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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MARIA ARGUETA; WALTER CHAVEZ; ANA GALINDO; W.C. by and through his parents Walter Chavez and Ana Galindo; ARTURO FLORES; BYBYANA ARIAS; JUAN ONTANEDA; VERONICA COVIAS; CARLA ROE 1; CARLA ROE 2; CARLOS ROE 2; CARLA ROE 3; and CARLOS ROE 4,

Plaintiffs,

-vs-

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT ("ICE"); JULIE L. MYERS, Assistant Secretary for Immigration and Customs Enforcement; JOHN P. TORRES, Deputy Assistant Director for Operations, Immigration and Customs Enforcement; SCOTT WEBER, Director, Office of Detention and Removal Operations, Newark Field Office; BARTOLOME RODRIGUEZ, Former Director, Office of Detention and Removal Operations, Newark Field Office; JOHN DOE ICE AGENTS 1-60; JOHN SOE ICE SUPERVISORS 1-30; and JOHN LOE PENNS GROVE OFFICERS 1-10,

Defendants.

DOCUMENT FILED ELECTRONICALLY

Honorable Peter G. Sheridan, U.S.D.J.
Honorable Esther Salas, U.S.M.J.

Civil Action No: 2:08-cv-1652

MEMORANDUM OF LAW IN OPPOSITION TO THE INDIVIDUAL DEFENDANTS' PARTIAL MOTION TO DISMISS

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Plaintiffs, by and through their undersigned counsel, respectfully submit this memorandum of law in opposition to the motion (the "Motion") of the Individual Defendants'[1] to dismiss the First Amended Complaint ("Am. Cplt.").[2]

PRELIMINARY STATEMENT

This lawsuit seeks redress for a series of unconstitutional intrusions by federal immigration agents into the homes of thirteen individual plaintiffs—some lawful permanent residents, some citizens, some lawful visa-holders and some removable aliens. In each of these intrusions, Immigration and Customs Enforcement ("ICE") agents—acting pursuant to aggressive policies established and implemented by ICE supervisory officials including defendants Julie Myers and John Torres—arrived at plaintiffs' homes in a storm of force and intimidation. The agents banged on doors in the pre-dawn hours falsely claiming authority as "police." After the agents got the attention of sleeping residents they forced or tricked their way inside their homes. Once inside, ICE agents engaged in a variety of abusive, intimidating and conscience-shocking actions against vulnerable residents out of proportion to any legitimate law enforcement need. As a result, plaintiffs have suffered serious injuries.

Plaintiffs are by no means the only people that have been subjected to defendants' unlawful conduct. As documented in detail in the Amended Complaint, ICE agents conducted similar, unconstitutional raids of immigrants' homes throughout New Jersey and across the country. The illegal acts are the consequence of policies established and practices condoned by the supervisory defendants named in the Amended Complaint. Specifically, defendants Julie Myers and John Torres devised a program titled "Operation Return to Sender" which grouped

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[1] As used herein, the terms "Individual Defendants" or "defendants" refer to Julie L. Myers, John P. Torres, Scott Weber, and Bartolome Rodriguez, to the extent those individuals are sued in their individual capacities.

[2] Defendants make a partial motion to dismiss. They do not challenge the right of the citizen plaintiffs and those with lawful immigration status—*i.e.*, plaintiffs Argueta, Chavez, Galindo, W.C., Covias, Arias, or Flores—to bring claims in this Court for violations of their constitutional rights. The Motion also does not address any of plaintiffs' claims against the various John Doe defendants.

ICE agents into various Fugitive Operation Teams ("FOTs") in New Jersey and nationwide. Defendants Myers and Torres then deployed those FOTs in Newark and other jurisdictions in order to search aggressively for undocumented immigrants. Despite receiving repeated, specific warnings about unlawful conduct by ICE agents in New Jersey (and nationwide) the supervisory defendants—including the Individual Defendants that now bring this Motion—took no action to reprimand, train or otherwise repudiate the wrongdoing of their subordinates. In short, the Individual Defendants created and condoned the illegal conduct alleged.

In their Motion, defendants do not contest the allegations that the ICE agents' conduct constituted plain violations of plaintiffs' Fourth and Fifth Amendment rights. Instead, they assert a number of procedural and jurisdictional arguments, some of which are framed so broadly as to immunize any wrongdoing—no matter how egregious—by federal officials as long as they happen to subjectively believe their victims are removable immigrants. Thus, under defendants' view of the law, anyone—including citizens and permanent residents—would be precluded from bringing a *Bivens* action if they were arrested and detained under the mistaken belief that they were removable aliens. None of these technical arguments have merit.

First, defendants attack the request made by certain plaintiffs in the Amended Complaint to proceed pseudonymously. That request, based upon those plaintiffs' credible fear of retaliation by government officials or private individuals, is justified in light of the lack of countervailing need for disclosure of their identities and is fully supported by the prevailing case law. Second, defendants contend that the Immigration and Nationality Act ("INA") precludes the Court from exercising jurisdiction over certain plaintiffs or the particular relief that those plaintiffs seek. This argument has been addressed and rejected by nearly a dozen courts that have uniformly held that the jurisdiction-stripping provisions defendants cite are limited only to claims that relate to challenges to an alien's removal; those provisions in no way foreclose jurisdiction in the district courts for *damages* resulting from government actions completely independent of discretionary removal decisions. Likewise, the INA's "comprehensive statutory scheme" makes no provision to remedy Fourth and Fifth Amendment violations by ICE agents.

As a result, and as the overwhelming weight of authority demonstrates, plaintiffs are entitled to pursue precisely the same damages remedy in federal district court that the Supreme Court found was available on nearly identical facts in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 397 (1971).

Finally, the Individual Defendants incorrectly suggest that plaintiffs are suing each of them merely because of the high government positions they hold. In fact, as described below, each of the Individual Defendants was personally involved in creating, executing and/or condoning the policies under which these unconstitutional actions took place, and each of them was given direct notice of the unconstitutional conduct of their subordinates. Defendant Julie Myers—the head of ICE—deployed the FOTs to Newark, issued press releases from her office boasting about the success of the New Jersey raids, and received personal memoranda reporting on specific fugitive operations in New Jersey. Having helped execute and taken credit for the "success" of the raids in this district, she cannot now protest that it would be unfair for her to be haled into this Court to defend her actions and those of her subordinates during those raids.

In light of the vulnerable legal status, intimidation and fear of retaliation many immigrants face, the government no doubt expects most will be in no position to challenge its unlawful conduct. Yet, immigrant residents, like any citizen are entitled to the protection of the law and of this Court. In addition to securing rightful redress for the harms these plaintiffs have suffered, this suit seeks to affirm the central principle "that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (Jackson, J., concurring).

For all of these reasons and others set forth more fully below, plaintiffs respectfully request that the Court deny defendants' Motion.

STATEMENT OF FACTS

A. The Unlawful Raids Practices

A widespread practice of unconstitutional immigration home raids has developed across the state of New Jersey and throughout the nation. That practice has occurred and is occurring in connection with a program that the Department of Homeland Security ("DHS") calls "Operation Return to Sender." The practice is a predictable consequence of the arbitrary, exponentially-increased quotas for the arrest of immigrants with old deportation orders that DHS recently established. (Am. Cplt. ¶1.) The Individual Defendants are responsible for these policies and practices. Specifically, the quotas that defendants seek to meet via Operation Return to Sender have resulted in a practice where immigration agents routinely disregard the obligation to secure a judicial search warrant or voluntary, informed consent before entering homes in which the agents suspect immigrant "fugitives" might reside. *Id.* ICE agents frequently engage in further unlawful, abusive and, on occasion, conscience-shocking conduct once inside the homes.

This home raids practice has been comprehensively documented through local and national media reports (*see* Am. Cplt. ¶ 47), congressional testimony, multiple lawsuits, and first-hand accounts from other victims. In a typical home raid, multiple ICE agents surround a home in the early morning hours, pound furiously on the door and/or windows, and use deceit, coercion or force to cause an occupant to open the door. (Am. Cplt. ¶¶ 39-43.)

Upon gaining unlawful entry, multiple agents typically enter and rapidly sweep through the home, displaying or brandishing firearms. On occasion, agents point their guns directly at unarmed occupants (including children). Even though the purported "fugitive" target is frequently unknown to the occupants, the agents interrogate those occupants about their own identities and immigration status. The agents do this without having any reasonable basis for doubting that the occupants of the homes are citizens or lawful residents of the United States. ICE agents are sometimes verbally and physically abusive. In front of children and family members, agents handcuff and take away individuals suspected of unlawful presence without

allowing them to change out of their bedclothes, and without telling family members where they are taking their loved ones or how to find them. (Am. Cplt. ¶¶ 44-46.)

B. The Plaintiffs

Plaintiffs are thirteen individuals whose New Jersey homes were unlawfully raided by ICE agents. The eight named plaintiffs in the suit are United States citizens (Arturo Flores, Bybyana Arias and nine-year-old W.C.), lawful permanent residents (Walter Chavez, Ana Galindo and Veronica Covias), a Temporary Protection Status-holder (Maria Argueta), and an individual who was granted Voluntary Departure and has left the United States (Juan Ontaneda). (Am. Cplt. ¶¶ 9-16.)

Five plaintiffs, Carlos and Carla Roes 1-4, have sought leave to proceed pseudonymously because of their acute fear of retaliation by the immigration authorities named as defendants in this case. ICE has been known to retaliate against immigrants who have spoken out against immigration laws and practices. (Am. Cplt. ¶¶ 22-23.)

Plaintiffs' claims are typical of the unconstitutional ICE raids practice alleged in the Amended Complaint. Each plaintiff was present in his or her home in the early hours of the morning when a team of federal agents gained unlawful entry into their homes, through deceit or—in the cases of eleven of the plaintiffs—through raw force. The agents did not possess judicial warrants that would authorize their entry or searches in any of plaintiffs' homes. The agents swept through plaintiffs' homes, ordered sleeping people—including, in some cases, children—out of bed, and detained the occupants without judicial warrant or other legal justification. (*See* Am. Cplt. ¶¶ 55-186.)

Almost all of the plaintiffs were subjected to physical or verbal abuse. *Id.* Ana Galindo, W.C. and Carla Roe 2 had firearms pointed directly at them or pressed into their chests. (Am. Cplt. ¶¶ 85, 157.) Carla Roe 1 was forcibly prevented from contacting counsel. (Am. Cplt. ¶ 141.) Maria Argueta was subsequently detained for 36 hours despite having papers—which the arresting agents refused even to look at—reflecting her legal status. (Am. Cplt. ¶¶ 65-76.)

Each plaintiff has suffered and continues to suffer from the effects of defendants' abusive conduct; nine-year old W.C. remains so traumatized that he is unable to sleep alone at night. (Am. Cplt. ¶¶ 3, 92-93.)

C. The Individual Defendants

The Individual Defendants are all officials employed within defendant ICE, a bureau of DHS. The Individual defendants were all personally involved with the implementation of Operation Return to Sender in New Jersey during the time of the home raids detailed in the Amended Complaint. Each Individual Defendant authorized or condoned the misconduct of the ICE agents who conducted the raids. (Am. Cplt. ¶ 5.)

1. Defendants Myers and Torres

Defendant Myers is, and was at all relevant times, the Assistant Secretary for Homeland Security for Immigration and Customs Enforcement. She is charged with the constitutional and lawful implementation of the Immigration and Nationality Act, 8 U.S.C. §§ 1101, *et seq.*, and with the administration of ICE. (Am. Cplt. ¶ 24, 25.)

Defendant Torres is the Acting Deputy Assistant Secretary for Operations of Homeland Security, ICE, and at all relevant times prior to March 5, 2008, was the Director (or Acting Director) of the ICE Office of Detention and Removal Operations ("DRO") in Washington, D.C. *See* Defs Br. 34, n.14. As Director, defendant Torres was responsible for overseeing the apprehension, detention and removal of foreign nationals charged with violating federal immigration law. He was also responsible for the supervision of law enforcement officers assigned to DRO field offices, including the Newark, New Jersey office. Defendant Torres was responsible for the supervision and oversight of the FOTs that conduct raids pursuant to Operation Return to Sender, *see* Am. Cplt. ¶ 26, and was the "Approving Officer" who authorized plans for specific FOT operations. *See* Operational Order/Plan, Detention and Removal Operations at 6, Exhibit ("Exh.") A to the Certification of Scott L. Walker dated September 15, 2008 ("Walker Cert.").

Between 2005 and 2007, defendants Myers and Torres authorized a five-fold increase in the number of FOTs that carry out Operation Return to Sender. They also approved a remarkable 800% increase in the arrest quotas of each team in the corresponding period of time. They did this without providing the necessary training to prevent ICE agents—faced with these new pressures—from acting abusively and unlawfully. Myers and Torres facilitated the creation of a culture of lawlessness and lack of accountability within an agency they supervise. (Am. Cplt. ¶ 191.)

Defendants Myers and Torres have been repeatedly placed on notice of ICE agents' routine unconstitutional home raids practices. In addition to consistent local and national media reports on these practices, *see* Am. Cplt. ¶ 47, defendants Myers and Torres have both been sued numerous times since November 2006 for their specific roles in these practices. (Am. Cplt. ¶ 192.) Defendant Myers has also been repeatedly placed on notice by members of Congress who have questioned her and her colleagues about ICE agents' unconstitutional raids practices. (Am. ¶¶ 52, 188.)[3]

On June 11, 2007, the National Immigration Forum sent a letter to DHS Secretary, Michael Chertoff, questioning the conduct by ICE agents in New Haven home raids. Defendant Myers responded to those allegations in a letter dated July 6, 2007. She acknowledged that only five of the 29 individuals arrested were fugitives. She similarly acknowledged that agents conducting residential searches and arrests routinely do not have judicially-issued warrants, and are therefore required to obtain knowing, voluntary consent before entering a home. However,

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[3] *See also* Department of Homeland Security Appropriations for 2009, Hearings before the Subcommittee on Homeland Security, a Subcommittee of the Committee on Appropriations of the House of Representatives, February 26, 2008 http://www.gpoaccess.gov/congress/house/appropriations/index.html (containing statement from congressman to Myers that the congressman had "complaints from the churches and groups that reach out to immigrants for the way people have come in on warrant chases, officers just finding somebody standing in the wrong place and asking them for their papers and deporting them, parents who have young children. There is a real problem here," and noting that same congressman had questioned Myers about the same issue the previous year); Kurtis Alexander, "Salinas Lawmaker Attacked Over Gestapo Remark," Mercury News, March 3, 2008 (http://www.mercurynews.com/ci_8434872).

according to defendant Myers, such consent was ensured simply by assigning a Spanish-speaking officer to each FOT. (Am. Cplt. ¶ 193.)

Defendant Torres also received specific notice of unconstitutional home raid practices when New Haven's mayor called him in June 2007 and raised allegations that ICE officers under defendant Torres's supervision "barged into houses without warrants and verbally abused the people and children were manhandled." The mayor questioned whether defendant Torres's office should continue to allow such home raids to be conducted with these allegations pending. (Am. Cplt. ¶ 194.)

Despite these reports, defendants Myers and Torres have failed to take action to reprimand wrongdoers or institute sufficient training, and otherwise continue to condone the unconstitutional practices of ICE agents in New Jersey and elsewhere. They continue to contribute to such unlawful conduct by publicizing, and lauding as "successful," their department's dramatic increase in immigration arrests. *See e.g.,* Am. Cplt. ¶ 195 (citing ICE Press Releases, Newark, May 1, 2007; Apr. 2, 2007; Mar. 1, 2007; Nov. 20, 2006; Oct. 19, 2006). The releases indicate that arrests were made pursuant to the nationwide interior immigration enforcement strategy announced by defendant Myers and Secretary Chertoff. *Id*. In a June 2, 2008 ICE press release, defendant Myers specifically praised raids conducted in New Jersey and five other states as a means of "protecting the integrity of our immigration system." *See* Exh. B to Walker Cert.

The FOT agents that raided plaintiffs' homes did so under the authority and control of defendants Myers and Torres. Defendant Myers confirmed that fact in an August 2006 press release:

> ICE Assistant Secretary Julie L. Myers announced that seven new ICE Fugitive Operations teams are now operating in Atlanta, Houston, Los Angeles, Newark, Phoenix, Washington, D.C. and Raleigh, NC, bringing the total number of teams nationwide to 45. *Although based in specific regional offices, these teams have federal authority and nationwide jurisdiction and can be deployed to conduct operations anywhere in the country.*

See Exh. C to Walker Cert. (emphasis added).[4]

2. Defendants Weber and Rodriguez

Defendant Weber is Director of the DRO Field Office in Newark, New Jersey. He is directly responsible for managing ICE enforcement activities in New Jersey, including the execution of Operation Return to Sender by FOTs. (Am. Cplt. ¶ 27.) Defendant Rodriguez is the former Acting Field Office Director for the DRO Field Office in Newark, New Jersey. In that role, he was directly responsible for managing ICE enforcement activities in New Jersey—including the execution of "Operation Return to Sender" by FOTs—from approximately February 2007 through May 2007. Defendant Rodriguez is still employed with ICE. (Am. Cplt. ¶ 28.)

Defendants Rodriguez and Weber—like defendants Myers and Torres—were aware of and condoned the unconstitutional conduct of ICE agents in New Jersey. They often spoke publicly (and in the case of defendant Weber, continue to do so) on the number of arrests made by ICE agents in New Jersey pursuant to "Operation Return to Sender." Their comments regarding specific allegations of unconstitutional conduct by New Jersey ICE agents during home raids suggest that each of them at best acquiesced in, and at worst, encouraged such behavior. For example, when defendant Weber was presented with allegations regarding a pattern of home raids in New Jersey conducted without search warrants or voluntary consent, he responded: "I don't see it as storming a home . . . . We see it as trying to locate someone." Elizabeth Llorente, *Immigration officials say raids on illegals are within the law*, The Record (Hackensack, N.J.), Jan. 2, 2008. (Am. Cplt. ¶ 196.)

As with Myers and Torres, despite being placed on notice that their agents were not seeking voluntary informed consent before entering private homes and were engaging in other unlawful conduct, neither Weber nor Rodriguez implemented any guidelines, protocols, training,

[4] The Court may consider in connection with this Motion both the June 2, 2008 ICE press release and the August 2006 ICE press release because they are both publicly available documents. *See Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006).

oversight, or record-keeping requirements that would ensure that officers under their supervision conducted home entries and searches within constitutional limits. They did not investigate or discipline their agents who engaged in misconduct during home raids in New Jersey. (Am. Cplt. ¶¶ 197-98.)

ARGUMENT

I. IN EVALUATING A MOTION TO DISMISS THE COURT MUST ASSUME THE TRUTH OF PLAINTIFFS' ALLEGATIONS

In considering defendants' motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the Court is "required to accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant." *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994). The court may not dismiss the complaint "based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder." *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1969 (2007). Thus, "[t]he test for reviewing a 12(b)(6) motion is whether under any reasonable reading of the pleadings, plaintiff[s] may be entitled to relief." *Simon v. Cebrick*, 53 F.3d. 17, 19 (3d Cir. 1995).

II. THE CLAIMS OF THE PSEUDONYMOUS PLAINTIFFS ARE NOT SUBJECT TO DISMISSAL AND LEAVE TO PROCEED PSEUDONYMOUSLY SHOULD BE GRANTED BECAUSE THEY FACE A REAL THREAT OF HARM SHOULD THEY BE FORCED TO REVEAL THEIR IDENTITIES

Citing authority from the 10th Circuit, defendants contend that the Court is required to dismiss the pseudonymous plaintiffs because they did not separately seek formal leave to proceed pseudonymously and because the facts pled on their behalf do not warrant granting leave. Defendants are wrong on both counts. First, the Amended Complaint does, in fact, seek leave to allow certain plaintiffs to proceed pseudonymously. The Amended Complaint specifically sets forth the reason plaintiffs Carlos and Carla Roes 1-4 "*seek* to proceed

pseudonymously": they face retaliation by government officials who have been known to punish immigrants who challenge government immigration policy. (Am. Cplt. ¶¶ 22-23) (emphasis added).[5]

Second, the balance of factors set forth in *Doe v. Hartford Life & Acc. Ins. Co*., 237 F.R.D. 545, 549-50 (D.N.J. 2006), decidedly weighs in favor of permitting plaintiffs to proceed pseudonymously. *See* Defs Br. 11-12 (listing *Hartford Life* factors). In *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007), the court considered an objection to the request of a group of undocumented aliens to proceed pseudonymously in a challenge to town ordinances that, among other things, prohibited the employment of, and the renting of dwellings to, undocumented immigrants. *Id.* at 484-86. The court, upon extended consideration, rejected the government's challenge and held that the individuals of "uncertain immigration status" were entitled to proceed pseudonymously. *Id*. at 504-15.

Applying the *Hartford Life* balancing test, the district court credited plaintiffs' allegations that they would be "easy targets of intense anti-immigrant and anti-Latino sentiment." *Id.* at 507-10. The court also cited the possibility of "adverse legal consequences"—presumably referring to removal proceedings—that could follow from the revelation of plaintiffs' identities. *Id*. at 511. In addition, the public interest weighed in favor of anonymity, the *Lozano* court found, because revelation of plaintiffs' identities could deter individuals from challenging such ordinances in the future, in which case "the public's interest in testing the constitutionality of certain aspects of such ordinances could remain unexplored." *Id*. at 512.

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[5] Even assuming that plaintiffs had not formally sought leave by separate motion to proceed pseudonymously, the remedy for that procedural oversight is not dismissal. *See* Fed. R. Civ. P. 17(a) ("no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by . . . the real party in interest"); *EW v. New York Bloos Ctr*., 213 F.R.D. 108, 109-113 (E.D.N.Y. 2003) (because "failing to bring an action in the name of the real party in interest does not immediately and automatically divest a district court of jurisdiction" plaintiffs may proceed pseudonymously where the facts merit such a result); *accord Doe v. Barrow County*, 219 F.R.D. 189, 191-92 (N.D. Ga. 2003).

The plaintiffs here face similar threats should they be forced to reveal their true identities. As in *Lozano*, plaintiffs are "easy targets of intense anti-immigrant and anti-Latino sentiment." Am. Cplt. ¶ 22.) Moreover, as the *Lozano* court noted, forcing plaintiffs to reveal their identities could deter other potential plaintiffs from standing up to challenge the constitutionality of the government's immigration enforcement practices. 496 F. Supp. 2d at 512. This is no small concern given the nationwide scope of the aggressive and legally questionable immigration enforcement practices that ICE and its agents are carrying out.

On the other side of the *Hartford Life* balancing, there is no "public interest in access to the identities" of these private individual plaintiffs. *Hartford Life*, 237 F.R.D. at 549. Moreover, defendants will suffer no prejudice at this stage of the proceedings. Defendants have been provided with detailed information in the Amended Complaint about the incidents at issue, including the month and location of the raids. This information is more than sufficient to allow defendants to prepare a defense, especially at this stage of the proceedings. Defendants surely possess records on every raid in every community in a given month and can seek discovery regarding the addresses and specific dates of the raids in question.

More importantly, should defendants—at *some future date*—require the identity of one or more of the plaintiffs (either for discovery purposes or for litigating the merits) the court and the parties can seek to accommodate their interests at that time. For all of these reasons, plaintiffs have met the standard for proceeding pseudonymously.

III. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS BECAUSE THE IMMIGRATION AND NATIONALITY ACT'S STREAMLINING PROVISIONS DO NOT APPLY TO CONSTITUTIONAL CLAIMS UNRELATED TO REMOVAL DECISIONS

Defendants argue that this Court may not consider the constitutional claims of plaintiffs Ontaneda, Carla Roe 1, Carlos Roe 2 and Carla Roe 3, because those plaintiffs might have been subject to removal proceedings. The government mistakenly bases its claim on three provisions of the Immigration and Nationality Act ("INA") that govern removal challenges: (1) 8 U.S.C.

§ 1252(b)(9), which channels all challenges to orders of removal to the courts of appeal; (2) 8 U.S.C. § 1252(d)(1), which requires exhaustion of administrative remedies before challenging an order of removal in the courts of appeal; and (3) 8 U.S.C. §1252(g), which bars challenges to Executive discretionary decisions to commence removal proceedings against particular individuals. None of those provisions apply here, because plaintiffs do not challenge an order of removal or the initiation or conduct of removal proceedings.

The Supreme Court has stressed that there is a strong presumption in favor of judicial review over claims of unconstitutional government conduct. This presumption is overcome only where there is "clear and convincing evidence" that Congress specifically intended to preclude jurisdiction. *Webster v. Doe*, 486 U.S. 592, 603 (1988) (the heightened "clear and convincing evidence" showing is mandated in order to "avoid the serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim") (quotations omitted); *Alaka v. Att'y Gen. of the U.S.*, 456 F.3d 88, 101 (3rd Cir. 2006); *see also Ogbudimkpa v. Aschroft*, 342 F.3d 207, 217 (3d Cir. 2003) ("We are reluctant to construe the [INA] to bar any type of judicial review without a clear statement from Congress indicating its intent to do so.") (applying analysis of §1252(b)(9) in *INS v. St. Cyr*, 533 U.S. 289, 299 (2001)). Defendants have failed to identify any evidence—let alone the requisite clear and convincing evidence—that the removal provisions on which they rely were intended to preclude judicial review over damages claims for unconstitutional searches and seizures and conscience-shocking conduct by federal agents. In fact, defendants completely ignore the statutory context, legislative history and Supreme Court precedent that undermine the novel expansive construction of the provisions that they propose.

A. Sections 1252(b)(9) and 1252(d)(1) Do Not Bar Subject Matter Jurisdiction because Plaintiffs Do Not Seek Review of a Removal Order.

Defendants argue that §§ 1252(b)(9) and 1252(d)(1) deprive this court of jurisdiction over plaintiffs' constitutional claims because—according to defendants—plaintiffs are

challenging "removal actions." (Defs Br. 17.) However, as noted above, §§ 1252(b)(9) and 1252(d)(1) apply only to challenges to an order of removal. Plaintiffs do not challenge an order of removal. They, like all plaintiffs in this suit, challenge the government's patently unconstitutional raids of their homes and the conscience-shocking conduct that occurred in the course of those raids. Neither of these challenges bears any relationship to the validity of a removal order.

Section 1252(b)(9) is one of a number of "streamlining provisions" that Congress enacted in 1996 via the Antiterrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). Congress passed those laws to remedy "what [it] saw as uncertain and piecemeal review of orders of removal." Previously, such review had been "divided between the district courts (habeas corpus) and the courts of appeals (petitions for review)." *Bonhometre v. Gonzalez*, 414 F.3d 442, 446 (3d Cir. 2005); *accord Sandoval v. Reno*, 166 F.3d 225, 227 (3d Cir. 1999). In enacting the 1996 provisions, Congress intended "to provide a single form of removal proceedings, with a streamlined approach and removal process." *Valdivia v. I.N.S.*, 80 F. Supp. 2d 327, 331-32 (D.N.J. 2000) (quoting H. Rep. No. 104-469(I), 104th Con., 2d Sess. 359, 463 (1996)) (citations omitted). However, despite Congressional intent to channel review of orders of removal exclusively through petitions for review, many courts held that in order to avoid violating the Suspension Clause, habeas corpus relief remained available for certain categories of aliens bringing constitutional challenges to their removal. *See St Cyr.*, 533 U.S. at 299.

Seeking to further consolidate the process for reviewing final orders of removal, Congress enacted the REAL ID Act of 2005.[6] That statute included new streamlining provisions—including the current version of §1252(b)(9)—to channel *all* removal order challenges, including those previously undertaken via habeas corpus, into a single petition for review procedure. The plain language of Section 1252(b) confirms that its sub-sections—

[6] Pub. L. 109-13, 119 Stat. 231 (2005).

including § 1252(b)(9)—apply only to claims related to review of a final order of removal and are not intended to preclude review of other kinds of claims.

Section 1252(b) is specifically titled, "Requirements for Review of Orders of Removal." Subsection (9) provides:

> Judicial review of all questions of law and fact . . . . arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28, or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

8 U.S.C. § 1252(b)(9).

Nearly all of the courts of appeal, following the Supreme Court's holding in *St. Cyr*,[7] have held that §1252(b)(9) does not preclude judicial review of a variety of non-removal related claims. For example, in *Bonhometre*, the Third Circuit clarified that section 1252(b)(9) "applies only to aliens who are challenging an order of removal," and leaves untouched an alien's right to challenge the legality of her immigration detention in district court. *Bonhometre*, 414 F.3d at 446 n. 4; *see also Kellici v. Gonzales*, 472 F.3d 416, 419-20 (6th Cir. 2006) (same); *Hernandez v. Gonzales*, 424 F.3d 42 (1st Cir. 2005) (same); *Ali v. Gonzales*, 421 F.3d 795, 797 n.1 (9th Cir. 2005) (same); *see also* Aguilar, 510 F.3d at 11 (1st Cir. 2007) (discussed below); *Madu v. U.S. Att'y Gen.*, 470 F.3d 1362, 1367 (11th Cir. 2006) (ruling in a challenge to the circumstances of an alien's detention, that "[b]ecause section 1252(b)(9) applies only '[w]ith respect to review of an order of removal,' and this case does not involve review of an order of removal, we find that

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[7] The Supreme Court has explicitly stated that it described §1252(b)(9) as the "unmistakable 'zipper' clause" because "its purpose is to consolidate 'judicial review' *of immigration proceedings* into one action in the court of appeals, *but it applies only '[w]ith respect to review of an order of removal under subsection (a)(1).'*" *St Cyr.*, 533 U.S. at 313 (emphasis added). Thus, the government is mistaken in claiming that the provision goes so far as to "consolidate[] in the courts of appeals *all legal and factual questions arising from actions taken to remove an alien*." (Defs Br. 14) (emphasis added).

section 1252(b)(9) does not apply to this case."); *Detroit Free Press*, 195 F.Supp.2d 948, 954 (E.D.Mich. 2002), *aff'd*, 303 F.3d 681 (6th Cir. 2002) (rejecting argument that § 1252(b)(9) deprived it of jurisdiction over challenge to the closure of removal proceedings to the public, because "[t]he plain language of the statute [] indicates that § 1252(b)(9) is limited to actions challenging "*an order of removal* under subsection (a)(1)") (emphasis in original); *accord Turnbull v. U.S.*, No. 1:06cv858, 2007 WL 2153279, at * 5 (N.D. Ohio July 23, 2007).

Against the weight of all the foregoing authority, defendants cite only two cases in support of their proposition that §1252(b)(9) bars all Fourth and Fifth Amendment *Bivens* claims of plaintiffs who might at some point be subject to removal proceedings.[8] The first, *Arias v. U.S.I.C.E.*, No. 07-1959, 2008 WL 1827604 (D. Minn. Apr. 23, 2008), misapplied the second, *Aguilar v. U.S.I.C.E.*, 510 F.3d 1, 11 (1st Cir. 2007). To start with, *Aguilar* fully supports plaintiffs' position here. In *Aguilar*, workers placed in removal proceedings as a result of a workplace immigration raid challenged the government's failure to provide them sufficient opportunity to make arrangements for their children before being detained. The First Circuit noted—contrary to defendants' position here (Defs Br. 17)—that "section 1252(b)(9) is a judicial channeling provision, not a claim-barring one." *Id.* As such, it does not apply to claims that "cannot effectively be handled through the administrative [removal] process." *Id.* The court explained that § 1252(b)(9) "cannot be read to swallow all claims that might somehow touch upon, or be traced to, the government's efforts to remove an alien." *Id.* (noting that legislative intent and judicial precedent demand a "bounded reading of the statute"). Taking into account "the presumption favoring judicial review of administrative actions," it determined that plaintiffs' family integrity claims did not fall within §1252(b)(9) because they could not be effectively remedied by immigration courts and had no bearing on the plaintiffs' immigration

[8] Defendants also cite to *Calcano-Martinez v. INS*, 232 F.3d 328, 340 (2d Cir. 2000), *aff'd*, 533 U.S. 348 (2001) for the proposition that "other challenges" may no longer be "brought pursuant to a federal court's federal question . . . jurisdiction under 28 U.S.C. § 1331." (Defs Br. 16.) Because that case concerned a direct challenge to orders of removal, it only further underscores that these are the only types of claims that section 1252(b)(9) addresses.

status. *Id.* at 19. The court noted that although "these claims bear some connection to removal," the link is tenuous and marginal. *Id.* If damages claims of the plaintiffs here could be said to bear *any* connection to removal, they would be even more attenuated than those permitted to proceed in *Aguilar* and related cases.

In *Arias*, the District of Minnesota misapplied *Aguilar* to the plaintiffs' *Bivens* claims, which arose out of home raids similar to those alleged in this suit. Purporting to apply *Aguilar*, the court in *Arias* determined that § 1252(b)(9) barred the *Bivens* claims by removable plaintiffs, based on the remarkably erroneous assumption that those claims "are common in removal proceedings." *Arias*, 2008 WL 1827604, *12. *Arias* cited no authority for this proposition and could not have, since damages claims simply cannot be brought against federal defendants as part of immigration court proceedings. *Cf. Bivens*, 403 U.S. 388 (1971) (fashioning damages remedy against federal agents for constitutional violations pursuant to federal courts' "arising under" jurisdiction of 28 U.S.C. § 1331).

There is certainly no reference to *Bivens* claims in the regulations governing removal proceedings, or in the Immigration Court Practice Manual. *See* Office of the Chief Immigration Judge, *Immigration Court Practice Manual* (2006, most recently updated in 2008). Unsurprisingly, defendants did not identify any case in which such a claim was considered, or any procedural mechanism by which an immigration judge *could* consider such a cross-claim in removal proceedings. (Defs Br. 17.) Applying *Aguilar*, *St. Cyr* and the overwhelming weight of circuit authority correctly, it is apparent that plaintiffs' claims—which cannot be brought in removal proceedings and have nothing to do with their immigration status—are precisely the kinds of claims Congress did not intend to fall within the channeling provision of §1252(b)(9).

Defendants also rely on 8 U.S.C. § 1252(d)(1), which does indeed "dovetail" (Defs Br. 18) with §1252(b)(9)—but in an equally inapplicable way. Section 1252(d)(1) provides:

> (d) A court may review a final order of removal only if (1) the alien has exhausted all administrative remedies available to the alien as of right.

8 U.S.C. § 1252(d)(1). Because plaintiffs do not seek to review a final order of removal, there are no extant procedures to exhaust. Accordingly, this provision is inapplicable.

B. Section 1252(g) does not Constrain this Court's Subject Matter Jurisdiction over any of Plaintiffs' Claims because Plaintiffs do not Challenge any Discretionary Decision to Commence Proceedings, Adjudicate Cases or Execute Removal Orders.

Defendants also argue that 8 U.S.C. §1252(g) strips this Court of jurisdiction over certain plaintiffs' claims. Section 1252(g), enacted through IIRIRA in 1996, deprives federal courts of jurisdiction

> to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. § 1252(g). Defendants ask this Court to extend §1252(g)'s reach beyond the specific decisions of commencing proceedings, adjudicating cases, or executing removal orders, so as to prohibit judicial review over *any* actions leading up to immigration agents' attempt to locate, arrest and detain illegal aliens. (Defs. Br. 19-20.) Defendants argue that such actions serve to initiate removal proceedings. *Id*.

The Supreme Court's decision in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483-84 (1999) ("*AADC*") compels the rejection of the defendants' proposed construction of §1252(g). In *AADC*, the court considered whether §1252(g) precluded review of a claim that deportation proceedings were discriminatorily commenced against affiliates of a Palestinian resistance group in violation of the First and Fifth Amendments. The Court there found that "Section 1252(g) was directed against a particular evil: attempts to impose judicial constraint upon prosecutorial discretion." *AADC*, 525 U.S. at 485 n.9. Justice Scalia, writing for the majority, rejected the assumption

> that § 1252(g) covers the universe of deportation claims--that it is a sort of "zipper" clause that says "no judicial review in deportation cases unless this section provides judicial review." In fact, what § 1252(g) says is much narrower. The provision applies only to three discrete actions that the Attorney General may take: her

> "decision or action" to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'"

AADC, 525 U.S. at 482 (emphasis in original); s*ee also Chmakov v. Blackman*, 266 F.3d 210, 215 (3d Cir. 2001) (§1252(g) did not bar jurisdiction over Fifth Amendment claim based on egregious ineffective assistance of counsel because plaintiffs' claims "did not fall within any of the three Attorney General decisions or actions covered by § 1252(g)"); *Turkmen v. Ashcroft*, 2006 WL 1662663, at *27 (E.D.N.Y. June 14, 2006). In clear contrast to defendants' position here, Justice Scalia observed in *AADC* that "[i]t is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings," *AADC*, 525 U.S. at 482, and that the provision was not intended to cover the "many other decisions or actions that may be part of the deportation process--such as the decisions to open an investigation [or] to surveil the suspected violator." *Id.*

Under the framework set forth in *AADC*, plaintiffs' claims are not barred. First, unlike the plaintiffs in *AADC* whose selective enforcement claims the Court held constituted an impermissible challenge to the Attorney General's decision to commence proceedings, 525 U.S. at 487, plaintiffs here do not raise collateral claims for relief from the decision to remove them. To the contrary, their unlawful search and seizure claims are precisely analogous to the Court's examples of the kinds of decisions that are *not* covered by §1252(g)—such as the decision to open an investigation or surveil a suspected violator. *AADC*, 525 U.S. at 482. Second, unlike with the *AADC* plaintiffs' selective enforcement claims—ones they "had no constitutional right to assert," *id*. at 488—this Court could not foreclose adjudication of plaintiffs' rights under the Fourth and Fifth Amendments without giving rise to a serious constitutional question.[9] *See INS v. St Cyr.*, 533 U.S. at 299-300. As the Eastern District of Virginia noted, "[c]learly, §1252 does

[9] Inexplicably, defendants accuse plaintiffs of "*couching* their cause of action as Fourth or Fifth Amendment violations" in order to "evade the jurisdictional bar," (Defs Br. 20) (emphasis added), although they nowhere suggest how pleading such causes of action was inappropriate. The statement represents a clear admission by defendants that Fourth and Fifth Amendment claims would in fact "evade" any jurisdictional restriction imposed by 1252(g).

not indicate that Congress intended to divest the court of jurisdiction over *Bivens* actions arising out of the unconstitutional conduct of federal officers." *Medina v. United States*, 92 F. Supp. 2d 545, 554 (E.D.Va 2000). "[T]here is nothing in §1252(g) which indicates that it was intended to foreclose monetary damages based on violations of federally protected rights." *Id.* at 552-53; *see also Humphries v. Various Federal USINS Employees*, 164 F.3d 936, 945 n.9 (5th Cir. 1999) (interpreting the INA to foreclose judicial review of otherwise meritorious *Bivens* claim would raise "serious constitutional question") (citing *Webster*, 486 U.S. at 603).

Finally, plaintiffs' claims cannot not fall within the purview of §1252(g) because §1252(g) only applies to discretionary decisions, and federal officials and officers do not have discretion to authorize, conduct or knowingly acquiesce in unconstitutional conduct. *AADC*, 525 U.S. at 487 (§1252(g) is a "discretion-protecting provision"); *see also Kwai Fun Wong v. United States*, 373 F.3d 952, 963 (9th Cir. 2004) (citing *Torres-Aguilar v. INS*, 246 F.3d 1267, 1270 (9th Cir. 2001) (because "decisions that violate the Constitution cannot be 'discretionary,'" review is not barred by §1252(g)); *Sanchez-Cruz v. INS*, 255 F.3d 775, 779 (9th Cir. 2001) (same); *Khorrami v. Rolince*, 493 F.Supp.2d 1061, 1070 (N.D.Ill. 2007) (same).[10]

At bottom, defendants ask this Court to ignore controlling Supreme Court precedent and give immigration agents a blank check to engage in any conduct they like provided they are looking for "illegal aliens." As the Eastern District of Virginia aptly observed when considering the scope of §1252(g) in a similar case, "[t]here is no reason to conclude that acts of

[10] The government's reliance on *Sissoko v. Rocha*, 509 F.3d 947 (9th Cir. 2007), is entirely unavailing. (Defs Br. 20-21) In *Sissoko*, the plaintiff was detained pursuant to 8 U.S.C. § 1225(b)(1)(B)(iii)(IV), which requires mandatory detention for individuals placed in expedited removal proceedings. The Ninth Circuit held that "*[i]n this limited context*" (emphasis added) §1252(g) barred jurisdiction over Sissoko's *Bivens* false arrest claim because it "directly challenges [the immigration agent's] decision to commence expedited removal proceedings." *Sissoko*, 509 F. 3d at 949-950. This holding is distinguishable from this case because the unreasonable searches and seizures allegedly by plaintiffs are wholly unrelated to—and certainly not mandated by—the commencement of any proceedings against them.

[immigration] agents are entitled to this protection, which is not afforded to those of a president, congressman, or other federal officers." *Medina*, 92 F.Supp.2d at 554 n.7.

IV. A *BIVENS* REMEDY IS AUTHORIZED BECAUSE PLAINTIFFS' CLAIMS ARE IDENTICAL TO THOSE RECOGNIZED BY THE SUPREME COURT AND BECAUSE THE IMMIGRATION AND NATIONALITY ACT FAILS TO PROVIDE A REMEDY FOR THE DEFENDANT'S WRONGDOING.

In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 397 (1971) the Supreme Court established that a plaintiff could sue a federal agent for damages in federal court for violations of the Fourth Amendment right to be free from unreasonable "searches and seizures," even absent a statute conferring such a right. The Court subsequently held that so-called *Bivens* actions could be pursued against federal officials for violations of the Due Process protections of the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228, 248-49 (1979) and for violations of the Eighth Amendment's prohibitions on cruel and unusual punishment, *Carlson v. Green*, 446 U.S. 14, 19 (1980).

Citing several recent Supreme Court cases, defendants suggest that the Court has been reluctant "to extend *Bivens* liability to any new context or category of defendants." (Defs Br. 22.) Defendants repeatedly assert that plaintiffs here seek such an "extension of *Bivens*." (Defs Br. 25, *see also id*. at 21, 22, 24) Plaintiffs seek no such thing. Plaintiffs' claims are in fact substantively identical to those recognized by the Court in *Bivens*. The plaintiff in *Bivens*, like the plaintiffs here, alleged that "the arrest and search were effected without a warrant, and that unreasonable force was employed in making the arrest." *Compare Bivens*, 403 U.S. at 389 *with* Am. Cplt. ¶¶ 48-50. In both cases, plaintiffs alleged federal law enforcement agents engaged in a Fourth Amendment violation, *see id*; in both cases, plaintiffs sought damages for loss of liberty, mental suffering and emotional harm. *See id*. Plaintiffs' claims related to "conscience shocking behavior" of the federal agents are likewise authorized by *Bivens* and

Davis v. Passman, 442 U.S. 228 at 248-49, an entitlement defendants do not appear to contest.[11]

Instead, defendants suggest there are two "special factors" which "counsel hesitation" in creating a *Bivens* remedy: the "comprehensive statutory scheme" of the INA, which purportedly "protect[s] the constitutional interests" at stake, and congress' "plenary power" over immigration matters. Indeed, the defendants make the startling claim that any time a federal agent commits an unconstitutional act against a person he happens to "believe" is an "unlawful alien," that agent cannot be subject to suit. (Defs Br. 21 and n. 10.) Such a position would not only appear to *sub silentio* overrule *Bivens*, it would go so far as to immunize *any* law enforcement agent for *any* wrongdoing, no matter how egregious, as long as the conduct was based on an agent's own subjective belief about the immigration status of the victim. It would also invite wholesale, unremediable racial profiling of immigrants. The defendants' arguments have no merit.

A. Because the INA's Regulatory Scheme Provides No Equivalent Remedy for Defendants' Constitutional Violation It Does Not Bar *Bivens* Relief.

Defendants contend that the INA represents a "deliberately crafted statutory scheme," which demonstrates a conscious decision by Congress to foreclose a *Bivens* remedy for removable aliens. (Defs Br. 23.) It is true, as defendants suggest, that the INA provides a comprehensive scheme to regulate the in-flow, removal and detention of aliens. *See* Defs Br. 24-

[11] Plaintiffs' claims in no way resemble the kind the Court has previously rejected; they are thus entirely unaffected by an asserted reluctance to create "new" *Bivens* remedies in "new contexts." *Cf. Bush v. Lucas*, 462 U.S. 367, 368 (1983) (First Amendment claim by federal employee against government employer); *Chappell v. Wallace*, 462 U.S. 296 (1983) (race discrimination claims by navy soldiers against commanding officers); *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (constitutional challenge to allegedly discriminatory adjudication of social security benefits); *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007) (retaliation and harassment claims against Bureau of Land Management). The government wishes simply to ignore the binding precedent of *Bivens* and accordingly, cites no authority supporting its contention that victims who suffer a Fourth Amendment violation at the hands of federal agents are not entitled to pursue a damages action.

25 (citing 8 U.S.C. §§ 1225, 11229 (procedures governing relief from removal); 8 U.S.C. §§ 1222, 1226 (relief from detention); 8 C.F.R. §§ 1003.16, 1003.19(d) (procedures to contest factual basis of removal decision); 8 C.F.R. §§1003.1(b)(7) (right to review immigration judge's bond determination)). But plaintiffs do not here seek to challenge an order of removal, seek relief from detention, seek review of bond, or otherwise contest their status. They seek damages for defendants' independent, nondiscretionary and unconstitutional conduct—a remedy that is simply not available under the INA regulatory scheme. Thus, contrary to defendants' bald assertion, the INA in no way addresses the "very substance of the plaintiffs' complaints." (Defs Br. 22.) The existence of the INA does not and cannot preclude a *Bivens* remedy.

Defendants cite no precedent supporting a denial of a *Bivens* claim for aliens seeking damages for unconstitutional conduct. Indeed, the conclusive weight of authority demonstrates that the INA's statutory regime is not a "special factor" of the kind that would preclude a *Bivens* remedy. As the most recent court to rule on the subject explained:

> The provisions defendants cite [8 U.S.C. §§ 1226, 1231] contain nothing of a remedial nature, much less an "intricate and carefully crafted" remedial scheme. They are merely regulatory, defining the Attorney General's powers and duties regarding the detention and removal of aliens, and do not mention or provide any means of redress for constitutional violations.

Cesar v. Achim, 542 F. Supp. 2d 897, 900 (E.D. Wis. 2008) (internal citations omitted). The court in *Achim* thus recognized that the plaintiff could proceed with his *Bivens* claims against ICE official for due process violations for the length of his detention and inadequate medical care. *Id.* at 900-901 (applying *Davis v. Passman*, 442 U.S. at 245).

Similarly, in *Turkmen v. Ashcroft*, 2006 WL 1662663, at *29 (E.D.N.Y. June 14, 2006), the court rejected the argument that the INA in general—and its provisions regulating detention of aliens in particular—represented a considered effort to foreclose damages remedies for detained aliens alleging abusive treatment by FBI and INS officials. The court explained, "[a]lthough the INA provides a comprehensive *regulatory* scheme for managing the flow of immigrants, it is by no means a comprehensive *remedial* scheme for constitutional violations that

occur incident to the administration of that regulatory scheme." *Id.*; *see also Khorrami v. Rolince*, 493 F. Supp. 2d 1061, 1074 (N.D. Ill. 2007) (permitting *Bivens* suit by alien to proceed for alleged abusive treatment and detention by INS, because "[t]he INA does not contain the type of comprehensive regulatory scheme that warrants hesitation in this context."). Defendants nowhere intimate, let alone demonstrate, that Congress ever gave thought to purposefully limiting damages claims for removable aliens. This is because Congress in its successive amendments to the INA regulatory process allowed the long-standing *Bivens* remedy to remain in place for actions outside or "incident to the administration of that regulatory scheme." *Turkmen*, 2006 WL 1662663, at *29.[12]

Significantly, under defendants' theory, no removable alien could ever seek redress for anything ICE agents did to him—including, for example, violent and gratuitous beatings, long-term indefinite detention without access to counsel, or even torture to secure a confession—as long as the government asserted that the agents' conduct was arguably connected to a broader removal process. With pointed understatement, the *Turkmen* court explained in considering similar possibilities: "That, of course, does not sound right." 2006 WL 1662663, at *29. It does not "sound right," because "the very essence of civil liberty certainly consists in the right of

[12] Rather than even acknowledge the weight of the authority in plaintiffs' favor, defendants rely on pronouncements from Supreme Court cases which, properly understood, actually reinforce plaintiffs' entitlement to relief here. In *Schweicker*, the Court denied *Bivens* relief for plaintiffs challenging the denial of social security as a violation of due process because they had already availed themselves of existing "elaborate administrative remedies." 487 U.S. at 424. Similarly, in *Bush v. Lucas*, the Court denied a federal employee a *Bivens* remedy for an alleged First Amendment violation by his government employers because his claims "ar[o]se out of an employment relationship . . . governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States." 462 U.S. at 368. And in the recent case of *Willkie v. Robbins*, the Court denied a plaintiff a *Bivens* remedy because he "has an administrative, and ultimately a judicial, process for vindicating *virtually all of his complaints*." 127 S. Ct. at 2588 (emphasis added)." Thus, the Court explained, Robbins is unlike the plaintiffs in *Davis* and *Bivens* and *Carlson*, all of whom lacked "other means of vindication" absent a *Bivens* remedy. *Id.* "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens*, 403 U.S. at 395. The INA is an insufficient remedial scheme because for these plaintiffs, just as for the plaintiffs in *Bivens* and *Davis* and *Carlson*, "it is damages or nothing." *Id.* at 410.

every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, (1 Cranch) 137, 163 (1803).

B. Congress' Plenary Power over Aspects of Immigration Policy Does Not Preclude a Bivens Remedy.

Defendants also contend that because Congress possesses plenary power over certain aspects of immigration policy—which is to say, that Congress alone decides who may enter, be detained or be removed from the country—aliens may not pursue damages against a federal agent who engaged in unconstitutional conduct. This argument has no support in law or logic.

Courts have repeatedly permitted *Bivens* suits to proceed in areas where Congress exercised plenary control over questions not addressed by the subject of the suit. *See Goldstein v. Moatz*, 364 F.3d 205, 215 (4th Cir. 2004) (Patent & Trademark Office officials not immune from *Bivens* suit despite Congress' long established plenary power over patents); *Wilkinson v. U.S.*, 440 F. 3d 970 (8th Cir. 2006) (*Bivens* actions against officials of Bureau of Indian Affairs); *Mace v. Skinner*, 34 F. 3d 854 (9th Cir. 1994) (*Bivens* claims against Federal Aviation Office officials); *Brown v. U.S.*, 742 F. 2d 1498 (D.C. Cir. 1984) (*en banc*) (*Bivens* suit against DC officials, over whom Congress has authority). Indeed, the very case defendants rely on, *Wilkie*, underscores this point. Even though Congress has plenary power to regulate government land, *see Utah Div. of State Lands v. U.S.*, 482 U.S. 193, 200 (1987), the Court did not suggest that a *Bivens* remedy would be unavailable against agents of the Bureau of Land Management. Instead, the court engaged in substantial analysis of the feasibility of crafting a remedy in the particular case, including the availability of alternative, meaningful remedies for the plaintiffs. *Id*. at 2601-05.[13]

[13] The only context in which the Court has precluded suit based on the existence of congressional plenary power is in military affairs, which has always been considered a unique area nearly impervious to judicial supervision. *See Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference"); *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975) (military structure and demands are "without counterpart in civilian life"). Thus, in *Chappell v. Wallace*, the Court precluded a soldier's *Bivens* suit against his commanding officer, in significant part because

Lacking direct authority in support of their position, defendants assert that a *Bivens* suit would somehow interfere with the foreign relations power of the executive branch or produce a "patchwork of interpretations" regarding the immigration laws. (Defs Br. 32.) Defendants nowhere explain how this Court's adjudication of a claim that an ICE agent (who is legally indistinguishable from an FBI agent) violated well-established Fourth and Fifth Amendment principles and precedent would implicate national immigration policy or require novel interpretations of immigration law.[14]

V. PLAINTIFFS HAVE ADEQUATELY ALLEGED THAT THE INDIVIDUAL DEFENDANTS WERE PERSONALLY INVOLVED IN THE VIOLATION OF PLAINTIFFS' CONSTITUTIONAL RIGHTS.

The defendants contend that certain individual defendants are entitled to "qualified immunity" on the ground that plaintiffs have not sufficiently pled the supervisory defendants' personal involvement in unconstitutional conduct. The defendants are confused. Qualified immunity is a full immunity from suit which is available only if defendants can demonstrate that the alleged conduct did not violate a "clearly established" constitutional right. *See Saucier v. Katz*, 533 U.S. 194, 200 (2001). Supervisory liability, an element of plaintiff's prima facie case, is a distinct inquiry. *See Carter v. City of Phila.,* 181 F.3d 339, 357 n.1 (3d Cir. 1999). Because defendants nowhere contend that the right to be free from warrantless, nonconsensual home searches and conscience-shocking law enforcement conduct is not "clearly established" in this

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of a comprehensive, parallel system of military justice which could remedy most of the plaintiffs' allegations. 462 U.S. 296, 300, 302 (1983) ("The need for special regulations in relation to military discipline, and the consequent need for special and exclusive system of military justice is too obvious to require extensive discussion").

[14] Indeed, contrary to government's misleading implication that executive actions are completely immune from independent judicial intervention, federal courts are deeply involved in ensuring immigration law comports with constitutional norms. *E.g. Clark v. Martinez*, 543 U.S. 371, 386 (2005) (rejecting executive claims that judicially-imposed limitation on indefinite detention of undocumented immigrants would "compromise" "the security of our borders"); *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (holding that INA does not authorize indefinite detention of aliens, if removal of detained alien is no longer reasonably foreseeable); *Lopez v. Gonzales*, 127 S.Ct. 625, 629 (2007) (curtailing executive authority to deport non-citizens based on mere drug possession and not distribution).

circuit, they are decidedly not entitled to qualified immunity in this suit. Thus, plaintiffs need allege defendants' supervisory liability subject only to the liberal notice pleading requirements of Fed. R. Civ. P. 8(a).

In otherwise contending that plaintiffs have not sufficiently alleged supervisory liability defendants both misconstrue the law and ignore the detailed allegations in the Amended Complaint showing the personal involvement of the Individual Defendants in the violations of plaintiffs' rights. Defendants misconstrue the law in at least two ways. First, contrary to the defendants' implication, (Def. Br. at 35-36), the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 126 S. Ct. 1995 (2007) has not altered or heightened the pleading standard applicable to plaintiffs' claims. *Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007) (finding that *Twombly* does not impose a heightened pleading requirement on *Bivens* or other civil rights claims and emphasizing "the Supreme Court's statement . . . that heightened pleading requirements must be obtained by the process of amending the Federal Rules, and not by judicial interpretation") (internal quotations omitted), *cert. granted sub nom, Ashcroft v. Iqbal*, 128 S.Ct. 2931 (June 16, 2008); *see also Evancho v. Fisher*, 423 F.3d 347, 352 (3d Cir. 2005) (confirming, pre-*Twombly*, that the liberal pleading standard of Rule 8(a) applies to civil rights actions); *Sony BMG Music Entm't v. Cloud*, 2008 WL 3895895, *2 (E.D. Pa. Aug. 22, 2008) (*Twombly* "does not alter the well-established notice pleading standard" of Rule 8(a)).

Thus, under Rule 8, plaintiffs need only provide defendants with "fair notice" of the grounds upon which plaintiffs "are entitled to relief." *Phillips v. Allegheny County*, 515 F.3d 224, 232 (3d Cir. 2008). "The simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and dispose of unmeritorious claims." *Swierkiewicz v. Soreman N.A.*, 543 U.S. 506, 512 (2002). As described below, plaintiffs have sufficiently pled the Individual Defendants' personal involvement.

Second, defendants incorrectly assert that plaintiffs can only meet the personal involvement requirement by alleging that each Individual Defendant had knowledge of each of

the specific raids and constitutional violations that plaintiffs experienced. (Defs Br. 36-37, 39).[15] That is not the law. Plaintiffs may prove supervisory liability also by pleading "actual knowledge of and acquiescence" in subordinates' conduct. *Evancho*, 423 F.3d at 353. Acquiescence occurs where a supervisor tolerates past or ongoing misconduct, *Stoneking v. Bradford Area Sch. Dist.*, 882 F. 2d 720, 724-25 (3d Cir. 1989), or where the supervisor is "aware of the problems . . . but d[oes] nothing to stop them," *Andrews v. City of Phila.*, 895 F.2d 1469, 1479 (3d Cir. 1990). Plaintiffs may also demonstrate supervisory liability by demonstrating that the defendants "adopt[ed] and maintain[ed] a practice, custom or policy" that contributed to the alleged violations. *Stoneking*, 882 F. 2d at 724-25; *see Al-Shahin v. U.S. Dep't of Homeland Sec.*, No. 06-5261, 2007 WL 2985553, at *7 (D.N.J. Oct. 4, 2007) ("actual knowledge and acquiescence *of a policy, plan or procedure*.") (emphasis added); *accord Alexis v. U.S. Dep't of Homeland Sec.*, No. Civ. 05-1484, 2005 WL 1502068, at *5 (D.N.J. June 24, 2005) (same).[16]

The Amended Complaint alleges that ICE agents in New Jersey routinely violated immigrants' constitutional rights and that the Individual Defendants knew of those abuses, and condoned them. As noted above, defendants Myers and Torres: (i) created and directed Operation Return to Sender; (ii) were repeatedly informed of the specific and predictable abuses by ICE agents in New Jersey and elsewhere—not just via media reports, but also in congressional testimony, a letter from the National Immigration Forum, a phone call from the mayor of New Haven and multiple lawsuits around the country naming them as defendants; (iii)

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[15] *See* Defs Br. 36-37 ("The plaintiffs do not allege that Meyers [sic] or Torres were in New Jersey at the time of the events in question, or were aware of the specific operations, agents involved, fugitive targets, or operational locations or timing.") and at 39 ("[T]he plaintiffs do not allege, or provide any facts, indicating that Rodriguez and Weber were present for or directed any of the alleged behavior.").

[16] Likewise, in the Second Circuit a plaintiff can establish personal involvement by alleging that a defendant "failed to remedy [a constitutional] violation after being informed of it by report . . . created a policy or custom under which the violation occurred . . . or . . . was deliberately indifferent to the rights of others by failing to act on information that constitutional rights were being violated." *Iqbal*, 490 F.3d at 152.

despite being put on notice of repeated unlawful conduct by agents acting pursuant to their policies, took no actions to reprimand, train or otherwise prevent continued violations; (iv) regularly commented on Operation Return to Sender's procedures in response to public criticism, and (v) routinely boasted of the operation's success in New Jersey and nationwide, notwithstanding those criticisms. (Am. Cplt. ¶¶ 191-95.) In other words, the Amended Complaint alleges "actual knowledge and acquiescence of an [unconstitutional] policy, plan or procedure" by Myers and Torres.

Such allegations are sufficient to establish their personal involvement. Applying an equivalent standard to another home-raids *Bivens* case brought in Minnesota against defendants Myers and Torres and local ICE supervisory officials, the court in *Arias v. ICE* rejected the government's attack on defendants' supervisory liability. The *Arias* court found plaintiffs had adequately pled that defendants either coordinated the unconstitutional raids (in the case of the local ICE officials) or condoned the unconstitutional policy under which those raids were conducted (in the case of Myers and Torres):

> the techniques applied during the raids were organized and approved by Defendants and other federal government officials and were not the product of *ad hoc* decisions by field operatives. In short, U.S. [DHS] officials created and approved operations that willfully ... disregarded Plaintiffs' Constitutional protections.

2008 WL 1827604, at *9-10 (citations omitted) (emphasis added). The court found that these facts adequately alleged that Myers and Torres "created or acquiesced in an unconstitutional policy" resulting in unlawful warrantless home raids. *Id.*; *see also Iqbal*, 490 F.3d at 165 ("[U.S. Attorney General] Ashcroft and [FBI Director] Mueller are alleged to have *condoned the policy* under which the Plaintiff was held in harsh conditions of confinement") (emphasis added); *Banks v. One or More Unknown Named Confid. Informants of Fed. Prison Camp Canaan*, No. 06-1127, 2008 WL 2563355, at *7 (M.D. Pa. June 24, 2008) (finding sufficient allegations of personal involvement where plaintiff claimed defendant "created a *de facto* policy of [allegedly unconstitutional] retaliation.").

In *Stoneking*, the plaintiff alleged, like plaintiffs here, that defendant's "practices, customs or policies created a climate which, at a minimum, facilitated" the alleged unlawful conduct, namely "sexual abuse of students by teachers in general, and that there was a causal relationship between these practices, customs or policies and the repeated sexual assaults against her by [the subordinate defendant]." 882 F.2d at 724. The Court concluded, therefore, that such allegations—like plaintiffs' allegations here—are "not *respondeat superior* in another guise, but an assertion of liability against the individual defendants based on theories recognized in a line of Supreme Court cases." *Id.* at 725; *cf. Evancho*, 423 F. 3d at 354 (insufficient allegations of personal involvement where "complaint merely hypothesizes that [Pennsylvania] Attorney General Fisher may have been somehow involved *simply because of his position* as the head of the Office of the Attorney General") (emphasis added). Plaintiffs do not attempt to hold Myers and Torres responsible merely because of the positions they hold; rather plaintiffs sue Myers and Torres because, as alleged, they have sufficient personal involvement in the unconstitutional practices to be held responsible for their actions.

Similarly, plaintiffs allege that defendants Weber and Rodriguez, as directors of the Newark field office, "knew that ICE agents were entering and searching homes in New Jersey without search warrants and without obtaining voluntary, informed consent." (Am. Cplt. ¶ 197.) Despite this knowledge, neither Weber nor Rodriguez took any steps to correct such unconstitutional conduct and instead publicized the "success" of these raids while allowing the conduct to persist. Accordingly, defendants Weber and Rodriguez "at best acquiesced in, and at worst, encouraged such [wrongful] behavior." *Id.* ¶ 196.

VI. PLAINTIFFS HAVE PLED ADEQUATE FACTS TO ESTABLISH PERSONAL JURISDICTION OVER DEFENDANTS MYERS AND TORRES.

A federal district court may exercise personal jurisdiction over a nonresident of the state where it presides after undertaking a two-step inquiry. First, the court must apply the long-arm statute of the forum state. *Imo Induss., Inc. v. Kiekert AG*, 155 F.3d 254, 259 (3d Cir. 1998).

Second, the court must determine if obtaining jurisdiction will violate the Due Process Clause of the Constitution. *Id.* "In New Jersey, this inquiry is collapsed into a single step because the New Jersey long-arm statute permits the exercise of personal jurisdiction to the fullest limits of due process." *Id*.; *see also Charles Gendler & Co. v. Telecom Equip*. Co., 102 N.J. 460, 469 (1986).

"'[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he [is] not present within the territory of the forum, he have certain minimum contacts with it such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Lebel v. Everglades Marina, Inc*., 115 N.J. 317, 322 (1989) (quoting *Int. Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)); *see also Burger King v. Rudzewicz*, 471 U.S. 462, 474 (1985) ("[T]he constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum state.") What comprises minimum contacts depends on the "quality and nature of the defendant's activity." *Id*. The purpose of the "minimum contacts" test is to "ensure[] that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Id.* at 475. Thus, a federal district court must determine whether a defendant has the requisite minimum contacts with the forum so that the defendant "'reasonably anticipate[s] being haled into court there.'" *Smith v. S&S Dundalk Eng'g*, 139 F. Supp.2d 610, 617 (D.N.J. 2001) (quoting *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980)).

The allegations in the Amended Complaint showing the Individual Defendants' personal involvement in the violations of plaintiffs' rights also establish that plaintiffs have met their burden of pleading the Court's personal jurisdiction over defendants Myers and Torres. As the Second Circuit explained in *Iqbal*, personal involvement and personal jurisdiction are so intertwined that plaintiffs' pleading of facts establishing personal involvement "suffices to establish personal jurisdiction . . . at this preliminary stage of the litigation." *Iqbal*, 490 F.3d at 177; *accord Arar v. Ashcroft*, 532 F.3d 157, 174-75 (2d Cir. 2008). As plaintiffs here have more than adequately pled defendants' personal involvement in the violations of plaintiffs' rights, *see*

supra section V, this court likewise possesses personal jurisdiction over the supervisory defendants.

Specifically, the Amended Complaint pleads that defendants Myers and Torres implemented and oversaw Operation Return to Sender which increased FOT activity dramatically in New Jersey; publicly commented on the procedures used in home raids conducted under that operation; were repeatedly informed of specific abuses that were occurring during these raids; and were credited in laudatory ICE press releases as the architects of the ICE strategy behind raids in New Jersey, including raids involving plaintiffs.[17] (Am. Cplt. ¶¶ 191-95.) Moreover, in a June 2, 2008 ICE press release, defendant Myers commented on raids conducted in New Jersey and five other states, praising them as a means of "protecting the integrity of our immigration system." (Walker Cert. at Exh. B.) The FOTs that executed the raids of plaintiffs' home did so under the authority and control of defendants Myers and Torres. In fact, defendant Myers proudly announced her ability to deploy and re-deploy FOTs—including the FOTs operating in Newark—wherever necessary.[18]

Indeed, this summer, New Jersey Senator Robert Menendez met specifically with defendant Myers to complain about the conduct of ICE agents under the Operation Return to Sender program. According to Senator Menendez, she was well aware of the actions undertaken in New Jersey but denied any wrongdoing. (Walker Cert. at Exh. D (Elizabeth Llorente,

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[17] For example, the April 2, 2007 press release cited at paragraph 195 of the Amended Complaint refers to Myers and pertains to raids conducted between March 19th and March 30th of that year. The raid of the home of plaintiff Veronica Covias occurred on March 26th of that year. (Am. Cplt. ¶ 126)

[18] Specifically, on August 13, 2006 ICE issued a press release in which

> Julie L. Myers announced that seven new ICE Fugitive Operations teams are now operating in Atlanta, Houston, Los Angeles, Newark, Phoenix, Washington, D.C. and Raleigh, NC, bringing the total number of teams nationwide to 45. *Although based in specific regional offices, these teams have federal authority and nationwide jurisdiction and can be deployed to conduct operations anywhere in the country.*

(Walker Cert. at Exh. C. (emphasis added).)

Menendez denounces raids on migrants, Bergen Record, June 13, 2008).) Thus, having been informed repeatedly about raids practices in New Jersey occurring pursuant their policies, and having taken public credit for the raids undertaken in New Jersey pursuant to the very program they instituted and using FOTs that they deployed to Newark, Myers and Torres cannot now claim it would be "random" "fortuitous" or otherwise "unfair" to subject them to the jurisdiction of this Court to question the legality of their actions.

The cases defendants rely upon in support of their argument are inapposite. For instance, in *McCabe v. Basham*, the court found no personal jurisdiction over the head of the Secret Service and the former head of the Department of Homeland Security in a suit brought by individuals who had been arrested at an Iowa presidential rally. 450 F. Supp. 2d 916, 924 (N.D. Iowa 2006). But in contrast to this case, the plaintiffs solely "premis[ed] jurisdiction over . . . two senior-level federal government officials upon the acts of low-level federal, state and/or local government employees." *Id* at 926. Similarly, in *Doe v. American Nat'l Red Cross*, 112 F.3d 1048 (9th Cir. 1997), the court stressed the absence of any evidence that the defendant—the head of the FDA—"control[led] the flow of blood or blood products into Arizona," where plaintiff claimed to have contracted AIDS from a contaminated blood transfusion. 112 F.3d at 1050-51. Plaintiffs allege here, in obvious contrast, that Myers and Torres directly oversaw the activities of Operation Return to Sender in New Jersey and were aware of and condoned the unconstitutional conduct of the New Jersey ICE agents.[19]

[19] Plaintiffs' allegations in the Amended Complaint are sufficient to establish personal jurisdiction over the Individual Defendants. Since filing the Amended Complaint, however, plaintiffs have uncovered conclusive evidence linking Myers and Torres to raids actions in New Jersey. *See, e.g*. Walker Cert. at Exh. E (memo from defendant Rodriguez to Myers reporting on New Jersey raids, including raids conducted during dates that one of the plaintiffs' homes was raided). It would thus make little sense to dismiss the Amended Complaint as against these defendants where objective, public evidence proves that this Court does, in fact, have personal jurisdiction over them. Should, however, the Court find that Amended Complaint's particular allegations are insufficient, plaintiffs should at a minimum, be given the opportunity to re-plead in order to incorporate this evidence.

For all of these reasons, plaintiffs respectfully submit that they have adequately pled that defendants Myers and Torres are subject to personal jurisdiction in this Court.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court deny defendants' Motion.

Roseland, New Jersey
Dated: September 15, 2008

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