

> any new context or new category of defendants." [*Malesko*, 534 U.S. at 68]. Indeed, the Court has refused to do so for the past 30 years.

Id. at 1856–57. Importantly, the Court emphasized that the question of whether to provide a *Bivens* remedy should be informed and limited by separation-of-powers principles:

> When a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, *separation-of-powers principles are or should be central to the analysis. The question is "who should decide" whether to provide for a damages remedy, Congress or the courts? Bush*, 462 U.S. at 380.
>
> The answer most often will be Congress. When an issue "'involves a host of considerations that must be weighed and appraised,'" it should be committed to "'those who write the laws'" rather than "'those who interpret them.'" *Id.* (quoting *United States v. Gilman*, 347 U.S. 507, 512–13 (1954)). In most instances, the Court's precedents now instruct, the Legislature is in the better position to consider if "'the public interest would be served'" by imposing a "'new substantive legal liability.'" *Schweiker*, 487 U.S. at 426–27 (quoting *Bush*, 462 U.S. at 390). As a result, the Court Has urged "caution" before "extending *Bivens* remedies

> into any new context." *Malesko*, 534 U.S. at 74.

Id. at 1857 (emphasis added).

Drawing from these principles and the prior cases in which it declined to extend *Bivens*, the Court then clarified the framework that now must be applied in determining whether a *Bivens* remedy is available against federal officials. *See* 137 S. Ct. at 1857–60. First, courts must inquire whether a given case presents a "new *Bivens* context." If the context is *not* new — *i.e.*, if the case is not "different in [any] meaningful way" from the three cases in which the Court has recognized a *Bivens* remedy, *id.* at 1859 — then a *Bivens* remedy continues to be available. But if the context is new, then courts must, before extending *Bivens* liability, evaluate whether there are "special factors *counselling hesitation* in the absence of affirmative action by Congress." *Id.* at 1857 (emphasis added) (cleaned up). If any such "special factors" do exist, a *Bivens* action is not available.

The Court has made clear that, for a case to be "different in a meaningful way from [the three] previous Bivens cases," a radical difference is not required. Abbasi, 137 S. Ct. at 1859. Indeed, the Abbasi Court, "without endeavoring to create an exhaustive list," provided several examples of "meaningful differences," some of which are quite minor:

> A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the

> problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches;or the presence of potential special factors that previous Bivens cases did not consider.

Id. at 1859–60; *see also id.* at 1865 ("The differences between [the *Abbasi* plaintiffs' prisoner abuse claims] and the one in *Carlson* are perhaps small, at least in practical terms. Given this Court's expressed caution about extending the Bivens remedy, however, the new-context inquiry is easily satisfied" (emphasis added)).

And in determining whether "special factors" are present to counsel hesitation in expanding Bivens, courts must consider "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." Abbasi, 137 S. Ct. at 1857–58. If a factor exists that "cause[s] a court to hesitate before answering that question in the affirmative," then a *Bivens* remedy is unavailable. *Id.* at 1858. "In sum, if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, then courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III." *Id.* (emphasis added).

III

Applying these principles to the case before us, we address first whether this case arises in a new *Bivens* context — a context distinct from the contexts in the Supreme Court's three *Bivens* cases. If the case does arise in a new context, we must then inquire as to whether there are "special factors counselling hesitation in the absence of affirmative action by Congress." *Abbasi*, 137 S. Ct. at 1857 (cleaned up).

A

The ICE agents contend that because this case arises in the immigration context — *i.e.*, because it concerns ICE agents' enforcement of the INA, rather than traditional law enforcement officers' enforcement of the criminal law, as in *Bivens* — it presents a new *Bivens* context. The plaintiffs respond that while this may be a difference, it is not a *meaningful* one, as required by *Abbasi*. Indeed, they contend that this case arises "squarely" in the same "search-and-seizure context 'in which [*Bivens*] arose'" (quoting *Abbasi*, 137 S. Ct. at 1856) and that, like in *Bivens*, the instant action is against individual line-level officers for violations of the Fourth Amendment. In addition, the plaintiffs argue that their allegations concern actions taken prior to the commencement of any removal proceeding under the INA and therefore that the INA is not relevant to the *Bivens* inquiry.

Agreeing with the ICE agents, we conclude that the plaintiffs' position fails to reckon with the Supreme Court's specific guidance regarding the new-context inquiry. Following that guidance, we find that several of the differences identified in *Abbasi* are present in this case.

First, "the statutory or other legal mandate under which the officer[s] [were] operating" is distinct. *Abbasi*, 137 S. Ct. at 1860. The ICE agents were not enforcing the criminal law, as in *Bivens*, but rather were enforcing the immigration law of the INA. *See id*. The plaintiffs attempt to trivialize this difference, arguing at a general level that because the ICE agents are "federal law enforcement officers" alleged to have "committed unconstitutional searches and seizures," this case arises in the same context as *Bivens* regardless of the statutory mandate under which the ICE agents were operating. Arguing at so general a level, however, not only ignores the language of *Abbasi*, it also fails to appreciate the substantively distinct aspects of immigration enforcement. Immigration enforcement is by its nature addressed toward noncitizens, which raises a host of considerations and concerns that are simply absent in the majority of traditional law enforcement contexts. Indeed, the Supreme Court has recognized as such and has distinguished between immigration enforcement and criminal law enforcement in the past. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984) (holding that the criminal-law exclusionary rule does not apply in removal proceedings); *cf. id*. at 1044 (noting that "[m]ost arrests of illegal aliens away from the border occur during farm, factory, or other workplace surveys. Large numbers of illegal aliens are often arrested at one time, and conditions are understandably chaotic"). And more generally, the INA takes an approach to enforcement that is distinct from the approach taken by criminal laws, favoring arrest and detention *for the purpose of removal* from the United States, while the criminal law imposes incarceration *for the distinct purposes stated in 18 U.S.C. § 3553(a).*

Also, enforcement of the immigration laws implicates broad policy concerns distinct from the enforcement of criminal law. Indeed, the plaintiffs recognized as much in their initial complaint, pointing out the *significance* of the Trump Administration's immigration policy to their case and emphasizing the differences between the policies of the Obama Administration and the Trump Administration:

> In contrast to the Obama Administration's immigration enforcement policies and practices, which discourage ICE agents from stopping individuals absent reasonable suspicion that the individuals had violated federal law, the January 25, 2017 Executive Order [of the Trump Administration] and implementing guidance from [the Department of Homeland Security] have encouraged a broader set of enforcement priorities that "no longer will exempt classes or categories of removable aliens from potential enforcement."

(Citing Department of Homeland Security memoranda from the two Administrations).

In addition, as part of the new-context analysis, the *Abbasi* Court "refused to extend *Bivens* to any . . . *new category* of defendants," and pointed out categories that had been found to be meaningfully distinct from the three *Bivens* cases, such as "federal employer[s]," "military officers," "Social Security officials," a "federal agency," a "private prison operator," "officials from the Bureau of Land Management," and "prison guards at a private prison." *Abbasi* 137 S. Ct. at 1857 (emphasis added). So it is in this case that

the plaintiffs seek to extend *Bivens* liability to a new category of defendants — ICE agents, who are charged with the enforcement of the immigration laws.

Further, the plaintiffs' Fifth Amendment claims have no analogue in the Supreme Court's prior *Bivens* cases. In effect, the plaintiffs attempt to wed the Fifth Amendment equal protection claim of *Davis v. Passman*, which concerned a Congressman firing his female secretary, *see* 442 U.S. at 230–31, with the Fourth Amendment claim of Bivens. But such hybridization cannot alter the fact that the plaintiffs' claim of discrimination "bear[s] little resemblance to the three Bivens claims the Court has approved in the past." *Abbasi*, 137 S. Ct. at 1860.

In short, as the *Abbasi* Court noted, "even a modest extension is still an extension" for purposes of the new-context analysis, 137 S. Ct. at 1864, and the district court was correct in recognizing this in its opinion. Because the plaintiffs seek to extend *Bivens* liability to a new context, we must now inquire as to whether there are any "special factors counselling hesitation [in extending *Bivens* liability] in the absence of affirmative action by Congress." *Id.* at 1857.

B

In determining whether "special factors" are present, we focus on whether Congress *might doubt* the need for an implied damages remedy. *See Abbasi*, 137 S. Ct. at 1858.

Arguing that "special factors" do exist in this case, the ICE agents point to the complex and comprehensive nature of the INA, as well as the "sheer size" of

the immigration system. They emphasize that Congress omitted a private damages remedy for constitutional violations arising from immigration enforcement and investigations while pervasively regulating other aspects of immigration policy and argue that this suggests that Congress intended to exclude such a remedy. The Judiciary's recognition of such a remedy absent statutory authorization would thus, according to the ICE agents, raise grave separation-of-powers concerns. In addition, the ICE agents point to immigration's relation to foreign policy and diplomacy and contend that the plaintiffs' action, in purpose and effect, seeks to alter immigration enforcement policy, which is a role for the Executive, not the Judiciary.

The plaintiffs, by contrast, argue that they are only challenging "run-of-the-mill, unconstitutional law enforcement activity by individual law enforcement agents" and that "this case is not about the U.S. 'immigration system'" as such. The plaintiffs also emphasize that, while the INA does provide "various procedural mechanisms to individuals who have been placed in removal proceedings," the INA "does *not* provide a remedial scheme for violations committed by immigration officials outside of removal proceedings." (Quoting *Diaz-Bernal v. Myers*, 758 F. Supp. 2d 106, 218 (D. Conn. 2010)).

Again, we conclude that the plaintiffs' position fails to take account of the Supreme Court's specific instructions about extending *Bivens* claims. As the ICE agents argue, because immigration enforcement is, at bottom, about ensuring that only those foreign nationals who are legally authorized to be in the United States remain present here, such enforcement

has "the natural tendency to affect diplomacy, foreign policy, and the security of the nation, which . . . counsel hesitation in extending *Bivens*." *Mirmehdi v. United States*, 689 F.3d 975, 983 (9th Cir. 2012) (cleaned up); *see also Abbasi*, 137 S. Ct. 1861–62 (concluding that plaintiffs' claims would "of necessity require an inquiry into sensitive issues of national security" and that this fact "counsell[ed] hesitation 'in the absence of affirmative action by Congress.'" (citation omitted)); *cf. Vanderklok v. United States*, 868 F.3d 189, 209 (3d Cir. 2017) ("[T]he role of the TSA in securing public safety is so significant that we ought not create a damages remedy in this context").

Moreover, immigration enforcement is "a context in which Congress has designed its regulatory authority in a guarded way, making it less likely that Congress would want the Judiciary to interfere." *See Abbasi*, 137 S. Ct. at 1858 (citing *Chappell*, 462 U.S. at 302 (military); *Stanley*, 483 U.S. at 679 (same); *Meyer*, 510 U.S. at 486 (public purse); *Wilkie*, 551 U.S. at 561–62 (federal land)). Indeed, Congress took steps to ensure that the protections it provided in the INA would be exclusive of any additional judicial remedy. *See* 8 U.S.C. § 1252(b)(9) ("Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available only in judicial review of a final order under this section"); *id.* § 1252(g) ("Except as provided in this section . . . , no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute

removal orders against any alien"); *id.* § 1226(e) (limiting court review of the Attorney General's decisions to arrest and detain aliens).

In the same vein, where Congress has provided "an alternative remedial structure . . . , that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Abbasi*, 137 S. Ct. at 1858. And the INA does indeed contain such a remedial structure. *See, e.g.*, 8 C.F.R. § 287.8 (establishing "standards for enforcement activities" conducted under the INA); *id.* § 287.10 (providing for an "[e]xpedited internal review process" of alleged violations of the standards established in § 287.8); *id.* §§ 236.1(d), 1003.38 (providing persons detained under the INA an adversarial bond hearing, with a right to appeal); 8 U.S.C. § 1229a(b) (adversarial removal hearing); *id.* § 1252 (judicial review of removal orders); *see also Alvarez v. ICE*, 818 F.3d 1194, 1206 (11th Cir. 2016) ("The [INA] is 'an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations'" (quoting *Bush,* 462 U.S. at 388)); *De La Paz v. Coy*, 786 F.3d 367, 375–78 (5th Cir. 2015) (detailing the INA's "comprehensive regulation of all immigration related issues," including provisions "specifically designed to protect the rights of illegal aliens," and concluding that the INA "comprises . . . an elaborate remedial scheme [that] precludes creation of a *Bivens* remedy").

The plaintiffs are correct that the protections provided by the INA do not include a money damages remedy and often do not redress constitutional violations that occur apart from removal proceedings. But this misses the point, for the relevant question "is not what remedy the court should provide for a wrong that

would otherwise go unredressed" but instead "whether an elaborate remedial system . . . should be augmented by the creation of a new judicial remedy." *Bush*, 462 U.S. at 388; *see also Chilicky*, 487 U.S. at 421–22 ("The absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation").

Congress's legislative actions in this area persuasively indicate that Congress did not want a money damages remedy against ICE agents for their allegedly wrongful conduct, as indicated by its frequent amendment of the INA and its repeated refusal to provide a damages remedy. *See, e.g.*, REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978; Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359; Act of Oct. 20, 1976, Pub. L. No. 94-571, 90 Stat. 2703; Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911; *see also De La Paz*, 786 F.3d at 377 ("Despite its repeated and careful attention to immigration matters, Congress has declined to authorize damage remedies against individual agents involved in civil immigration enforcement. The institutional silence speaks volumes and counsels strongly against judicial usurpation of the legislative function"). And "legislative action suggesting that Congress does not want a damages remedy is itself a factor counseling hesitation." *Abbasi*, 137 S. Ct. at

1865; *see id.* at 1862 (concluding that, as regarded the plaintiffs' conditions-of-confinement claims, Congress's failure to provide a damages remedy was instructive given its "frequent and intense" interest in the response to the September 11 attacks); *id.* at 1865 (reasoning that, as regarded the plaintiffs' prisoner abuse claims, Congress's failure to provide "a standalone damages remedy against federal jailers" in the Prison Litigation Reform Act, which was enacted after *Carlson*, arguably "suggests Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment").

Finally, *Bivens* actions "have never [been] considered a proper vehicle for altering an entity's policy." *Malesko*, 534 U.S. at 74. Yet, this is what the plaintiffs appear to want. Allegations that they made in their initial complaint specifically targeted the Trump Administration's immigration enforcement policy with the purpose of altering it, even though they attempted in their amended complaint to distance themselves — at leastovertly — from alleging such a purpose, surely to avoid this very discussion. But their purpose was undoubtedly not abandoned, as betrayed by their extensive challenge to policy in their initial complaint *based on the same facts* and by their contention that the Trump Administration's policy gave rise to the conduct that they alleged *in both complaints* was illegal. *See United States v. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984) ("The law is quite clear that [superseded] pleadings constitute the admissions of a party- opponent and are admissible in the case in which they were originally filed as well as in any subsequent litigation involving that party. A party thus cannot advance one version of the facts in its pleadings, conclude that its

interests would be better served by a different version, and amend its pleadings to incorporate that version, safe in the belief that the trier of fact will never learn of the change in stories"). This attack on executive policy represents yet another "special factor counselling hesitation." *Abbasi*, 137 S. Ct. at 1860.

* * *

At bottom, we conclude that the plaintiffs' complaint seeks to extend the *Bivens* remedy to a new context and that the application of *Bivens* to this new context causes us to hesitate, as it raises the substantial question of whether Congress would want the plaintiffs to have a money damages remedy against ICE agents for their allegedly wrongful conduct when enforcing the INA. Accordingly, we conclude that no *Bivens* remedy is available. Because of this ruling, we do not reach the ICE agents' claim of qualified immuity. *See Wilkie*, 551 U.S. at 549 n.4.

We therefore reverse the district court's order denying the ICE agents' motion to dismiss and remand to the district court with instructions to dismiss the plaintiffs' action.

REVERSED AND REMANDED WITH INSTRUCTIONS

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MYNOR ABDIEL TUN-COS *et al.*,

Plaintiffs,

v.

B. PERROTTE et al.,

Defendants.

Civil Action No. 17-cv-943 (AJT/TCB)

ORDER

This matter is before the Court on Defendants' Motion to Dismiss the First Amended Complaint [Doc. No. 38] (the "Motion"). The Court held a hearing on the Motion on January 26, 2018, following which it took the matter under advisement. For the reasons

stated herein, Defendants' Motion is DENIED as to all Plaintiffs.[1]

I. BACKGROUND

This *Bivens*[2] action, filed on August 23, 2017, challenges the legality of stops and home invasions on two occasions. Defendants are agents of the Immigration and Customs Enforcement ("ICE") who are alleged to have conducted the illegal stops and searches while operating as an ICE "Fugitive Operations Team." Am. Compl. ¶ 2. More specifically, seven Plaintiffs[3] allege that on February 8, 2017 in Arlington, Virginia, Defendants engaged in an early morning "home invasion," ostensibly in search of a particular person, and after completing that search without finding that person, Defendants arrested six

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[1] Also pending before the Court is Plaintiffs' Motion for Leave to File Notice of Supplemental Authority Regarding Defendants' Motion to Dismiss, [Doc. No. 47] which the Court will grant.

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

[3] These Plaintiffs include Pedro Velasquez Perdomo, Luis Velasquez Perdomo, German Velasquez Perdomo, Eder Aguilar Aritas, Nelson Callejas Peña, Eduardo Montano Fernández, and Jose Cárcamo who were added as Plaintiffs by way of an Amended Complaint on November 16, 2017. See [Doc. No. 25]. On December 22, 2017, the Court held a hearing on Defendants' Motion to Strike the Seven Additional Plaintiffs from the Amended Complaint. The Court denied that motion without prejudice to any future motions to sever claims for trial or in limine evidentiary motions. [Doc. No. 35].

of these seven Plaintiffs,[4] who were taken to an ICE facility where they were detained for approximately ten hours. *Id.* ¶¶ 31, 49, 51. They were also served with a Notice to Appear dated February 8, 2017 "at a time and place to be set." [Doc. No. 39-3] ("Defs.' Mem. in Support, Ex. 3").

The remaining two Plaintiffs, Mynor Tun-Cos and Jose Saput, allege that during an early morning February 17, 2017 encounter in Annandale, Virginia, Defendants unlawfully stopped them in their vehicle, asked for and received identification,[5] and then demanded a search of Saput's nearby apartment to find "the Houx-Hernandez brothers." Amend. Compl. ¶¶ 55-62. Once there, Defendants searched the apartment and after completing the search without locating the Houx-Herandez brothers, arrested these two Plaintiffs and took them to an ICE detention facility in Lorton, Virginia in an unmarked van. *Id.* ¶¶ 62-63, 65, 67. They were subsequently released with instructions to return for periodic check-ins with ICE officials. *Id.* ¶ 67.

All Plaintiffs assert two Bivens claims - one for violation of Plaintiffs' Fourth Amendment rights, claiming that they were illegally stopped and their homes illegally searched, and one for violation of the Plaintiffs' equal protection rights under the Fifth

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[4] Plaintiff Cárcamo was the only Plaintiff present during this encounter who not arrested and taken to an ICE facility. Amend. Compl. ¶ 49.

[5] Identification was provided by the Plaintiffs but not another occupant.

Amendment, claiming that they were targeted for illegal searches because of their Latino ethnicity. *Id.* ¶¶ 1-4. Defendants move to dismiss the Amended Complaint on the grounds that under Section 242 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252, the Court lacks subject matter jurisdiction as to the claims of all Plaintiffs except Cárcamo because of the pending immigration removal proceedings against those Plaintiffs. *See* 8 U.S.C. § 1252(b)(9). Alternatively, Defendants seek dismissal of the Amended Complaint against all Plaintiffs on the grounds that the *Bivens* remedy should not be extended to the constitutional claims asserted in this action; and that in any event, they are entitled to qualified immunity.

Upon consideration of the Motion, the memoranda and exhibits in support thereof and in opposition thereto, the arguments of counsel at the January 26, 2018 hearing, and for the reasons stated below, the Court concludes that (1) it has subject matter jurisdiction over the Plaintiffs' *Bivens* claims; (2) Plaintiffs have stated cognizable *Bivens* claims, as those claims are against persons properly considered federal law enforcement officers under circumstances that sufficiently approximate those within the recognized contours of that remedy; and (3) Defendants are not entitled to qualified immunity at this time with respect to those claims, as Plaintiffs have sufficiently alleged clear violations of a known constitutional right.

II. STANDARD OF REVIEW

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, a party may challenge a court's

subject matter jurisdiction in an action as an affirmative defense. A party may present a Rule 12(b)(1) motion by contending either that a complaint fails to allege facts upon which subject matter jurisdiction can be based or that the jurisdictional allegations of the complaint are not true. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). Once subject matter jurisdiction has been challenged, plaintiff, as the party asserting jurisdiction, has the burden of proving that subject matter jurisdiction does in fact exist. *Piney Run Preservation Ass'n v. Cty. Comm'rs of Carroll Cty.*, 523 F.3d 453, 459 (4th Cir. 2008). When subject matter jurisdiction is challenged on the grounds that the complaint fails to allege facts sufficient to establish subject matter jurisdiction, "all the facts alleged in the complaint are assumed true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration." *Id.* The Court is also required to regard the pleadings' allegations as evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment. *Adams*, 697 F.2d at 1219; *Trentacosta v. Frontier Pacific Aircraft Indus., Inc.*, 813 F.2d 1553, 1558 (9th Cir. 1987) (citing *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947)). If a district court lacks subject matter jurisdiction over an action, the action must be dismissed. *U.S. ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347 (4th Cir. 2009).

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the complaint. *See Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994); *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1994). A claim should be dismissed "if, after accepting all well-pleaded allegations in the plaintiffs complaint

as true ... it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999); *see also Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001). In considering a motion to dismiss, "the material allegations of the complaint are taken as admitted," *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted), and the court may consider exhibits attached to the complaint, *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F. 2d 1462, 1465 (4th Cir. 1991).

III. ANALYSIS

Defendants move to dismiss this action on the grounds that the (1) INA has eliminated the Court's subject matter jurisdiction over all of Plaintiffs' constitutional claims except those of Plaintiff Cárcamo; (2) the Court should not extend the *Bivens* remedy to the constitutional claims against these Defendants, given the context and the special factors and considerations related to that context; and (3) in any event, Defendants are entitled to qualified immunity.

A. The Court has subject matter jurisdiction over Plaintiffs' *Bivens* claims.

Removal proceedings are pending against all Plaintiffs but Cárcamo; and Defendants contend that in light of those proceedings the Court does not have jurisdiction over these Plaintiffs' *Bivens* claims.

Section 242 of the INA, 8 U.S.C. § 1252, contains two provisions that restrict a district court's jurisdiction. Section 1252(a)(5) assigns "sole and exclusive jurisdiction" to the federal courts of appeals for

judicial review of an order of removal.[6] Section 1252(b)(9), governing the "Consolidation of Questions for Judicial Review," provides in pertinent part that "with respect to review of an order of removal under subsection (a)(1),[7] ... all questions of law and fact, including the interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States ... shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9).[8] The issue here is whether "the

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[6] Section 1252(a)(5) provides in pertinent part as follows:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate **court of appeals** in accordance with this section shall be the **sole** and **exclusive** means for **judicial review of an order of removal** entered or issued under any provision of this chapter . . . . (emphasis added).

[7] Section 1252(a)(1) provides in pertinent part that "[j]udicial review of a final order of removal . . . is governed only by chapter 158 of Title 28 [titled Orders of Federal Agencies; Review]

[8] Section 1252(b)(9) provides as follows:

> (b) **Requirements for review of orders of removal** With respect to review of an order of removal under subsection (a)(1), the following requirements apply:
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> * * *

questions of law and fact" embodied in Plaintiffs' Fourth and Fifth Amendment *Bivens* claims "aris[e] from any action taken or proceeding brought to remove [Plaintiffs] from the United States." *See* 18 U.S.C. § 1252(b)(9).

In *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court considered the scope of § 1252(b)(9). The Court explained that "[Section 1252(b)(9)'s] purpose is to consolidate 'judicial review' of immigration proceedings into one action in the court of appeals, but it applies only 'with respect to review of an a order of removal under subsection (a)(1).' " *St. Cyr*, 533 U.S. at 313 (alterations omitted) (quoting 8 U.S.C. § 1252(b)(9)).[9]

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(9) Judicial review of **all questions of law and fact**, including the interpretation and application of constitutional and statutory provisions, **arising from any action taken or proceeding brought to remove an alien** from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 or Title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact. (emphasis added).

[9] In *St. Cyr*, the Court considered whether the Court had subject matter jurisdiction over a criminal habeas petition by an alien who challenged his removability without the opportunity for a

Applying the reasoning of *St. Cyr*, the lower courts have concluded that § 1252(b)(9) does not apply to a variety of claims that do not challenge or implicate the validity of a final order of removal (whether or not yet issued). For example, in *Singh v. Gonzales*, 499 F. 3d 969, 978 (9th Cir. 2007), the Ninth Circuit concluded that § 1252(b)(9) did not deprive the district court of jurisdiction over an ineffective assistance of counsel claim presented within a habeas action, since the relief obtainable, if successful, was limited to restarting the 30 day period to appeal a final order of removal to the court of appeals, rather

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waiver of inadmissibility at the discretion of the Attorney General. Distinguishing between "judicial review" and "habeas review," the Court concluded that it had subject matter jurisdiction. *St. Cyr*., 533 U.S. at 313. Congress subsequently amended § 1252 (b)(9) in the REAL ID Act by adding language that explicitly included habeas petitions within its scope. Real ID Act of 2005, Pub.L. 109–13, 119 Stat. 231. That amendment, however, did not affect the basis for the Court's conclusion that § 1252(b)(9) applies only to a review of an a order of removal under subsection (a)(1). *See Singh v. Gonzales*, 499 F. 3d 969, 978 (9th Cir. 2007) ("The language added by the REAL ID Act does nothing to change or undermine that analysis [in St. Cyr]."); *Chezazeh v. Attorney General of the United States*, 666 F.3d 118, 132 (11th Cir. 2012) ("Although St. Cyr issued prior to the REAL ID Act, the REAL ID Act did not modify § 1252(b) or the instruction that § 1252(b)(9) applies only [w]ith respect to review or an order of removal under section (a)(1).") (citations omitted) (alteration in original).

than invalidating an order of removal.[10] The Third and Eleventh Circuits have likewise concluded that § 1252(b)(9) does not apply where, rather than challenge an order of removal, the challenge is based on there being no order of removal. *See Chehazeh v. U.S. Atty. Gen.*, 666 F.3d 118, 131 (3d Cir. 2012) ("[T]he Supreme Court has noted that § 1252(b)(9) is subject to limitations of § 1252(b), and therefore, 'applies only with respect to review of an order of removal under subsection (a)(1).' ") (quoting *St. Cyr*, 533 U.S. at 313) (alterations omitted); *Madu v. U.S. Atty. Gen.*, 470 F.3d 1362, 1367 (11th Cir. 2006) ("Because we find that [petitioner] does not challenge a final administrative order of removal or seek review of a removal order, neither section 106(c) nor section 1252(a)(5) apply to this case.") (internal quotation marks omitted). To the extent that courts have concluded that claims not directly challenging an order of removal are nevertheless within the scope of § 1252(b)(9), it has been with respect to claims, such as a right to counsel claim, that affect centrally the integrity of the removal proceedings. *See, e.g., Aguilar v. United States*, 510 F.3d 1, 13 (1st Cir. 2007); J.E.F.M. v. Lynch, 837 F.3d 1026, 1035 (9th Cir. 2016).

In *Aguilar*, the First Circuit considered in depth the scope of § 1252(b)(9). On the one hand, it

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[10] In reaching that conclusion, the court noted that according to the legislative history § 106 of the REAL ID Act " 'would not preclude habeas review over challenges to detention that are *independent of challenges to removal orders*. Instead, the bill would eliminate habeas review *only over challenges to removal orders*.' " *Singh*, 499 F. 3d at 978 (quoting H.R.Rep. No. 109-72, at 175H.R.Rep. No. 109-72, at 175, 2005 U.S.C.C.A.N. 240, 299).

rejected the contention that § 1252(b)(9) applies only to "singular orders of removal or to removal proceedings simpliciter" and therefore does not apply to claims based on actions that occurred before the institution of any formal removal proceedings. *Aguilar*, 510 F.3d at 9. On the other hand, it emphasized that § 1252(b)(9) is not "limitless in its scope." *Id*. at 10. The Court of Appeals recognized that while "[t]he words 'arising from' do not lend themselves to precise application, ... those words are not infinitely elastic" and "cannot be read to swallow all claims that might somehow touch upon, or be traced to, the government's efforts to remove an alien." *Id*. at 10. (internal citations omitted). Overall, it concluded that "Congress's choice of phrase suggests it did not intend § 1252(b)(9) to sweep within its scope claims with only a remote or attenuated connection to the removal of an alien." *Id*. "Courts consistently have recognized that the term 'arising from' requires more than a weak or tenuous connection to a triggering event." Id. (citations omitted). Noting, as the Ninth Circuit did in *Singh*, that Congressional intent, as reflected in legislative history, was to create an exception for claims "independent" of removal, the First Circuit characterized § 1252(b)(9) as a "judicial channeling provision, not a claim - barring one." *Id*. at 11. The First Circuit therefore concluded that " 'arising from' in section 1252(b)(9) . , , exclude[s] claims that are independent of, or wholly collateral to, the removal process. Among others, claims that cannot effectively be handled through the available administrative process fall within that purview." *Id*. It also found relevant in determining the scope of § 1252(b)(9) whether its application would "foreclose all meaningful judicial review." *Id*. at 14 (*quoting Thunder Basin Coal Co.*

v. Reich, 510 U.S. 200, 212-13 (1994) (internal quotation marks omitted)). With these principles in mind, the First Circuit concluded that § 1252(b)(9) deprived the district court of jurisdiction over a right to counsel claim since that claim was "part and parcel of the removal proceeding itself." *Id*. at 13 ("So viewed, an alien's right to counsel possesses a direct link to, and is inextricably intertwined with, the administrative process that Congress so painstakingly fashioned."). In short, the First Circuit viewed the right to counsel claim as inseparable from the validity of any order of removal that might issue from that proceeding. *Id*. at 13-14. It concluded otherwise, however, with respect to the plaintiffs' Fifth Amendment substantive due process claims based on the treatment of their minor children.[11] *Id*. at 19. It also cited with approval its earlier decision that challenges to the legality of detention are not barred by § 1252(b)(9) and surmised that constitutional challenges regarding the availability of bail would likewise fall outside that section's reach. *Id*. at 12.

In *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), the Supreme Court recently considered how to determine under § 1252(b)(9) whether a legal question "aris[es] from any action taken or proceeding brought to remove an alien from the United States." Considering that issue within the context of a *Bivens* claim challenging an alien's detention during immigration removal proceedings without the opportunity for a bail hearing, a majority of the Court concluded that §

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[11] The Court dismissed these claims, however, for failure to state a claim. *Id*. at 24.

1252(b)(9) did not deprive the district court of jurisdiction over those claims, *albei*t on different rationales. Echoing but not citing the decision in *St. Cyr*, three justices (Justices Ginsburg, Breyer, and Sotomayor), in an otherwise dissenting opinion, concluded that § 1252(b)(9) did not apply because it "by its terms applies only '[w]ith respect to review of an order of removal under [§ 1252(b)(9)].' " *Id.* at 876 (Breyer, J., dissenting) (alteration in original) (quoting 8 U.S.C. § 1252(b)).

In Part II of the Court's plurality opinion, two other justices (Chief Justice Roberts and Justice Kennedy) concluded that § 1252(b)(9) did not deprive the Court of jurisdiction based on essentially a causation analysis. *See id*. at 839-41. In that regard, the plurality opinion "assume[d] for the sake of argument that the actions taken [to detain without a bail hearing] . . . constitute 'actions taken to remove them from the United States' " and with that assumption, identified the dispositive issue as "whether the legal questions that we must decide 'arise from' the actions taken to remove these aliens." *Id*. at 840 (alterations omitted) (quoting 8 U.S.C. § 1252(b)(9)). The plurality opinion conceded that the legal question could be viewed in that fashion "in the sense that if those actions had never been taken, the aliens would not be in custody at all." *Id*. It rejected, however, that "expansive interpretation" because "cramming judicial review of those questions into the review of final removal orders would be absurd." *Id*. Moreover, such an "expansive interpretation of § 1252(b)(9) would lead to staggering results[,]" including eliminating any review at all since "[b]y the time a final order of removal was eventually entered, the allegedly excessive detention

would have already taken place. And of course, it is possible that no such order would ever be entered in a particular case, depriving the detainee of any meaningful chance for judicial review." *Id.* Under the plurality opinion, the issue is not whether absent removal proceedings, the alien would have been subjected to the challenged conduct but whether the specific claims at issue, i.e., "the legal questions" in the case, "arise from" the specific actions taken to remove the alien. [12] Overall, the plurality opinion concluded that "it was not necessary for us to attempt to provide a comprehensive interpretation. For present purposes, it is enough to note that [the detained aliens] are not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal; and they are not even challenging any part of the process by

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[12] Within the context of the legal questions presented in *Jennings*, the plurality opinion articulated this causation differentiation as follows: "the applicability of § 1252(b)(9) turns on whether the *legal questions* that we must decide *arise* from the actions taken to remove these aliens." *Jennings*, 138 S. Ct. at 840 (emphasis added). There, the plurality opinion concluded that the legal questions related to the decision not to afford a bail hearing after detention were "too remote from the actions taken to fall within the scope of § 1252(b)(9)." *Id.* Under this analysis, it would appear that the plurality opinion in substance incorporates concepts that in other contexts recognize the difference between "but-for transaction causation" (i.e., absence removal proceedings, the alien would not have been subjected to the challenged conduct) and "loss causation" (i.e., the challenged conduct issues directly out of some action necessary to the process of removing an alien).

which their removability will be determined." *Id*. at 841.

In a third opinion, Justice Thomas, joined by Justice Gorsuch, concluded that § 1252(b)(9) *did* deprive the Court of jurisdiction, since even construing § 1252(b)(9) narrowly, "detention *is* an 'action taken to remove' an alien." *Id*. at 855 (Thomas, J.) (alterations omitted) (quoting 18 U.S.C. § 1252(b)(9)). He also considered misplaced the plurality's concerns over barring claims "far afield from removal" since "[u]nlike detention during removal proceedings, those actions [that the plurality viewed as too remote] are neither congressionally authorized nor meant to ensure that an alien can be removed. Thus, my conclusion that § 1252(b)(9) covers an alien's challenge to the *fact* of his detention (an action taken in pursuit of the lawful objective of removal) says nothing about whether it also covers claims about inhumane treatment, assaults, or negligently inflicted injuries *during* detention (actions that go beyond the Government's lawful pursuit of its removal objectives)." *Id*.[13]

Here, Plaintiffs claim that their Fourth and Fifth Amendment rights were violated when certain of the Plaintiffs were illegally targeted and stopped

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[13] Because his analysis is also premised on a sufficiently direct link to the removal process, Justice Thomas' analysis departs from the plurality opinion not so much in its methodology but rather in its assessment concerning how directly related the bail hearing was to an action necessary for the authorized purpose of removing an alien, i.e., detention. *See Jennings*, 138 S. Ct. at 853-59 (Thomas, J.).

and their homes illegally invaded. Based on those allegations, they are seeking damages. They "are not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal; and they are not even challenging any part of the process by which their removability will be determined." *Id.* at 841. Likewise, they are not challenging conduct that is "congressionally authorized nor meant to ensure that an alien can be removed." *Id.* at 855 (Thomas, J., concurring in part). Rather, they are challenging "actions that go beyond the Government's lawful pursuit of its removal objectives." *Id.* While the challenged conduct arguably would not have happened absent the institution of removal proceedings, Defendants' alleged violations of Plaintiffs' Fourth and Fifth Amendment rights are not "a direct link to, and . . . inextricably intertwined with, the administrative process that Congress so painstakingly fashioned" or "part and parcel of the removal proceeding itself." *Aguilar, supra* at 13. Two Plaintiffs have raised in substance their Fourth and Fifth Amendment claims in their removal proceedings for the purpose of suppressing certain evidence. *See* Defs.'s Ex. 1; Defs.'s Ex. 2.[14] But simply because the

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[14] *See* Defs.' Ex. 1 ("Tun-Cos Mot. to Suppress Evid. & Term. Procs., at 7-12; Defs.' Ex. 2 ("Saput Mot. To Suppress Evid. & Term. Procs.," at 7-12 to Suppress Evidence and Terminate Proceedings"). Specifically. Plaintiffs Jose Saput and Mynor Tun-Cos moved for suppression of evidence obtained as a result of Defendants' unlawful seizure, interrogation, and detention of Plaintiffs. contending Defendants had neither reasonable suspicion to justify a seizure nor reasonable suspicion to interrogate them and that Defendants' actions were based solely on Plaintiffs

Defendants' conduct may have consequences within the removal proceedings does not equate their claims with those that "arise from" an action or proceeding to remove an alien. Further, the legal question to be considered during the removal proceedings in connection with the two Plaintiffs' motion for suppression is somewhat different than under Bivens, as reflected by the legal standards applicable to those respective claims[15] as well as Plaintiffs' request for damages against ICE agents sued in their individual capacity. In short, Plaintiffs' success or lack of success in this action will have absolutely no effect on the removal proceedings, which cannot in any event grant Plaintiffs the relief they seek. For all the above reasons,

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race, ethnicity, or perceived national origin. Defs.'s Ex. 1, 2; Defs.' Ex. 2, 2.; cf. Am. Compl. ¶ 3 ("Defendant ICE agents violated Plaintiffs' clearly established constitutional rights by detaining them at length without a reasonable, articulable suspicion" that Plaintiff had violated any law but rather Defendants conducted the unlawful searches and seizures on the basis Plaintiffs "appeared to be of Latino race or ethnicity.").

[15] Plaintiffs' motion to suppress in their immigration proceedings will be assessed by an "egregiousness" standard, *See Yanez-Marquez v. Lynch*, 789 F.3d 434, 450 (4th Cir. 2015) ("the exclusionary rule applies in removal proceedings to egregious violations of the Fourth Amendment"); whereas, Plaintiffs' Fourth Amendment claims will be assessed under the standard of reasonableness. *See INS v. Delgado*, 466 U.S. 210, 215 (1984); *see also United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

Plaintiffs' claims are outside the scope of § 1252(b)(9).[16]

B. Plaintiffs have adequately alleged a plausible *Bivens* claim.

Defendants alternatively seek dismissal on the grounds that the *Bivens* remedy Plaintiffs assert has not been recognized by the Supreme Court under the circumstances of this case and an extension of *Bivens* in this case is unwarranted under established jurisprudence.

The Supreme Court recently outlined the following analysis for determining whether a claim arises in a new *Bivens* context:

If the case is different in a meaningful way from previous Bivens cases decided by this Court, the context is new. Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. A case might differ in

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[16] In concluding that § 1252(b)(9) does not deprive the Court of jurisdiction over the Plaintiffs' claims, the Court joins other district courts that have uniformly reached the same conclusion with respect to comparable claims. *See, e.g., Diaz-Bernal v. Myers*, 758 F. Supp. 2d 106, 123 (D. Conn. 2010) (finding jurisdiction even with the existence of a final order since constitutional claims did not arise out of the order of removal); *see also Escobar v. Gaines*, No. 3-11-0994, 2014 WL 4384389, at *2 (M.D. Tenn. Sept. 4, 2014) (finding court's jurisdiction not stripped by § 1252(b)(9) over plaintiffs' *Bivens* claims).

a meaningful way because of the rank of officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusions by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

Ziglar v. Abbassi, 137 S. Ct. 1843, 1859-60 (2017). In determining whether a *Bivens* remedy should be recognized in that case, the Court in *Abbassi* compared the respondents' claims[17] to already recognized *Bivens* claims[18] and noted that a new context arises in cases where "even a modest extension" exists. *Id.* at 1864.

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[17] At issue in *Abbassi* were claims challenging the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy formulated in response to a terrorist attack. *Abbassi*, 137 S. Ct. at 1860. The Supreme Court concluded that those claims were significantly different and therefore a "new context" than that in which *Bivens* had been previously applied. *Id.*

[18] The Supreme Court referenced "a claim against FBI agents for handcuffing a man in his own home without a warrant; a claim against a Congressman for firing his female secretary; and a claim against prison officials for failure to treat an inmate's asthma." (citing *Davis v. Passman*, 442 U.S. 228 (1979), *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), and *Carlson v. Green*, 446 U.S. 14 (1980)).

The alleged conduct in this case has the recognizable substance of Fourth Amendment violations. Nevertheless, Defendants are ICE agents, rather than traditional law enforcement officers, federal workplace supervisors, or prison officials and were purporting to operate under a different "statutory or other legal mandate" than the officials outlined in the "traditional" *Bivens* claims referenced in *Abbassi*. For these reasons, the Court assumes that this case presents a "modest extension" in a "new context" for the application of a *Bivens* remedy and will therefore determine whether "(1) Congress has not already provided an exclusive statutory remedy; (2) there are no 'special factors counseling hesitation in the absence of the affirmative action by Congress; and (3) there is no 'explicit congressional declaration' that money damages not be awarded." *Hall v. Clinton*, 235 F.3d 202, 204 (4th Cir. 2000) (quoting Bivens, 403 U.S. at 396-97).

Defendants do not contend that Congress has already provided an exclusive statutory remedy for Plaintiffs' constitutional claims or that there is an "explicit congressional declaration that money damages not be awarded." The issue then reduces to whether any "special factors" counsel against extending an implied right of action within the context of this case. As identified in *Abbassi*, special factors include, among others, whether Plaintiffs' claims are the "proper vehicle for altering an entity's policy," *Abbassi*, 137 S. Ct. at 1860; whether Plaintiffs' challenges raise "separation-of-powers" concerns, *id.* at 1857 (internal quotation marks omitted); and whether Congress's interest has been "frequent and intense[,]" *id.* at 1862 (internal quotation marks omitted). Based on all the

facts and circumstances involved with Plaintiffs' claims, there are no "special factors" that counsel against recognizing a *Bivens* remedy for the constitutional violations alleged in this case.

First, Plaintiffs are not challenging an entity's policy.[19] Rather, they are claiming straight-forward violations of their Fourth and Fifth Amendment rights based the Defendants' conduct. Moreover, while Defendants are ICE agents, they nevertheless fall within the broad category of federal law enforcement officers, whose conduct raises the same issues and concerns as in *Bivens*.[20] Second, Plaintiffs' claims do not raise the same separation-of-power concerns that in *Abbassi* counseled against the recognition of a *Bivens* remedy. Lastly, Congress has not provided an explicit remedy for Plaintiffs' claims, nor has it precluded damages. In fact, the Supreme Court in *Bivens* itself found significant that there was "no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment

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[19] Defendants contend otherwise, based on the reference to President Trump's immigration policy in the original Complaint. That reference has been eliminated in the superseding Amended Complaint, which does not base Plaintiffs' claims on any such policy. *See Young v. City of Mount Ranier*, 238 F.3d 567, 572 (4th Cir. 2001) ("an amended pleading ordinarily supersedes the original and renders it of no legal effect") (internal quotation marks omitted).

[20] In this regard, Plaintiffs allege that during the alleged confrontations, some of the Defendants repeatedly identified themselves as "the police." *See e.g.*, Am. Compl. ¶¶ 21, 22.

may not recover money damages for the agents." *See, e.g.*, *Bivens*, 403 U.S. at 397.[21] Defendants argue that Congress's intent to preclude a *Bivens* damages remedy can be found in its failure to provide for an explicit damages remedy in the INA, while otherwise "aggressively" legislating in the immigration area. However, while Congress can preclude a lesser remedy than a *Bivens* action, here Congress has provided no remedy whatsoever. Congress's silence in this context does not reliably reflect any Congressional intent to preclude a *Bivens* damages remedy, particularly given the long standing judicial recognition of a *Bivens* remedy for the types of Fourth and Fifth Amendment claims asserted in this case. For these reasons, there are no special factors that would counsel against a *Bivens* remedy for Plaintiffs' claims.

C. Defendants are not entitled to Qualified Immunity.

The doctrine of qualified immunity shields government officials from civil liability when their conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Whether the invocation of qualified immunity is appropriate therefore requires courts to assess whether there was a violation of a constitutional right and whether the "right in question" is one that is " 'clearly established.' " *Vance v. Rumsfeld*, 701 F.3d 193, 197 (4th Cir. 2012) (quoting

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[21] Footnote missing.

Pearson, 555 U.S. at 243). Whether a "clearly established" right has been violated is to be determined within the specific context of the case and depends on "[whether] it was clear to a reasonable officer that the conduct in which he allegedly engaged was unlawful in the situation he confronted." *Merchant v. Bauer*, 677 F.3d 656, 662 (4th Cir. 2012) (quoting *Figg v. Schroeder*, 312 F.3d 625, 635 (4th Cir. 2002)). Further, government officials are entitled to qualified immunity in cases where a plaintiff does not "plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

Defendants claim that they are entitled to qualified immunity in their personal capacities on the grounds that (1) Plaintiffs Saput and Tun Cos fail to allege facts that make plausible that Defendants committed a clearly established Fourth Amendment violation during the February 17, 2017 incident; (2) the remaining Plaintiffs fail to allege with the required specificity each Defendant's involvement in the February 8, 2017 incident; and (3) all Plaintiffs have failed to adequately plead a violation of the Fifth Amendment.

1. Plaintiffs Saput and Tun Cos sufficiently allege "clearly established" violations of the Fourth Amendment during the February 17, 2017 incident.

The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. Defendants concede for the purposes of the Motion that an investigatory stop occurred, but that it was

not unreasonable and therefore was not constitutionally infirm. At a minimum, Defendants contend that under the circumstances alleged, they did not violate a known, clearly established constitutional right.

Under the Fourth Amendment reasonableness analysis, law officials "may initiate a brief investigatory stop if the officer had reasonable suspicion to believe that 'criminal activity may be afoot.' " *United States v. Griffin*, 589 F.3d 148, 152 (4th Cir. 2009) (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). "An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity" and must be limited to satisfy the officer's suspicion. *United States v. Cortez*, 449 U.S. 411, 417(1981) (citations omitted); *see also Illinois v. Caballes*, 543 U.S. 405, 407 (2005). The Amended Complaint alleges facts sufficient to make plausible that Fourth Amendment violations occurred. As alleged, Defendants pulled over Plaintiffs Saput and Tun Cos based on their ethnicity and without reasonable suspicion that either was engaged in criminal activity, and then engaged in what Plaintiffs essentially allege was a pretextual investigation and search based on their purporting to search for the Houx-Hernandez brothers. *See* Am. Compl. ¶¶ 55, 61, 63, 79-81; *see also United States v. Sundiata*, 3 F. Supp. 2d 682, 686 (E.D. Va. 1998) ("[R]ace is not a proper basis for an investigatory stop . . . ."). Based on the allegations, these Plaintiffs have alleged facts that make plausible that Defendants lacked an "objective manifestation" of illegality when they stopped and questioned these Plaintiffs and violated a "clearly established" right by seizing and detaining these Plaintiffs on the account of their race.

2. Plaintiffs sufficiently allege with specificity each Defendants' involvement in the February 8, 2017 incident.

Plaintiffs have alleged at this stage each Defendants' involvement with a sufficient level of factual specificity to give "fair notice" of the claims asserted against each individual and the conduct relied on for those claims.[22] Plaintiffs allege that all Defendants participated in either the February 8, 2017 or February 17, 2017 incidents; and to the extent the Amended Complaint fails to allege Defendants' full names as to each incident, they have been identified based on the information reasonably available to the Plaintiffs and with sufficient specificity to provide notice to each Defendant of the claims asserted.[23] *See* Am. Compl. ¶¶ 2, 18. For these reasons, Defendants are not entitled to qualified immunity on the ground that the Plaintiffs have failed to state with specificity each Defendants' involvement.

3. All Plaintiffs have adequately alleged Fifth Amendment violations.

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[22] A complaint satisfies the notice requirement of the pleading requirement if it " 'give[s] the defendants] fair notice of what the ... claim is on the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41 (1957)).

[23] Plaintiffs allege that they have identified the Defendants as they appear on their 1-213 form. Am. Comp. ¶ 18, n. 1 ("A Form 1-213 is an official record routinely prepared by an immigration officer at the time of the initial processing of an individual suspected of being unlawfully present in the United States.").

Plaintiffs have also adequately pleaded that they were discriminated against on the basis of race or ethnicity. The law is well settled that the equal protection component of the Due Process Clause of the Fifth Amendment "prohibit[s] the United States from invidiously discriminating between individuals or groups." *Washington v. Davis*, 426 U.S. 229, 239 (1976) (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)). Specifically, Plaintiffs allege that Defendants intentionally "targeted, questioned, and seized Plaintiffs" because of their "race, ethnicity, and/or perceived national origin." Am. Compl. ¶ 85. Plaintiffs' claims are supported by their factual allegations that Defendants continued to detain them even though none of the Plaintiffs resembled the suspects they were looking for "other than that they all appear[ed] to be men of Latino race or ethnicity." *Id.* ¶ 64. As to Plaintiff Cárcamo, one Defendant asked if there were "other Spanish families" living in the neighborhood, as the Defendants questioned, searched, and seized Plaintiffs without reasonable, articulable suspicion that they had violated the law. *Id.* ¶ 77. Based on the allegations, Plaintiffs have alleged facts sufficient to make plausible their claims of Fifth Amendment violations.

IV. CONCLUSION

For the reasons stated above, the Court has subject matter jurisdiction as to all claims by all Plaintiffs, Plaintiffs have stated a *Bivens* claim against the Defendants, and Defendants are not entitled to qualified immunity based on the allegations of the Amended Complaint. Accordingly, it is hereby

ORDERED that Plaintiffs' Motion for Leave to File Notice of Supplemental Authority Regarding Defendants' Motion to Dismiss. [Doc. No. 47] be, and the same hereby is, GRANTED; and it is further

ORDERED that Defendants' Motion to Dismiss the First Amended Complaint [Doc. No. 38] be, and the same hereby is, DENIED.

The Clerk is directed to forward copies of this Order to all counsel of record.

s/ Anthony J. Trenga

Anthony J. Trenga
United States District Judge

Alexandria, Virginia
April 5, 2018

APPENDIX C

FILED: August 22, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1451
(1:17-cv-00943-AJT-TCB)

Mynor Abdiel Tun-Cos, José Pajarito Saput, Luis Velasquez Perdomo, Eder Aguilar Aritas, Eduardo Montano Fernández, Pedro Velasquez Perdomo, José Cárcamo, Nelson Callejas Pena, and Germán Velasquez Perdomo,

Plaintiffs-Appellees

v.

B. Perrotte, T. Osborne, D. Hun Yim, P. Manneh, and A. Nicholas

Defendants-Appellants

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court
s/ Patricia S. Connor, Clerk