

No. 10-1104

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IN THE  
**Supreme Court of the United States**

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MARGARET MINNECI, et al.,

*Petitioners,*

*v.*

RICHARD LEE POLLARD, et al.,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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**BRIEF OF *AMICUS CURIAE*  
UNITED MEXICAN STATES  
IN SUPPORT OF RESPONDENTS**

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**INTEREST OF AMICUS CURIAE<sup>1</sup>**

This case presents the question whether employees of a private company operating a correctional facility under contract with the Bureau of Prisons (BOP) are subject to implied damages actions under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

In addition to the BOP, other federal agencies also house detainees in privately-run facilities. In the context of this case, it is of particular concern to the United Mexican States (Mexico) that roughly half of the detainees held by U.S. Immigration and Customs Enforcement (ICE) are housed in privately-operated facilities. On any given day, more than 10,000 Mexican nationals are being held in civil detention by ICE.

Under Article 5(a) of the Vienna Convention on Consular Relations, to which both the United States of America and Mexico are parties, Mexico has the right to protect the interests and welfare of its nationals, within the limits of international law. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820. Mexico accordingly files this Amicus Curiae brief in the interest of ensuring that all of its nationals present in the U.S. and held in custody by any agency of the U.S. government in a privately-operated facility are accorded the full measure of human and civil rights

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1. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person, other than the amicus curiae or its counsel made any monetary contribution to the preparation or submission of this brief.

guaranteed to them under the U.S. Constitution, treaties and international law. In this case, that includes an interest in preserving *Bivens* remedies for those Mexican nationals detained in privately-operated jails, prisons and immigration detention facilities in the United States.

### SUMMARY OF THE ARGUMENT

The United Mexican States (Mexico) submits this brief as Amicus Curiae in support of the Respondent, Richard Lee Pollard.

A. Richard Lee Pollard was, at the time this case arose, an inmate in a Bureau of Prisons (BOP) facility. But the significance of the question presented for review by this Court reaches beyond the particular facts involved in his case. Other federal agencies also house detainees in privately-operated facilities, including many Mexican nationals, many of whom are held in civil not criminal detention. Unless narrowly decided, a ruling in this case will likely carry consequences for thousands of other detainees whose detention arises from circumstances materially different than Mr. Pollard's. In particular, Mexico is concerned that a focus on Mr. Pollard's specific claims should not cause the Court to overlook the possible consequences of a decision in this case for Mexican nationals being detained in facilities that are privately operated, including in civil immigration detention facilities.

Mr. Pollard might have alternative remedies under state law for his particular Eighth Amendment claims. But many detained Mexican nationals bringing claims for alleged constitutional violations have no cause of action

except one under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), because of: (a) the gaps between federal constitutional law and state common law and statutory law; (b) the increasing hostility of state law in a number of jurisdictions to noncitizens' rights, which further limits their state remedies; (c) ICE's refusal to provide administrative remedies, in the case of immigration detainees; and (d) the unavailability of entity liability under *Bivens* after *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) (holding that there is no private right of action pursuant to *Bivens* against private entities, while reserving the question of whether an action would lie against the individual employees of a private entity). Without a cause of action against employees of private prison companies under *Bivens*, Mexican nationals, both in civil immigration detention and in other forms of privatized custody in the U.S., will in many instances be left without any meaningful cause of action for many of the most frequent violations of their rights.

**B.** The decision of the Court of Appeals in this case correctly recognized a *Bivens* cause of action against the employees of a private prison company. In the context of privatization, a *Bivens* cause of action serves a very vital function. It prevents federal agencies from evading constitutional scrutiny and liability for the exercise of the most palpable forms of state police power when, instead of exercising those powers themselves, they delegate them to private concessionaires. In the absence of a *Bivens* cause of action to constrain their conduct, employees of private concessionaires exercising police powers will be insufficiently deterred from conduct that violates constitutional norms. State law causes of action simply are

not an adequate substitute for a *Bivens* remedy, either in general or for Mexican nationals and other immigrants in particular. The protections afforded by the Constitution and by state law are not coextensive.

## ARGUMENT

### I. A *BIVENS* CAUSE OF ACTION SERVES THE VITAL FUNCTION OF PREVENTING FEDERAL AGENCIES FROM CIRCUMVENTING CONSTITUTIONAL CONSTRAINTS ON THE EXERCISE OF THEIR POWERS WHEN THEY DELEGATE THOSE POWERS TO PRIVATE CONTRACTORS.

A. The fastest growing form of federal incarceration is the detention of immigrants in privately-operated facilities. ICE detained 363,064 immigrants during 2010 and housed approximately half of them in scores of facilities across the country that are operated not by ICE itself but rather by private prison companies.<sup>2</sup> By contrast,

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2. Detention Watch Network, *The Influence of the Private Prison Industry in Immigration Detention*, <http://www.detentionwatchnetwork.org/privateprisons> (noting that 49% of ICE detainees were held in privately-operated detention facilities in 2009); Donald Kerwin & Serena Yin-Ying Lin, *Immigration Detention: Can ICE Meet its Legal Imperatives and Case Management Responsibilities?* (Migration Policy Inst., 2009) 14-15 (noting that twelve of ICE's seventeen most populated immigration detention facilities were managed by for-profit correctional companies in 2009), <http://www.migrationpolicy.org/pubs/detentionreportSept1009>; *Moving Toward More Effective Immigration Detention Management: Hearing Before the Subcomm. on Border, Maritime, and Global Counter-terrorism of the H. Comm. on Homeland Security*, 111th Cong. 10-11 & Table 1

in the criminal justice system, eight percent of prison beds are managed by private companies.<sup>3</sup>

**B.** Mexican nationals account for roughly 61 percent of the total immigrant population detained by ICE.<sup>4</sup> Their detention is a state-imposed form of physical restraint, “the most palpable form of state police power.” *Richardson v. McKnight*, 521 U.S. 399, 414 (1997) (Scalia, J., dissenting). It encompasses both the use of force and the placement of detainees in isolation. It should be subject to constitutional constraints, both when administered directly by the BOP or ICE and when administered by private concessionaires.

**C.** Delegation to private concessionaires should not become a means for any federal agency to remove the exercise of its police powers from constitutional scrutiny and liability, whether in BOP facilities, ICE facilities or elsewhere. *See generally, Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995) (“It surely cannot

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(2009) (statement of Donald Kerwin, Vice President for Programs, Migration Policy Inst.) (noting that “private corporations manage all but one of ICE’s own Service Processing Centers (SPCs) and its largest contract facilities”), <http://www.homelandsecurity.house.gov/SiteDocuments/20091210105631-76330.pdf>.

3. Bureau of Justice Statistics, U.S. Dep’t of Justice, *Prisoners in 2009*, Appendix table 20 (Dec. 2010), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2232>.

4. Office of Immigration Statistics, U.S. Dep’t of Homeland Sec., Annual Report (June 2011), *Immigration Enforcement Actions* 4 (providing data for total detentions and percentage of Mexican nationals), <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>.

be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form”); *West v. Atkins*, 487 U.S. 42, 56 & n.14 (1988) (“Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State’s prisoners of the means to vindicate their Eighth Amendment rights.”); Gillian E. Metzger, *Privatization as Delegation*, 103 Colum. L. Rev. 1367, 1401 (2003) (“Adequately guarding against abuse of public power requires application of constitutional protections to every exercise of state authority, regardless of the formal public or private status of the actor involved.”)<sup>5</sup>

Because state police powers are increasingly privatized, and because without a *Bivens* cause of action those powers are prone to being exercised without constitutional scrutiny and liability, *Bivens* remedies are an increasingly necessary safeguard in protection of liberty and due process. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Fifth Amendment’s Due Process] Clause protects”);

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5. Regarding incentives to outsource sovereign functions and the risks of doing so, see generally, Paul R. Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do About It* (Cambridge Univ. Press 2007). *See also*, Jon D. Michaels, *Deputizing Homeland Security*, 88 Tex. L. Rev. 1435, 1447-66 (2010) (discussing “the Executive Branch’s ability to deploy private-sector resources in efforts to overcome restrictions placed by Congress and the courts on its (public) power”).

*Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184, 2190 (2010) (Roberts, J., dissenting) (“A basic step in organizing a civilized society is to take th[e] sword [of enforcement] out of private hands and turn it over to the organized government, acting on behalf of all the people.”) A *Bivens* cause of action is a particularly vital safeguard in protection of liberty and due process in cases where, as for many Mexican nationals, meaningful alternative remedies are often unavailable.<sup>6</sup>

D. Migration between Mexico and the United States has occurred for generations. In the relations between the United States and Mexico, as in the relations between many countries throughout the world, migration is a fact of life. Although sovereigns have the authority to detain unauthorized immigrants present within their borders, that detention is subject to limits, including

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6. The tradition of judicially-implied causes of action, created without express legislative authorization, has a long pedigree that pre-dates *Bivens* by hundreds of years. See, e.g., *Couch v. Steel*, (1854) 118 Eng. Rep. 1193, 1196-98 (K.B.); *Rowning v. Goodchild*, (1773) 96 Eng. Rep. 536 (K.B.); *Anonymous*, (1703) 87 Eng. Rep. 791 (Q.B.); *Ashby v. White*, (1702) 92 Eng. Rep. 126, 136-39 (K.B.). See also, Michael G. Collins, “Economic Rights,” *Implied Constitutional Actions, and the Scope of Section 1983*, 77 Geo. L.J. 1493, 1496 (1989) (“The historical record...reveals a tradition of federal question damage actions [for constitutional injuries], long antedating modern implied rights of action...[and against] both federal and state officers”); Al Katz, *The Jurisprudence Of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. Pa. L. Rev. 1, 43-44 (1968) (“[T]here is nothing in history to show that damages—the ordinary remedy at law—were not as readily applied to protect interests in liberty as to protect other interests...The remedy at law, in fact, appears to be the only one the propriety of which was never seriously questioned.”)

under international law. Mexican nationals detained in the U.S., like immigrants detained in other countries, have certain inalienable rights that may not be violated either by sovereigns themselves or by their contractors. *See* International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (Dec. 18, 1990).<sup>7</sup> *See also* Universal Declaration of Human Rights, G.A. Res. 217A (III), Article 2, U.N. Doc. A/810 (Dec. 12, 1948) (declaration that all individuals are to be afforded the same rights and freedoms without regard to nationality); Ley de Migración [Immigration Law], Diario Oficial de la Federación, el 25 de mayo de 2011 (Mex.), [http://dof.gob.mx/nota\\_detalle.php?codigo=5190774&fecha=25/05/2011](http://dof.gob.mx/nota_detalle.php?codigo=5190774&fecha=25/05/2011). (An English translation of the Ley de Migración will be filed with the Clerk of the Court upon request).

**E.** Most immigration detainees in the United States have never been convicted of a crime.<sup>8</sup> Many, despite their detention, are entitled to reside and remain in the United States. Notably, in nearly one third of

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7. The United States is not a signatory to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

8. Michelle Roberts, *Immigrants Face Long Detention, Few Rights*, Associated Press, March 16, 2009 (according to data provided by ICE, 58 percent of immigrants held in detention on January 25, 2009 had no criminal convictions), <http://www.deseretnews.com/article/705291116/Immigrants-face-long-detention-few-rights.html>. The less than half of immigration detainees who have been convicted of a crime have already served their sentences. They are placed in ICE custody only after their criminal sentences. Their detention for immigration purposes is a form of civil administrative detention.

removal hearings, ICE's requests for removal are denied. Transactional Records Access Clearinghouse, *ICE Seeks to Deport the Wrong People* (Nov. 9, 2010), <http://trac.syr.edu/immigration/reports/243/>. Among the Mexican nationals in detention, many are the parents of U.S. citizen children under the age of 5.<sup>9</sup> Some are themselves United States citizens.<sup>10</sup> Many others are longtime residents of the United States who were brought to this country as children by their parents, have lived in the U.S. ever since,

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9. Between 1997 and 2007, the United States deported the foreign parents, many of them Mexican, of an estimated 88,000 U.S. citizen children. Approximately half of these children were under the age of 5 when their parent was deported. Jonathan Baum et al., *In the Child's Best Interest? The Consequences of Losing a Lawful Immigrant Parent to Deportation* 4 (March 2010), [http://www.law.berkeley.edu/files/Human\\_Rights\\_report.pdf](http://www.law.berkeley.edu/files/Human_Rights_report.pdf). See also, U.S. Dep't of Homeland Sec., Office of Inspector Gen., *Removals Involving Illegal Alien Parents of United States Citizen Children* (2009), [http://www.dhs.gov/xoig/assets/mgmt\\_rpts/OIG\\_09-15\\_Jan09.pdf](http://www.dhs.gov/xoig/assets/mgmt_rpts/OIG_09-15_Jan09.pdf); Emily Butera, *Torn Apart By Immigration Enforcement: Parental Rights And Immigration Detention* (Women's Refugee Comm'n, 2010), <http://womensrefugeecommission.org/programs/detention/parental-rights>; Dorsey & Whitney LLP, *Severing a Lifeline: The Neglect of Citizen Children in America's Immigration Enforcement Policy* (2009), [http://www.dorsey.com/files/upload/DorseyProBono\\_SeveringLifeline\\_ReportOnly\\_web.pdf](http://www.dorsey.com/files/upload/DorseyProBono_SeveringLifeline_ReportOnly_web.pdf).

10. Tyche Hendricks, *U.S. citizens wrongly detained, deported by ICE*, S. F. Chron. July 27, 2009, at A1; Andrew Becker & Patrick J. McDonnell, *Citizens Snared in the Net*, L.A. Times, Apr. 9, 2009, at A1; Jacqueline Stevens, *Thin ICE*, The Nation, June 23, 2008. See also, Jacob Chin et al., *Attorneys' Perspectives on the Rights of Detained Immigrants in Minnesota* (Hubert H. Humphrey Inst. of Public Affairs, 2009), <http://www.mcaa-mn.org/docs/2009/20091204121228744.pdf>.

attended school in the U.S., and have started their own families here. For them, deportation means separating both from their families and from a country where they have lived virtually their entire lives. *Cf. Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (recognizing the “impact of deportation on families living lawfully in this country”).

F. ICE and its contractors detain immigrants under civil law, either pending a decision on whether they will be removed (deported), 8 U.S.C. § 1229a, or awaiting removal after a removal order has issued. *See Zavydas v. Davis*, 533 U.S. 678, 682 (2001). Yet, despite the clear civil nature of immigration detention, the Department of Homeland Security (DHS) acknowledges that ICE and its contractors operate detention facilities as if they were penal institutions.<sup>11</sup> After reviewing ICE’s detention practices for DHS, the former Director of ICE’s Office of Detention Policy and Planning prepared a report and recommendations criticizing ICE for

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11. *See* Dora B. Schriro, U.S. Dep’t of Homeland Sec., Immigration Detention Overview and Recommendations 16, 21 (2009), <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>; Mary Bosworth & Emma Kaufman, *Foreigners in a Carceral Age: Immigration and Imprisonment in the United States*, 22 *Stan. L. & Pol’y Rev.* 429, 440 (2011); Amnesty Int’l, *Jailed without Justice: Immigration Detention in the USA 29-43* (March 25, 2009) (describing detention conditions), <http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf>; Michelle Brané & Christiana Lundholm, *Human Rights Behind Bars: Advancing the Rights of Immigration Detainees in the United States Through Human Rights Frameworks*, 22 *Geo. Immigr. L.J.* 147, 162 (2008) (“Detention center staff is ignorant about the distinction between administrative detention and punitive custody.”)

“carrying criminal incarceration policies and practices into the arena of immigration detention.”<sup>12</sup> She noted that importing standards of criminal detention into civil immigration detention facilities was both inconsistent with immigration detention’s non-criminal purposes and inappropriate for the majority of ICE’s immigration detention population.<sup>13</sup> She also emphasized that: “The demeanor of the Immigration Detention population is distinct from the Criminal Incarceration population. The majority of the [Immigration Detention] population is motivated by the desire for repatriation or relief, and exercise exceptional restraint....[F]ights are infrequent, and assaults on staff are even rarer.” Schriro, U.S. Dep’t of Homeland Sec., *Immigration Detention Overview and Recommendations* 16.

G. Both DHS itself and others have repeatedly documented widespread deficiencies in the policies and conditions in immigration detention facilities.<sup>14</sup> Many of

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12. Schriro, *supra*, at 21. Conditions permissible for criminal custody are not constitutionally permissible for civil detention, “lest ‘civil commitment’ become a ‘mechanism for retribution,’” which is a function properly “of criminal law, not civil commitment.” *Kansas v. Crane*, 534 U.S. 407, 412 (2002). *See also*, Rule 8(c), Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/611, Annex I A (1955); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (distinguishing civil from criminal detention).

13. Schriro, *supra*, at 21.

14. *See*, among others, Schriro, *supra*, at 21; *Jailed without Justice*, *supra*; Karen Tumlin et al., *A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers* (Nat’l Immigration Law Center, 2009) (“NILC Report”), <http://www.nilc.org/immlawpolicy/arrestdet/A-Broken-System-2009-07.pdf>; Inter-American Comm’n on

these failings raise serious constitutional questions. It has also been noted that they give rise to hardships that induce appreciable numbers of detainees to acquiesce in removal simply to obtain release from custody, even when they have valid claims to remain in the United States.<sup>15</sup>

The following are among the serious reported violations of constitutional rights allegedly suffered by Mexican nationals and others in ICE facilities: restrictions

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Human Rights, *Immigration in the United States: Detention and Due Process* (2010) (“IACHR Report”), <http://cidh.org/pdf/files/ReportOnImmigrationInTheUnitedStates-DetentionAndDueProcess.pdf>; N.Y. Univ. Sch. Of Law Immigrant Rights Clinic, *Locked Up but not Forgotten: Opening Access to Family & Community in the Immigration Detention System* (2010), [http://www.law.nyu.edu/ecm\\_dlv3/groups/public/@nyu\\_law\\_website\\_\\_news\\_\\_media/documents/documents/ecm\\_pro\\_065626.pdf](http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__news__media/documents/documents/ecm_pro_065626.pdf); Seattle Univ. Sch. Of Law Int’l Human Rights Clinic & OneAmerica, *Voices from Detention: A Report on Human Rights Violations at the Northwest Detention Center in Tacoma Washington* (2008) (reporting on conditions at the privately-run Northwest Detention Center, owned and operated by The GEO Group, Inc.), <http://law.seattleu.edu/x3333.xml>; Dana Priest & Amy Goldstein, *Careless Detention*, *Washington Post*, May 11-14, 2008, <http://www.washingtonpost.com/wp-srv/nation/specials/immigration/index.html>.

15. *Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing before the Subcomm. on Immigration, Citizenship, Refugees, Border Security and Int’l Law of the House Comm. on the Judiciary*, 110th Congress, 2nd Sess., 56, 62 (2008) (statement of Kara Hartzler, Florence Immigrant and Refugee Rights Project); Amnesty International, *Jailed Without Justice: Immigration Detention in the USA* 13, 20 (March 25, 2009), <http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf>.

on access to counsel and to legal materials;<sup>16</sup> obstacles to detainees' rights to participate in hearings regarding the potential termination of their parental rights;<sup>17</sup> inadequate

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16. NILC Report, *supra*, at 26-43 (discussing restrictions on access); U.S. Gov't Accountability Office, GAO-07-875, Report to Congressional Requesters, Alien Detention Standards 5 (July 2007) (same), <http://www.gao.gov/new.items/d07875.pdf>; Michael J. Wishnie et al., Petition for Rulemaking to Promulgate Regulations Governing Detention Standards for Immigration Detainees 24-28 (2007) ("Rulemaking Petition") (same), [http://nationalimmigrationproject.org/legalresources/Immigration Enforcement and Raids/Detention Standards Litigation/Detention Standards Petition for Rulemaking-2009.pdf](http://nationalimmigrationproject.org/legalresources/Immigration%20Enforcement%20and%20Raids/Detention%20Standards%20Litigation/Detention%20Standards%20Petition%20for%20Rulemaking-2009.pdf). *See also*, *Bounds v. Smith*, 430 U.S. 817, 821-22 (1977) (detainee access to courts must be adequate, effective and meaningful); Inter-American Comm'n on Human Rights, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle V (2008) (affirming the right of all persons deprived of liberty to "to communicate privately with their counsel, without interference or censorship, [and] without delays or unjustified time limits"), [http://www.cidh.oas.org/Basicos/English/Basic21.a.Principles and Best PracticesPDL.htm](http://www.cidh.oas.org/Basicos/English/Basic21.a.Principles%20and%20Best%20PracticesPDL.htm).

17. Elizabeth Hall, Note, *Where Are My Children...and My Rights? Parental Rights Termination as a Consequence of Deportation*, 60 Duke L.J. 1459 (2011); Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, Connecticut Law Review, Vol. 44, No. 1, 2011; Emily Butera, *Torn Apart By Immigration Enforcement: Parental Rights And Immigration Detention* (2010), <http://womensrefugeecommission.org/programs/detention/parental-rights>; Jonathan Baum, et al., *In the Child's Best Interest?: The Consequences of Losing a Lawful Immigrant Parent to Deportation* 1 (March 2010), [http://www.law.berkeley.edu/files/Human\\_Rights\\_report.pdf](http://www.law.berkeley.edu/files/Human_Rights_report.pdf). *Compare Santosky v. Kramer*, 455 U.S. 745 (1982) (fundamental liberty interest of natural parents in the care custody, and management of their child); *Stanley v. Illinois*, 405 U.S. 645 (1972) (entitlement to a

medical care;<sup>18</sup> overcrowding;<sup>19</sup> and the absence of effective, or sometimes any, procedures for detainees to file grievances.<sup>20</sup>

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hearing); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 44, G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (Dec. 18, 1990) (“State Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers.”)

18. Fla. Immigrant Advocacy Ctr., *Dying for Decent Care* 7 (2009) (“[D]etainees are routinely subjected to poor, and sometimes appalling, medical care”), <http://www.fiacfla.org/reports/DyingForDecentCare.pdf>; Dana Priest & Amy Goldstein, *Careless Detention*, Washington Post, May 11-14, 2008 (four-part investigative series, concluding that there is a “massive crisis in detainee medical care”) <http://www.washingtonpost.com/wp-srv/nation/specials/immigration/index.html>. Compare *Estelle v. Gamble*, 429 U.S. 97 (1976) (deliberate indifference to serious illness or injury constitutes cruel and unusual punishment).

19. American Civil Liberties Union, *Conditions of Confinement in Immigration Detention Facilities* 8-9 (2007), [http://www.aclu.org/pdfs/prison/unsr\\_briefing\\_materials.pdf](http://www.aclu.org/pdfs/prison/unsr_briefing_materials.pdf).

20. NILC Report, *supra*, at 62 (noting that “At least 12 facilities failed to include *any* of the required grievance procedure information in their detainee handbooks....All told, [ICE’s own] reviews documented violations of th[e grievance standard] at 40 facilities”); IACHR Report, *supra*, at 119-20; Rulemaking Petition, *supra*, at 24-28. Compare Inter-American Comm’n on Human Rights, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle VII (“Persons deprived of liberty shall have the right of individual and collective petition and the right to a response before judicial, administrative, or other authorities.”), [http://www.cidh.oas.org/Basicos/English/Basic\\_Principles\\_and\\_Best\\_Practices\\_PDL.htm](http://www.cidh.oas.org/Basicos/English/Basic_Principles_and_Best_Practices_PDL.htm).

**H.** There are no regulatory standards binding on private immigration detention facilities or enforceable by immigration detainees. While the United States emphasizes that BOP contract facilities operate subject to compliance standards (U.S. Br. at 3-4), contract facilities housing immigration detainees do not operate under similar constraints. The Bureau of Prisons issued comprehensive, binding regulations for detention standards more than thirty years ago. 28 C.F.R. §§ 500.1-572.40. DHS, by contrast, has not done so.<sup>21</sup> As a result, Mexican nationals in immigration detention not only have no meaningful administrative remedies, they frequently have none at all. *Compare Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (emphasizing that BOP inmates like Mr. Pollard, by contrast, “have full access to remedial mechanisms established by the BOP” including “grievances filed through the BOP’s Administrative Remedy Program”).

**I.** The United States similarly emphasizes BOP’s performance requirements, as well as its ongoing monitoring of its contract facilities. U.S. Br. 3-5. Again,

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21. DHS has full statutory authority to issue regulatory standards that would bind private immigration detention facilities. *See* 8 U.S.C. § 1103(a)(11) (conferring authority over detention conditions for immigrants detained by the federal government but held in non-federal institutions). But it has refused to issue regulations. DHS Denial of “Petition for Rulemaking to Promulgate Regulations Governing Detention Standards for Immigration Detainees” (July 24, 2009), <http://nationalimmigrationproject.org/legalresources/ImmigrationEnforcementandRaids/DetentionStandardsLitigation/DHSdenial-07-09.pdf>. *See also*, Nina Bernstein, *U.S. Rejects Changes in Detainee Rules*, N.Y. Times, July 29, 2009, at A17.

immigration detention facilities are not similarly monitored. Deficiencies in ICE's oversight over contract facilities have been well documented, both by ICE itself and by others.<sup>22</sup> The opaqueness under which ICE has permitted contract facilities to operate is also well documented.<sup>23</sup> For years, the agency refused to allow the public access either to its own facility audits or to the results of reviews conducted by the American Bar Association and the United Nations High Commissioner for Refugees.<sup>24</sup> The extent to which immigration

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22. NILC Report, *supra*, at vii (noting that “the government’s past efforts to monitor compliance...have been woefully deficient”); Rulemaking Petition, *supra*, at 20-22. ICE has itself acknowledged that “The present immigration detention system [spread out over as many as 350 different facilities, most of which are not run by ICE] is sprawling and needs more direct federal oversight and management.” U.S. Customs and Immigration Enforcement, *Fact Sheet: 2009 Immigration Detention Reforms*, <http://www.ice.gov/news/library/factsheets/reform-2009reform.htm>.

23. NILC Report, *supra*, at vi (“[T]he government has maintained a deliberate policy of opaqueness with respect to whether detention facilities conform to [performance] standards”); Nina Bernstein, *Officials Obscured Truth of Migrant Deaths in Jails*, N.Y. Times, Jan. 9, 2010, at A1 (referring to a “culture of secrecy,” including “scathing [internal] investigative reports that were kept under wraps” and “officials working to stymie outside inquiry”).

24. Both the ABA and the UNHCR were granted access to immigration detention facilities on the condition that reports of their observations would be shared only with ICE. NILC Report, *supra*, at vi. In 2008, Jorge Bustamante, the United Nations Special Rapporteur on the human rights of migrants, was denied access to the privately-run Hutto Detention Center in Texas—despite receiving approval from the U.S. State Department. Press Release, United Nations, Special Rapporteur

detention facilities operate free of substantive constraints and unobserved makes *Bivens* remedies all the more necessary.

**J.** Economic theory would suggest that in the absence of *Bivens* remedies private contractors operating immigration detention facilities will have few, if any, incentives to comply with the normative constraints of constitutional law. First, their competitive advantage often turns on their claim to be able to perform at a lower cost than a public agency, whereas in most cases constitutional accountability and price-cost margins point in opposite directions. Second, in the case of contracts for immigration detention facilities, the power to exit the contract rests with ICE, not detainees, and ICE's interests in constitutional compliance do not equal detainees' interests in constitutional compliance. On both these points, see generally, Edward Rubin, *The Possibilities and Limitations of Privatization*, 123 Harv. L. Rev. 890, 924-928 (2010).

Third, *Bivens* actions are likely to be more effective and more efficient than any increase in governmental monitoring, because monitoring adds a layer of expensive, cumbersome bureaucracy, and that is particularly the case when adequate metrics for evaluating performance are likely to be complex, as they are in the case of prison management. See Richard Frankel, *Regulating Privatized Government Through §1983*, 76 U. Chi. L. Rev. 1449, 1498-99 (2009).

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on Migrants Ends Visit to the United States (May 17, 2007), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=6139&LangID=E>.

**II. STATE LAW IS INSUFFICIENTLY PROTECTIVE OF CONSTITUTIONAL NORMS, INSUFFICIENTLY PROTECTIVE OF THE RIGHTS OF MEXICAN NATIONALS AND OTHER IMMIGRANTS, AND SHOULD BE IRRELEVANT TO THE EXISTENCE OF A *BIVENS* CAUSE OF ACTION.**

A. The concepts of judicial review and of a constitution that is judicially enforceable against the executive branch are among the United States of America's greatest exports. They have influenced constitutional design and judicial power all over the world. See Anne-Marie Slaughter, *A Brave New Judicial World*, in *American Exceptionalism and Human Rights*, 275, 301 (Michael Ignatieff ed. 2005); *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Louis Henkin & Albert J. Rosenthal, eds., 1990).<sup>25</sup> Among the ideals that this Court has thus propagated to the world are, first, that a constitution should be judicially enforceable as positive law and, second, that when a court has jurisdiction to decide a constitutional issue it also has the power to grant relief for constitutional violations. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824); *Ex parte Young*, 209 U.S. 123

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25. In 1881, Ignacio Vallarta, President of the Supreme Court of Mexico, wrote a decision declaring the power of judicial review, citing *Marbury v. Madison* and The Federalist No. 78. *Pleno de la Suprema Corte de Justicia de la Nación. Seminario Judicial de la Federación, Segunda Época, tomo III, septiembre de 1881*, 339. (An English translation of the decision will be filed with the Clerk of the Court upon request).

(1908).<sup>26</sup> The Court should not retreat from these ideals in this case.<sup>27</sup>

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26. Many seminal civil rights cases have been brought as direct actions to enforce the Constitution. See, among others, *Truax v. Raich*, 239 U.S. 33 (1915); (striking down an Arizona statute prohibiting the employment of noncitizens, on equal protection grounds) *Bell v. Hood*, 327 U.S. 678, 684 (1946) (noting there was an “established practice” of granting injunctive relief directly under the Constitution, and suggesting no reason why damages should be different); *Terry v. Adams*, 345 U.S. 461, 478 n.2, 484 (1953) (Clark, J. concurring) (addressing claims that “rested on” the Fourteenth and Fifteenth Amendments and holding that “pre-primary” elections conducted by private associations, from which African-Americans were excluded, were unconstitutional); *id.* at 467 (n.2) (noting that the Fifteenth Amendment is “self-executing”); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that racial segregation in the District of Columbia’s public schools violated the Fifth Amendment). See generally, Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U.L. Rev. 681 (2009).

27. As Professor Meltzer has noted, a retreat from the tradition that the Constitution is enforceable by the judiciary, independent of Congressional directives, would have profound consequences, detrimentally making the Constitution merely a shield and not a sword: “[I]f Congress had never enacted § 1983 or other federal civil rights statutes, *Brown v. Board of Education* might well have been dismissed on a Rule 12(b)(6) motion; no federal remedy would have existed, and the plaintiffs’ ability to obtain specific relief against school segregation would have depended on the happenstance of whether state law provided some private remedy through which plaintiffs could get such relief against school officials.” Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 Geo. L. J. 2537, 2551 (1998).

**B.** Petitioners and the United States both urge a retreat, however. They contend that a *Bivens* cause of action should not exist where state law provides adequate alternative remedies. Pet. Br. 21-36; U.S. Br. 21-28. Their contention aggrandizes the role of state law; a federal constitution should be enforceable on its own terms, not merely when it lacks congruence with subconstitutional law. See Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. Cal. L. Rev. 289, 291 (1995). Cf. *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 299 (1989) (O'Connor, J., concurring in part and dissenting in part) (“[T]he applicability of a provision of the Constitution has never depended on the vagaries of state or federal law”).

Far from making state law the measure of federal contractors' conduct, the Court has previously found that in the arena of federal contracting, state law affirmatively must be *displaced* in favor of uniform federal rules. See, e.g., *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) (creating a federal common law government contractor defense, immunizing a military contractor from state tort law liabilities). There is a considerable tension between the interest in uniformity, recognized in *Boyle*, and the suggestion made by Petitioners and the United States in this case that contractor liabilities should instead be *controlled* by state law. In this case, as in *Boyle*, the liability of federal contractors should be determined by federal not state statutory or common law. Statutes and the common law are not uniform from state to state, and states, of course, may also modify or repeal their statutory and common law rules at their pleasure.

C. State law is insufficiently protective of constitutional norms because it leaves many federally-protected rights unprotected, including, for example, many of the violations of due process suffered by Mexican nationals in privately-operated facilities.<sup>28</sup> These gaps between state law and the Constitution include remedial gaps for injuries resulting from barriers to detainees' access to counsel, to legal materials, and to their participation in hearings in which their parental rights are subject to termination.<sup>29</sup> These rights, among others, often have no clear counterparts in state tort law and no means of enforcement under state constitutions.<sup>30</sup> State law and the U.S. Constitution simply

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28. The due process rights of noncitizens under the Fifth Amendment are well established. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons...Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”) (citations omitted); *Wong Wing v. United States*, 163 U.S. 228 (1896).

29. “[T]he disparity in outcomes of immigration proceedings depending on whether noncitizens are unrepresented or represented is striking.” Comm’n on Immigration, Am. Bar Ass’n, *Reforming the Immigration System: Proposals To Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* 5-3 (2010), [http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba\\_complete\\_full\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf); Lisa Getter, *Few Applicants Succeed in Immigration Courts*, L.A. Times, April 15, 2001, at 20 (analysis of 1.2 million immigration cases, finding that “Immigrants with lawyers are 17 times more likely to avoid deportation than those without them.”)

30. In both California and Texas, for example, two of the states in which large numbers of immigrants are detained, no

are not coextensive. As Justice Harlan noted, concurring in *Monroe v. Pape*, 365 U.S. 167 (1961), “It would indeed be the purest coincidence if the state remedies for violation of common law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.” 365 U.S. at 196 n.5.

State law is not only insufficiently protective of constitutional norms in general, it is also insufficiently protective of the rights of noncitizens in particular. “As a class,” noncitizens, including Mexican nationals in the U.S., “are a prime example of a ‘discrete and insular’ minority.” *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Too often, they are subjected to “prejudice, passion, neglect, [and] intolerance.” *Monroe v. Pape*, 365 U.S. 167, 180 (1961). As several states have passed omnibus immigration legislation and others have bills pending, state restrictions on the rights of Mexican nationals in the U.S. have recently been very much in evidence. *See, e.g.*, Arizona’s S.B. 1070, enacted in April 2010;<sup>31</sup> Utah’s H116, H466, H469 and H497, enacted on March 15, 2011;<sup>32</sup>

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implied right of action for damages exists for state constitutional violations. *Javor v. Taggart*, 98 Cal.App.4th 795, 807 (2002) (“It is beyond question that a plaintiff is not entitled to damages for a violation of the due process clause or the equal protection clause of the state Constitution.”); *Harrison v. Texas Dept. of Criminal Justice-Institutional Div.*, 915 S.W.2d 882, 888 (Tex.App.—Houston [1 Dist.], 1995) (“[N]o implied private right of action for money damages exists under the Texas Constitution.”)

31. <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf>.

32. <http://www.ncsl.org/documents/statefed/hb0116.pdf>; <http://www.ncsl.org/documents/statefed/hb0466.pdf>; [http://www.ncsl.org/documents/statefed/Utah\\_HB469.pdf](http://www.ncsl.org/documents/statefed/Utah_HB469.pdf) and <http://www.ncsl.org/documents/statefed/hb0497.pdf>.

Georgia’s HB87, signed May 13, 2011; Indiana’s SB590, signed May 10, 2011; Alabama’s HB56, enacted June 9, 2011; and South Carolina’s S20 signed June 27, 2011.<sup>33</sup> *See also*, Texas’s proposed HB 428 (which would bar a foreign consul from access to school campuses “if the foreign consul enters the campus with the intent to” distribute or accept applications for “foreign identification cards”), <http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB00428I.htm>. *See generally*, National Conference of State Legislatures, Report on State Omnibus Immigration Legislation (August 3, 2011) (“In 2011, 30 states considered 53 omnibus bills. Six omnibus bills have been enacted; 21 are pending or carryover bills”), <http://www.ncsl.org/default.aspx?tabid=22529>.

**D.** Even in cases where state law provides remedies, those remedies should be irrelevant to relief under *Bivens*.<sup>34</sup> Constitutional accountability should not turn

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33. [http://www1.legis.ga.gov/legis/2011\\_12/pdf/hb87.pdf](http://www1.legis.ga.gov/legis/2011_12/pdf/hb87.pdf) (Georgia); <http://www.ncsl.org/documents/statefed/IndianaSB590.pdf>; <http://www.ncsl.org/documents/statefed/AlabamaH56.pdf>; and <http://www.ncsl.org/documents/statefed/SouthCarolinaS20.pdf>.

34. Congressionally provided remedies may, by contrast, be relevant, if constitutionally adequate. See by analogy, *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n.*, 453 U.S. 1, 20 (1981) (“When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983”). The adequacy of such Congressionally provided remedies should, however, remain subject to judicial determination, bearing in mind Chief Justice Marshall’s concern that the Constitution creates and constrains Congress, not the other way around. *Marbury*, 5 U.S. (1 Cranch) at 176-7. *See also*, *Boumediene v. Bush*, 553 U.S. 723, 765-66 (2008) (noting that because “the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation

on niceties of state law or vary from state to state. The federal interest, contractors' interests, and the interests of immigration detainees who are frequently transferred between facilities in different states will all be served best by a uniform, federal liability rule in this area.<sup>35</sup> Likewise the interests of Mexico and other foreign sovereigns, both in providing consular protection to their nationals and in knowing that the rights of their nationals will be protected

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of powers[,] [t]he test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.”)

35. During Fiscal Year 2007, ICE transferred 261,910 detainees from one detention facility to another. U.S. Dep't of Homeland Sec., Office of Inspector Gen., Immigration and Customs Enforcement's Tracking and Transfers of Detainees 2 (2009), [http://www.dhs.gov/xoig/assets/mgmtrpts/OIG\\_09-41\\_Mar09.pdf](http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-41_Mar09.pdf). It has been reported that these transfers often occur without notification to detainees' families or counsel. NILC Report, *supra*, at 75-76. And it has also been reported that they “erect often insurmountable obstacles to detainees' access to counsel, ... impede [detainees'] rights to challenge their detention, lead to unfair midstream changes in the interpretation of laws applied to their cases, ... can ultimately lead to wrongful deportations ..., [and] also take a huge personal toll on detainees and their families, often including children.” Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States 2* (2009), <http://www.hrw.org/sites/default/files/reports/us1209web.pdf>. Compare Inter-American Comm'n on Human Rights, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle IX(4) (“[Transfers] shall take into account the need of persons to be deprived of liberty [to be] in places near their family, community, their defense counsel or legal representative, and the tribunal or other State body that may be in charge of their case”), [http://www.cidh.oas.org/Basicos/English/Basic21.a.Principles and Best PracticesPDL.htm](http://www.cidh.oas.org/Basicos/English/Basic21.a.Principles%20and%20Best%20PracticesPDL.htm).

by the federal law of a single sovereign partner, based on precise legal grounds that are not subject to redefinition by any of the sovereign's political subdivisions, will also be served best by a uniform, federal liability rule in this area.

The enforcement of Constitutional rights against jailers engaged in state action, acting under color of law, and exercising “the most palpable form of state police power,” *Richardson*, 521 U.S. at 414 (Scalia, J., dissenting), should not depend on federal vs. state law—or public vs. private—distinctions.

### CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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