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No. 08-1529

In The
Supreme Court of the United States

ESTHER HUI AND STEPHEN GONSALVES,
Petitioners,
v.

YANIRA CASTANEDA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCISCO CASTANEDA, ET AL.,
Respondents.

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

BRIEF OF AMICUS CURIAE NATIONAL IMMIGRANT JUSTICE CENTER IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES. iii

INTEREST OF *AMICUS CURIAE*. 1

SUMMARY OF THE ARGUMENT. 1

ARGUMENT. 3

I. THE GROWING IMMIGRANT DETAINEE POPULATION IS HELD IN CUSTODY IN A LABYRINTH OF DETENTION FACILITIES OWNED BY VARIOUS GOVERNMENT ENTITIES AND PRIVATE COMPANIES. 3

II. THE DIHS, A COMPONENT OF ICE'S DETENTION AND REMOVAL OPERATIONS, HAS RESPONSIBILITY FOR ENSURING HUMANE CONDITIONS FOR IMMIGRANT DETAINEES. 6

A. ICE Has Detention Standards For Medical Care, But They Are Not Legally Enforceable. 9

B. Immigrant Detainees Have No Right To Counsel, Speak Limited English, And Face Insurmountable Procedural Obstacles When They Request Medical Treatment. 10

III. SERIOUS PROBLEMS WITH MEDICAL CARE SERVICES BEING PROVIDED TO IMMIGRANT DETAINEES HAVE BEEN

REPORTED IN STUDIES AND BY THE MEDIA. 11

A. The Bellevue/New York University Report. 11

B. The Washington Post Articles. 13

C. Recent Articles In The New York Times. 16

IV. THE GOVERNMENT'S RESPONSE TO REPORTS OF DETAINEE DEATHS AND INADEQUATE MEDICAL CARE. 17

V. THE PETITIONERS IGNORE THE SHAMING FUNCTION OF *BIVENS* LIABILITY WHILE OVERSTATING ITS POTENTIAL EFFECTS ON RECRUITMENT, DESPITE THE FACT THAT PHS, ITSELF, STATES THAT IT PROVIDES MALPRACTICE INSURANCE TO ITS RECRUITS. 20

CONCLUSION. 22

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INTEREST OF *AMICUS CURIAE*[1]

The National Immigrant Justice Center ("NIJC") is a nationally-recognized non-governmental organization ("NGO") that provides direct legal services to thousands of detained and non-detained immigrants and asylum-seekers each year. This direct services expertise informs NIJC's advocacy, litigation, and educational initiatives, promoting the rights of individuals on a local, regional, national, and international stage. NIJC, along with its network of over 1000 pro bono attorneys, monitors detention conditions for immigrant detainees and regularly observes basic rights violations at detention facilities. Through relationships and partnerships with policymakers and NGOs, NIJC is a leader in advocating for due process protections and in addressing human rights issues facing noncitizens.

SUMMARY OF THE ARGUMENT

Because *Bivens* actions play an important function of exposing and labeling as unconstitutional mistreatment that falls below constitutional standards – mistreatment which otherwise would remain unchecked – the repeated failure of immigration authorities to ensure adequate medical treatment for all immigrant detainees ought to weigh heavily in this Court's decision in this matter. Amicus submits this

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[1] Pursuant to Rule 37.6, Amicus Curiae states that no counsel for a party authored this brief in whole or in part, and that no party or counsel for a party made a monetary contribution intended to fund this brief's preparation or submission. Each party has consented to the filing of this brief. The parties' letters of consent are filed with the Court.

brief to draw the Court's attention to grave and continuing problems in medical treatment of detainees in the immigration detention system.

The immigrant detainee population is held in custody by ICE in a sprawling labyrinth of detention facilities owned by various governmental entities and private companies. The Division of Immigration Health Services ("DIHS") serves as ICE's medical authority as to those detainees. DIHS provides for the primary health care of detainees housed in ICE detention centers and also provides or arranges for health care for other ICE detainees. Although ICE has detention standards for medical care, the standards are not themselves legally enforceable. Immigrant detainees, who have no right to counsel and speak limited English, face insurmountable procedural obstacles when they request medical treatment.

Over the past decade, serious problems with medical care provided to immigrant detainees have been reported in study after study, and have been reported extensively by the media. These reports tell chilling stories of preventable suffering. As one nurse was quoted as saying, "Dogs get better care in the dog pound." These reports have led Congress to hold hearings on the treatment of immigrant detainees, and has led to investigations by the Government Accountability Office ("GAO") and Executive branch officials. But these efforts have not led thus far to significant improvements, and in the absence of continued attention to these issues – attention that *Bivens* actions would garner – improvements are unlikely.

Finally, while the Petitioners understate the importance of *Bivens* actions in labeling and deterring unconstitutionally deficient treatment, they overstate the importance of liability insurance. Petitioners and Amici in support of Petitioners focus on the alleged effects which the Ninth Circuit's decision would have on the U.S. Public Health Service's ("PHS") recruitment. This overlooks the fact that PHS, itself, states that it provides malpractice liability insurance to its recruits.

ARGUMENT

I. THE GROWING IMMIGRANT DETAINEE POPULATION IS HELD IN CUSTODY IN A LABYRINTH OF DETENTION FACILITIES OWNED BY VARIOUS GOVERNMENT ENTITIES AND PRIVATE COMPANIES.

Instead of developing a network of centers run by the federal government, ICE subcontracts to a variety of entities for "jail space," a rotating collection of jails that take turns housing ICE detainees for unpredictable lengths of time. In 2008, 378,582 immigrant detainees from 221 countries were held in custody or supervised by ICE. Dr. Dora Schriro, Immigration and Customs Enforcement, U.S. Department of Homeland Security, *Immigration Detention Overview and Recommendations*, October 6, 2009, available at http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf. That makes ICE detention the largest detention system in the country, *id.* at 2, a vast labyrinth of disparate detention facilities located throughout the country, each of which have different functions and ownership. Service Processing Centers (SPCs) are owned by ICE

and staffed by a combination of federal and contract employees; Contract Detention Facilities (CDFs) are owned by private companies that contract directly with the government and are also staffed by federal and contract employees; and Inter-Governmental Service Agreement facilities (IGSAs) are operated by local governments and are usually public facilities but can also be privately owned. Dedicated IGSAs are facilities with detention space reserved exclusively for ICE. Other facilities used by ICE include staging facilities for transportation, holding facilities, and hospitals for emergency care. *Medical Care and Treatment of Immigration Detainees and Deaths in DRO Custody*, Hearing on March 3, 2009, before the H. Appropriations Comm., Subcomm. on Homeland Security 2 (statement of James T. Hayes, Director, Office of Detention and Removal Operations), available at http://appropriations.house.gov/Witness _testimony/HS/James_Hayes_03_03_09 .pdf.

The total number of detainees in 2009 is estimated to have reached at least 369,483, which is more than twice what the total was a decade ago in 1999. *TRAC Immigration, Huge Increase in Transfers of ICE Detainees* (2009) http://trac.syr.edu/immigration /reports/220 (the "TRAC Report"). As of March 2009, approximately 67 percent of the ICE population was in IGSA facilities, the approximately 300 state and local jails that receive a daily fee for their bed space under contracts with ICE, 15 percent were in contract Detention Facilities, and 10 percent were in ICE-owned facilities, with the remainder housed by the Office of Refugee Resettlement, the Bureau of Prisons, or other, less restrictive detention settings. Statement of James T. Hayes at 2.

At any one point, ICE employs approximately 350 jails and detention centers, Department of Homeland Security, Office of Inspector General, *ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities* OIG-08-52, June 2008, 2, available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_08-52_Jun08.pdf ("OIG-08-52 Report"), but the actual centers being used are in a state of constant flux. A study by TRAC found that for the period from October 1, 1998 through March 31, 2008, immigrant detainees were housed in 1,528 different facilities. During the 12-month period of April 1, 2007 through March 31, 2008, ICE detainees were housed in 654 different facilities.[2] ICE's "average daily detainee population in December 2007 was 28,702, which was a 61% increase compared to January 2006." OIG-08-52 Report at 2. In 2009, ICE detained more than 32,000 aliens on an average day." Department of Homeland Security, Office of Inspector General, *The*

[2] The TRAC Report analyzed and used data received from FOIA requests to ICE and records obtained by Human Rights Watch through its independent FOIA request. In the Report, TRAC states that its "efforts to obtain data about individual ICE detainees, as well other information to clarify the hodgepodge of confused and secretive records regarding the mix of detention facilities used by the agency to house them, goes back to February 2006. At that time, in addition to seeking information about the detainees and their individual characteristics, TRAC requested copies of all ICE contracts with private companies as well as all the Intergovernmental Service Agreements." Although TRAC ultimately obtained copies from ICE of what it said were complete records of contracts and Intergovernmental Service Agreements and records on each detainee from DHS's Enforcement Case Tracking System, "the materials produced by ICE after more than a two-year delay were both incomplete and heavily redacted." *Id*. at 3.

U.S. Immigration and Customs Enforcement Process for Authorizing Medical Care for Immigration Detainees, OIG-10-23, December 2009, 2 ("OIG-10-23 Report"), available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-23_Dec09.pdf.

This continuous turnover in facilities exacerbates the unpredictable movement of ICE detainees. During the first six months of 2008, the latest period for which data are available, the majority of detainees (52.4%) had been transferred from one detention facility to another at least once, and many more than once. TRAC Report, *supra*. These transfers occur despite the fact that the majority of ICE detainees are detained for less than 30 days. *ICE Fiscal Year 2008 Annual Report* 20, available at http://www.ice.gov/doclib/pi/reports/ice_annual_report/pdf/ice08ar_final.pdf. ICE's system of placing detainees in a variety of facilities has been described as "haphazard" with ICE claiming "an almost unfettered power to transfer detainees at will, resulting in a disorderly system of detainee musical chairs that often violates non-citizens' rights." Human Rights Watch, *Locked Up Far Away, The Transfer of Immigrants to Remote Detention Centers in the United States* (December 2, 2009) 13, available at http://www.hrw.org/en/reports/2009/12/02/locked-far-away.

II. THE DIHS, A COMPONENT OF ICE'S DETENTION AND REMOVAL OPERATIONS, HAS RESPONSIBILITY FOR ENSURING HUMANE CONDITIONS FOR IMMIGRANT DETAINEES.

The Office of Detention and Removal Operations (DRO) is "the primary enforcement arm within ICE for

the identification, apprehension and removal of illegal aliens from the United States." Office of Detention and Removal, http://www.ice.gov/pi/dro/ (last visited Jan. 19, 2010). The Division of Immigration Health Services (DIHS), "is a component of DRO." *The Director's Perspective, The Rapid Pulse: Communiqué of The Division of Immigration Health Services* (Nov. 2009), http://www.inshealth.org/RapidPulse/2009/RPsepoctnov09.pdf (last visited Jan. 19, 2010) ["*The Rapid Pulse Nov. 2009*"]. "DIHS serves as ICE's authority for medical issues. DIHS provides for the primary health care of detainees housed in DIHS-staffed detention centers, and oversees the financial authorization and payment for off-site specialty and emergency care for detainees in ICE custody." OIG-10-23 Report at 2.[3]

DIHS understands itself to share in the enforcement mission of its parent agency. *See*, *e.g.*, *The Director's Perspective, The Rapid Pulse: Communiqué of The Division of Immigration Health Services* (July 2006), http://www.inshealth.org/RapidPulse/2006/RPJuly06.pdf (last visited Jan. 19, 2010) ("DIHS will have a critical role to play in President Bush's Secure Border Initiative (SBI).... One of the goals of the SBI is to end the 'catch and release' of non-Mexican illegal aliens.... One of the remedies to this problem is for DHS to expand the capacity of its detention system

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[3] There appears to be some confusion of the status of DIHS. According to the DRO website, "[p]rimary healthcare for alien detainees is managed by the Division of Immigration Health Services (DIHS). The DIHS is located within the Bureau of Primary Health Care of the Public Health Service of the Department of Health and Human Services (HHS)." Office of Detention and Removal, http://www.ice.gov/pi/dro/ (last visited Jan. 19, 2010).

by bringing more 'beds' online, along with the appropriate staff, in order to detain aliens until their removal. This is where DIHS will play a vital role."); *The Director's Perspective, The Rapid Pulse: Communiqué of The Division of Immigration Health Services* (Sept. 2007), http://www.inshealth.org/RapidPulse/RPSep07.pdf (last visited Jan. 19, 2010) ("I would first like to commend each of you for your commitment and dedication to our mission to protect America by providing health care and public health services in support of immigration law enforcement."); *The Rapid Pulse* Nov. 2009, *supra* ("it is clear where DIHS sits within DRO. Our position at this level in DRO clearly reflects the importance of our contributions as the medical authority for healthcare for the detainees in ICE custody. It also represents a challenge and increased responsibility as leaders, clinicians and healthcare subject matter experts (SMEs)."). Thus, while some individuals at DIHS are commissioned officers of PHS,[4] the DIHS itself is within the enforcement arm of the Department of Homeland Security.

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[4] The PHS Commissioned Corps officers serve in a variety of positions throughout the U.S. Department of Health and Human Services (HHS) and certain non-HHS Federal Agencies and programs such as in the Division of Immigration Health Services of the U.S. Department of Homeland Security. *See* U.S. Public Health Service Commissioned Corps, http://www.usphs.gov/aboutus/questions.aspx#whatis (last visited Jan. 19, 2010).

A. ICE Has Detention Standards For Medical Care, But They Are Not Legally Enforceable.

In 2000, the INS, ICE's predecessor, adopted a set of detention standards to provide minimum safeguards for the fair and humane treatment of detainees. *See* U.S. Immigration and Customs Enforcement, Detention Operations Manual (2000), available at http://www.ice.gov/pi/dro/opsmanual/index.htm. These standards were to apply to facilities that hold non-citizens in ICE custody for 72 hours or more. The Detention Standard for Medical Care in place during Francisco Castaneda's detention in 2006-2007 begins, "All detainees shall have access to medical services that promote detainee health and general well-being." INS Detention Standard, Medical Care, September 20, 2000, p. 1, available at: http://www.ice.gov/doclib/pi/dro/opsmanual/medical.pdf.

These detention standards, however, are merely internal agency guidelines and do not have the binding authority of federal regulations or statutory law, and therefore cannot be meaningfully enforced. *See Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535 (S.D.N.Y. 2009). Indeed, it appears that ICE took no steps to actually enforce the standards, not even training its employees on their contents. *Id*. at 537. "It has become clear that the lack of a legal enforcement mechanism has seriously undermined the effectiveness of the [ICE National Detention] Standards, and that in turn has contributed to the deficiency of medical care provided to detainees in some circumstances." *Problems with Immigration Detainee Medical Care*, June 4, 2008, Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law

Hearing (statement of William H. Neukom, President, ABA), at 4, http://www.abanet.org/poladv/letters/immigration/050209letter_immigration.pdf.

B. Immigrant Detainees Have No Right To Counsel, Speak Limited English, And Face Insurmountable Procedural Obstacles When They Request Medical Treatment.

Amicus NIJC routinely advocates for detainees who need medical care and who cannot obtain it in ICE detention. *See generally Problems with Immigration Detainee Medical Care*, June 4, 2008, Hearing before H. Judiciary Comm., Subcomm. on Immigration, Citizenship, Refugees, Border Security & International Law 10 (statement of Mary Meg McCarthy, Executive Director, National Immigrant Justice Center), http://judiciary.house.gov/hearings/pdf/McCarthy080604.pdf. Even though immigration detention is civil and administrative in nature, the atmosphere is one of criminal imprisonment. Detainees are not afforded the right to appointed counsel, as are criminal defendants and prisoners. Language barriers create further difficulties in obtaining relief in the case of inadequate medical care. Complaints about access to medical care are a constant theme in NIJC's conversations with detained immigrants. The grievances range from the denial of over-the-counter paid medication to a refusal to provide life-sustaining medication for chronic illnesses. Without an attorney or an advocate, these individuals would never have received appropriate medical care. In NIJC's experience, when detainees request treatment or complain about inadequate care, they "face insurmountable procedural obstacles and an

accountability vacuum within both ICE and DIHS." McCarthy Testimony at 10.

III. SERIOUS PROBLEMS WITH MEDICAL CARE SERVICES BEING PROVIDED TO IMMIGRANT DETAINEES HAVE BEEN REPORTED IN STUDIES AND BY THE MEDIA.

A. The Bellevue/New York University Report.

In the past several years there have been documented instances of problems with the medical care services being provided to immigrant detainees held in ICE facilities. For example, in June 2003, the Bellevue/New York University Program for Survivors of Torture and Physicians for Human Rights issued a report, *From Persecution to Prison: the Health Consequences of Detention for Asylum Seekers*, for which it interviewed 70 asylum seekers held in immigration detention (the "2003 Bellevue/NYU Report"). In October 2007, the Director of the Bellevue/NYU program, Dr. Allen S. Keller, then an Associate Professor of Medicine at New York University School of Medicine and a member of the Advisory Board of Physicians for Human Rights, testified at a Hearing on "Detention and Removal: Immigration Detainee Medical Care," in which he recounted the findings of the 2003 study before the House Judiciary Committee's Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, with many of the findings sounding eerily similar to the problems noted more recently:

In this study we interviewed 70 asylum seekers held in immigration detention. We documented both high levels of psychological distress, which worsened during the course of detention, and inadequate or non-existent mental health services. We also documented difficulties accessing medical and dental services for painful and sometimes dangerous health problems. Unfortunately, recent reports in major newspapers such as the *New York Times* and the *Washington Post* demonstrate that the problems we identified with regards to accessing health care in immigration detention have not been corrected. In fact, the concerns are even greater today, because current immigration policies continue to expand the use of immigration detention. While our study focused on asylum seekers in immigration detention, the findings clearly have relevance to all immigrant detainees. [5]

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In addition to inadequate mental health services, more than half of the 62 individuals (56%) who reported having serious health problems reported having at least one serious condition for which they had substantial

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[5] For the 2003 Bellevue/NYU Report, the asylum seekers interviewed were held in detention facilities in the New York City area, including in private contract facilities, such as the Elizabeth Detention Center in Elizabeth, New Jersey, and several county jails in New York, New Jersey and Pennsylvania. Individuals interviewed had already been detained for from one month to four and one-half years. Keller Statement at 1-2.

> difficulty accessing medical services. Many detainees complained of difficulty obtaining specialized care, including treatment for chronic conditions. This raises important questions about what care is appropriate and what can reasonably be delayed. A fundamental problem we saw—and one which appears to persist today—was that health care was provided with, at best, a short-term, stop-gap, "jail mentality." That is, medical care seemed based on the assumption that patients would only be detained for a few days or weeks, while in fact many of the individuals we interviewed were detained for months or years.
>
> As a result, detainees reported that medical conditions perceived as chronic or non-acute could be addressed only after their release from custody. Many also described being aware of bureaucratic difficulties related to obtaining care, including delays in getting approval for certain diagnostic procedures or treatment.

Detention and Removal: Immigration Detainee Medical Care, Oct. 4, 2007, Hearing before H. Judiciary Comm., Subcomm. On Immigration, Citizenship, Refugees, Border Security, and International Law, 2-3 (statement of Allen S. Keller, M.D., Associate Professor of Medicine), http://physiciansforhumanrights.org/library/documents/testimony/a-keller-immigration-subcommitttee.pdf.

B. The Washington Post Articles.

In 2008, The Washington Post ran a series of articles in which it identified 83 deaths of immigration

detainees between March 2003, when ICE was created, and March 2008. The report found that 30 of the deaths were questionable. *See* Dana Priest and Amy Goldstein, *Series: Careless Detention: Medical Care in Immigrant Prisons*, The Washington Post, May 11-14, 2008, available at http://www.washingtonpost.com/wp-srv/nation/specials/immigration/index.html:

> Some 83 detainees have died in, or soon after, custody during the past five years. The deaths are the loudest alarms about a system teetering on collapse. Action taken – or not taken – by medical staff members may have contributed to 30 of those deaths, according to confidential internal reviews and the opinions of medical experts who reviewed some death files for The Post.

Id. at 3.

The case studies tell chilling stories of actions and inaction and decisions made by individuals, some of whom were employed by PHS, that reflect an indifference to pain and suffering and an unwillingness to deal quickly and effectively with extraordinary health situations. Day 1 of the series is entitled, *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, The Detainees in their Care Often Pay a Heavy Cost*, in which the reporters described one death of an immigrant detainee from Ghana in June 2006 at the San Diego Correctional Facility ("SDCF") – the same facility in which

Francisco Castaneda was held from March 27, 2006 until November 17, 2006: [6]

> Osman's death is a single tragedy in a larger story of life, death and often shabby medical care within an unseen network of special prisons for foreign detainees across the country. Some 33,000 people are crammed into these overcrowded compounds on a given day, waiting to be deported or for a judge to let them stay here. *Id.*, Day 1 at 2.
>
> * * *
>
> Medical spending has not kept pace with the growth in population. Since 2001, the number of detainees over the course of each year has more than tripled to 311,000, according to ICE and the Government Accountability Office. Meanwhile, spending for the DIHS and outside care has not quite doubled, ICE figures show. ICE's conflicting population and budget numbers made the trends difficult to determine. *Id.*, Day 1 at 4.

In the article, nurses are quoted as saying, "Dogs get better care in the dog pound." *Id.* at 5. Petitioner Dr.

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[6] Day 2 of the series is entitled, *In Custody, In Pain: Beset by Medical Problems as She Fights Deportation, A U.S. Resident Struggles to Get the Treatment She Needs*; Day 3 is entitled *Suicides Point to Gaps in Treatment: Errors in Psychiatric Diagnoses and Drugs Plague Strained Immigration System*; and Day 4 completes the series with an article entitled, *Some Detainees Are Drugged For Deportation: Immigrants Sedated Without Medical Reason*.

Hui is mentioned as having "sent a memo to DIHS medical director Timothy T. Shack, saying her colleagues were worried that they might be sued because of the substandard care they were giving detainees. The agency's mission of 'keeping the detainee medically ready for deportation' often conflicts with the standards of care in the wider medical community, Hui wrote. 'I know in my gut that I am exposing myself to the US legal standard of care argument. …Do we need to get personal liability insurance?'" *Id.*, Day 1 at 4.

Francisco Castaneda is also discussed in Day 1 of the series under Dana Priest and Amy Goldstein, *E-Mails Show Attempt to "Patch Up" a Case of Medical Negligence* at A9, available at http://www. washington post.com/wp-srv/nation/specials/immigration/ cwc_d1sidebar.html. The article reveals a CCA Inmate/Resident Grievance Form completed by Mr. Castaneda on June 12, 2006 and August 17, 2006, and an e-mail from one physician's assistant to another at SDCF, in which the first physician's assistant requests a "favor" from the other: "Could you somehow 'patch up' that Grievance with an amendment, then put it in my box. I just want to avoid problems when the Auditors show up." *Id.* under "Key Documents." *See also* Thomas Larson, *Go Directly to Jail…and Die*, San Diego Reader, Dec. 10, 2008, available at http://www.sandiegoreader.com/news/2008/dec /10/cover.

C. Recent Articles In The New York Times.

More recently, articles appearing in the New York Times reported new disturbing evidence about detainee deaths that appear to have involved

substandard medical care or abuse. *See* Nina Bernstein, *Documents Reveal Earlier Immigrant Deaths*, N.Y. Times, Jan. 9, 2010, available at http://www.nytimes.com/2010/01/10/nyregion/10deta inside.html and Nina Bernstein, *Officials Hid Truth of Immigrants Deaths in Jail*, N.Y.Times, Jan. 10, 2010, available at www.nytimes.com/2010/01/10/us /10detain.html. The results of the Times investigation reveal "a culture of secrecy" that has endured and may continue to endure:

> But behind the scenes, it is now clear, the deaths had already generated thousands of pages of government documents, including scathing investigative reports that were kept under wraps, and a trail of confidential memos and BlackBerry messages that show officials working to stymie outside inquiry.

1/10/10 NY Times Article. Internal documents suggest that inside ICE there was an appreciation of the "horrible medical stories" that had arisen, but the public face put on the situation by ICE was a much rosier picture of the detainee medical care system and an improved mortality rate. *Id.*

IV. The Government's Response To Reports Of Detainee Deaths And Inadequate Medical Care.

As Justice Harlan noted in his concurrence in *Bivens*, "the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 407 (1971). The problems with medical treatment

of immigrant detainees are unlikely to be resolved by the political branches, precisely because of the unpopular nature of immigrants; particularly immigrants perceived as unlawful immigrants or criminal aliens, such as those in ICE detention.

This is not to say that the political branches have been entirely inactive in this area. Spurred by "troubling media reports about detainee deaths," Congress has held hearings on the treatment of immigrant detainees. *Health Services for Detainees in U.S. Immigration and Customs Enforcement Custody*, March 3, 2009 Hearing, Subcomm. on Homeland Security (statement of David Price, Chairman), available at http://appropriations.house.gov/pdf/HS-FY10-03-03-09.pdf (stating as purpose of hearing "to investigate the health care services ICE provides to individuals held in its custody at detention centers around the country, and to discuss efforts that DHS will make to improve those services"). Likewise, GAO reports have been requested concerning compliance with ICE's Medical Care standards. *See Alien Detention Standards, Observations on the Adherence to ICE's Medical Standards in Detention Facilities*, Hearing before the Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law, Comm. on the Judiciary (statement of Richard M. Stana, Director, Homeland Security and Justice Issues) June 4, 2008, 1, available at http://www.gao.gov/new.items/d08869t.pdf.

The Executive branch has also recently responded to these issues. Dora Schriro, then newly appointed Special Advisor on Detention and Removal Operations at ICE to Secretary Napolitano, stated candidly on detention deaths in custody that "[i]n several recent

instances, the medical and custodial care that those detainees received before expiring appeared to be contrary to DRO policy." *Medical Care and Treatment of Immigration Detainees and Deaths in DRO Custody*, Hearing before the H. Appropriations Comm., Subcomm. on Homeland Security, March 3, 2009 (statement of Dora Schriro, Special Advisor to Secretary Napolitano on Detention and Removal Operations) 3, available at http://appropriations .house.gov/Witness_testimony/HS/Dora_Schriro_03_ 03_09.pdf. She also expressed the opinion that there was reason for concern: "Clearly, many concerns have been expressed within government and by the community for some time about the medical care and treatment that the ICE detainees receive and detainee deaths in custody. In my view, there is reason for concern." In October 2009, Ms. Schriro issued a report on *Immigration Detention: Overview and Recommendations*, which presented a "seven part framework for meeting the challenge of developing a new system of Immigration Detention" including recommendations for medical care and accountability. *See* Dr. Dora Schriro, Department of Homeland Security, Immigration and Customs Enforcement, *Immigration Detention: Overview and Recommendations*, October 6, 2009, available at http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf. According to Dr. Schriro, "Some recommendations can be actualized soon; others will require further analysis, including a comprehensive budget review. In order for ICE to achieve sustainable, organizational change, it must continue the progress of recent months." *Id.* at 3. *See also* OIG-10-23 Report, available at http://www.dhs.gov/xoig/assets/ mgmtrpts/OIG_10-23_Dec09.pdf.

But these efforts have not led thus far to significant improvements for immigrant detainees; and in the absence of continued attention to these issues, improvements are unlikely. As with other reform issues, "political realities dictate that reform may be difficult to achieve in the immediate future." American Bar Association, *Ensuring Fairness and Due Process in Immigration Proceedings* 1, available at http://www.abanet.org/poladv/transition/2008dec_immigration.pdf.

V. THE PETITIONERS IGNORE THE SHAMING FUNCTION OF *BIVENS* LIABILITY WHILE OVERSTATING ITS POTENTIAL EFFECTS ON RECRUITMENT, DESPITE THE FACT THAT PHS, ITSELF, STATES THAT IT PROVIDES MALPRACTICE INSURANCE TO ITS RECRUITS.

Petitioners and Amici make much of the potential for *Bivens* liability to affect PHS's ability to attract and maintain quality staff. They claim that opening PHS officials to potential *Bivens* liability would effectively require PHS officials to give up part of their below market rate salaries to pay for malpractice insurance. Gonsalves Br. 53; Hui Br. 43-45; U.S. Br. 14; C.O.A. Br. 6.

The Public Health Service's website suggests that this consideration is substantially overstated. The PHS website specifically states that PHS currently provides malpractice coverage to PHS officers.

> Commissioned Corps benefits are generous. They include:

- Competitive starting pay that increases with promotions and years of service

  * * *

- **<u>Malpractice insurance coverage</u>**

U.S. Public Health Service Commissioned Corps, http://www.usphs.gov/aboutus/questions.aspx (last visited Jan. 19, 2010) (emphasis added). To the extent that liability insurance was one of the rationales for the enactment 42 U.S.C. § 233(a), it would appear that that rationale has been superseded.

By contrast, the Petitioners understate or ignore the deterrent impact of *Bivens* liability on governmental agencies. As this Court noted in *Carlson v. Green*, 446 U.S. 14 (1980), in addition to compensating victims, the *Bivens* remedy deters grave mistreatment in part by labeling unconstitutionally deficient treatment as such. 446 U.S. at 21. Executive branch officials are, "motivated not only by concern for the public fisc but also by concern for the Government's integrity," *Carlson*, 446 U.S. at 21, or at least, motivated by the perceptions of the agency's integrity. *Bivens* liability has a shaming effect, by labeling an agency's actions as violative of constitutional rights. Because *Bivens* actions play an important function of exposing and labeling mistreatment that falls below constitutional standards – mistreatment which otherwise would remain unchecked – the repeated failure of DIHS to ensure adequate medical treatment for all immigrant detainees ought to weigh heavily in this Court's decision in this matter.

CONCLUSION

For these reasons, and those stated in Respondents' brief, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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