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Oliver Lawal, Daosamid Bounthisane, and Gazali Shittu, Appellants, v. Marc McDonald, William Riley, and Frederick Chose, Appellees: Brief of Appellants

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No. 13-1881

IN THE

United States Court of Appeals for the Third Circuit

OLIVER LAWAL, DAOSAMID BOUNTHISANE, and GAZALI SHITTU,

Appellants,

v.

MARC MCDONALD, WILLIAM RILEY, and FREDERICK CHOW,

Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania in Case No. 12-3599(CDJ)

BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 as the case arises under the Fourth Amendment, U.S. Const. amend. IV. The district court dismissed the amended complaint on February 26, 2013. On March 27, 2013, the Plaintiffs filed a timely notice of appeal. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether federal immigration officers are entitled to qualified immunity for violating American citizens' clearly established Fourth Amendment right to be free from unreasonable seizures by (1) arresting and interrogating them without probable cause or reasonable suspicion, respectively, and again by (2) continuing to detain them for several hours after the officers confirmed their citizenship. Defs.' Mot. to Dismiss, Dkt. No. 8 at 21-27; Pls.' Resp. in Opp'n to Defs.'Mot. to Dismiss, Dkt. No. 9 at 14-19; Defs.' Reply Br. in Supp. of Defs.' Mot. to Dismiss, Dkt. No. 12 at 7-10; JA11-14.

2. Whether the district court erred in granting the defendants' motion to dismiss the amended complaint because the plaintiffs did not plead that all defendants personally participated in the ultimate conduct rather than recognizing a supervisor can be liable for the acts of his subordinates if he directed others to violate a plaintiff's rights or had knowledge of and acquiesced in his subordinates'

violations. Defs.' Mot. to Dismiss, Dkt. No. 8 at 14-20; Pls.' Resp. in Opp'n to Defs.'Mot. to Dismiss, Dkt. No. 9 at 8-13; Defs.' Reply Br. in Supp. of Defs.' Mot. to Dismiss, Dkt. No. 12 at 2-4; JA7-11.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case was originally before the United States District Court for the Eastern District of Pennsylvania as Case No. 2:12-cv-03599. There are no related cases.

INTRODUCTION

The plaintiff appellants (the "Drivers") are three U.S. citizens who were seized, detained, handcuffed, thrown against the walls at gunpoint, and held for hours as alleged illegal aliens based solely on the facts that they drove taxis and the defendant appellees (the "ICE Agents") did not use readily available information to determine their citizenship.

The ICE Agents are special agents employed by the United States Immigration and Customs Enforcement ("ICE"), which is a division of the United States Department of Homeland Security. After initially contacting the Philadelphia Parking Authority (the "Parking Authority") in June 2009, the ICE Agents collaborated with the Parking Authority over the course of the next year and exchanged various versions of a list of possible illegal aliens working as taxi and limousine drivers.

At the conclusion of these efforts, however, the Drivers still remained on the list because the ICE Agents and their subordinates purportedly were unable to confirm the Drivers' citizenship status. But the ICE Agents and their subordinates' failure to identify this information was inherently unreasonable, given the fact that all of the information they used to verify the Drivers' citizenship after arresting them, such as their social security numbers and driver's license information, was already part of the Parking Authority's records.

Thus, the Drivers' arrest and interrogation violated their right to be free from unreasonable seizure under the Fourth Amendment and cannot be justified by the authority granted to immigration officials under 8 U.S.C. §§ 1357(a)(1)-(a)(2) to interrogate and arrest suspected aliens. Statutes cannot qualify the Constitution's floor when it comes to protection of individual liberty, and thus the belief must be based on either probable cause or reasonable suspicion.

Here, however, the ICE Agents and their subordinates had neither probable cause nor reasonable suspicion to justify their seizure of the Drivers where their justification was grounded in their own unreasonable failure to confirm the Drivers' citizenship. For government officials are not immune from liability because of their own willful and indifferent ignorance. Accordingly, the ICE Agents were not entitled to qualified immunity.

Moreover, despite confirming the Drivers' citizenship to their own satisfaction and knowing that they mistakenly included the Drivers on the interrogation list, rather than release the Drivers, the ICE Agents again violated their Fourth Amendment right to be free from unreasonable seizure by continuing to detain them for several hours. The ICE Agents' justified this continued detention because of a baseless suspicion that the Drivers might "tip-off" the few outstanding taxi drivers who had not appeared yet. Despite the district court's finding otherwise, this prolonged and continued detention was an unreasonable seizure, completely unsupported by reasonable suspicion. No reasonably competent ICE agent could view such conduct as lawful. Accordingly, such an unreasonable detention does not fall within the ambit of qualified immunity.

The power of ICE agents to interrogate and arrest suspected illegal aliens must comport with the Fourth Amendment's guarantee that all people shall have the right to be secure in their persons against unreasonable seizures. Otherwise, they must be held accountable without allowing them to avoid responsibility by cloaking themselves in qualified immunity.

STATEMENT OF THE CASE

On June 26, 2012, plaintiff appellants filed a complaint against defendant appellees for *Bivens* claims, alleging that defendant appellees' gross negligence and deliberate indifference violated their Fourth Amendment rights to be free from

unreasonable seizure by arresting them without probable cause, by refusing to release them once they learned they were U.S. citizens, and by failing to release them once their citizenship was determined. Plaintiff appellants also asserted that defendants appellees' failure to ensure that no United States citizens' name was on the working list, and their mistakenly including the plaintiff appellants on the working list, constituted outrageous and conscience shocking governmental conduct violative of their liberty and due process rights under the Fifth Amendment. Plaintiff appellants sought compensatory and punitive damages. On October 2, 2012 the defendant appellees filed their first motion to dismiss or, in the alternative, motion for summary. In response, on October 23, 2012, the plaintiff appellants filed their first amended complaint.

On November 6, 2012, the defendant appellees moved to dismiss the amended complaint or, in the alternative, for summary judgment, asserting that the allegations contained in the amended complaint failed to state viable *Bivens* claims, and that each defendant appellee was entitled to qualified immunity. They also argued that plaintiff appellants' Fifth Amendment claims should be dismissed because they are properly analyzed under the Fourth Amendment.

On November 27, 2012, the plaintiff appellants filed their response in opposition to the defendant appellees motion to dismiss. After having their motion

to file a reply granted by the district court on December 5, 2012, the defendant appellees filed their reply that same day.

On February 26, 2013, the district court granted the defendant appellees' motion to dismiss. The court held the plaintiff appellants failed to sufficiently plead their *Bivens* claim because they did not identify each specific action the defendant appellees took leading to the alleged misconduct, despite the defendant appellees' direct and supervisory participation in the operation that resulted in plaintiff appellants' arrests and detentions. The district court also held the defendant appellees' actions were protected by qualified immunity, reasoning that a reasonable agent would believe that the defendant appellees' conduct in including plaintiff appellants on the interrogation list of suspected non-citizens, luring them to the Parking Authority Headquarters, arresting them, interrogating them, and continuing to detain them after acknowledging their citizenship, was lawful. This appeal was timely noticed on March 28, 2013.

STATEMENT OF FACTS

A. McDonald Included The Drivers on the List of Suspected Illegal Immigrants.

In or around June 2009, Marc McDonald contacted the Enforcement Manager of Parking Authority's Taxicab and Limousine Division, to request a list of all taxicab drivers certified by the Parking Authority to operate a taxicab in Philadelphia because McDonald and Frederick Chow were assigned to verify the

taxi drivers' immigration status. JA46. The Parking Authority provided a list of all certified taxicab drivers to McDonald. JA46. Over the next year, McDonald and the Parking Authority exchanged various versions of the certified operator list in order to identify illegal aliens or immigrants operating taxicabs in Philadelphia. JA46.

When deposed in a companion case against the Parking Authority, the Enforcement Manager testified that the Parking Authority collects information about every applicant's date of birth, social security number, and proof of citizenship and that Parking Authority maintained records that proved each plaintiff was a U.S. citizen. *See* JA92-93. Although those Parking Authority records were available to the ICE Agents, the Parking Authority had demonstrated a willingness to provide information, and the ICE Agents had over a year to request the documents, McDonald failed to obtain the records. Rather, McDonald obtained and used only the Parking Authority's biographical information. *See* JA73.

McDonald instructed an ICE Intelligence Research Specialist to use the biographical information to check immigration and criminal history databases. JA73. McDonald then narrowed the list to people who appeared to be illegal immigrants. JA73-74. As a result of McDonald's failure to identify the Drivers as U.S. citizens, their names inexplicably remained on the list of people who had no

evidence of U.S. citizenship or of undocumented or unknown immigration status. *See* JA127-29; JA73.

McDonald did not work alone and unsupervised—Chow, the Assistant Special Agent in Charge for Homeland Security Investigations in Philadelphia, Pennsylvania, was McDonald's second-line supervisor. JA80. As such, Chow reviewed and gave final approval for the plan McDonald developed. *See* JA80. He was also present on site the day the plan was implemented. *See* JA80. ICE Agent William Riley also supervised and assisted with the plan—as Assistant Special Agent in Charge of the Department of Homeland Security, Immigration and Customs Enforcement, he supervised investigative groups focused on violations of immigration and custom laws. *See* JA78. Riley knew of and acquiesced in the plan by providing a number of agents under his control to participate in the operation. *See* JA78. The operation to determine the drivers on the list was ultimately executed by the ICE Agents and twenty-two subordinate agents under their direction and control. *See* JA73-74.

B. The ICE Agents Directed The Arrests Of The Drivers At The Parking Authority Facility.

ICE Agents directed Parking Authority to send a letter to all persons on the List, falsely informing each person he was entitled to a refund from Parking Authority in order to have drivers on the List come to Parking Authority headquarters. JA67-69.

Each Driver complied with the letter and arrived at Parking Authority's headquarters on the same day in June 2010. JA47. Shittu arrived at about 7:00 AM, Bounthisane arrived at about 9:00 AM, and Lawal arrived at about 9:30 AM. JA47, 52, 56. Upon arrival, each Driver provided his driver's license, taxicab ID, name, date of birth, address, and social security number to an ICE agent. JA47, 52, 56. All of which was information the Parking Authority already had. JA92-93. The Drivers were then instructed to enter, separately, another room to receive their refunds. Pursuant to the ICE Agents' plan, agents wearing police-marked raid attire with holstered weapons violently attacked each plaintiff, threw him against a wall, handcuffed him, and told him he was under arrest for an immigration violation. JA47, 52, 56; *see* JA74.

During each arrest, the Drivers repeatedly informed the ICE Agents and their subordinates that they were U.S. citizens. JA48, 52, 57. After their arrests, the Drivers were removed to another room where they were detained, handcuffed, and interrogated for over an hour by the ICE Agents and subordinates under the ICE Agents' control. JA48, 52, 57. During their detention, each Driver continued to inform the ICE Agents and subordinates that he was a U.S. citizen. JA48, 52, 57.

When Lawal was arrested and detained, the ICE Agents had already identified Shittu and Bounthisane as U.S. citizens who had been erroneously

included on the List. JA57. Lawal repeatedly told the ICE Agents and their subordinates that his valid U.S. passport and certificate of citizenship were in his taxicab. JA57. The ICE Agents eventually directed a Parking Authority representative to search Lawal's taxicab. JA57. As Lawal said, the Parking Authority representative found Lawal's valid U.S. passport and certificate of citizenship and presented them to the ICE Agents. JA57. Despite proving his citizenship, Lawal was still not permitted to leave. JA58.

C. The ICE Agents Detained Lawal, Bounthisane, and Shittu Despite Acknowledging Their Status As U.S. Citizens.

After each Driver had been detained more than an hour, the ICE Agents told them it had been a mistake. JA48, 53, 57. Despite acknowledging that each Driver was a U.S. citizen, the ICE Agents instructed their subordinates to repeatedly inform each plaintiff he could not leave. JA48, 53, 58.

The Drivers knew the people in the room were agents because the Drivers had just been violently arrested. Further, about four wore uniforms, several wore raid attire with police markings and some had guns strapped to their waists. *See* JA49, 53, 59, 74. Several of the agents were positioned by the exit, indicating to each plaintiff that he was not permitted to leave. JA49, 53, 58. Each Driver even asked the ICE Agents and their subordinates whether he was permitted to leave Parking Authority Headquarters, and the ICE Agents said, "no—remain seated in the room with the other detained taxi cab drivers." JA49, 53, 58. Indeed, when an

overwhelming number of agents with guns and badges told the Drivers they could not leave, the Drivers concluded this was true. As a result, the Drivers were held in custody against their will for several additional hours. JA49, 53, 58.

Although ICE Agents permitted their subordinates to offer Lawal refreshments during his detention, they did not allow the Drivers to speak or stand. JA49, 53, 58. When Shittu and Lawal attempted to speak with each other, the ICE Agents directed their subordinates to separate Shittu and Lawal. JA48. The Drivers were finally allowed to leave after McDonald concluded the operation. JA76.

STANDARD OF REVIEW

This Court exercises plenary review of a district court's grant of a motion to dismiss. *Burtch v. Millberg Factors*, Inc., 662 F.3d 212, 220 (3d Cir. 2011).

To survive a motion to dismiss under Rule 12(b)(6), the pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the Agent fair notice of what the . . . claim is and the ground upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To survive a motion to dismiss, a complaint does not need to contain detailed factual allegations. *Id.* A complaint only needs to contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550

U.S. at 570). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the Agent is liable for the misconduct alleged. *Id.* (citing *Twombly*, 550 U.S. at 557).

SUMMARY OF ARGUMENT

The Drivers have alleged facts sufficient to show that the ICE Agents acted outside the scope of their statutory authority and violated the Drivers' Fourth Amendment right to be free from unreasonable seizures where their arrests and interrogations were based upon the ICE Agents' unreasonable failure to confirm their citizenship despite readily available evidence in the Parking Authority's possession.

The initial seizures of the Drivers constituted arrests under 8 U.S.C. § 1357(a)(2) because a reasonable person in the Drivers' situation would believe they were under arrest where the ICE Agents and their subordinates repeatedly told them that they were being arrested for an alleged immigration violation, took their identification documents, displayed weapons, handcuffed them, had twenty-two officers present—most in raid gear, and interrogated them for over an hour. At the very least, the initial seizure constituted a de facto arrest because the seizure was more intrusive than necessary to effectuate an interrogation. But whether an arrest or a de facto arrest, the Drivers' arrests were not based on probable cause and were therefore unreasonable, and in violation of their Fourth Amendment rights.

Even if the initial seizures constituted interrogations under 8 U.S.C. § 1357(a)(1), such warrantless interrogations are constrained by the Fourth Amendment and must be based on reasonable suspicion. The ICE Agents, however, did not have reasonable suspicion that the Drivers were illegal aliens because they could have verified the Drivers' citizenship using the readily available documentation in the Parking Authority's possession. Further, the vast resources available to ICE and the fact that the ICE Agents took over a year to create the interrogation list, and therefore were not operating under the stress of urgency to justify their negligence and lack of due diligence, demonstrates that there was no excuse for their failure to confirm the Drivers' citizenship.

Further, the seizure was not sufficiently limited in scope because rather than routinely question the Drivers, they orchestrated a secret interrogation that involved subjective intrusion in the form of fear and emotional distress and which lasted for several hours.

In light of these circumstances, coupled with the well-established law as it existed at the time of the ICE Agents' conduct, reasonably competent ICE agents would know that their conduct was unlawful—whether governed by probable cause or reasonable suspicion. Accordingly, the district court erred when it held that the ICE Agents were entitled to qualified immunity.

Moreover, the Drivers have alleged sufficient facts to show that the ICE Agents and their subordinates again disregarded § 1357(a)(1)'s requirement that the seizure of a suspected alien is only justified when based on reasonable suspicion and violated the Drivers' Fourth Amendment rights after they continued to detain the Drivers for several hours after confirming their citizenship and knowing that they had been mistakenly detained. Indeed, once the ICE Agents confirmed the Drivers' citizenship to their own satisfaction, no reasonable suspicion could exist to justify their continued detention. Similarly, the ICE Agents' stated purpose for the continued detention—that they wanted to mitigate any risk of the Drivers informing other taxi drivers who had not shown up yet—is not only an insufficient justification for their seizures, but is not based on reasonable suspicion as there is no evidence supporting the legitimacy of this concern.

Fourth Amendment jurisprudence also makes clear that the continued detention of the Drivers squarely falls within the definition of a seizure and the several additional hours for which the Drivers were detained are not de minimis. Specifically, in addition to the prolonged detention, the ICE Agents and their subordinates repeatedly told the Drivers that they were not permitted to leave despite being wrongfully seized; refused to allow the Drivers to speak or stand; had twenty-two agents, many of who wore raid gear and displayed guns strapped to

their waists and stood by the holding room exit; and disrupted not only the daily lives of the Drivers, but also limited their physical movement. Thus, a reasonable person in the Drivers' position would believe that they were not free to leave, constituting a seizure.

Reasonably competent ICE agents would have known that this conduct both constituted a seizure and was unsupported by reasonable suspicion. Accordingly, the ICE Agents were not entitled to qualified immunity, and the district court erred in so holding.

Lastly, the district court erred in ruling that the Drivers did not plead facts sufficient to establish a *Bivens* claim. A defendant is liable for a *Bivens* claim not only if he or she committed the ultimate act, but also if he or she was a supervisor who directed others to violate a plaintiff's rights or had knowledge of and acquiesced in his or her subordinates' violations. The Drivers pled that McDonald developed the enforcement investigation that seized them. They pled that Riley supervised investigation units, including McDonald's, and had to know of and acquiesce in the violation because he assigned subordinates to the team. And they pled that Chow was in charge of investigations where the investigation and seizures occurred, signed off on the plan, and was actually present at the site of the seizures. These pleadings are more than sufficient to state a facially plausible

claim leading to the reasonable inference that the ICE Agents are liable for the alleged misconduct.

Accordingly, because the Drivers have stated plausible *Bivens* claims and the ICE Agents are not entitled to qualified immunity, the district court erred when it granted the ICE Agents' motion to dismiss. Therefore, this Court should reverse the district court's opinion.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE ICE AGENTS HAD QUALIFIED IMMUNITY FOR INTERROGATING THE DRIVERS BASED ON THEIR WRONGFUL INCLUSION ON THE LIST.

***STANDARD OF REVIEW*:** The standard of review for a district court's denial of a motion to dismiss on qualified immunity grounds as it involves a pure question of law is de novo. *James v. City of Wilkes-Barre*, 700 F.3d 675, 679 (3d Cir. 2012). In reviewing a denial of qualified immunity at the Rule 12(b)(6) stage of litigation, the Court accepts the plaintiffs' allegations as true and draws all inferences in their favor. *Torisky v. Schweiker*, 446 F.3d 438, 442 (3d Cir. 2006).

Since Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), the Supreme Court has recognized an implied private action for damages against federal officers alleged to have violated a citizen's Fourth Amendment

rights. *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012). In confronting such claims, however, federal officers may assert the affirmative defense of qualified immunity. *Ashcroft v. Iqbal*, 556 U.S. 662, 672, 675 (2009).

Qualified immunity bars suit against a government official unless the official violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, (1982). This inquiry must be conducted in the light most favorable to the plaintiff, taking into account the specific context of the case. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Once a government official raises qualified immunity as a defense to suit, courts must engage in a two-pronged analysis: (1) whether the facts alleged by the plaintiff show violation of a constitutional right, and (2) whether that right was clearly established at the time of the violation. *Id.* The constitutional right at issue here is the Fourth Amendment's protection from "unreasonable searches and seizures." U.S. Const. amend. IV. To determine whether this right is clearly established, "a court must consider the state of the existing law at the time of the alleged violation and the circumstances confronting the officer to determine whether a reasonable state actor could have believed that his conduct was lawful." *Kelly v. Borough of Carlisle*, 622 F.3d 248, 253 (3d Cir. 2010).

The ICE Agents violated the Fourth Amendment rights of the Drivers to be free from unlawful seizures because the lack of indicia of their citizenship did not

create probable cause or reasonable suspicion so as to justify their inclusion on the list and subsequent arrest and interrogation—especially as this lack evidence was self-imposed because the Parking Authority was in possession of such documentation. Further, the seizure was not sufficiently limited in scope because rather than routinely question the Drivers, they orchestrated a secret interrogation that involved subjective intrusion in the form of fear and emotional distress and which lasted for over an hour.

Moreover, reasonably competent ICE agents would know that the ICE Agents' conduct was unlawful in arresting and interrogating the Drivers based on their wrongful inclusion on the list. The well-developed caselaw on what constitutes a reasonable seizure and the contours of Fourth Amendment jurisprudence as they existed at time of the ICE Agents' conduct demonstrate that the ICE Agents are not entitled to qualified immunity.

A. The ICE Agents Violated The Drivers' Fourth Amendment Right To Be Free From Unreasonable Seizures Where The Drivers' Arrests And Interrogations Were Based On The ICE Agents' Failure To Confirm Their Citizenship Despite Readily Available Evidence.

Regarding the first prong of the qualified immunity analysis, the Drivers have alleged sufficient facts to demonstrate that, in the light most favorable to them, the ICE Agents violated their Fourth Amendment rights to be free from an "unreasonable seizure" when the ICE Agents arrested and interrogated them based

on their inability to confirm the Drivers' citizenship. Under the Fourth Amendment, any seizure inquiry has two steps: determining whether there was in fact a seizure, and if so, whether that seizure was reasonable. *United States v. Smith*, 575 F.3d 308, 313 (3d Cir. 2009).

It is undisputed that the ICE Agents seized the Drivers when the ICE Agents arrested, handcuffed, detained, and interrogated them for over an hour. JA47, 48, 52, 53, 56, 57. The only questions, then, are whether the seizures were arrests or interrogations, and whether, in any case, the seizures were reasonable. *See U.S. v. Laville*, 480 F.3d 187, 194 (3d Cir. 2007).

1. The initial seizures constituted arrests and were unreasonable because they were not based on probable cause.

The ICE Agents' initial seizures of the Drivers were arrests, requiring that they be based upon probable cause. But no probable cause existed that justifies their inclusion on the interrogation list when the arrests were based on the ICE Agents' unreasonable failure to discern the Drivers' citizenship when such information was readily available and in the possession of the Parking Authority. Accordingly, these arrests violated the Drivers' Fourth Amendment right to be free from unreasonable seizures.

Immigration officials are statutorily permitted to, without a warrant, "arrest any alien in the United States, if he has reason to believe that the alien is . . . in

violation of any such law or regulation [regarding the admission, exclusion, expulsion, or removal of aliens] and is likely to escape before a warrant can be obtained . . . ." 8 U.S.C. § 1357(a)(2).

Whether an arrest has occurred is an objective inquiry based on "what a reasonable person would believe, based on the circumstances of the interrogation." *U.S. v. Jacobs*, 431 F.3d 99, 105 (3d Cir. 2005) (discussing definition of "in custody" for purposes of *Miranda* rights). Although the subjective intent of the officers or the suspect is irrelevant, *see Whren v. U.S.*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."), whether an officer tells a person that he is arrested may be strong evidence that a suspect is under arrest. This is because when an officer tells a person he is arrested, a reasonable person in the individual's position would believe this to be so. *See, e.g.*, *Tebbens v. Mushol*, 692 F.3d 807, 816 (7th Cir. 2012) (finding that a reasonable person would believe they were under arrest when officer told person before placing his hands on him, that he was "going to make [the charges] stick"). Other relevant factors indicating an arrest may include: blocking of suspect's path or impeding his progress; retention of ticket or piece of identification; officer's statement that suspect is subject of investigation; display of weapons; number of officers present and their demeanor; length of detention; and

extent to which officers physically restrained suspect. *U.S. v. Hammock*, 860 F.2d 390, 393 (11th Cir. 1988).

Here, a reasonable person in the Drivers' situation would believe they were under arrest. Exemplifying all of the factors listed above, the ICE Agents and their subordinates told the Drivers they were under arrest for alleged immigration violations, JA47-48, 52, 56-57; they took their identification documents, JA47, 52, 56; they displayed weapons and most were dressed in raid gear, JA49, 53, 59, 74-75; they handcuffed the Drivers, JA47-48, 52, 56-57; there were twenty-two ICE agents present, JA74; and the interrogations lasted over an hour for each Driver, JA48, 52, 57.

In any event, the initial seizure of the Drivers constitutes a de facto arrest, in that the interrogation was not "so minimally intrusive as to be justifiable on reasonable suspicion," and therefore ripened from an interrogation to an arrest, requiring probable cause. *See*, *e.g.*, *U.S. v. Leal*, 235 F. App'x 937, 941 (3d Cir. 2007) (quoting *U.S. v. Place*, 462 U.S. 696, 709 (1983)).

As with all arrests, an arrest under § 1357(a)(2), whether de facto or otherwise, must be based upon probable cause. *Olivia-Ramos v. Attorney Gen. of U.S.*, 694 F.3d 259, 285 (3d Cir. 2012) ("under section 1357(a)(2) . . . 'arrest' means an arrest upon probable cause") (quoting *Babula v. I.N.S.*, 665 F.2d 293, 298 (3d Cir. 1981)). "Probable cause exists whenever reasonably trustworthy

information or circumstances within an arresting officer's knowledge are sufficient to warrant a person of reasonable caution to conclude that an offense has been or is being committed by the person being arrested." *Laville*, 480 F.3d at 194.

Here, the ICE Agents did not have probable cause to arrest the Drivers. The ICE Agents' self-imposed failure to discern the Drivers' citizenship when such information was readily available and in the possession of the Parking Authority does not permit a person of reasonable caution to conclude that the Drivers were illegal aliens. Further, there is no evidence to suggest that the Drivers were, at any time, at risk of escaping. *See Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 218 (9th Cir. 1995) (finding that failure to carry alien registration documentation without more did not provide probable cause to arrest suspected undocumented employees for criminal violation of illegal reentry and that there was no evidence of escape risk). Accordingly, because there is no probable cause, the arrests of the Drivers violated their Fourth Amendment right to be free from unreasonable seizures.

2. Even if the initial seizures of the Drivers were interrogations, they were unreasonable because they were not based on reasonable suspicion.

Even assuming the initial seizures of the Drivers were interrogations, the ICE Agents did not have reasonable suspicion justifying the Drivers' inclusion on the list and their subsequent interrogation.

Immigration officials are statutorily permitted to "interrogate any alien or person believed to be an alien as to his right to be or remain in the United States" without a warrant. 8 U.S.C. § 1357(a)(1). But that authority is constrained by the Fourth Amendment, which "demands something more than the broad and unlimited discretion sought by the Government." *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975). Accordingly, the Supreme Court held that for warrantless interrogations conducted under § 1357(a)(1) to be constitutional, they must be justified by reasonable suspicion. *Id.* at 884 ("For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.").

To determine whether an officer had reasonable suspicion, the Supreme Court has considered the "totality of the circumstances," and "whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *U.S. v. Arvizu*, 534 U.S. 266, 273 (2001) (overturning the lower court's formalistic methodology for determining reasonable suspicion); *see also U.S. v. Cortez*, 449 U.S. 411, 418 (1981) ("Based upon that whole picture, the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.").

In *Brignoni-Ponce*, border patrol claimed that they had the authority to question occupants about their citizenship not only at fixed check points near the Mexican border, but also through random stops initiated by patrolling agents. 422 U.S. at 877. In executing these roving stops, border patrol's only selection criterion was the occupants' apparent Mexican ancestry. *Id.* at 875. The Supreme Court, however, held that such interrogations, when based solely on the individual's apparent ancestry, does not constitute reasonable suspicion and was proscribed by the Fourth Amendment. *Id.*; *see also, Orhorhaghe v. I.N.S.* 38 F.3d 488, 497 (9th Cir. 1994) (finding that plaintiff's "Nigerian-sounding name" and the fact that the plaintiff's name did not appear in I.N.S. records for lawful entries into the United states did not amount to reasonable suspicion that the alien was illegally in the country). In *Brignoni-Ponce*, the Court also enumerated a non-exhaustive list of the possible factors that may give rise to reasonable suspicion, including reports of illegal aliens in the area, the specific behavior of the individuals, and other factors that may be in the expertise of the agent. 422 U.S. at 885.

Thus, in finding reasonable suspicion, the courts have focused on the particularized factors observed by the officers. For example, in *Lee v. I.N.S.*, 590 F.2d 497 (3d Cir. 1979), this Court found reasonable suspicion when an officer observed two individuals speaking in Chinese near a restaurant that was known to hire illegal immigrants, and one of the plaintiffs began acting suspiciously as the

officer approached. 590 F.2d at 499-500. Similarly, in *Babula vs. I.N.S.*, 665 F.2d. 293 (3d Cir. 1981), this Court found that immigration officials were within the scope of § 1357(a)(1) when they questioned factory workers after receiving an anonymous tip from a "reliable source" that illegal aliens were employed at the factory. *Id.* at 296. Within four months of receiving the tip, the I.N.S. agents in *Babula* had confirmed the identity of individuals who would not be questioned, so as to avoid interrogating American citizens and aliens legally present in the Unites States. *Id.* at 294.

Here, the ICE Agents had no reasonable suspicion justifying the seizure of the Drivers because the mere absence of indicia of the Drivers' citizenship cannot justify their interrogation—the absence of evidence is not evidence itself. *See*, *e.g.*, *Orhorhaghe*, 38 F.3d at 497-98 (finding that the absence of the plaintiff's name in I.N.S. records for lawful entries into the United states did not amount to reasonable suspicion that the alien was illegally in the country); *Mountain High*, 51 F.3d at 218 (finding lack of alien registration documentation, without more, does not provide probable cause of the criminal violation of illegal entry). This adage is especially true in this case considering the totality of the circumstances. McDonald had over a year to acquire the readily available citizenship documentation of the Drivers before placing them on the list for interrogation—that the ICE Agents were purportedly unable to confirm their citizenship results

from their own unreasonable failing. *See* JA46, 73-74. Without any explanation as to why the ICE Agents and their subordinates did not or could not obtain the readily available citizenship documentation from the Parking Authority or elsewhere, the ICE Agents have pointed to no particularized factor that might indicate alienage, much less illegal status. Rather, such failing absent any allegations otherwise, indicates that the ICE Agents simply relied on the Drivers' biographical information to assume alienage. *Cf. Brignoni-Ponce*, 422 U.S. at 875 (finding that relying solely on apparent descent does not constitute reasonable suspicion for purposes of determining whether a seizure was reasonable); *Orhorhaghe*, 38 F.3d at 497-98 (finding that a foreign sounding name alone does not constitute reasonable suspicion).

Here, however, it took the ICE Agents and their subordinates over a year to implement the operation. JA46, 73-74. Yet despite varied and numerous resources, including the Parking Authority's records of the Drivers' U.S. citizenship, and their unconstrained timeframe, the ICE Agents and their subordinates purportedly still could not confirm the Drivers' citizenship. Indeed, the Supreme Court recently described the breadth of ICE's capabilities: "ICE's Law Enforcement Support Center operates '24 hours a day, seven days a week, 365 days a year' and provides, among other things, 'immigration status, identity information and real-time assistance to local, state and federal law enforcement

agencies.'" *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (citing ICE, Fact Sheet: Law Enforcement Support Center (May 29, 2012), online at http://www.ice.gov/news/library/factsheets/lesc.htm) (reviewing the reach of federal regulation on immigration in relation to states' interest in setting immigration policy).

Moreover, even if reasonable suspicion exists, the inquiry would not end there—the seizure must also be reasonably related to the circumstances that justified the intrusion initially. *Lee*, 590 F.2d at 499-500; *see also*, *Brignoni-Ponce*, 422 U.S. at 881 (quoting *Terry v. Ohio*, 392 U.S. 1, 29 (1968)). This inquiry requires a balancing of governmental interests and the individual freedoms at stake. *Brignoni-Ponce*, 422 U.S. at 882-84 (balancing the interests of Border Patrol agents in randomly stopping vehicles for questioning against Fourth Amendment rights of citizen).

In *Brignoni-Ponce*, the Supreme Court thought it reasonably justified, given the interests of border patrol agents in securing the borders, to allow agents to conduct an inquiry described as "a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States." *Id.* at 880; *see also U.S. v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976) (finding that "routine" vehicle stops do not give rise to an objectionable intrusion on personal freedoms). Likewise, in *Lee*, this Court found an officer's questioning of

individuals to be justified in scope, given that the officer merely approached individuals speaking in Chinese near a restaurant known to hire illegal immigrants, identified himself as an agent, and inquired about their identity. 590 F.2d at 502. In *Delgado*, the Supreme Court similarly held that an I.N.S. agent's questioning of individuals in a factory was justified in scope since the factory workers were allowed to continue with their routine despite the presence of I.N.S. agents. 466 U.S. at 218.

Here, the interrogation imposed a far more significant burden. The interrogation in this case is far from routine questioning. *Cf. Delgado*, 466 U.S. at 218 (finding that an INS agent's questioning of individuals in a factory was justified in scope since the factory workers were allowed to continue with their routine despite the presence of INS agents). The ICE Agents created a decoy refund scheme to lure the Drivers in for a secret interrogation that involved violence and intimidation. *See* JA47, 48, 52, 56-57, 74. In addition to the objective intrusion found here (i.e., the actual interrogation), there was also substantial subjective intrusion in the form of fear and emotional distress. *See U.S. v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976) (drawing a distinction between roving patrols and fixed checkpoints based on the existence of both an objective and subjective intrusion in roving patrol). Most importantly, though, the interrogations lasted for more than hour, JA48, 52, 57, which is far longer than the

momentary ones discussed in cases such as *Brignoni-Ponce*. *See also U.S. v Place*, 462 U.S. 696, 709-710 (1983) ("[T]he brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion.").

B. Reasonably Competent ICE Agents Would Know That The Failure To Confirm The Drivers' Citizenship Despite Readily Available Documentation Does Not Constitute Probable Cause Or Reasonable Suspicion.

Under the second prong of the qualified immunity analysis, the Drivers' Fourth Amendment right to be free from unreasonable seizures must be "clearly established," such that if at the time the interrogation occurred, it would be clear to reasonably competent ICE agents that the ICE Agents' conduct was unlawful in the situation they confronted." *See Saucier*, 533 U.S. at 202. Furthermore, although the abstract right to be free from unreasonable seizure clearly is established, for qualified immunity purposes, the right must be considered on a more specific level: "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *In re City of Philadelphia Litig.*, 49 F.3d 945, 961 (3d Cir. 1995) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In making such a determination, "a court must consider the state of the existing law at the time of the alleged violation and the circumstances confronting the officer to determine whether a reasonable state

actor could have believed that his conduct was lawful." *Kelly*, 622 F.3d at 253. "[I]f the law was clearly established [at the time of the conduct], the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Id.* (quoting *Harlow*, 457 U.S. at 818-19).

This Court has also recognized, in the context of determining the applicability of qualified immunity, that "[p]olice officers generally have a duty to know the basic elements of the laws they enforce. *Id.* at 258; *see also Orsatti v. New Jersey State Police*, 71 F.3d 480, 484 (3d Cir. 1995) ("The obligation of local law enforcement officers is to conduct criminal investigations in a manner that does not violate the constitutionally protected rights of the person under investigation.").

1. Reasonably competent ICE agents would not believe they had probable cause to arrest the Drivers.

At the time of the ICE Agents' conduct, the Third Circuit held that immigration officials' arrest powers under § 1357(a)(2) require officials to have probable cause justifying such an arrest. *See Babula*, 665 F.2d at 298 ('arrest' under section 1357(a)(2) means an arrest upon probable cause, and not simply a detention for purposes of interrogation). Here, no reasonably competent ICE agents would believe that they had probable cause to arrest the Drivers. Probable cause requires that a reasonable person to conclude that an offense is being committed. The absence of documentation confirming the Drivers' status,

however, cannot rise to the level of indicating that they are, in fact, likely to be illegal aliens. As the Ninth Circuit found in *Mountain High*, recognized, "although the lack of documentation or other admission of illegal presence may be some indication of illegal entry, it does not, without more, provide probable cause of the criminal violation of illegal entry." 51 F.3d at 218 (quotation and marks omitted). Moreover, the plain language of § 1357(a)(2) requires the arresting officer reasonably believe that the alien is in the country illegal *and* that he is "likely to escape before a warrant can be obtained for his arrest." *Id.* Here, as in *Mountain High*, no additional particularized evidence exists as is required for probable cause, and the ICE Agents have not alleged grounds for a reasonable belief that the Drivers were particularly likely to escape. Accordingly, because no reasonable ICE agents could believe that their conduct was lawful, the ICE Agents are not entitled to qualified immunity, and the district court erred in holding otherwise.

2. Reasonably competent ICE agents would not believe they had reasonable suspicion.

Similarly, the Supreme Court held that the reasonableness of warrantless interrogations under § 1357(a)(1) must be based on reasonable suspicion. *Brignoni-Ponce*, 422 U.S. at 884. Because analyzing the reasonableness of seizures in this context turns on whether reasonable suspicion existed, to determine the boundaries of the law as it existed, the appropriate inquiry here is whether

reasonably competent ICE Agents would know that they did not have reasonable suspicion in interrogating the Drivers.

Cases since *Brignoni-Ponce* have further defined and narrowed the contours by enumerating and evaluating specific factors and circumstances that satisfy reasonable suspicion. For example, relying on *Brignoni-Ponce*, the Ninth Circuit rejected the I.N.S.'s contention that the plaintiff's foreign sounding name, without more, provided reasonable suspicion to seize and interrogate him. *Orhorhaghe*, 38 F.3d at 497-98. Importantly, the court also rejected that the absence of any record of the plaintiff's entry into the U.S. did not provide any additional basis for suspecting he was an illegal alien. *Id.* at 498. *See also, Lee v. I.N.S.*, 590 F.2d 497 (3d Cir. 1979) (finding reasonable suspicion when an officer observed two individuals speaking in Chinese near a restaurant that was known to hire illegal immigrants, and one of the plaintiffs began acting suspiciously as the officer approached).

The foregoing analysis, however, is noticeably absent from the district court's finding that the ICE Agents' interrogation did not violate a clearly established right. Rather, the district court cursorily found that reasonable ICE agents would not know that their conduct was unlawful in light of immigration agents' interrogation authority under § 1357(a)(1), and based upon the fact that the

ICE Agents created the list over the course of a year and exchanged various versions. JA12-13.

The district court's reliance on that fact that there was more than a year between initiation of the investigation and its operational execution, however, is based on the faulty premise that the lengthy interim period and the fact that various versions were exchanged therein reflects a thorough investigation. But this reasoning ignores that taken in the light most favorable to the Drivers, rather than reflect diligence, it can indicate neglect, inefficiency, and non-urgency, as evidenced by the ICE Agents' failure to determine the Drivers' citizenship despite readily available evidence and ICE's tremendous resources. Indeed, this suppositional conflict illustrates the need for discovery here.

Further, rather than support the district court's finding that reasonable ICE agents would not know that the interrogation of the Drivers was unlawful, § 1357(a)(1) actually supports the opposite conclusion. As discussed above, the Supreme Court has expressly held that the authority and discretion granted to immigration officials under § 1357(a)(1) is not limitless—it is constrained by the Fourth Amendment's requirement of having reasonable suspicion in executing such seizures. *See Brignoni-Ponce*, 422 U.S. at 884.

Accordingly, because the Supreme Court has directly addressed the boundaries of the specific constitutional right and statute at issue here, no

reasonably competent ICE agent can be excused from knowing that seizures grounded in anything less than reasonable suspicion are unlawful. And as illustrated by the existing law as applied to the circumstances here, a reasonable ICE agent should have known that reasonable suspicion cannot be justified by reference only to the absence of indicia of citizenship. Moreover, a reasonable ICE agent should be aware that the aggressive manner in which the initial interrogation was conducted, coupled with its extended duration, far exceeded the justification that the Drivers might be illegal aliens. Accordingly, the district court's holding that the ICE Agents were entitled to qualified immunity for the initial interrogation and seizure of the Drivers should be reversed.

II. THE DISTRICT ERRED IN HOLDING THAT THE ICE AGENTS WERE ENTITLED TO QUALIFIED IMMUNITY FOR CONTINUING TO DETAIN THE DRIVERS FOR SEVERAL HOURS AFTER CONFIRMING THEIR CITIZENSHIP.

***STANDARD OF REVIEW*:** The standard of review for a district court's denial of a motion to dismiss on qualified immunity grounds as it involves a pure question of law is de novo. *James v. City of Wilkes-Barre*, 700 F.3d 675, 679 (3d Cir. 2012). In reviewing a denial of qualified immunity at the Rule 12(b)(6) stage of litigation, the Court accepts the plaintiffs' allegations as true and draws all inferences in their favor. *Torisky v. Schweiker*, 446 F.3d 438, 442 (3d Cir. 2006).

The ICE Agents and their subordinates again violated the Drivers' Fourth Amendment Rights to be free from unreasonable seizure after they continued to detain the Drivers for several hours after confirming their citizenship. Such detention could not be based in reasonable suspicion once the ICE Agents confirmed the Drivers' citizenship even to their own satisfaction. Further, reasonable ICE agents would have known that the continued detention of the Drivers for several hours after confirming their citizenship was an unconstitutional seizure. As discussed above, Fourth Amendment jurisprudence makes clear that these circumstances squarely fall within the definition of a seizure, and the several additional hours for which the Drivers were detained are not de minimis. Accordingly, the ICE Agents were not entitled to qualified immunity, and the district court erred in so holding.

A. The ICE Agents Violated The Drivers' Fourth Amendment Right To Be Free From Unreasonable Seizure When They Detained The Drivers For Several Hours After Confirming Their Citizenship.

The Drivers have alleged sufficient facts to demonstrate that, separate and apart from their initial unreasonable arrest and interrogation, the ICE Agents violated their Fourth Amendment right to be free from unreasonable seizure a second time when the ICE Agents continued to detain the Drivers for several hours after confirming their U.S. citizenship. The central dispute here is whether the

Drivers' continued detention for several additional hours constituted a seizure or a de minimis detention.

A seizure occurs when an officer, by show of authority, restrains the liberty of a citizen in some way. *U.S. v. Mendenhall*, 446 U.S. 544, 552 (1980). To delineate between mere questioning and actual seizure of an individual not under arrest, the Supreme Court has considered whether under the circumstances, a reasonable individual would believe he was free to leave or free to refuse to answer an officer's questions. *Delgado*, 466 U.S. 210, 217 (1984); *Oliva-Ramos*, 694 F.3d at 283-84 ("[A] person has been 'seized within the meaning of the Fourth Amendment only, if in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.") (quotation omitted). Such relevant circumstances include a show of force or intimidating tactics by the acting officers. *Delgado*, 466 U.S. at 215. Questioning may amount to a seizure even if the questioned individual does not attempt to leave. Factors that may indicate a seizure when an individual did not attempt to leave include the intimidating presence of several officers, exposed weapons, physical touching, or "the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554.

Although the Supreme Court in *Delgado* found no seizure "in a factory survey" operation where I.N.S. agents questioned individuals in a factory

suspected of hiring illegal immigrants, the Court highlighted that under the particular circumstances of that case, the individuals were allowed to proceed with their normal workday procedures despite the ongoing questioning: "the employees were about their ordinary business, operating machinery and performing other job assignments. Even though the surveys did cause some disruption, including the efforts of some workers to hide, the record also indicates that workers were not prevented by the agents from moving about the factories." *Delgado*, 466 U.S. at 218.

The Supreme Court has expressly recognized that the Fourth Amendment's protection against unreasonable seizures extends "to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." *Brignoni-Ponce*, 422 U.S. at 878. Indeed, in determining the constitutional boundaries of warrantless interrogations by immigration agents under § 1357(a)(1), the Court found that the "modest intrusion" resulting from random stops by border patrol—stops that were limited to visual inspections and usually consumed no more than one minute—were nonetheless unreasonable seizures under the Fourth Amendment. *Id.* at 880, 883. Both the Supreme Court and this Court have previously found that detaining U.S. citizens is only proper for very brief periods of time when there is a legitimate public concern at stake, including for example, allowing officials to conduct a search of an individual's residence

suspected of serious criminal charges, or while officers attempt to verify or dispel their suspicions in felony drug courier cases. *See, e.g.*, *Michigan v. Summers*, 452 U.S. 692 (1981) (residence); *Florida v. Royer*, 460 U.S. 491 (1983) (drug courier); *accord U.S. v. Coggins*, 986 F.2d 651 (3d Cir. 1993) (drug courier). Other circuit courts that have considered the issue of de minimis detention pertaining to the Fourth Amendment generally characterize de minimis detention in very brief periods of time such as minutes, rather than hours.[1]

Here, the jurisprudence supports that the circumstances in the continuing to detain Drivers all fall within the factors demonstrating a seizure and not a de minimis violation. Specifically, the ICE Agents and their subordinates detained and repeatedly told the Drivers that they were not permitted to leave despite being wrongfully seized. JA48, 53, 58. ICE Agents and their subordinates held the Drivers in custody against their will for several additional hours. JA49, 53, 58.

[1] *See, e.g.*, *U.S. v. Norwood*, 377 Fed. Appx. 580, 581 (8th Cir. 2010) (minute and a half seizure while officer searched the plaintiff's vehicle was de minimis and not a violation of his Fourth Amendment right); *U.S. v. Olivera-Mendez*, 484 F.3d 505, 511 (8th Cir. 2007) ("[W]e do not think [the officer] effected an unreasonable seizure simply by asking three brief questions related to possible drug trafficking amidst his other traffic-related inquiries and tasks"); *Ford v. Wilson*, 90 F.3d 245, 247 (7th Cir. 1997) (a routine traffic stop was de minimis under Fourth Amendment scrutiny). Most notably, however, "the weight of Third Circuit authority indicates that investigatory stops lasting *less than one hour* are within the purview of *Terry* and do not constitute arrests requiring probable cause." *Apata v. Howard*, No. 05-3204, 2008 WL 4372917, at *25 (D.N.J. Sept. 23, 2008) (citing *Brown v. City of Phila.*, No. 07-0192, 2008 WL 269495, at *7 (E.D. Pa. Jan. 29, 2008) (collecting cases) (alteration in original)).

During the detention, ICE Agents and their subordinates refused to allow the Drivers to speak or stand. JA48, 53, 58. ICE agents wearing raid gear and displaying guns strapped to their waists also stood by the holding room exit. JA48, 49, 53, 58; *see* JA74-75. And unlike *Delgado*, the continued detention not only disrupted the daily lives of the Drivers, but also limited their physical movement.

Additionally, although the ICE Agents do not appear to assert that they had reasonable suspicion to detain the Drivers because of their desire to prevent the Drivers from "tipping-off" the other taxi drivers who had not yet arrived, the ICE Agents' mere "hunch" is insufficient to justify such prolonged and continued detention. *See, e.g.*, *Manzanares v. Higdon*, 575 F.3d 1135, 1144 (10th Cir. 2009) (rejecting officer's belief that a suspect's co-worker and friend "knew more than he was willing to say" about the suspect as sufficient to justify his continued detention because such conjecture was not anchored in any factual observation).

Given these circumstances, any reasonable person would have understood that he was not permitted to leave the room where the Drivers were being held. *See Oliva-Ramos*, 694 F.3d at 283-84 (using an objective standard to determine whether there was a show of authority). The district court erred in comparing the Drivers' prolonged and restrictive detention to the manner in which the ICE Agents treated the taxi drivers whom they *correctly* determined to be illegal aliens. JA14 ("[The Drivers] do not allege that once their citizenship status was confirmed

that they were thereafter handcuffed or treated in the same manner as those determined to be illegal aliens."). Moreover, the failure to use handcuffs after determining their citizenship is not the dispositive issue in this case. Detaining U.S. citizens for several hours, forbidding them to leave, stand, or speak, while standing by the exits armed and in raid gear, is substantial evidence to indicate a show of authority. *Cf. Mendenhall*, 446 U.S. at 554. The district court applied a misguided principle by discounting the fact that the Drivers were held in custody against their will merely for lack of physical restraint of handcuffs. Indeed, Lawal and Shittu even expressly asked to leave but were denied. JA49, 58.

B. A Reasonably Competent ICE Agent Would Have Known That Continuing to Detain The Drivers After Confirming Their Citizenship Violated The Fourth Amendment.

In light of the well-established rule requirement announced in *Brignoni-Ponce* that immigration officials may only exercise their authority to conduct warrantless seizures where reasonable suspicion exists, a reasonably competent ICE agent could not believe that an unreasonable detention for several hours is a de minimis violation, rather than an unlawful seizure. Indeed, in the specific context of § 1357(a)(1), the Supreme Court in *Brignoni-Ponce* found that even a one minute detention absent reasonable suspicion constitutes an unreasonable seizure under the Fourth Amendment. 422 U.S. at 880, 883. Considering the totality of the circumstances and the sheer lack of any reasonable suspicion for detaining the

Drivers once their citizenship status was confirmed, the continued detention was an unreasonable seizure. And the district court's reasoning that the absence of handcuffs or the provision of food should counsel otherwise, JA14, is without any legal support. *Cf. Mendenhall*, 446 U.S. at 55 (listing factors that could demonstrate a seizure).

Continued detention of a U.S. citizen without a reasonable suspicion of criminal activity violates a clearly established constitutional right. In light of the draconian detention methods employed by the ICE Agents—holding the Drivers against their will for several hours, and prohibiting them to stand, speak or leave the room, JA48-49, 53, 57-59—no reasonable ICE agent would believe his conduct was a reasonable seizure under the Fourth Amendment, justified by reasonable suspicion. And any ICE agent reasonably aware of the law would understand that continuing to confine the Drivers for several hours after confirming their citizenship would rise to a level far greater than a de minimis level of detention; rather, such confinement constitutes an unreasonable seizure in light of the clear contours of this jurisprudence.

Moreover, the district court's finding that that the Drivers have "not allege[d] or argue[d] that the [ICE Agents'] stated purpose for keeping them at Parking Authority headquarters until the operation was concluded was not legitimate," JA14, fails to recognize that the Drivers need not make such

"allegations or arguments" in order to plead sufficient facts to demonstrate that no reasonably competent ICE agent would believe that the continued detention of the Drivers was reasonable. *See also Manzanares*, 575 F.3d at 1144 (finding that an officer could not reasonably believe he could detain a suspect's co-worker and friend based on his hunch that individual "knew more than he was willing to say"). More brazenly, this reasoning introduces some new, lesser justification for abridging a citizen's Fourth Amendment rights even after the Supreme Court already rejected such attempts in *Brignoni-Ponce*. *See* 422 U.S. at 884 (rejecting the government's assertion that warrantless seizures under § 1357(a)(1) may be justified solely on the immigration official's sole discretion).

Similarly, for reasonable ICE agents to believe that the the reason for continuing to detain the Drivers—namely, to maintain the element of surprise, *see* JA49, 53, 58—could create a reasonable belief in the lawfulness of the ICE Agents' conduct would require them to believe that the Drivers' constitutional rights can give way to mere hunches absent any supporting evidence. This is especially true where the ICE Agents already implemented other methods to address such concerns when they scheduled the Drivers' interviews towards the latter half of the schedule. JA75. Weighing the balance in favor of the Drivers' constitutional freedom from unlawful seizure and, most importantly, in the absence of any reasonable basis of suspecting that the Drivers were illegal demonstrates

that no legal foothold exists that would allow reasonable ICE agents to find that the ICE Agents and their subordinates believed their conduct was lawful.

Accordingly, the district court's finding that the ICE Agents were not aware that the Drivers had a clearly established constitutional right not to be detained once their citizenship was confirmed is unfounded, and this Court should reverse the decision.

III. THE DRIVERS STATED A CLAIM FOR VIOLATIONS OF THEIR FOURTH AMENDMENT RIGHTS.

***STANDARD OF REVIEW*:** The standard of review over a district court's dismissal of a complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is de novo. The Court must accept as true all of the factual allegations in the complaint as well as the reasonable inferences that can be drawn from them. *Brown v. Philip Morris Inc.*, 250 F.3d 789, 796 (3d Cir. 2001).

A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the Agent fair notice of what the . . . claim is and the ground upon which it rests." *Twombly*, 550 U.S. at 555. To survive a motion to dismiss, a complaint need not contain detailed factual allegations. *Id*. Rather, a complaint need only contain sufficient factual matter that, accepted as true, "state[s] a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (*citing Twombly*, 550 U.S. at 570). A claim is facially

plausible when a plaintiff pleads factual content that enables the court to draw a reasonable inference that the Agent is liable for any of the alleged misconduct. *Id.* (citing *Twombly*, 550 U.S. at 557).

The Drivers stated a *Bivens* claim by alleging facts that allow the reasonable inference that the ICE Agents' gross negligence and deliberate indifference violated the Drivers' rights to be free from unreasonable seizure under the Fourth Amendment. *See* JA49, 54, 59; *see also Bivens*, 403 U.S. at 390. To be personally liable for a *Bivens* claim, a Agent must have been involved in the violation in some way. *See Santiago v. Warminster Township*, 629 F.3d 121, 129 (3d Cir. 2010). But to plead personal involvement, a plaintiff need only allege an individual directed or knew of and acquiesced in the unconstitutional conduct. *See Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988); *see also Santiago*, 629 F.3d at 129 ("supervisor may be personally liable . . . if he or she participated in violating the plaintiff's rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates' violations."). Personal involvement can also be demonstrated where a supervisor has established or maintained a policy, practice, or custom that directly caused the constitutional harm. *Santiago*, 629 F.3d at 129. The Drivers sufficiently alleged involvement.

The Drivers alleged the subordinates who took the ultimate actions were operating under the ICE Agents' direction when they arrested, seized, interrogated,

and detained each of the Drivers. Specifically, McDonald developed the enforcement investigation that seized the Drivers, JA73-74; Riley supervised investigation units, including McDonald's, JA78; and Chow was in charge of investigations where the violation occurred, Philadelphia, JA80-81. Indeed, the ICE Agents had to know of the unconstitutional conduct because they directly developed and approved the plan. JA73-74, 78, 80-81. Moreover, McDonald and Chow personally and directly supervised the plan's execution. JA73-75, 80-81.

The facts alleged demonstrate the ICE Agents are not high-ranking officials, thus it is facially plausible that they possessed actual knowledge of and acquiesced in the offending conduct. *See Atkinson v. Taylor*, 316 F.3d 257, 271 (3d Cir. 2003) (distinguishing Agent correctional commissioner from Governor and Attorney General based on scope of responsibilities and finding court could not conclude the Drivers did not have actual knowledge of alleged misconduct). This case is not like *Argueta v. ICE*, where plaintiffs brought an action against "four high-ranking federal officials," alleging ICE conducted unlawful and abusive raids on immigrant homes. 643 F.3d 60, 62 (3d Cir. 2011). There, the Court held plaintiffs failed to allege a plausible claim because the high-ranking officials were charged with enforcing immigration law throughout the *entire country*, had *national* supervisory responsibilities, and did not have notice of the underlying

unconstitutional conduct. *Id.* at 76-77. Here, the named ICE Agents are lower-ranking officials with much narrower supervisory responsibilities.

The Drivers therefore alleged facts sufficient to state a claim, and this Court should reverse the District Court's holding to the contrary. Even if they had not, though, the Court should remand the case to the district court for more specific allegations to be pled and so that a second amended complaint can name unknown ICE officers as defendants until they are identified through discovery.

CONCLUSION

For the foregoing reasons, Appellants Oliver Lawal, Daosamid Bounthisane, and Gazali Shittun respectfully request that this Court reverse the judgment below.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this Brief of Appellants is proportionately spaced and contains 10,511 words excluding parts of the document exempted by Rule 32(a)(7)(B)(iii).

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Pursuant to Third Circuit Local Appellate Rule 28.3(d), I certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

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Pursuant to Third Circuit Local Appellate Rule 31.1(c), I certify that the text of the electronic brief is identical to the text in the paper copies. I also certify that a virus check was performed using Trend Micro Office Scan, 10.6.3205 sp2, and that no virus was detected.

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No. 13-1881

United States Court of Appeals for the Third Circuit

OLIVER LAWAL, DAOSAMID BOUNTHISANE, and GAZALI SHITTU,

Appellants,

v.

MARC MCDONALD, WILLIAM RILEY, and FREDERICK CHOW,

Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania in Case No. 12-3599(CDJ)

JOINT APPENDIX
VOLUME I, Pages 1-14

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June 17, 2013

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

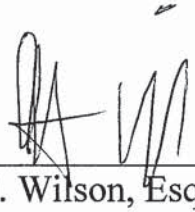
OLIVER LAWAL, DAOSAMID BOUNTHISANE and GAZALI SHITTU Plaintiffs	:	
v.	:	No. 2:12-cv-03599-CDJ
MARK McDONALD, WILLIAM RILEY and FREDERICK R. CHOW Defendants	:	

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs Oliver Lawal, Daosamid Bounthisane, and Gazili Shittu appeal to the United States Court of Appeals for the Third Circuit from the dismissal order entered by the District Court on February 26, 2013 (Docket No. 14) and all prior opinions, orders and rulings in this case.

Dated: March 27, 2013

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 27th day of March, 2013, I electronically filed the foregoing with the Clerk of this Court by using the CM/ECF system, which will send a notice of electronic filing to:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OLIVER LAWAL, DAOSAMID BOUNTHISANE, and GAZALI SHITTU,	:	CIVIL ACTION
Plaintiffs,	:	NO. 12-3599
v.	:	
MARK MCDONALD, WILLIAM RILEY, and FREDERICK R. CHOW,	:	
Defendants.	:	

ORDER

AND NOW, this 26th day of February, 2013, it is hereby ORDERED as follows:

1. Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (Dkt. No. 8) is GRANTED.

2. The Amended Complaint of Plaintiffs Oliver Lawal, Daosamid Bounthisane and Gazali Shittu (Dkt. No. 6) is DISMISSED with prejudice.

BY THE COURT:

/s/ C. Darnell Jones, II

C. DARNELL JONES, II J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OLIVER LAWAL, DAOSAMID BOUNTHISANE, and GAZALI SHITTU,	:	CIVIL ACTION
Plaintiffs,	:	NO. 12-3599
v.	:	
MARK MCDONALD, WILLIAM RILEY, and FREDERICK R. CHOW,	:	
Defendants.	:	

MEMORANDUM

Jones, II, J. **February 26, 2013**

Plaintiffs Oliver Lawal, Daosamid Bounthisane and Gazali Shittu brought this action claiming violations of their rights under the Fourth and Fifth Amendments of the United States Constitution. Defendants Mark McDonald, William Riley and Frederick R. Chow are employed as Special Agents by the Immigration and Customs Enforcement bureau ("ICE") of the United States Department of Homeland Security. Plaintiffs, who are each United States citizens and hold licenses to operate taxicabs in the City of Philadelphia, allege that the Defendants wrongfully arrested and detained them during a sweep coordinated by ICE and the Philadelphia Parking Authority ("PPA") designed to detect illegal aliens who were driving taxis in Philadelphia. Presently before this Court is a Motion by the Defendants to dismiss Plaintiffs' Amended Complaint, or in the alternative, for summary judgment. (Dkt. No. 8.) For the reasons that follow, the Motion is granted.[1]

[1]All parties have appended matters outside of the pleadings to their moving papers. Because this Court determines the Motion without reference to the outside matter, the Motion is construed solely as one filed pursuant to Fed. R. Civ. P. 12(b)(6).

I. STANDARD OF REVIEW

In deciding a motion to dismiss pursuant to Rule 12(b)(6), courts must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008). After the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), "threadbare recitals of a cause of action's elements, supported by mere conclusory statements" do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable of the alleged misconduct." *Id.* (citing *Twombly*, 550 U.S. at 556). This standard, which applies to all civil cases, "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678; *accord Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) ("All civil complaints must contain more than an unadorned the-defendant-unlawfully-harmed-me accusation."). Moreover, "the factual detail in a complaint [must not be] so undeveloped that it does not provide a defendant [with] the type of notice of claim which is contemplated by Rule 8 [of the Federal Rules of Civil Procedure]." *Villegas v. Weinstein & Riley, P.S.*, 723 F. Supp. 2d 755, 756 (M.D. Pa. 2010) (quoting *Phillips*, 515 F.3d at 232).

II. FACTS

In their Amended Complaint,[2] Plaintiffs allege that in or about June 2009, Defendant McDonald contacted William P. Schmid, the Enforcement Manager of PPA's Taxicab and Limousine Division, to request a list of all taxicab drivers certified by PPA to operate a taxicab in Philadelphia ("the PPA List"). (Am. Compl. ¶ 12.) Over the next year, PPA and ICE then

[2]Plaintiffs' original Complaint was filed on June 26, 2012. Defendants filed a Motion to Dismiss the Complaint on October 2, 2012. Thereafter, Plaintiffs filed the Amended Complaint.

exchanged various versions of the operator list in an effort to create a final working list ("the working list") identifying suspected illegal alien taxicab drivers. (*Id.* at ¶ 14.) On June 15, 2010, PPA, "at the request and direction of Defendants, sent a letter to Plaintiffs advising each Plaintiff that he was entitled to a refund from PPA and instructed each Plaintiff to arrive at PPA headquarters on June 23, 2010." (*Id.* at ¶ 16.) Each Plaintiff appeared at PPA headquarters on June 23, 2010, but was told to return on June 30, 2010 to receive their refunds. (*Id.* at ¶¶ 17, 18.) When they arrived on June 30, 2010, each Plaintiff provided his driver's license, taxicab ID, and name, date of birth, address, and social security number to an unidentified female ICE agent, and was instructed to enter another room to receive their refunds. (*Id.* at ¶¶ 22, 54, 86.) Upon entering the other room, each Plaintiff alleges that he was suddenly and violently attacked, thrown against a wall and handcuffed by Defendants and other ICE agents under Defendants' direction and control, and were told they were under arrest for alleged immigration violations. (*Id.* at ¶¶ 23, 55, 87.) Each informed the ICE agents that they were United States citizens. (*Id.* at ¶¶ 24, 56, 88.) Each Plaintiff alleges that he was interrogated for more than one hour by Defendants and other ICE agents under Defendants' direction and control. (*Id.* at ¶¶ 25, 58, 90.) Thereafter, each Plaintiff was told he had been mistakenly detained, but all three were nonetheless held for several additional hours with other persons arrested in the operation, and were forbidden to stand or speak.[3] (*Id.* at ¶¶ 27-30, 60-63, 96-99.) Defendants advised the Plaintiffs that they had to remain because Defendants did not want them to have an opportunity

[3]Plaintiff Lawal makes additional allegations that he told "Defendants and other ICE agents who were under Defendants' direction and control" that his United States passport and certificate of citizenship were located in his taxicab, which had already been towed to an unknown location by the PPA. An unnamed PPA representative traveled to this unknown location and returned with Lawal's documents. Thereafter, like the other Plaintiffs, he was told that he was mistakenly detained, but held for an additional time. (Am. Compl. ¶¶ 92-99.) Lawal also alleges that Defendants offered him coffee and donuts while he waited. (*Id.* ¶ 101.)

to advise other taxicab drivers of the ICE operation occurring at PPA headquarters that day. (*Id.* at ¶¶ 33,65, 104.)

Based on these allegations, Plaintiffs assert *Bivens*[4] claims that Defendants' gross negligence and deliberate indifference violated their Fourth Amendment rights to be free from unreasonable seizure of their persons by arresting them without probable cause, by refusing to release them once they learned they were United States citizens, and by failing to release them once their citizenship was determined. (*Id.* at ¶¶ 39, 71, 110.) Plaintiffs also assert that Defendants' failure to ensure that no United States citizens' name was on the working list, and their mistakenly including the Plaintiffs on the working list, constituted outrageous and conscience shocking governmental conduct violative of their liberty and due process rights under the Fifth Amendment. (*Id.* at ¶¶ 46-50, 78-82, 117-121.) In their Motion, Defendants argue that the allegations contained in the Amended Complaint fail to state viable *Bivens* claims, and that each Defendant is entitled to qualified immunity. They also argue that Plaintiffs' Fifth Amendment claims should be dismissed because they are properly analyzed under the Fourth Amendment.

III. THE FIFTH AMENDMENT CLAIMS

This Court finds that the claims Plaintiffs present as substantive due process claims under the Fifth Amendment — that Defendants' failure to ensure that no United States citizens' name was on the PPA list, and by including their names on the working list, was egregious, outrageous and conscience shocking — are properly addressed as Fourth Amendment unreasonable seizure claims. In *Graham v. Connor*, 490 U.S. 386 (1989), the United States Supreme Court held that "where a particular amendment provides an explicit textual source of constitutional protection

[4]A cause of action under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) is the "federal analog to suits brought against state officials under . . . 42 U.S.C. § 1983." *Iqbal*, 556 U.S. at 676 (*quoting Hartman v. Moore*, 547 U.S. 250, 254 (2006)).

against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Id.* at 395 (holding that, in a case asserting both a Fifth Amendment substantive due process claim and a Fourth Amendment excessive force claim arising in the context of an arrest or investigatory stop, that the cause of action should be analyzed under the Fourth Amendment and its reasonableness standard, rather than under a substantive due process approach). However, the Supreme Court has made clear that *Graham* is limited to situations where there is a specific constitutional provision that applies to the alleged conduct. *United States v. Lanier*, 520 U.S. 259, 272, n.7 (1997) (stating that "*Graham* requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process."); *see also, Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843-844 (1998) (stating that substantive due process analysis is "inappropriate . . . if respondents' claim is 'covered by' the Fourth Amendment," but holding that *Graham* did not apply because there was no search or seizure under the Court's precedents); *Chester Upland Sch. Dist. v. Pennsylvania*, Civ. A. No. 12-132, 2012 WL 1344368, at *6 (E.D. Pa. April 17, 2012) (stating that Supreme Court precedents have shown distinct disfavor of allowing substantive claims of due process to proceed when alternative constitutional grounds can achieve the same results). Although the holding in *Graham* arose in the Fourth Amendment context of excessive force, it has been applied to other allegations of unreasonable searches and seizures. *See, e.g., Garcia-Torres v. Holder*, 660 F.3d 333, 337 (8th Cir. 2011) (stating that "[a]ll claims of an unconstitutional search or seizure must be addressed solely in terms of the Fourth Amendment, not the "fundamental fairness" requirement "under a 'substantive due process' approach"); *Russo v. City of Bridgeport*, 479

F.3d 196, 205 (2nd Cir. 2007) (applying *Graham* to the Fourth Amendment context of a claim of unreasonably prolonged detention); *Bryant v. Vernoski*, Civ. A. No. 11-263, 2011 WL 4400820, at *3 (M.D. Pa. Sept. 1, 2011) (holding that plaintiffs could not state a substantive due process claim based on governmental behavior of shooting plaintiff's dog because claim was covered by the Fourth Amendment protection against unreasonable seizures of "effects"); *Schor v. North Braddock Borough,* 801 F. Supp. 2d 369, 379 (W.D. Pa. 2011) (same).

Here, Plaintiffs' Fifth Amendment claims are unquestionably covered by the Fourth Amendment since they are based on allegations of an unlawful seizure. While Plaintiffs argue that their Fifth Amendment claims are based on the creation of the working list and the inclusion of their names on it arise out of different conduct than their claims brought under the Fourth Amendment, taken in the light most favorable to Plaintiffs it is clear that the activity of identifying them as possible illegal aliens, and actually detaining them, was part of a single, continuous process that led to the asserted constitutional violations. Since the propriety of arrest and detention by governmental officials go to the heart of the Fourth Amendment protection against unreasonable seizures, this Court concludes that the substantive due process claims fail to state plausible claims for relief. [5]

IV. THE FOURTH AMENDMENT CLAIMS

This Court also finds that Plaintiffs have failed to meet their pleading burden on their Fourth Amendment claims. First, the Amended Complaint is entirely bereft of factual allegations identifying each Defendant's specific actions in the incident leading to the Plaintiffs'

[5]Plaintiffs ask that, in the event this Court finds that their substantive due process claims are subject to dismissal, that they be permitted to file a further amendment in order to incorporate all relevant allegations contained in Counts II, IV and VI into the claims brought under the Fourth Amendment. In discussing the viability of the remaining claims and Defendants' entitlement to qualified immunity, this Court will assume that the entire factual basis for the Fifth Amendment claims already appear in Counts I, III and V.

appearances at the PPA headquarters, their treatment once they arrived, and the decision-making process leading to their eventual release, so as to plausibly draw a reasonable inference that any of the named Defendants is liable for any of the alleged misconduct. For example, the allegation that each Plaintiff was "suddenly and violently attacked, thrown against a wall and handcuffed" fails to name which specific Defendant engaged in this conduct. Likewise, Plaintiffs do not identify which Defendant held them in custody for several hours after their citizenship statuses were affirmatively established. Other than its introductory paragraphs, the Amended Complaint does not even mention Defendants Riley and Chow by name, and the sole mention of Defendant McDonald alleges only that he contacted the PPA to request the *initial* PPA list of all taxicab drivers certified by PPA to operate a taxicab in Philadelphia, an allegation that does not directly implicate the Plaintiffs' inclusion on the final working list of those taxicab drivers for whom citizenship status could not be confirmed, or their arrests and detention. (Am. Compl. ¶ 12.) While Plaintiffs argue that they have alleged that all Defendants "were present for and participated directly in the unlawful arrest, seizure and detention of each Plaintiff," (Pl. Br. at 13 (*citing* Am. Compl. ¶¶ 38, 70, 109)), this allegation is insufficient to plausibly permit this Court to draw a reasonable inference as to which Defendants are liable for the alleged misconduct.

Second, the *Iqbal* Court reiterated that a federal official sued in his or her individual capacity for alleged constitutionally tortious behavior cannot be held liable on the basis of some general link to allegedly responsible individuals or actions. *Id.*, 556 U.S. at 676-77 ("[A] plaintiff must plead that *each* Government-official defendant, through the official's *own* actions, has violated the Constitution. . . . [P]urpose rather than knowledge is required to impose *Bivens* liability on . . . an official charged with violations arising from his or her superintendent responsibilities") (emphasis added). *Accord, e.g.*, *Richards v. Pennsylvania*, 196 Fed. App'x 82,

85 (3d Cir. 2006) (agreeing that plaintiff's "failure to allege personal involvement on the part of defendant proved fatal to [plaintiff's] claims"). Accordingly, the allegations that Defendants acted collectively, or that other non-defendants acted under their collective direction and control, also fail to state plausible claims for relief.

V. QUALIFIED IMMUNITY

Finally, this Court finds that Plaintiffs' allegations do not plausibly establish that the Defendants knowingly violated their clearly established rights. Accordingly, the doctrine of qualified immunity protects them "from undue interference with their duties and from potentially disabling threats of liability." *Elder v. Holloway*, 510 U.S. 510, 514 (1994). The doctrine applies unless Plaintiffs sufficiently plead that Defendants violated their "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). In accordance with this doctrine, government officials will be immune from suit in their individual capacities unless, "taken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right" and "the right was clearly established" at the time of the objectionable conduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). "The relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. This inquiry "must be undertaken in light of the specific context of the case." *Id.* at 201. Accordingly, "to decide whether a right was clearly established, a court must consider the state of the existing law at the time of the alleged violation and the circumstances confronting the officer to determine whether a reasonable state actor could have believed his conduct was lawful." *Kelly v. Borough of Carlisle*, 622 F.3d 248, 253 (3d Cir. 2010). Courts may exercise

their discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in consideration of the circumstances presented by the particular case at hand. *Pearson v. Callahan*, 555 U.S. 223 (2009).

It is well established that qualified immunity is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial [or the defendant is compelled to undergo other burdens of litigation]." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original). Therefore, "[w]here possible, qualified immunity should even protect officials from pretrial matters such as discovery, for '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" *Chinchello v. Fenton*, 805 F.2d 126, 130 (3d Cir.1986) (citations omitted).

This Court finds that the Plaintiffs have failed to plausibly allege that a reasonable ICE agent would believe that the conduct alleged in the Amended Complaint was unlawful. Notably, while the Amended Complaint contains the legal conclusion that Defendants "unjustifiably" and "outrageously" included them on the working list of persons suspected to be illegal aliens, they themselves plead that the process of creating the final working list took Defendants more than one year to complete, during which ICE agents "exchanged various versions" of the information provided by the PPA on the original PPA list in "an effort to create a working list that identified illegal aliens or immigrants certified by PPA to operate taxicabs in Philadelphia." (Am. Compl. ¶ 14.) Furthermore, with regard to the allegations concerning the Defendants' actions concerning the Plaintiffs' mistaken inclusion on the working list, their alleged arrest, and their initial interrogations to determine their citizenship status, this Court notes that ICE agents are empowered with the statutory authority to interrogate any alien or person *believed to be* an alien

as to his right to be or to remain in the United States. *See* 8 U.S.C. § 1357(a)(1).[6] Thus, considered in the light most favorable to them, Plaintiffs have failed to sufficiently plead that reasonable ICE agents would believe that their year-long effort of identifying possible illegal alien taxicab drivers, and interrogating the persons so identified to determine their citizenship status, was unlawful. Because qualified immunity "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law," *see Malley v. Briggs*, 475 U.S. 335, 341 (1986), this Court must conclude that the Defendants are entitled to qualified immunity for their actions in mistakenly placing the Plaintiffs on the working list, causing them to come to the PPA headquarters, and interrogating them regarding their immigration status.

This Court also concludes that Defendants are entitled to qualified immunity in their alleged conduct of continuing to detain the Plaintiffs after they had determined that they were citizens.[7] Plaintiffs allege that they were kept at the PPA headquarters until the ICE operation was concluded so that they could not tip off other taxicab drivers about the ICE operation.

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[6]The statute provides that:

> Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant -- **(**1**)** to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States . . . .

8 U.S.C. § 1357(a)(1).

[7]The Amended Complaint fails to allege with specificity the amount of time each Plaintiff was actually detained after his citizenship status was confirmed. While Plaintiffs alleges that they were detained "for several additional hours," they only allege the time that each Plaintiff arrived at the PPA headquarters, not the times that their citizenship statuses were each determined, or the time they were actually permitted to leave. This Court notes that each Plaintiff was apparently present at the PPA headquarters for different amounts of time since each arrived at different times. For example, while the letters advised the recipients to arrive at 9:30 (*see* Am. Compl. Ex. A, B), Plaintiff Shittu alleges he arrived at 7:00 a.m. (Am. Compl. ¶ 21), Plaintiff Bounthisane arrived at 9:00 a.m. (*id.* ¶ 53), and Plaintiff Lawal arrived at 9:30 a.m. (*Id.* ¶ 85.)

Although Plaintiffs characterize the continued detention as conscience-shocking, they do not allege or argue that the Defendants' stated purpose for keeping them at the PPA headquarters until the operation concluded was not legitimate. While this Court deeply sympathizes with Plaintiffs having to wait for some additional time after their citizenship had been established, the Supreme Court has counseled that "[t]here is, of course, a de minimis level of imposition with which the Constitution is not concerned." *Ingraham v. Wright*, 430 U.S. 651, 674 (1977); *see also United States v. Hernandez*, 418 F.3d 1206, 1212 n.7 (11th Cir. 2005) ("Of trifles the law does not concern itself: De minimis non curat lex."); *Ford v. Wilson*, 90 F.3d 245, 248 (7th Cir. 1996) (Posner, J.) (outlining the contours of de minimis intrusions that do not violate the Fourth Amendment). While they claim they were required to remain, to remain seated, and to not speak, Plaintiffs do not allege that once their citizenship status was confirmed that they were thereafter handcuffed or treated in the same manner as those determined to be illegal aliens. Plaintiff Lawal alleges that those who were determined to be legally present were provided with food and drink while they waited. This Court finds that, considered in the light most favorable to them, Plaintiffs have failed to sufficiently plead that reasonable ICE agents would believe that the minimal intrusion of requiring the Plaintiffs to remain, remain seated, and refrain from talking until after the operation was concluded, was unreasonable or unlawful. Accordingly, Defendants are entitled to qualified immunity for this conduct as well.

For these reasons, this Court grants Defendants' Motion to Dismiss. An appropriate order follows.[8]

[8]Because Plaintiffs have already had the opportunity to amend their complaint in the face of the same arguments raised by Defendants in the instant Motion to Dismiss, and failed to correct the defects identified by Defendants and found valid herein, this Court finds no cause to grant Plaintiffs an additional opportunity to amend their pleading.