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

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Evaluating the Drivers' amended complaint under the proper pleading standard—and not the one requiring "specificity" the ICE Agents have manufactured—reveals that at best, the ICE Agents motion to dismiss is premature as disputes of historical facts exist, including (1) the availability and content of the Drivers' citizenship information on file with the Philadelphia Parking Authority (the "PPA"), (2) the reasonableness of the ICE Agents' inclusion of the Drivers on the list after searching two databases and taking a year to execute the investigation, and (3) whether the Drivers were asked to remain at the PPA and voluntarily agreed after their citizenship had been confirmed or whether the Drivers were expressly told they could not leave.

The ICE Agents spend much of their brief asserting that the Drivers have not pled facts sufficient to entitle them to relief or to show that the ICE Agents are not entitled to qualified immunity. These assertions, however, are based on the ICE Agents' attempt to disregard, recast, and cherry-pick the facts in the amended complaint surrounding their arrest and interrogation of the Drivers. But the ICE Agents ignore that all of the Drivers' factual allegations in their Complaint must be accepted as true, and the complaint must be construed in the light most favorable to the Drivers. Moreover, the ICE Agents ignore that it is *their* burden to establish

they are entitled to qualified immunity and that their declarations may not be considered in support.

Accordingly, the district court's order granting the defendant-appellees' motion to dismiss should be vacated and this case should be remanded with instructions to allow the plaintiff-appellants to amend their complaint if necessary and for additional discovery.

ARGUMENT

I. THE ICE AGENTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY FOR INTERROGATING THE DRIVERS.

The ICE Agents have not proven that they are entitled to qualified immunity for their arrest and interrogation of the Drivers. Reasonable ICE agents in the circumstances would know that a self-imposed failure to confirm the Drivers' citizenship cannot create probable cause or reasonable suspicion justifying such intrusion on the Drivers' Fourth Amendment rights to be free from unreasonable search and seizures. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001) (detailing the two-part test for qualified immunity). *See also Burns v. PA Dep't of Corr.*, 642 F.3d 163, 176 (3d Cir. 2011) ("The burden of establishing qualified immunity falls to the official claiming it as a defense."). Rather, the existence of disputed historical facts—including the availability and content of the Drivers' citizenship information on file with the PPA, and the reasonableness of the ICE Agents' inclusion of the Drivers on the list after searching two databases and taking a year

to execute the investigation— highlights the need for discovery and renders the ICE Agents' motion to dismiss premature. *See Curley v. Klem*, 298 F.3d 271, 278 (3d Cir. 2002) ("[A] decision on qualified immunity will be premature when there are unresolved disputes of historical fact relevant to the immunity analysis" as "the existence of disputed, historical facts material to the objective reasonableness of an officer's conduct will give rise to a jury issue.").

Regarding the first prong of the qualified immunity analysis—whether the facts alleged by the Drivers show a violation of a constitutional right—the Drivers have pled sufficient facts to show that the ICE Agents violated their Fourth Amendment rights to be free from unreasonable seizures when they arrested and interrogated the Drivers absent either probable cause or reasonable suspicion.

The Drivers plainly established that the ICE Agents' authority to interrogate and arrest suspected aliens under 8 U.S.C. §§ 1357(a)(1) and (a)(2), respectively, is constrained by the Fourth Amendment, "which demands something more than the broad and unlimited discretion sought by the Government." AOB 21-29, citing *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (rejecting the government's assertion that warrantless seizures under § 1357(a)(1) may be justified solely an immigration agent's discretion). Accordingly, arrests under § 1357(a)(2) must be justified by probable cause, *Olivia-Ramos v. Attorney Gen. of U.S.*, 694 F.3d 259,

285 (3d Cir. 2012), while interrogations under § 1357(a)(1) must be justified by reasonable suspicion, *Brignoni-Ponce*, 422 U.S. at 884.

The ICE Agents fail to address this well-settled principle, instead suggesting that this statutory authority provides them with carte blanche qualified immunity. *See, e.g.*, AB 29 ("The Drivers' detention for purposes of ascertaining their immigration status is part of the Agents' job, pursuant to 8 U.S.C. § 1357, even if the Drivers were ultimately determined to be U.S. Citizens."). Indeed, despite 13 pages in the Drivers' initial brief addressing the significance of section 1357, *see generally* AOB 21-34, the ICE Agents make the flatly untrue statement that "the Drivers fail to address the fact that the appellee ICE Agents were authorized by statute to interrogate persons like the Drivers who are suspected of being in the U.S. illegally." AB 16.

Moreover, the ICE Agents' attempt to frame the constitutional right at issue here as a question of whether their conduct in "compiling the list" violated the Constitution is a red herring. The Drivers agree that compiling a list does not violate the Constitution without anyone acting on the list. But what the ICE Agents did with the list runs afoul of the Fourth Amendment's protections: they arrested the Drivers under purported suspicion of being aliens in the U.S. illegally, using the list to claim probable cause. The list, however, cannot provide the necessary probable cause first because it was the product of the ICE Agents'

inability to confirm the Drivers' citizenship based on their own needlessly deficient investigation as such information was readily available with the PPA and other less intrusive methods were available. It also could not provide probable cause even if adequately investigated because it was of such a general nature that only an interrogation under reasonable suspicion could possibly have been reasonable.

The ICE Agents' initial seizure of the Drivers—and they do not dispute that they seized the Drivers—constitutes an arrest. The ICE Agents dispute that the seizure was an arrest because "[t]he agents planned to question the Drivers pursuant to § 1357(a)(1)," and there was "no plan to arrest any person who was identified as a U.S. citizen or lawful permanent resident." AB 7. But this misses the point: the ICE Agents subjective intent 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.").[1]

In further support of the ICE Agents' assertion that there was no arrest, they point to the fact that "although the Drivers allege that they were 'attacked, thrown against the wall,' and 'told [they] were being arrested, at no time was any one of

[1] Nevertheless, the ICE Agents' brief inaccurately restates McDonald's declaration on this subject. McDonald did not declare that there was "no plan to arrest any person identified as a U.S. citizen or lawful permanent resident" as the ICE Agents' brief asserts, AB 7; rather, he stated, "The plan did not include arresting or holding any drivers *beyond the time of their being identified as legally in the U.S.*" JA74 (emphasis added).

the Drivers transported away from the PPA facility as were others who were placed under arrest because they were discovered to be in the U.S. illegally," AB 7-8, and the Drivers were only handcuffed "because the PPA facility was not a secure facility and the agents had no way of knowing if any of the drivers would be armed," AB 7. This factual narrative is irrelevant and self-servingly incomplete. The ICE Agents' purported justification for handcuffing the Drivers and throwing them against the wall does not change the fact that they placed the Drivers under severe custody characteristic only of an arrest. *See U.S. v. Jacobs*, 431 F.3d 99, 105 (3d Cir. 2005) (stating that whether an arrest has occurred is an objective inquiry based on "what a reasonable person would believe based on the circumstances of the interrogation").

Moreover, the ICE Agents ignore that besides being told they were being arrested, thrown against the wall, and handcuffed, the ICE Agents and their subordinates also took the Drivers' identification documents, JA47, 52, 56; displayed weapons, JA49, 53, 59, 74-75; were dressed in raid gear, *id.*; had twenty-two ICE agents present, JA74; and interrogated each plaintiff for over an hour, JA48, 52, 57. These circumstances demonstrate that a reasonable person in the Drivers' position would believe they were under arrest.

Moreover, no probable cause existed to arrest the Drivers because the list was not reasonably trustworthy information to warrant a person of reasonable

caution to conclude that the Drivers were aliens in the country illegally and that they were likely to escape before a warrant for their arrest could be obtained. *See U.S. v. Laville*, 480 F.3d 187, 194 (3d Cir. 2007) ("[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."); §1357(a)(2).[2] Here, the absence of documentation confirming the Drivers' status cannot rise to the level of indicating that they are, in fact, likely to be illegal aliens. *See Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216 (9th Cir. 1995) (recognizing that "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").

U.S. v. Quintana, 623 F.3d 1237 (8th Cir. 2010), does not counsel otherwise. The ICE Agent's reliance on *Quintana* to provide an analogous case is misplaced as the case is easily distinguishable. The absence of the plaintiff's name in a records search provided probable cause in *Quintana* because the context was a traffic stop where the thoroughness of such a search and availability of other

[2] Under § 1357(a)(2),immigration officials are statutorily permitted, without a warrant, to "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 . . . ."

options is extremely limited if it is to be reasonable. Here, however, no such restrictions existed as the ICE Agents did not execute the operation plan until over a year later. That the ICE Agents would suggest a cursory, minutes-long search is analogous to the facts here raises its own questions. Moreover, the Border Patrol Agent in *Quintana* had reason to believe that the alien was likely to escape before a warrant could be obtained. That is not the case here. No evidence exists to suggest that the Drivers were, at any time, an escape risk, and the ICE Agents have not argued otherwise.

Regardless, whether the ICE Agents' seizure of the Drivers constitutes an arrest under §1357(a)(2), or an interrogation under §1357(a)(1), requiring reasonable suspicion, is of no matter. In determining 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 lower court's formalistic methodology for determining reasonable suspicion). Under either analysis, the scope of the seizure was not reasonably related to the ICE Agents' purpose of identifying illegal aliens, balanced against the Drivers' right to be free from unreasonable seizures, *see Lee v. INS*, 590 F.2d 497, 499-500 (3d Cir. 1979), and the list did not provide sufficient justification.

First, the scope of the ICE Agents' seizure of the Drivers is not sufficiently limited in scope. The seizure posed a far more significant burden than necessary to effectuate the ICE Agents' purpose of identifying illegal aliens. Indeed, the decoy refund scheme the ICE Agents' created to lure the cab drivers to the PPA for a secret arrest and interrogation, where the Drivers were thrown against the wall, handcuffed, and interrogated for over an hour is a far cry from the routine questioning in *Lee*, 590 F.2d at 502 (finding that an officer's questioning of individuals was justified in scope, given that he merely approached the individuals speaking in Chinese near a restaurant known to hire illegal immigrants, identified himself as an agent, and inquired about their identity) or *INS v. Delgado*, 466 U.S. 210, 218 (1984) (finding that an INS agent's questioning of factory workers was justified in scope as the factory workers were allowed to continue with their routine despite the agents' presence). Moreover, the interrogations lasted over an hour, JA48, 52, 57, which is far longer than the momentary interrogations found to be reasonable in scope in cases like *Brignoni-Ponce*, 422 U.S. at 880 (given the interests of border patrol agents in securing the borders, it is reasonable to allow agents to illicit "a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States").

Importantly, the ICE Agents fail to explain why other less objectively and subjectively intrusive methods were not used where the ICE Agents were unable to

confirm citizenship such as individually questioning the Drivers outside the context of this operation or sending them a different letter from the PPA requesting updated citizenship information for payroll purposes.

Second, the list does not create reasonable suspicion. That the ICE Agents were purportedly unable to confirm the Drivers' citizenship results from their own unreasonable failing. *See* JA46, 73-74. *See also Orhorhaghe v. I.N.S.*, 38 F.3d 488, 497 (9th Cir. 1994) (finding a plaintiff's "Nigerian-sounding name" and the absence of his name in INS records for lawful entry into the U.S. did not create reasonable suspicion he was illegally in the country); *Benitez-Mendez v. INS*, 760 F.2d 907, 909 (9th Cir. 1983) (finding that a border patrol officer who knew only that an alien was working in the fields and his co-workers had fled upon sight of marked border patrol detail, that the individual was an alien, and that alien claimed to possess documents showing his legal status, did not have reasonable suspicion to believe individual was an alien illegally in the U.S.) .

The ICE Agents conclusory statement that the PPA did not have immigration information for the Drivers, *see* AB 27, is belied by the fact that the PPA Enforcement Manager stated that they had information such as " Social Security numbers and things like that." AB 22 (quoting JA92). And as the ICE Agents must certainly know, Social Security Numbers can be used to confirm United States citizenship. To the extent the ICE Agents claim the Drivers may

have forged that information, they provide no factual basis supporting reasonable suspicion or probable cause to believe any drivers had done so.

The ICE Agents assert that that they are entitled to qualified immunity for reasonable mistakes, AB 30, but they fail to explain how their mistake of arresting the Drivers was reasonable. Even though the ICE Agents state that they checked "immigration databases" and ran "criminal history" checks, JA73, they offer no information on what these databases and history checks said about the Drivers here. Indeed, in *U.S. v. Quintana*,—the same case the ICE Agents rely upon to claim their arrest of the Drivers was based on probable cause—the Eighth Circuit admonished the Border Patrol Agents for failing to make "a better showing that the databases preliminarily searched by Agent Bane and the Grand Forks Patrol Dispatch are sufficiently thorough and complete to permit a reasonable Border Patrol Agent to infer that [the plaintiff] was present in the country illegally." 623 F.3d at 1241.[3]

And the faulty premise that the year span initiation and execution of the operation and the fact that various versions of the list were exchanged therein reflects a thorough investigation ignores that, taken in the light most favorable to the Drivers, rather than reflect diligence, this delay indicates neglect, inefficiency,

[3] The Border Patrol's failure to provide such information was not dispositive there because the plaintiff's reply memorandum did not challenge the database or the inference the Border Patrol Agent drew. *Id.*

and non-urgency, as established by the ICE Agents' failure to determine the Drivers' citizenship despite readily available evidence and ICE's tremendous resources. Indeed, this dispute of historical fact illustrates yet another reason why discovery is necessary and the ICE Agents' motion to dismiss is premature. *See Curley*, 298 F.3d at 278 ("[T]he existence of disputed, historical facts material to the objective reasonableness of an officer's conduct will give rise to a jury issue.").

Lastly, as required under the second prong of the qualified immunity analysis—that the Drivers' Fourth Amendment right to be free from unreasonable seizures must be "clearly established"—and detailed in the Drivers' initial brief, AOB 29-34, the ICE Agents have failed to show that reasonably competent ICE agents would believe that the ICE Agents' arrest and interrogation of the Drivers was lawful because the Supreme Court has directly addressed the boundaries of the Fourth Amendment and §1357. Therefore, no reasonably competent ICE agent can be excused from knowing that seizures grounded in anything less than probable cause or reasonable suspicion are unlawful.

II. THE ICE AGENTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY FOR CONTINUING TO DETAIN THE DRIVERS AFTER CONFIRMING THEIR CITIZENSHIP.

The ICE Agents and their subordinates have also not shown that they are entitled to qualified immunity for their continued detention of the Drivers for several hours after confirming their citizenship. Such detention cannot be based in

reasonable suspicion when the ICE Agents confirmed their citizenship, even to their own satisfaction, and no reasonable ICE agent would believe otherwise.

The ICE Agents agree with the Drivers on the law governing when a seizure has occurred. AB 32. The ICE Agents, however, claim that the Drivers do not meet these standards based on their own incomplete factual narrative. But this they may not do. All of the Drivers' factual allegations in the complaint must be accepted as true and construed in the light most favorable to the Drivers. *Byers v. Intuit, Inc.*, 600 F.3d 286, 291 (3d Cir. 2010).

The ICE Agents' declarations, however, should not be considered in determining the ICE Agents' motion to dismiss because they constitute evidence beyond the complaint and, unlike the exhibits attached to the Drivers' response, do not fall within the limited exception "for documents that are integral to or explicitly relied upon in the complaint." *See West Penn Allegheny Health Sys., Inc., v. UPMC*, 627 F.3d 85, 97 n.6 (3d Cir. 2010) (quotation and marks omitted). Further, converting the ICE Agents' motion to dismiss into a motion for summary judgment so that the court may consider the declarations would also be improper as the Drivers have not been provided "reasonable opportunity to present all material that is pertinent to the motion" as required under Fed. R. Civ. P. 12(d). At this time, no discovery has taken place, and the Drivers have not had the opportunity to refute the ICE Agents' declaration. Regardless, the ICE Agents' declarations do

not rebut the Drivers' allegations in their amended complaint—they further establish a triable issue fact on whether a reasonable person would have felt free to leave. *See* JA73-76.

The ICE Agents' brief claims the Drivers' travel was unrestricted. AB 17. But that is flat untrue. The amended complaint alleges that their travel was restricted, and the declarations do no state otherwise. In any event, even if the ICE Agents would have let them go had they walked out the open door, the standard is not the ICE Agents' subjective intent. *Terry v. Ohio*, 392 U.S. 1, 22, (1968) ("If subjective good faith [on the part of the arresting officer] alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police."). Rather, it is whether a reasonable person would have believed he was not free to leave in the situation of the Drivers in view of all of the circumstances surrounding the arrest and interrogation. *Olivia-Ramos*, 694 F.3d at 283-84.

Given that the ICE Agents and their subordinates had already forcibly detained the Drivers by the ICE Agents' own admission, AB 7, repeatedly told the Drivers that they were not permitted to leave despite being wrongfully seized, JA48, 53, 58, refused to allow them to speak or stand, JA48, 53, 58, and were dressed in raid gear and/or displaying guns strapped to their waists, including those

who stood by the exit, JA48, 49, 53, 58; *see* JA74-75, no reasonable person would believe he was free to get up and leave.

The ICE Agents suggest at several places that they simply "ask[ed] the drivers to remain," *e.g.*, JA35, but they cite no support for that assertion, and their inadmissible hearsay declarations are not supported with direct quotes or even direct knowledge of what was actually said to the Drivers. *See* JA76 ("Between 0900 and 1000 hours, one team member told me that it had been suggested to the in-status drivers that they remain at the facility for a brief time after they had been processed, for officer safety reasons. I was told that those drivers appeared to understand the reason for the request, and willingly complied."). Perhaps most importantly, given the context of the already-existing undisputed seizure, no reasonable person would feel free to leave until and unless the seizing authorities with guns expressly stated he was free to leave. No declaration claims that the agents affirmatively told the Drivers they were free to leave.

Moreover, the Drivers' specifically pled that they were repeatedly advised that they were not permitted to leave, JA48, 49, 53, 58; plaintiff Shittu directly asked if he was permitted to leave but was told that "he had to sit in the room with the other taxi drivers who had been detained and was not permitted to leave," JA49, and plaintiff Lawal expressly told the ICE Agents and their subordinates that "he just wanted to leave," JA58. These facts, accepted as true and construed in the

light most favorable to the Drivers, demonstrate that their continued detention was neither a voluntary choice nor consensual in nature. Regardless, to the extent the ICE Agents justify their conduct in continuing to detain the Drivers based on the Drivers' purported voluntary agreement to remain at the PPA, this dispute of historical fact provides another example of why the ICE Agents' motion to dismiss is premature. *See Curley*, 298 F.3d at 278.

The ICE Agents do not dispute that they had no evidence on which to have a reasonable suspicion to detain the Drivers. They claim continued detention was justified for safety reasons, but they do not connect those safety reasons to any articulable reasonable suspicion of illegal conduct by the Drivers. And the mere possibility or subjective feeling that someone might be tipped off about an operation does not justify detaining everyone who knows about the operation. *See, e.g.*, *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) ("To insist neither upon an appropriate factual basis for suspicion directed at a particular [individual] nor upon some other substantial and objective standard or rule to govern the exercise of discretion 'would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . .") (quoting *Terry*, 392 U.S. at 22); *see also Manzanares v. Higdon*, 575 F.3d 1135, 1144 (10th Cir. 2009) (rejecting officer's belief that a suspect's 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).

Further, the ICE Agents' reliance on *U.S. v. Edwards*, 53 F.3d 616 (3d Cir. 1995), to support their safety rationale for suspicionless detention is misplaced. [4] *See* AB 34. The court's statement in *Edwards* that officers may "take such steps as are reasonably necessary to protect their personal safety and to maintain the status quo," is predicated on the fact that the officers conducting the *Terry* stop had *reasonable suspicion* based on articulable facts that a crime had been committed—the court did not hold that concerns with officers' safety justified a *suspicionless* detention. *Id.* at 618-19.

Moreover, it is absurd. The agents' post-hoc claim of safety concerns assumes that these "armed" cab drivers would launch an assault on the facility rather than simply choose not to appear at the facility if they were tipped off. Even if such a rationale existed, non-individualized concerns are insufficient to justify continued seizure of the Drivers. ICE Agents cannot be permitted to invade citizens' Fourth Amendment rights absent any evidence whatsoever by merely citing attenuated and fantastic safety concerns.

[4] Notably, the ICE Agents' assertion that they merely asked the Drivers to remain (and they did so voluntarily) undermines the seriousness of the ICE Agents' purported safety concerns.

Moreover, in light of the 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 would know that continued detention of a U.S. citizen without a reasonable suspicion 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 . And any ICE agent reasonably aware of the law would understand that continuing to detain the Drivers for 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.

III. *BIVENS* CLAIMS DO NOT NEED TO BE PLED WITH SPECIFICITY.

The facts pleaded in the amended complaint need only state a plausible claim for relief. They do so, and the district court erred in holding otherwise. When considering a motion to dismiss, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), directs courts to ignore legal conclusions, to accept a complaint's facts as true, and to apply a standard of plausibility to those facts. The ICE Agents, however, ask this court to ignore the facts in the amended complaint, to accept the ICE Agents'

preferred version of the facts—unsupported by even their own declarations—and to apply a standard of specificity to the ICE Agents preferred facts.

The ICE Agents' primarily argue the Drivers did not allege personal involvement with sufficient specificity. *See* AB 20, 21. *See also* JA9-10 (stating the amended complaint did not identify "each Defendant's *specific* actions" (emphasis added)). But specificity is not required. *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2006) ("[W]e do not require heightened fact pleading of specifics.").

The amended complaint alleges many non-conclusory facts. The ICE Agents assert that the Drivers "allege only that 'Defendants were present for and participated directly' in the conduct [that violated the Drivers' rights]" and assert one reason this allegation is "insufficiently particular" is "because the allegations are wholly lacking in any factual specificity indicating any individual Agent's conduct or knowledge." AB 20. But a review of the amended complaint reveals otherwise. Regarding personal involvement, the Amended Complaint alleges "McDonald, Riley and Chow," JA46:

- "exchanged various versions of the certified operator list in an effort to create a working list," JA46;
- directed letters be sent to the Drivers advising each he was entitled to a refund, JA46, 47;

- "suddenly and violently attacked [each driver], thr[ew] [him] against a wall and handcuffed [him]," JA47, 48, 52, 56, 57;
- were told by the Drivers that the Drivers were citizens, JA48, 52, 57;
- "interrogated [each driver] for more than one hour," JA48, 52, 57;
- admitted to each driver the driver "had been mistakenly detained," JA48, 53, 57, 58;
- nonetheless "repeatedly advised [each driver] that he was not permitted to leave," JA48, 49, 53, 53, 58;
- held the Drivers "for several additional hours," JA48, 53, 58; and
- prohibited the Drivers from "speak[ing] or stand[ing]" while held JA48, 53, 58.

Defendants ignore these factual allegations and ask this Court to do the same, the law directs otherwise.

And these facts are entitled to a presumption of truth. The ICE Agents incorrectly assert "[t]his Court is not required to assume . . . nonspecific allegations are true." AB 15-16. Again, specificity is not the standard. Instead, "a court must accept as true all of the allegations contained in a complaint" except "legal conclusions." *Iqbal*, 556 U.S. at 678. The facts laid out above are not legal conclusions; they recount events and are entitled to a presumption of truth. Ignoring the Supreme Court's directive, the ICE Agents contradict the factual

allegations to create a narrative they prefer. Indeed, their statement of facts cites sources other than the amended complaint and decision almost exclusively, acknowledging the amended complaint's existence only once outside the opening and closing paragraphs of their five-page fact section. AB 6-10. In considering the district court's grant of the motion to dismiss, it is the ICE Agents' statement of facts that should be ignored, not the well-pleaded facts in the amended complaint.

Moreover, these facts state a plausible claim for relief. The ICE Agents concede personal involvement "can be shown through allegations of personal direction or actual knowledge and acquiescence." AB 19. Regarding facts, they concede "Special Agent McDonald compiled the list of drivers invited to the PPA facility located at 2415 S. Swanson Street, in Philadelphia," *id.* at 6, and "supervised the operation primarily from the first room the drivers entered, and circulated among the other rooms from time to time," *id.* at 9. They further concede Chow was present during the operation, arriving at the facility "to see how the operation was going." *Id.* at 8. These concessions alone are sufficient to demonstrate that, at the very least, the ICE Agents knew what was going on and acquiesced in it. The amended complaint's allegations further establish these things for all the ICE Agents—because the ICE Agents themselves admitted to the Drivers they had been "mistakenly detained" and could not leave, the ICE Agents necessarily knew of the violations. The personal involvement standard recognizes

it was incumbent upon the supervisory agents to respect the Drivers' rights and release them as soon as the ICE Agents knew what was going on. By not doing so, and acquiescing in the Drivers' detention, the supervisory agents themselves violated the Drivers' rights. As the concessions and pleadings establish knowledge and acquiescence without speculation, the Drivers state a plausible claim for relief.

The ICE Agents cite *Iqbal* and *Rode v. Dellarciprete*, as cases dismissing supervisors for lack of personal involvement. *Id.* at 19. However, those cases are distinguishable because they involved imposing liability on people "at the highest level[s] of the . . . law enforcement hierarch[ies]," *Iqbal*, 556 U.S. at 668,—the governor and attorneys general—not boots-on-the ground agents. *Id.*; *Rode*, 845 F.2d 1195, 1207 (3d Cir. 1988). *Rode* attempted to establish knowledge through "articles that appeared in newspapers throughout the state," "through the introduction of a legislative resolution seeking an investigation into racially motivated retaliation against PSP employees, the filing of grievances with the Governor's office of administration, and telephone calls and correspondence with the office of the Lieutenant Governor." 845 F.2d at 1208. The complaint did not allege the governor or attorney general were present for any of the wrongs, or that they even read the newspaper articles or reviewed the complaints. *See id.*

Iqbal is also distinguishable because it involved *Bivens* liability for "invidious discrimination in contravention of the First and Fifth Amendments,"

which the Supreme Court's "decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose." *Iqbal*, 556 U.S. at 676. The ICE Agents wrongly suggest all *Bivens* liability requires an intentional violation of constitutional rights. AB 7, 23. However, "[t]he factors necessary to establish a *Bivens* violation . . . vary with the constitutional provision at issue," *Iqbal*, 556 U.S. at 676, and plaintiffs need not plead or prove purpose for Fourth Amendment violations. *See supra* Parts I, II. In *Iqbal*, the plaintiff's allegations in ultimately failed because the actions pled were "merely consistent with" a discriminatory purpose, not necessarily done because of that purpose. 556 U.S. at 678. Because the drivers need not prove purpose, they need not allege purpose and their allegations that demonstrate participation, knowledge, and acquiescence are sufficient.

Heightening the pleading standard on *Bivens* claims would eviscerate the doctrine. Rarely does an officer violating a citizen's rights stop to make sure the citizen has his name for a future lawsuit. Nor can citizens be expected to take copious notes in order to eventually draft a complaint with specificity. The ICE Agents comment that "the Drivers allege that they themselves were present . . . yet no Driver can identify any Agent," AB 21, not only ignores the allegations in the Amended Complaint, but also ignores that *Bivens* itself involved unnamed agents. *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). Here,

there are numerous culpable unnamed agents who likely will be added to the complaint after more discovery.[5] But the fact that there are other culpable unnamed agents does not make the named agents any *less* culpable.

[5] To the extent the failure to include John Doe defendants was a deficiency in the pleadings, "the District Court should not have dismissed the plaintiffs' claims without either granting leave to amend or concluding that any amendment would be futile." *Shane v. Fauver*, 213 F.3d 113, 116 (3d Cir. 2000).

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 Reply Brief of Appellants is proportionately spaced and contains 5,656 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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