

No. 17-1678

IN THE
Supreme Court of the United States

JESUS C. HERNÁNDEZ, *et al.*,
Petitioners,

v.

JESUS MESA, JR.,
Respondent.

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

**BRIEF *AMICI CURIAE* OF
TAHIRIH JUSTICE CENTER,
ASISTA IMMIGRATION ASSISTANCE,
WOMEN'S LAW PROJECT, NATIONAL
IMMIGRANT WOMEN'S ADVOCACY PROJECT,
PROFESSOR LAURIE COOK HEFFRON,
LEGAL VOICE, THE IMMIGRATION CENTER
FOR WOMEN AND CHILDREN AND THE
IMMIGRANT AND NON-CITIZEN RIGHTS
CLINIC AT CUNY LAW SCHOOL
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI CURIAE*¹

The **Tahirih Justice Center** is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant women and girls who survive gender-based violence. Since its beginning in 1997, Tahirih has provided free legal assistance to more than 22,000 individuals, many of whom have experienced the coercion inherent in immigration detention facilities. Through direct legal and social services, policy advocacy, and training and education provided in five cities across the country, Tahirih protects immigrant women and girls and promotes a world where they can live in safety and dignity. Tahirih *amicus* briefs have been accepted in numerous federal courts across the country.

ASISTA Immigration Assistance (“ASISTA”) worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault, and other crimes. ASISTA serves as liaison for the field with Department of Homeland Security personnel charged with implementing the resulting laws. ASISTA also trains and provides technical support to local law-enforcement officials, judges, domestic violence and sexual assault advocates, and attorneys working with immigrant crime survivors. ASISTA has previously filed *amicus* briefs with this Court and numerous courts of appeals.

¹ No counsel for any party has authored this brief in whole or in part, and no person other than the *amici curiae* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All counsel of record for all parties received notice of the intent to file this brief ten or more days before its filing, and all parties have consented to its filing.

The **Women’s Law Project** (“WLP”) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. The WLP’s mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. To this end, the WLP engages in high-impact litigation, advocacy, and education. The WLP is committed to ending violence against women, to safeguarding the legal rights of women who experience sexual abuse, and to protecting the rights of incarcerated women. The WLP has provided counseling to victims of violence through its telephone counseling service; engages in public policy advocacy work; participates in *amicus curiae* briefs that seek to improve the legal system’s response to victims of sexual assault and violence; and represents women seeking to vindicate their legal rights to health, safety, and equality while incarcerated.

National Immigrant Women’s Advocacy Project (“NIWAP”) is a non-profit, public-policy advocacy organization that develops, reforms, and promotes laws and policies that improve legal rights, services, and assistance to immigrant women and children who are victims of domestic violence, sexual assault, child abuse, stalking, human trafficking, and other crimes. NIWAP and its Director Leslye E. Orloff have published legal and social-science research articles on family violence and sexual assault experienced by immigrant women and children. NIWAP also offers technical assistance and training to assist a wide range of professionals at the federal, state, and local levels whose work affects immigrant crime victims, including judges, police, prosecutors, Department of Homeland Security personnel, victim advocates, attorneys, and health and mental health care providers. NIWAP’s Director, Leslye E. Orloff, was involved in

drafting the immigration protections for victims of domestic and sexual violence that were included in the Violence Against Women Acts of 1994, 2000, 2005, and 2013 and was appointed and served on the U.S. Immigration and Customs Enforcement (“ICE”) Advisory Committee on Family Residential Centers (2015-2016) serving as Chair, Subcommittee on Medical and Mental Health that investigated and reported on conditions in ICE detention facilities including addressing and preventing sexual assault and abuse in ICE run and ICE contractor run facilities. NIWAP, Inc. has filed amicus briefs that have been accepted in numerous federal courts.

Laurie Cook Heffron, PhD, LMSW, is a licensed social worker, researcher, and Assistant Professor of the School of Behavioral and Social Sciences at St. Edward’s University in Austin, Texas. Her work focuses on the intersections of migration and violence against women, particularly women from Guatemala, Honduras, and El Salvador. She regularly serves as a pro bono expert; provides psycho-social assessments in immigration cases related to domestic violence, human trafficking, asylum, U Visas, T Visas, and the Violence Against Women Act; and conducts research interviews with survivors of domestic violence and sexual assault.

Legal Voice is a regional nonprofit public interest organization that works to advance the legal rights of all women, girls, and LGBTQ communities through litigation, legislation, and education. Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country and is currently involved in numerous legislative and litigation efforts. Legal Voice has been a regional leader in combating sexual violence and sexual harassment

against women and LGBTQ communities, with a particular focus on immigrant women and women of color.

The Immigration Center for Women and Children (“ICWC”) is a non-profit legal services organization whose mission is to provide affordable immigration services to underrepresented immigrants in California and Nevada. Specifically, ICWC cases focus on the rights and legal remedies of the most vulnerable immigrant communities, including victims of serious crimes, domestic violence, and sexual assault. ICWC represents thousands of clients before USCIS each year with a specialization in U nonimmigrant status. ICWC assists clients gain legal status and obtain work authorization to improve their lives and create security and stability for their families. ICWC does this by providing direct legal services, hosting a database for advocates nationwide, conducting national trainings and publishing practice manuals in our area of expertise. Since ICWC was founded in 2004, it has provided legal assistance to more than thirty thousand individuals, including many who are eligible for, and have received, U nonimmigrant status. ICWC has filed amicus briefs previously.

The Immigrant and Non-Citizen Rights Clinic (“INRC”) is a law clinic at the City University of NY School of Law. INRC seeks to empower the rising generation of social justice lawyers to confront the degradation of the rights of citizens and non-citizens alike under the guise of homeland security and public safety and motivated by oppressive and discriminatory forces. The Clinic’s objectives are carried out in our legal representations—where we press for progressive, humane and fair interpretations of the law on behalf of members of the most excluded, marginalized, and criminalized groups—as well as through

policy and advocacy projects in partnership with community-based organizations. INRC has represented numerous immigrants whose Constitutional rights have been violated by Customs and Border Protection and the Department of Homeland Security. INRC also provides legal counsel to many survivors of sexual violence. Preserving the right of non-citizens to be able to raise any and all constitutional claims against governmental actors is essential to INRC's work.

SUMMARY OF ARGUMENT

Amici respectfully submit this brief to draw attention to the impact of the Court's decision in this case on the ability of immigrant, as well as other, survivors to seek redress for the devastating impact of sexual assaults perpetrated by federal officials. This brief demonstrates the continued importance of *Bivens* as a remedy for recognized constitutional violations.

As the discussion below illustrates, the constitutional rights of immigrants are routinely violated by sexual assaults committed by federal officers, particularly Department of Homeland Security ("DHS") personnel. This conduct is beyond justification. The survivors of these assaults are among the most vulnerable individuals in the United States, and often, no alternative avenue for legal redress is available. The prevalence of sexual assault makes clear that the *Bivens* remedy is needed to deter federal officials from violating clearly established constitutional rights, and to provide redress for survivors.

Amici therefore urge the Court to reaffirm the continued importance of *Bivens* by reversing the Fifth Circuit's ruling. As petitioners' brief demonstrates, the unjustified shooting by a rogue law enforcement officer that gave rise to this case constitutes a pro-

atypical situation for applying the *Bivens* remedy. So, too, do sexual assaults committed by federal officials. The Fifth Circuit’s ruling, if allowed to stand, will send the message that federal officials can commit constitutional violations with impunity and will deny justice to plaintiffs without attention to the merits of their claims. Accordingly, we urge this Court to refrain from any ruling that might impact the putative claims of immigrant sexual assault survivors and others subjected to unconstitutional conduct by federal officials.

ARGUMENT

I. The Problem of Sexual Assaults Committed by Federal Officials Against Immigrants Has Been Extensively Documented.

Sexual assaults against immigrants by federal officials present a pressing and pervasive problem. Many women and girls who flee to the United States do so because they have experienced gender-based violence in countries where such violence is deeply ingrained in the culture and institutionally accepted by the government.² Once they reach the United States, far too many of those survivors are sexually assaulted—and further traumatized—by DHS officials, including U.S. Immigration and Customs Enforcement (“ICE”) and border patrol agents and federal contractors.

For example, a 2017 analysis of complaints against DHS by the organization Freedom of Immigrants (formerly Community Initiatives for Visiting Immigrants

² See, e.g., Kids in Need of Defense, *Sexual and Gender Based Violence & Migration Fact Sheet* (Jan. 2017), <https://supportkind.org/wp-content/uploads/2017/02/SGBV-and-Migration-Fact-Sheet.pdf> (collecting sources); Tahirih Justice Center, *What Is Gender-Based Violence?*, https://www.tahirih.org/wp-content/uploads/2019/05/Gender-Based-Violence-One-Pager-5_9_19-2.pdf.

in Confinement (“CIVIC”)) illustrates the problem.³ The organization reviewed 33,126 complaints of sexual assault and/or physical abuse that had been filed against DHS agencies with the DHS Office of Inspector General (“OIG”), the oversight body responsible for investigating allegations of misconduct by DHS personnel.⁴ From January 2010 through July 2016, 14,693 of these complaints were lodged against ICE,⁵ which has responsibility for immigration enforcement;⁶ and 10,295 complaints were lodged against Customs and Border Protection (“CBP”),⁷ which is responsible for securing U.S. borders.⁸ Within this same time period, OIG received 702 complaints of “coerced sexual contact,” of which 402 were lodged against ICE and 84 were lodged against CBP.⁹ Between May 2014 and July 2016, OIG received at least 1,016 reports of sexual abuse or assault filed by people in immigration detention—averaging to more than one complaint per day.¹⁰

³ CIVIC Complaint, filed with Office for Civil Rights and Civil Liberties, U.S. Dep’t of Homeland Security, Apr. 11, 2017, https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/5a9da297419202ab8be09c92/1520280217559/SexualAssault_Complaint.pdf [hereinafter “CIVIC Complaint”].

⁴ *Id.* at 3–4. These complaints pertained to 17,550 unique incidents of alleged abuse. Alice Speri, *Detained, Then Violated*, THE INTERCEPT (Apr. 11, 2018, 11:11 AM), <https://theintercept.com/2018/04/11/immigration-detention-sexual-abuse-ice-dhs/>.

⁵ CIVIC Complaint, *supra* note 3, at 4.

⁶ *What We Do*, IMMIGRATION AND CUSTOMS ENF’T, <https://www.ice.gov/overview> (last visited Aug. 6, 2019).

⁷ CIVIC Complaint, *supra* note 3, at 4.

⁸ *About CBP*, CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/about> (last visited Aug. 6, 2019).

⁹ CIVIC Complaint, *supra* note 3, at 6.

¹⁰ *Id.*

In many of these cases, the alleged perpetrators are federal officers or federal contractors. An investigative journalist’s review of 1,224 sexual abuse complaints to OIG made between January 2010 and September 2017 showed that the majority (59 percent) identified either a DHS officer or a private detention center contractor as the perpetrator of the alleged abuse.¹¹ Thirty-four percent identified an officer as either directly witnessing the alleged abuse or being made aware that the abuse had taken place.¹² And 22 percent of the complaints identified an officer as the alleged perpetrator and at least one additional officer as a witness.¹³ ICE’s own data support these findings: the agency reported members of its own staff or contractors to be the perpetrators of sexual assaults in one-quarter of the 639 sexual abuse complaints it recorded from 2016 to 2018.¹⁴

Undocumented children are especially vulnerable to sexual abuse or sexual harassment.¹⁵ Between October 2014 and July 2018, the Office of Refugee Resettlement (“ORR”), an agency within the

¹¹ Speri, *supra* note 4.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* (“ICE provided data about alleged perpetrators only for the years 2016-2018 (year to date) — indicating that the agency found ICE staff or contractors to be the perpetrator in 162, or 25 percent, of the 639 complaints it recorded for those years.”).

¹⁵ See Michael Grabell & Topher Sanders, *Immigrant Youth Shelters: “If You’re a Predator, It’s a Gold Mine,”* PROPUBLICA (July 27, 2018, 12:19 PM), <https://www.propublica.org/article/immigrant-youth-shelters-sexual-abuse-fights-missing-children> (Police reports and logs show that “allegations of staff abuse and inappropriate relationships” at children’s immigrant shelters are far from isolated incidences occurring at only a few shelters.).

Department of Health and Human Services that is responsible for unaccompanied minors, received a total of 4,556 allegations of sexual abuse or sexual harassment,¹⁶ of which 178 included accusations that adult staff members had sexually assaulted immigrant children.¹⁷ Within the four-year period reviewed, the five-month span with the largest number of complaints was the most recent—from March 2018 to July 2018—totaling 859 complaints of sexual abuse or sexual harassment.¹⁸ Similarly, a 2014 complaint on behalf of 116 unaccompanied immigrant children detailed allegations that a quarter of them reported facing some form of physical abuse from CBP officials, including sexual assault.¹⁹

The story of Laura Monterrosa exemplifies these trends: Monterrosa was a detainee at a private Texas detention center when she came forward in 2017 with allegations of repeated sexual abuse by a guard.²⁰

¹⁶ Matthew Haag, *Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html?module=inline>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Letter from Ashley Huebner, Nat'l Immigrant Justice Ctr. to Megan H. Mack, Officer for Civil Rights and Civil Liberties, DHS and John Roth, Inspector General, DHS re: Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection, at 2 (June 11, 2014), *available at* <https://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf>.

²⁰ Tina Vasquez, *Texas Detention Center Faces Allegations of Widespread Sexual Abuse—Again (Updated)*, REWIRE.NEWS (Nov. 22, 2017, 10:36 AM), <https://rewire.news/article/2017/11/22/texas-detention-center-faces-allegations-widespread-sexual-abuse-again/>.

Weeks after ICE purported to have investigated Monterrosa's complaint and determined her allegations to be "unsubstantiated," the FBI took the unusual step of intervening to begin its own investigation, suggesting that ICE's investigation may have been incomplete.²¹ Meanwhile, Monterrosa still "regularly encountered her abuser . . . and reported that ICE was retaliating against her by using solitary confinement."²² Monterrosa attempted suicide in January, the month after the FBI began its investigation.²³ She said that a guard threatened to place her in solitary "indefinitely" if she refused to recant her allegations of sexual abuse.²⁴ This case is but one example. Additional reports confirm the prevalence and gravity of the problem.²⁵

²¹ Tina Vasquez, 'A Huge Victory': Woman Who Alleged Assault by Guard Finally Released from Detention, REWIRE.NEWS (Mar. 19, 2018, 12:24 PM), <https://rewire.news/article/2018/03/19/huge-victory-woman-alleged-sexual-assault-ice-contracted-detention-guard-finally-released/>; Tina Vasquez, *FBI Intervenes After Sexual Assault Allegations at Texas Immigrant Detention Center*, REWIRE.NEWS (Dec. 12, 2017, 3:14 PM), <https://rewire.news/article/2017/12/12/fbi-intervenes-sexual-assault-allegations-texas-immigrant-detention-center/>.

²² Vasquez, 'A Huge Victory', *supra* note 21.

²³ *Id.*

²⁴ *Id.*

²⁵ See, e.g., Manny Fernandez, *They Were Stopped at the Texas Border. Their Nightmare Had Only Just Begun*, N.Y. TIMES, Nov. 12, 2018 (detailing sexual assault of 14-year-old undocumented immigrant, her friend and the friend's mother who were sexually and physically assaulted by border patrol agent, and detailing challenges of recovering damages through civil claims); Mark Dow, *Sex Abuse and Homeland Security*, THE CRIME REPORT (May 12, 2017), <https://thecrimereport.org/2017/05/12/sex-and-the-dhs/> (detailing complaints against CBP); Anna Werner &

II. Strong Accountability Mechanisms Are Needed to Deter Sexual Assault by Federal Officials.

DHS's responsibility in the face of the widespread problem of sexual assault against immigrants is to implement and enforce robust accountability mechanisms. DHS's failure to follow or enact effective policies against sexual assault, to investigate reports of sexual assault and hold perpetrators accountable, and to implement effective internal inspection and auditing processes have allowed a culture of impunity for sexual assault to flourish. Like the case before the Court, the persistence of sexual assault by federal officials illustrates the enduring function of *Bivens* as a means of deterring constitutional violations when other measures fall short.

The prevalence of sexual assault by DHS officials is at least partially attributable to the agency's disregard for enforcing its own policies. DHS nominally has policies that, among other things, prohibit sexual assault of those in CBP custody and set standards for the transport of female detainees.²⁶ CBP, however, regularly disregards these policies,²⁷ and evidence

Laura Strickler, "Disturbing" sex abuse within agency that patrols U.S. border, says former top official, CBS NEWS (May 4, 2015), <https://www.cbsnews.com/news/u-s-border-patrol-has-a-sex-abuse-problem-says-whistleblower/> (reporting that CBP received 285 documented complaints or allegations related to sexual abuse since 2009).

²⁶ *E.g.*, 6 C.F.R. §§ 115.11, 115.13, 115.15.

²⁷ *See, e.g.*, Plaintiffs' Response to the Federal Defendants' Motion to Dismiss Plaintiffs' Amended Complaint, *Doe v. Neveleff*, No. 11-CV-00907-LY, 2012 WL 1506127, at 6–7 (W.D. Tex. Mar. 6, 2012) (aggregating sources). Plaintiffs' complaint included a successful *Bivens* claim against federal defendants,

shows that sexual assault persists despite these policies, highlighting the need for additional deterrence measures.²⁸

In addition, DHS agencies' poor track record of investigating reports of sexual assault and misconduct and of taking substantive action likely contributes to the problem. DHS regulations require its agencies to adopt a "zero tolerance" approach to sexual assault and that investigations of sexual assault be "prompt, thorough, [and] objective."²⁹ OIG is responsible for providing "independent oversight . . . within DHS."³⁰ However, CIVIC's analysis of 33,126 complaints of sexual and/or physical abuse against DHS agencies in OIG's files between January 2010 and July 2016 found that OIG undertook investigations into only 247 cases, or 0.07 percent.³¹ Of the 702 complaints of "coerced

alleging that they failed to protect detainees from sexual assault at the private detention center as a result of deliberate indifference. *See Neveleff*, No. 11-CV-907-LY, 2013 WL 489442, at *4 (W.D. Tex. Feb. 8, 2013), *report and recommendation adopted*, No. 11-CV-907-LY, 2013 WL 12098684 (W.D. Tex. Mar. 12, 2013).

²⁸ *See* Letter from CIVIC to John Roth, Inspector General, DHS, et al. at 4–9 (Jan. 25, 2015), <https://www.prisonlegalnews.org/media/publications/CIVIC%20Complaint%20against%20ICE%2C%20SACJ%2C%202015.pdf>; *see also* Christina Fialho, *Fialho: Stop State-Sanctioned Sexual Assaults in Santa Ana*, VOICE OF OC (Feb. 2, 2016), <https://voiceofoc.org/2016/02/fialho-stop-state-sanctioned-sexual-assaults-in-santa-ana/>.

²⁹ *DHS Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities*, Title 6 C.F.R. Part 115.11(a), 115.71(a) (the "DHS Standards").

³⁰ *About Us*, OIG, DHS, <https://www.oig.dhs.gov/about> (last visited Aug. 5, 2019).

³¹ CIVIC Complaint, *supra* note 3, at 4. Although OIG undertook 570 total investigations of sexual and/or physical abuse incidences, only 247 of these arose out of a complaint.

sexual assault” in OIG’s files filed by people in detention, it undertook investigations into only 11 of the complaints against ICE and seven against CBP, referring the majority of the cases to the relevant DHS agency without requesting any follow up.³² It is unrealistic to think that such small percentages of these complaints merited formal investigation by an oversight body.

Disciplinary action is even rarer: one study found that CBP’s Internal Affairs Office, which is responsible for investigating complaints of misconduct against CBP officers, failed to take any disciplinary action in 97 percent of complaints about physical, sexual, and verbal abuse.³³ Notably, even the Homeland Security Advisory Council, which is responsible for oversight of DHS agencies, has acknowledged that CBP’s discipline system is “broken,” finding that “[t]he average case involving allegations of serious misconduct takes more than a year and a half from intake to final disposition of discipline,” which “undermines the deterrence goals of discipline.”³⁴

³² *Id.* at 6.

³³ Daniel E. Martínez et al., AM. IMMIGRATION COUNCIL, *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse* 2, 8 (2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/No%20Action%20Taken_Final.pdf.

³⁴ Homeland Sec. Advisory Council, U.S. DEP’T OF HOMELAND SEC., *Final Report of the CBP Integrity Advisory Panel* 21 (2016), https://www.dhs.gov/sites/default/files/publications/HSAC%20CBP%20IAP_Final%20Report_FINAL%20%28accessible%29_0.pdf; *Homeland Security Advisory Council*, DHS, <https://www.dhs.gov/homeland-security-advisory-council> (last visited Aug. 6, 2019).

As an example, in March 2017, the ACLU filed two claims with the federal government on behalf of two sisters from Guatemala who alleged sexual assault by a CBP officer in July 2016.³⁵ The sisters, then 19 and 17 years old, reported that they encountered CBP officers after crossing the border, asked for help, and were taken to a CBP field office, where they were led by a federal officer into a closet-like room one at a time, told to remove all their clothes, and sexually assaulted.³⁶ The sisters reported the abuse shortly after it occurred to another CBP officer in the field office where they were held, and an investigation was launched by the DHS OIG. But federal authorities apparently never pursued criminal charges against the officers.³⁷

Also contributing to the problem are indications that ICE does not consistently enforce compliance with detention standards, as it “does not require, and many field offices do not send,” evidence pertaining to whether corrective actions have been taken to the Detention Standards and Compliance Unit, which has responsibility for monitoring follow-up and corrective actions resulting from ICE’s detention.³⁸ DHS

³⁵ Letter from ACLU of N. Cal. to Office of the Gen. Counsel, DHS, Attach. A, 1–3 (Mar. 21, 2017), https://www.aclunc.org/docs/20170321-redacted_minor_tort_claim.pdf; Letter from ACLU of N. Cal. To Office of the Gen. Counsel, DHS, Attach. A, 1–3 (Mar. 21, 2017), https://www.aclunc.org/docs/20170321-redacted_clarita_tort_claim.pdf; *see also* CIVIC Complaint, *supra* note 3, at 4.

³⁶ *Id.*

³⁷ CIVIC Complaint, *supra* note 3, at 4–5.

³⁸ Office of Inspector Gen., DEP’T OF HOMELAND SEC., OIG-18-67, *ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements* 12–13 (2018), <https://www.oig.dhs.gov/sites/defa>

agencies also do not adequately comply with public reporting requirements regarding incidents of sexual assault. Despite federal regulations requiring DHS to collect, review, and report on data and to prepare an annual report,³⁹ CBP's reports are often untimely.⁴⁰ Even if these reports were timely, there is reason to question the results. CBP's reported statistics, which are drawn from electronic investigative case files, are shockingly low,⁴¹ and run counter to the voluminous

ult/files/assets/2018-06/OIG-18-67-Jun18.pdf (identifying repeat deficiencies during annual inspections).

³⁹ 6 C.F.R. § 115.187 (2019).

⁴⁰ *Annual Report Assessing CBP Efforts to Prevent, Detect, and Respond to Sexual Abuse in Holding Facilities (FY 2017)*, U.S. CUSTOMS AND BORDER PROT. (Feb. 26, 2019), <https://www.cbp.gov/document/annual-report/annual-report-assessing-cbp-efforts-prevent-detect-and-respond-sexual-abuse-0>; *Annual Report Assessing CBP Efforts to Prevent, Detect, and Respond to Sexual Abuse in Holding Facilities (FY 2016)*, U.S. CUSTOMS AND BORDER PROT. (Feb. 15, 2019), <https://www.cbp.gov/document/annual-report/annual-report-assessing-cbp-efforts-prevent-detect-and-respond-sexual-abuse>; U.S. Customs and Border Prot., *Annual Report Assessing CBP Efforts to Prevent, Detect, and Respond to Sexual Abuse in Holding Facilities: Fiscal Year 2017* (2019), <https://www.cbp.gov/sites/default/files/assets/documents/2019-Feb/CBP%20PREA%20Annual%20Report%202017.pdf> [hereinafter "2017 CBP REPORT"]; U.S. Customs and Border Prot., *Annual Report Assessing CBP Efforts to Prevent, Detect, and Respond to Sexual Abuse in Holding Facilities: Fiscal Year 2016* (2019), https://www.cbp.gov/sites/default/files/assets/documents/2019-Feb/CBP%20PREA%20FY%202016%20Annual%20Report_0.pdf [hereinafter "2016 CBP REPORT"]; Mitra Ebadolahi, *CBP Fails to Discredit Our Report on Abuse of Immigrant Kids*, AM. CIV. LIBERTIES UNION (May 31, 2018, 6:15 PM), <https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/cbp-fails-discredit-our-report-abuse-immigrant>.

⁴¹ See 2017 CBP REPORT, *supra* note 40, at 7 (reporting seven allegations of sexual abuse in CBP facilities in FY 2017); 2016

data that outside organizations and the media have compiled, as described *supra* in Section I. ICE’s website, meanwhile, does not appear to provide any annual reports aggregating data, which DHS is required by regulation to provide;⁴² rather, it provides access only to audit reports for individual facilities.⁴³

Investigations into detention center conditions further illustrate the need for mechanisms that promote deterrence. For instance, a recent California Department of Justice investigation found multiple deficiencies in numerous detention centers, including repeated deficiencies related to protections against sexual abuse.⁴⁴ In sum, the persistence of sexual violence committed by federal officials against immigrants underscores the need for accountability measures that promote deterrence.

CBP REPORT, *supra* note 40, at 6–7 (reporting 16 allegations of sexual abuse or sexual assault in CBP facilities in FY 2016); U.S. Customs and Border Prot., *May 2014 Through December 2015 Sexual Abuse and Assault in Holding Facilities Report* 12 (2017), https://www.cbp.gov/sites/default/files/assets/documents/2017-Apr/May%20201420-%20December%202015%20Sexual%20Abuse%20and%20Assault%20in%20Holding%20Facilities%20Report_1.pdf [hereinafter “2015 CBP Report”] (reporting 18 allegations of sexual abuse or assault in CBP holding facilities from May 6, 2014 to Dec. 31, 2015).

⁴² 6 C.F.R. § 115.189(b) (“The agency shall make all *aggregated* sexual abuse data from holding facilities under its direct control and from any private agencies with which it contracts available to the public at least annually on its Web site consistent with agency information disclosure policies and processes.”) (emphasis added).

⁴³ See *PREA*, U.S. Immigration and Customs Enft (last visited Aug. 5, 2019), <https://www.ice.gov/prea>.

⁴⁴ California Dep’t of Justice, *Immigration Detention in California* 22, 30, 31, 36 (2019), <https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/immigration-detention-2019.pdf>.

III. A *Bivens* Remedy Provides Immigrant Survivors of Sexual Assault by Federal Officials an Established Remedy and Acts as a Deterrent.

Like the shooting in the instant case, sexual assaults of immigrants demonstrate the great capacity for harm that is wielded by wrongdoers clothed in the authority of the federal government. As the *Bivens* Court acknowledged,

[a]n agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. . . . And “where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.”⁴⁵

Accordingly, it is well established that in circumstances such as these, a *Bivens* remedy is needed to deter unconstitutional conduct by federal officials, whether it be unjustified shootings or sexual assaults, and to provide redress for survivors.

This Court most recently addressed the framework used to determine the reach of *Bivens* claims in *Ziglar v. Abbasi*.⁴⁶ The Court confirmed the availability of *Bivens* remedies in the contexts of constitutional violations previously recognized by this Court, albeit noting that “expanding the *Bivens* remedy is now a

⁴⁵ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

⁴⁶ 137 S. Ct. 1843 (2017).

‘disfavored’ judicial activity.”⁴⁷ In particular, this Court acknowledged that a *Bivens* remedy remains appropriate for “individual instances of . . . law enforcement overreach, which due to their very nature are difficult to address except by way of damages after the fact.”⁴⁸ It additionally affirmed that where equitable remedies are insufficient, a *Bivens* remedy is necessary to “redress past harm and deter future violations.”⁴⁹ These principles directly apply to the case before the Court,⁵⁰ much as they would to cases involving sexual assaults of immigrants by federal officials.

Bivens provides needed deterrence for sexual assault by federal officials. Under *Abbasi*, the first question is whether the case presents a “new” context, as familiar claims may proceed.⁵¹ If the case presents a new context for a *Bivens* claim, then the Court will extend the *Bivens* remedy only if the plaintiff does not have an adequate alternative remedy and there are no “special factors counselling hesitation in the absence of affirmative action by Congress.”⁵²

⁴⁷ *Id.* at 1857 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)).

⁴⁸ *Id.* at 1862.

⁴⁹ *Id.* at 1858.

⁵⁰ See Brief For The Petitioners at 38–40, *Hernandez v. Mesa*, No. 17-1678 (Aug. 2, 2019).

⁵¹ See *Abbasi*, 137 S. Ct. at 1857; see also *Rodriguez v. Swartz*, 899 F.3d 719, 738 (9th Cir. 2018) (“*Abbasi* mandates caution and disfavor only when courts extend *Bivens* into a ‘new context’ . . .”).

⁵² *Abbasi*, 137 S. Ct. at 1855, 1857–58 (internal quotation marks omitted).

Like the shooting by a rogue law enforcement officer at issue here,⁵³ cases involving sexual assaults by law enforcement officers operating without meaningful oversight do not present a “new” *Bivens* context. Sexual assault by federal officials violates established constitutional rights that have been previously recognized as the bases for *Bivens* claims.⁵⁴

First, as with the underlying claim in *Bivens* itself, sexual assaults by law enforcement officials constitute unreasonable searches and seizures in violation of the Fourth Amendment.⁵⁵ In fact, violations resulting from sexual assaults by federal officers may well inflict even more harm to the Fourth Amendment right “to be secure in their persons” than the unlawful search of property without a warrant that gave rise to *Bivens* in the first place. In *Abbasi*, the Court explicitly stated that its “opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the

⁵³ See Brief For The Petitioners at 21–26, *Hernandez v. Mesa*, No. 17-1678 (Aug. 2, 2019).

⁵⁴ See *Abassi*, 137 S. Ct. at 1859.

⁵⁵ See, e.g., *Kirkelie v. Thissell*, No. 1:15-cv-00735-DAD-SAB (PC), 2017 WL 5900075, at *2–4, 5 (E.D. Cal. Nov. 30, 2017), *report and recommendation adopted*, 2018 WL 306666 (E.D. Cal. Jan. 5, 2018) (allegations that a corrections officer searched up and down a prisoner’s legs, grabbed his genitals, and subjected him to near-daily verbal sexual comments stated a claim that the officer violated the prisoner’s Fourth Amendment rights under *Bivens*); *Van Beek v. Robinson*, 879 F. Supp. 2d 707, 709–10, 713 (E.D. Mich. 2012) (finding that a genuine issue of material fact existed as to whether a CBP officer’s search of a woman crossing the Canadian border, in which he twisted her nipples, touched her breasts, and conducted a “forceful sweep” of her groin area violated her Fourth Amendment right against unreasonable search and seizure).

search-and-seizure context in which it arose.”⁵⁶ There can be no question that sexual assaults cannot be justified by any policy concerns that would be a basis to distinguish these claims from those in *Bivens*.

In addition, a *Bivens* claim for sexual assault by federal officials would not differ in any “meaningful way”⁵⁷ from the Eighth Amendment context in which the Court has recognized a *Bivens* remedy. In *Carlson v. Green*, the Court upheld a *Bivens* claim for an Eighth Amendment violation that was brought against federal custodial officials for unconstitutional conditions of confinement.⁵⁸ This Court subsequently upheld Eighth Amendment-based *Bivens* claims to vindicate constitutional violations resulting from sexual assault against prisoners.⁵⁹ The Eighth Amendment

⁵⁶ 137 S. Ct. at 1856.

⁵⁷ *Id.* at 1859.

⁵⁸ 446 U.S. 14, 24 (1980).

⁵⁹ *See, e.g., Farmer v. Brennan*, 511 U.S. 825 (1994). Lower courts also have regularly declined to dismiss these types of claims. *See, e.g., Leibelson v. Collins*, No. 5:15-CV-12863, 2017 WL 6614102, at *13–14 (S.D. W. Va. Dec. 27, 2017), *aff’d in part, rev’d in part sub nom. Leibelson v. Cook*, 761 F. App’x 196 (4th Cir. Feb. 22, 2019) (allowing claim against officer who allegedly “inserted his finger(s) into the plaintiff’s rectum” during a strip search to proceed and denying qualified immunity); *Kirkelie*, 2017 WL 5900075, at *5–6 (allowing Eighth Amendment *Bivens* claim against officer who repeatedly sexually assaulted a prisoner to proceed and finding that “the Eighth Amendment protects inmates from . . . sexual abuse”); *Barnes v. Broyles*, No. CV 13-737 (NLH), 2016 WL 155037, at *4 (D.N.J. Jan. 12, 2016) (declining to dismiss prisoner’s Eighth Amendment *Bivens* claims based on allegation that prison guard sexually assaulted and/or fondled prisoner to proceed); *Roberson v. Shaw*, No. 3:12-CV-00501-PK, 2013 WL 1295417, at *4 (D. Or. Jan. 10, 2013), *report and recommendation adopted in part, rejected in part*, 2013 WL 1292215 (D. Or. Mar. 26, 2013) (denying defendants’ motion to

operates through the Due Process Clause of the Fifth Amendment to protect immigration detainees from unconstitutional conditions of confinement,⁶⁰ so sexual assault of immigrant detainees would violate the Fifth Amendment as well.

For example, in *Doe v. Neveleff*, immigrant detainees who had been sexually assaulted by an employee of an ICE detention center sued ICE officials for being deliberately indifferent to the risk of sexual assault by the officer.⁶¹ The court upheld the *Bivens* claim, reasoning that it did not differ from *Carlson v. Green*, where the Court recognized a claim under the Eighth Amendment against federal custodial officials, “with the exception that this case involves immigration detainees—and thus Fifth, not Eighth Amendment violations.”⁶² Accordingly, the court concluded that “[a]pplying the cause of action recognized in . . . *Carlson* to this case in no way requires an extension of

dismiss Eighth Amendment *Bivens* claim based on sexual assault of prisoner by prison official, and recognizing that “sexual assault on an inmate by a prison official offends human dignity, and is in of itself, sufficient injury to state [an Eighth Amendment claim]”).

⁶⁰ *E.D. v. Sharkey*, 928 F.3d 299, 306–07 (3d Cir. 2019) (collecting cases); see also *Unknown Parties v. Johnson*, No. CV-15-00250-TUC-DCB, 2016 WL 8188563, at *4 (D. Ariz. Nov. 18, 2016) (“[Immigration detainees] are protected under the Fifth Amendment from being held without due process of law under conditions that amount to punishment . . . In other words, [immigration detainees] are protected by both the Fifth and Eighth Amendments.”).

⁶¹ No. A-11-CV-907-LY, 2013 WL 489442, at *2 (W.D. Tex. Feb. 8, 2013), *report and recommendation adopted*, 2013 WL 12098684 (W.D. Tex. Mar. 12, 2013).

⁶² *Neveleff*, 2013 WL 489442, at *6 (citing *Carlson*, 446 U.S. at 14).

Bivens.”⁶³ Courts therefore need not go beyond familiar cases to uphold *Bivens* claims brought to redress constitutional violations resulting from sexual assault.⁶⁴

Bivens claims based on sexual assault illustrate the precise types of circumstances in which *Bivens* claims should be upheld, given the absence of alternative remedial schemes.⁶⁵ As this Court has acknowledged, a *Bivens* remedy is called for in cases such as these, which present the specter of “damages or nothing.”⁶⁶ For survivors of sexual assault at the hands of federal officials, alternative legal remedies generally are unavailable. For example, although cases of sexual assault by DHS officials may be criminally prosecuted, the criminal justice process does not directly redress the harm suffered by sexual assault survivors.⁶⁷ A

⁶³ *Id.*

⁶⁴ In addition to violating Fourth Amendment protections from illegal searches and seizures, Eighth Amendment prohibitions on cruel and unusual punishment in confinement, and Fifth Amendment due process protections, sexual assaults of immigrant detainees by federal officials also may violate the Fifth Amendment’s equal protection clause, given the Court’s recognition of *Bivens* claims based on equal protection sex discrimination violations in *Davis v. Passman*, 442 U.S. 228 (1979), and its recognition of conduct constituting sexual assault as an impermissible form of sex discrimination. See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 60–61 (1986).

⁶⁵ See *Abbasi*, 137 S.Ct at 1858.

⁶⁶ *Id.* at 1862 (quoting *Bivens*, 403 U.S. at 410).

⁶⁷ See, e.g., *Arizona v. Johnson*, 351 F.3d 988 (9th Cir. 2003) (upholding conviction for sexual assault and kidnapping when border agent drove a young woman into the desert, handcuffed her, told her to take off her clothes, and told her that he would leave her in the desert if she did not perform oral sex on him,

survivor of sexual assault can, in theory, sue an individual in a personal capacity under tort law, but immunities and statutory exclusions typically foreclose those claims as a legal and practical matter.⁶⁸ Neither does the ability to seek non-immigrant status (often termed a “U visa”), which is open to survivors who assist in the investigation or prosecution of perpetrators, afford a meaningful avenue for redress.⁶⁹ Among other limitations, in order to obtain a U visa, survivors of sexual assaults by DHS officials or other law enforcement officers would have to take the difficult step of requesting certification from a different law enforcement official himself.⁷⁰

Finally, these are the types of cases the *Abbasi* Court identified as suitable for damages relief, since equitable remedies may be insufficient to redress the harm inflicted by sexual assault.⁷¹ Sexual assault often results in economic damages, whether from medical costs, mental health consequences, or for those in the

which she did, notwithstanding his testimony that it was consensual).

⁶⁸ See, e.g., Gregory C. Sisk, *Holding the Federal Government Accountable for Sexual Assault*, 104 IOWA L. REV. 731, 741–59 (2018) (discussing the unavailability of Federal Tort Claims Act (“FTCA”) and other tort-based recovery for claims of sexual assault).

⁶⁹ 8 U.S.C. § 1101(a)(15)(U).

⁷⁰ 8 U.S.C. § 1184(p)(1); see also Tina Vasquez, *FBI Intervenes After Sexual Assault Allegations at Texas Immigrant Detention Center*, REWIRE.NEWS (Dec. 12, 2017, 3:14 PM), <https://rewire.news/article/2017/12/12/fbi-intervenes-sexual-assault-allegations-texas-immigrant-detention-center>.

⁷¹ See *Abbasi*, 137 S. Ct. at 1858 (recognizing the importance of a damages remedy where equitable remedies are insufficient). Of course, statutory remedies exist for sexual assaults of federal employees or by federal officials in prisons. See Sisk, *supra* note 68, at 759-60.

formal economy, lost wages and even housing, which would not otherwise be compensable.⁷²

In sum, *Amici* strongly believe that petitioners have a valid *Bivens* claim and that the Court should reaffirm the continued importance and validity of *Bivens* by reversing the court below.

CONCLUSION

For the foregoing reasons, the Court should find in favor of petitioners.

Respectfully submitted,

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August 9, 2019

⁷² See, e.g., Julie Goldscheid, *Gender Violence and Work: Reckoning with the Boundaries of Sex Discrimination Law*, 18 COLUM. J. GENDER & L. 61, 73–78 (2008) (reviewing studies documenting the economic impact of sexual assault and intimate partner violence); *The Facts on Gender-Based Workplace Violence*, WORKPLACES RESPOND TO DOMESTIC AND SEXUAL VIOLENCE, <https://www.workplacesrespond.org/resource-library/facts-gender-based-workplace-violence/> (last visited Aug. 5, 2019) (same); Sheetal Dhir, *It's time to speak about the economic cost of sexual assault*, AL JAZEERA, Opinion (Sept. 30, 2018), <https://www.aljazeera.com/indepth/opinion/time-speak-economic-cost-sexual-assault-180930071453246.html> (discussing studies and the economic impact of sexual assault).