No. 14-1425

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ADA MORALES,
Plaintiff - Appellee,
v.
BRUCE CHADBOURNE, DAVID RICCIO, EDWARD DONAGHY,
Defendants - Appellants.

APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

U.S. Immigration and Customs Enforcement ("ICE") Agent Edward Donaghy and Supervisors Bruce Chadbourne and David Riccio, submit this combined brief, appealing the district court's February 12, 2014 decision that denied them qualified immunity with respect to Plaintiff-Appellee Ada Morales's *Bivens*[1] claims under the Fourth Amendment and the Fifth Amendment of the Constitution. Dkt. 64. Agent Donaghy and Supervisors Chadbourne and Riccio timely noticed their appeal on April 11, 2014. Dkt. 82.

A district court's denial of a qualified immunity is "immediately appealable as a final decision within the meaning of 28 U.S.C. § 1291." *Soto-Torres v. Fraticelli*, 654 F.3d 152, 157 (1st Cir. 2011).

[1] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 391-97 (1971).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Was the law regarding detainer issuance sufficiently clear in 2009 to deny qualified immunity to Agent Donaghy and to Supervisors Chadbourne and Riccio with respect to Ms. Morales's claim under the Fourth Amendment, when no Supreme Court or First Circuit case addressed under what circumstances an ICE agent may properly issue a detainer under 8 C.F.R. § 287.7?
2. Did the district court commit reversible error when it concluded that, in the face of Agent Donaghy's unchallenged sworn declarations, he issued the detainer *solely* because she was born in another country and thus was not entitled to qualified immunity with respect to Ms. Morales's Fifth Amendment claim?
3. Did Morales sufficiently plead that both Chadbourne and Riccio were personally and affirmatively involved so as to be liable for the issuance of detainers that violated her civil rights?

STATEMENT OF THE CASE

On May 3, 2012, Ms. Morales filed an amended complaint asserting constitutional tort claims under *Bivens* against Agents Donaghy and Mercurio, and Supervisors Chadbourne and Riccio. Dkt. 4 (Counts I, II, and III). She also asserts related claims against the United States (Counts IX and X) and the Rhode Island Defendants (Count IV, V, VI, VII, and VIII), and she asserts a claim for declaratory relief (Count XI). She seeks compensatory and punitive damages against "all individual Defendants in their individual capacities." Dkt. 4 at 31.

On February 12, 2014, the district court rejected efforts by Appellants to terminate the majority of Ms. Morales's claims. Specifically, the district court denied Agent Donaghy qualified immunity with respect to Ms. Morales's claims under the Fourth and Fifth Amendment and denied Supervisors Chadbourne and Riccio qualified immunity with respect to Ms. Morales's Fourth Amendment claim. Dkt. 64 at 19, 20-23. The district court also denied the United States' motion to dismiss and motion for summary judgment and the State of Rhode Island's motion to dismiss. Dkt. 64 at 23-33.

The district court granted Supervisors Chadbourne and Riccio's motion to dismiss Ms. Morales's procedural due process claims because it determined that the "right to notice and an opportunity to be heard before an ICE detainer is issued was a clearly established right." Dkt. 64 at 20. The district court also dismissed

claims against Agent Mercurio because "one can at best assume that Mr. Mercurio was a passive actor . . ." Dkt. 64 at 12. Ms. Morales does not appeal either of these rulings.

Only the district court's denial of qualified immunity to Agent Donaghy and Supervisors Chadbourne and Riccio is subject to interlocutory appeal. *See Soto-Torres*, 654 F.3d at 157 (Denial of a qualified immunity is "immediately appealable . . . [under] 28 U.S.C. § 1291.").

STATEMENT OF THE FACTS

Ms. Morales is a U.S. citizen who was born in Guatemala and naturalized in 1995. *See* Dkt. 4, ¶¶ 1, 10. It is undisputed that she naturalized under her maiden name, Ada Amavilia Cabrera. Dkt. 63 at 2.

On Friday, May 1, 2009, Rhode Island State Police arrested Ms. Morales on a warrant for criminal charges arising from alleged misrepresentations she made in a state public benefits application. Dkt. 4, ¶ 26. A Rhode Island police officer asked her where she was born and whether she was "legal." Dkt. 4, ¶ 27. Ms. Morales allegedly answered that she was born in Guatemala and that she was a U.S. citizen. *Id*. After her arrest, Ms. Morales was moved to the Rhode Island Adult Correctional Institution ("ACI"). Dkt. 4, ¶ 28.

On May 4, 2009, Agent Donaghy conducted a check on the immigration status of arrestees at the ACI, including Ms. Morales, using relevant government

databases. *See* Dkt. 47-1, ¶¶ 4-8.[2] This search revealed that no one by the name of "Ada Morales" appeared in the Central Index System ("CIS") and there was no record of anyone by that name applying for naturalization or other immigration benefits. Dkt. 20-3, ¶ 5; *see also*, Dkt. 64 at 3. The National Crime Information Center database ("NCIC") contained an "Ada Madrid" who had the alias "Ada Morales" and listed two different Social Security numbers for that person. Dkt. 20-3, ¶ 10; *see also,* Dkt. 64 at 3. At the time, ICE did not have a system that could inform someone searching whether the person about whom information was sought had previously been subject to an immigration detainer. Dkt. 20-3, ¶ 10.[3]

Based on the information derived from these database searches, Agent Donaghy issued a detainer on Monday, May 4, 2009. Dkt. 20-3, ¶ 12 ("Because there was no record of any prior encounter with ICE, no record of MORALES applying for immigration benefits, including naturalization, and evidence of at least one alias with multiple social security numbers, I issued a detainer to local

[2] By way of background, Agent Donaghy explained that the report he pulled contained "at least 100 names . . ." Dkt. 47-1, ¶ 7. He further testified, "After completing a search for each individual on the list, I frequently made notations on a printout of the daily commitment report, to keep track of the information for each name." *Id*., ¶ 8.

[3] By way of further background, Agent Donaghy stated, "To the best of my knowledge, alien files, such as naturalization records were not available to me electronically on May 4, 2009, nor are they currently available to me electronically. Likewise, to the best of my knowledge, paper copies of alien files, such as naturalization records, were not accessible to me during my weekly on-call duties." Dkt. 47-1, ¶ 18.

Rhode Island law enforcement."); *see also* Dkt. 47-1 ("After reviewing the ACI, CIS, and NCIC databases, I concluded that . . . there was probable cause to issue an ICE detainer against her."). The detainer listed Ms. Morales's nationality as Guatemalan and included her birthdate. Dkt. 4, ¶ 32. Prior to issuing the detainer, no one from ICE interviewed Ms. Morales and Agent Donaghy "did not speak to anyone at ACI . . ." Dkt. 4, ¶ 37; Dkt. 47-1, ¶ 13.

Later that same day, Ms. Morales was arraigned in Rhode Island Superior Court and was granted a bond. Dkt. 4, ¶¶ 13, 42-44. Still later at 4:20 pm., an employee at the Rhode Island Department of Corrections Records Unit faxed a notice regarding Ms. Morales to ICE Agent Gregory Mercurio. Dkt. 4, ¶ 50. The notice stated, "Below is the name of an inmate who no longer has state charges pending. An Immigration Detainer is the only document holding this inmate at the Department of Corrections. . . . Please Pick Up 5-5-09." Dkt. 4, ¶ 50.

"The following day, on May 5, 2009, Ms. Morales was taken into ICE custody and transported to an ICE office in Rhode Island." Dkt. 4, ¶ 57. ICE interviewed her, learned of her U.S. citizenship, and then released her. *See generally*, Dkt. 4, ¶ 13. Ms. Morales alleges that the immigration detainer "caused her to be detained illegally and unconstitutionally for approximately one day." Dkt. 4, ¶ 63.

Ms. Morales further asserts that on at least one previous occasion after she naturalized, she was the subject of a federal immigration detainer that was issued based on incorrect allegations that she was a deportable alien. *See* Dkt. 4, ¶¶ 2, 12.

STANDARD OF REVIEW

To survive a motion to dismiss for failure to state a claim for relief, a plaintiff must provide "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations and quotations omitted). Thus, a complaint "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 678 (citations and quotations omitted).

Summary judgment is appropriate if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Estrada v. Rhode Island*, 549 F.3d 56, 62 (1st Cir. 2010) (citing Fed.R.Civ.P. 56(c)). A genuine issues exists where a "reasonable jury could resolve the point in favor of the nonmoving party." *Id*. (citations and quotations omitted). "A fact is material only if it possesses the capacity to sway the outcome of the litigation under the applicable law." *Id*. (citations and quotations omitted).

When a defendant moves for summary judgment on the basis of qualified immunity, "the plaintiff bears the burden of showing infringement of a federal

right." *Lopera v. Town of Coventry*, 640 F.3d 388, 396 (1st Cir. 2011). "This court reviews grants of summary judgment de novo." *Id*. at 395.

STANDARD FOR QUALIFIED IMMUNITY

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly' established' at the time of the challenged action." *Ashcroft v. al-Kidd*, --- U.S. ----, 131 S. Ct. 2074, 2083 (2011) (citations and quotations omitted).

A Government official's conduct violates "clearly established law when at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable officer would have understood that what he is doing violates the right." *al-Kidd*, 131 S. Ct. at 2083 (citations and quotations omitted). The Supreme Court has further defined a right as "clearly established" when there exists "cases of controlling authority in their jurisdiction at the time of the incident" or when there exists "a *consensus* of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Id.* at 2086 (internal citations omitted) (emphasis added); *see generally, Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023-24 (2014) ("[R]espondent has not pointed us to any case – let along a controlling case or a robust consensus of cases – decided between 1999 and 2004 that could be said to have clearly established the

unconstitutionality of using lethal force to end a high-speed car chase."). This standard ensures that law enforcement officers have "fair and clear warning of what the Constitution requires." *al-Kidd*, at 2086-87 (internal marks and citations omitted); *see also*, *Estrada*, 594 F.3d at 63 ("[I]f a reasonable officer would not have understood that his conduct violated Plaintiffs' constitutional rights, we must grant him qualified immunity.").

In determining whether the legal question at issue is "beyond debate[,]" courts are not to define the constitutional question at a "high level of generality." *al-Kidd*, 131 S. Ct. at 2083-84 ("The general proposition, for example, that an unreasonable search and seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established"). This holding is consistent with the principle that qualified immunity gives government officials "breathing room to make reasonable but mistaken judgments about open legal questions." *Id.* at 2085.

Qualified immunity is "both a defense to liability and a limited entitlement not to stand trial or face the other burdens of litigation." *Iqbal*, 556 U.S. at 672 (citations and quotations omitted); *see Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) ("If the law at that time did not clearly establish that the officer's conduct would violate the Constitution the officer should not be subject to liability, or, indeed, even the burdens of litigation."); *Anderson v. Creighton*, 483 U.S. 635, 646

n.6 (1987) (holding that one of the purposes of the qualified immunity standard "is to protect public officials from the broad-ranging discovery that can be peculiarly disruptive of effective government") (citations and quotations omitted). The content of "clearly settled law" is a question "appropriately addressed by courts before trial, where possible." *See Lopera v. Town of Coventry*, 640 F.3d 388, 397 (1st Cir. 2011).

STATUTORY AND REGULATORY BACKGROUND

The Immigration and Nationality Act ("INA") governs the ability of ICE agents to detain and investigate individuals who may be subject to removal. *See, e.g.,* 8 U.S.C. §§ 1357, 1226.[4] Indeed, any ICE officer or special agent may "interrogate any alien or person believed to be an alien as to his right to be or remain in the United States," and may arrest illegal aliens. 8 U.S.C. § 1357(a)(1) and § 1357(a)(2).

The INA provides specific procedures for detention throughout removal proceedings, as well as requirements for release from detention. *See* 8 U.S.C. §§ 1225, 1226, 1231. The INA also provides detailed provisions governing the initiation and conduct of removal proceedings, and it sets forth procedural safeguards for those proceedings. *See* 8 U.S.C. §§ 1229, 1229a, 1229a(d).

[4] ICE is the investigative arm of the Department of Homeland Security ("DHS"). DHS assumed responsibilities of the former Immigration & Naturalization Service ("INS") in 2002. *See* Homeland Security Act of 2002, 6 U.S.C. § 101 *et seq*.

The section of the INA that deals with the apprehension and detention of aliens contemplates that the Attorney General may issue a warrant to arrest and detain an alien "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). Further, Congress has authorized any immigration officer or agent to arrest any alien "in the United States, if he has reason to believe that the alien so arrested is in the United States [illegally] and is likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. § 1357(a)(2). Congress further directed the Secretary to "establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter." 8 U.S.C. § 1103(a)(3). ICE agents may detain illegal aliens, see generally 8 U.S.C. §§ 1226, 1357, and may ask other law enforcement agencies to do so, *see* 8 U.S.C. § 1357(g)(10)(B); *see Arizona v. United States*, 132 S. Ct. 2492, 2506-2508 (2012).

A mechanism by which ICE may be enabled to assume custody of an illegal alien who has been arrested or detained by a state or local law enforcement agency is the issuance of a "detainer" for the alien to the state or local law enforcement agency. Two sources – one statutory and one regulatory – afford ICE the authority to issue detainers. The first allows immigration officials to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States," 8 U.S.C. § 1357(a)(1) (2000), and to arrest aliens reasonably believed to

be in the United States illegally and likely to flee before a warrant may be obtained, 8 U.S.C. § 1357(a)(2); *see also* 8 U.S.C. § 1226(a) (issuance of warrant); 8 C.F.R. §§ 287.5(e)(2) and 287.8(c) (arrests). Similarly, a federal regulation allows immigration officials to issue detainers to "seek [] custody of an alien presently in the custody of [another] agency, for the purpose of arresting and removing the alien." 8 C.F.R. § 287.7.

SUMMARY OF ARGUMENTS

I. Agent Donaghy and Supervisors Chadbourne and Riccio are entitled to qualified immunity with respect to Ms. Morales's Fourth Amendment claim.

The district court erred in denying qualified immunity to Agent Donaghy and Supervisors Chadbourne and Riccio with respect to Ms. Morales's Fourth Amendment claim.

Agent Donaghy is entitled to qualified immunity for two reasons. First, a reasonable officer in Agent Donaghy's position would have had probable cause to issue an immigration detainer. Specifically, Agent Donaghy knew that Ms. Morales was born abroad and his search of two Government databases indicated that there was "no record" of anyone with her name applying for immigration benefits "including naturalization," no record of "any prior encounter with ICE," and "evidence of at least one alias with multiple social security numbers." Dkt. 20-3, ¶ 12. Given the absence of any case law addressing whether an officer has

probable cause to issue a detainer under these circumstances, Agent Donaghy is entitled to qualified immunity. *See al-Kidd*, 131 S. Ct. at 2084 ("[A]bsent authority . . . [a question is clearly established if there is] a robust consensus of cases of persuasive authority.") (citations and quotations omitted).

The district court erred in concluding that Agent Donaghy was not entitled to qualified immunity. Rather than considering whether there was a "robust consensus of cases of persuasive authority" in 2009 clearly establishing under what circumstances an officer has probable cause to issue a detainer, the district court instead looked primarily to two cases that post-dated Agent Donaghy's actions, neither of which addressed this question: *Lyttle v. United States*, 867 F. Supp. 2d 1256, 1292-93 (M.D. Ga. 2012) and *Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012) (hereafter *Arizona* (2012)). In fact, in the *Lyttle* decision, a district court found that two of the ICE agents were *entitled* to qualified immunity when they detained a U.S. citizen based on a government database, even though, the plaintiff there provided documentation, including a U.S. passport, proving that he was a U.S. citizen. *See Lyttle*, 867 F. Supp. 2d at 1292-93 (noting that these two ICE agents faced "a difficult predicament."). Thus, to the extent *Lyttle* has any relevance to the present case it *supports* the position that the *Bivens* Defendants are entitled to qualified immunity.

Second, it was not "clearly established" in 2009 that an ICE agent needed probable cause before issuing a detainer given the special needs implicated by the transfer of an individual between state and federal authorities and given that no cases had addressed that unique situation to provide the necessary guidance to Agent Donaghy. *See al-Kidd*, 131 S. Ct. at 2084. The district court based its conclusion to the contrary on a single unpublished case that was decided after 2009. Dkt. 64, at 10 (citing *Galarza v. Szalczyk*, Civ. A. No. 10-CV-06815, 2012 WL 10800020, at *13 (E.D. Pa. Mar. 20, 2012) *rev'd on other grounds*, 745 F.3d 634 (3d Cir. 2014)). Accordingly, the district court committed reversible error in holding that it was clearly established in 2009 that an ICE officer is required to have probable cause in order to issue an immigration detainer.

II. Agent Donaghy is entitled to qualified immunity with respect to Ms. Morales's Fifth Amendment/Equal Protection claim.

The district court found that Agent Donaghy was not entitled to qualified immunity with respect to Ms. Morales's Equal Protection claim because "ICE investigated Ms. Morales simply because she was born in another country." Dkt. 64, p. 22. This conclusion is in error because it disregards the sworn declarations submitted by Agent Donaghy that describe the investigatory steps he took before issuing the detainer. Dkt. 20-3, ¶¶ 5-8, 10-11. It is true that Agent Donaghy considered, among other things, the fact that Ms. Morales was born in another country. But this Court previously held, in the context of removal proceedings,

that the Government may consider an individual's foreign birth in determining whether the individual is a U.S. citizen. *See Walker v. Holder*, 589 F.3d 12, 18 (1st Cir. 2009) (individual "born abroad . . . presumed to be an alien and bears the burden of establishing his claims to United States citizenship . . .) (citations and quotations omitted); *see also*, *Santos v. Mukasey*, 516 F.3d 1, 4 (1st Cir. 2008) (applying this principle) *cert. denied* 55 U.S. 839 (2008). Thus, as a matter of law, there is no basis for holding Agent Donaghy personally liable.

LEGAL ARGUMENTS

I. It was not clearly established in 2009 that Agent Donaghy violated Ms. Morales's Fourth Amendment rights by issuing a detainer based on information from Government databases.

A. Legal standard for *Bivens* claims under the Fourth Amendment.

The purpose of *Bivens* is to "deter individual federal officers from committing constitutional violations." *Soto-Torres*, 654 F.3d at 157 n.5 (citations and quotations omitted). As a general matter, the Constitution does not address "injuries inflicted by governmental negligence." *See Daniels v. Williams*, 474 U.S. 327, 333 (1986); *see also Soto-Torres*, 654 F.3d at 157 n.5 (dismissing allegations that plaintiff's detention would have been prevented if federal officials had taken the time to investigate and to determine who he was prior to executing a warrant).

Fourth Amendment reasonableness is predominantly an "objective inquiry" in which courts ask whether the circumstances justify the challenged action. *al-*

Kidd, 131 S. Ct. at 2083 (citations and quotations omitted); *see also Estrada*, 594 F.3d at 65 (affirming entry of summary judgment in favor of an officer notwithstanding police report that called into question whether he subjectively believed that he had probable cause). "Probable cause exists when the arresting officer, acting upon apparently trustworthy information, reasonably concludes that a crime has been (or is about to be) committed and that the putative arrestee likely is one of the perpetrators." *Cox v. Hainey*, 391 F.3d 25, 31 (1st Cir. 2004) (affirming of entry of summary judgment based on qualified immunity; citations and quotations omitted); *see generally Hill v. California*, 401 U.S. 797, 802 (1971) ("When the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest.").

In the criminal context, numerous courts have found that officers can reasonably rely on computer databases in determining whether probable cause exists. *See, e.g., Marinelli v. Capone*, 868 F.2d 102, 104-6 (3d Cir. 1989); *McAllister v. Desoto Cnty, Miss.*, No. 11-60482, 2012 WL 1521642, *6 (5th Cir. May 1, 2012) (affirming entry of summary judgment based on qualified immunity because officers "reasonably believed that Connie McAllister in the Eagle System was the drug dealer ["Connie Mac"]."); *see generally, Arizona v. Evans,* 514 U.S. 1, 16 (1995) (no indication that arresting officer was not acting objectively

reasonably when he relied upon the police computer record that included incorrect information).

B. Agent Donaghy is entitled to qualified immunity with respect to Ms. Morales's Fourth Amendment claim.

1. The undisputed facts establish that probable cause supported issuance of the detainer, and, moreover, there was no clearly established law suggesting that these facts fell short of probable cause.

Even assuming for purposes of argument that it was clearly established in 2009 that an ICE agent was required to have probable cause before issuing a detainer (which Appellants do not concede), the facts available to Agent Donaghy met that standard and, moreover, there is no case law establishing otherwise. *See Cox*, 391 F.3d at 31 ("[I]n the case of a warrantless arrest, if the presence of probable cause is arguable or subject to legitimate question, qualified immunity will attach.").[5] In his initial sworn declaration, Agent Donaghy explains that he searched the relevant Government databases for information relating to Ms. Morales and that:

- His search of the CIS database did not reveal any record of Ms. Morales "ever applying for any immigration benefits or naturalization" or any record of her being "encountered" by ICE or U.S. Citizenship and

[5] Because the question of whether Agent Donaghy had probable cause under the facts of this case, or arguably did, is a question of law, the district court's finding that he was not entitled to qualified immunity is reviewed *de novo*. *See Lopera*, 640 F.3d at 395.

Immigration Services ("USCIS") officials. Dkt. 20-3, ¶¶ 5, 6; *see also* Dkt. 64 at 3.

- His search of NCIC database revealed another alias of Ms. Morales with "two different social security numbers. *Id.*, ¶ 8; *see also* Dkt. 64 at 3.

- In May 2009, his office "did not have a system to verify if an individual had previously been subject to a detainer." *Id.*, ¶ 10.[6]

Numerous courts have found that law enforcement officers are entitled to qualified immunity when they reasonably rely on information in a computer database. *See, e.g., Marinelli*, 868 F.2d at 104-6 (reversing denial of a motion for summary judgment); *McAllister*, 2012 WL 1521642, at *6 (affirming entry of summary judgment). These cases support the conclusion that qualified immunity applies here, particularly given the absence of case law addressing the question of when an ICE agent may properly issue a detainer. *See al-Kidd*, 131 S. Ct. at 2084; *see also, Estrada*, 594 F.3d at 63 ("[I]f a reasonable officer would not have understood that his conduct violated Plaintiffs' constitutional rights, we must grant him qualified immunity.").

It is undisputed that Ms. Morales is a U.S. citizen who naturalized under her maiden name, Ada Amivilla Cabrera. *See* Dkt. Nos. 63, p. 2; 47-2; 47-3. But

[6] Additionally, none of the systems he searched "uncovered information about Morales's naturalization . . . [that he] had no knowledge about her naturalization or claim of U.S. citizenship . . . [that] none of the systems . . . included information regarding the detainer that had previously been issued against her . . . [and that at the time] to the best of my knowledge, [he] was not required . . . to conduct any investigation beyond what [he] did – search the ACI database, the CIS, and the NCIC." Dkt. 47-1, ¶¶ 11, 12, 14.

Agent Donaghy could act only on the facts available to him based on his investigation. Had Agent Donaghy's understanding of the facts been correct (that Ms. Morales was born in Guatemala and that she never applied for immigration benefits such as naturalization Dkt. 20-3, ¶¶ 5, 11), he would have had probable cause to issue the immigration detainer. Thus, the gravamen of Ms. Morales's Fourth Amendment claim against him is for negligence; *i.e.* that Agent Donaghy was negligent because he "failed to sufficiently investigate Ms. Morales's immigration status before issuing the detainer." *See* Dkt. 4, ¶ 38. The Fourth Amendment, however, does not address injuries caused by negligence. *See Soto-Torres*, 654 F.3d at 157 n.5 (dismissing claim); *see generally Daniels*, 474 U.S. at 33 (Constitution does not address "injuries inflicted by governmental negligence."). The district court should not have held Agent Donaghy personally liable in *Bivens* because his understanding of the facts turned out to be incorrect. *See* Dkt. 20-3, ¶¶ 5, 11.

Moreover, Ms. Morales did not allege in her Amended Complaint what additional steps Agent Donaghy was required to take before issuing the detainer. *See* Dkt. 4, ¶ 38. Nor has she alleged any facts or pointed to any case law providing fair warning that it was not reasonable for him to rely on Ms. Morales's foreign birth and information in the ACI, CIS, and NCIC databases. Without more, one cannot say that probable cause "clearly was lacking" at the time Agent

Donaghy issued the detainer. *See Cox*, 391 F.3d at 32. Thus, the district court erred in denying Agent Donaghy qualified immunity.

The district court may have been troubled by the detainer form that was used at the time.[7] Dkt. 64, pp. 10-11. But these concerns have absolutely no bearing on whether Agent Donaghy had probable cause to issue the ICE detainer in 2009. Moreover, there is no allegation that Agent Donaghy had any role in the creation of this form and no authority for the proposition that it was unconstitutional for Agent Donaghy to use this form (which was the form that ICE used at the time). Agent Donaghy's use of the form he was given is simply not a proper basis for holding him personally liable in a *Bivens* action. *See al-Kidd*, 131 S. Ct. at 2083.

In order to establish liability in a *Bivens* action, the right cannot be generally stated, but "must have been 'clearly established' in a more particularized, and hence more relevant, sense." *Anderson*, 483 U.S. at 640. Thus, in the context of a seizure under the Fourth Amendment, it must be "clearly established that the circumstances with which [the officer was] confronted did not constitute probable cause." *Id*. at 640-41; *see also, al-Kidd*, 131 S.Ct. 2084 (Courts should not "define clearly established law at a high level of generality."). In short, because it was not

[7] It is undisputed that the immigration detainer form was changed. *See* Dkt 4, ¶ 76 ("ICE announced that it would begin to use an amended Form I-247 that would clarify that detainers are not mandatory."). Ms. Morales contends that the subsequent detainer form is also confusing *id*., but this contention is not a basis for holding Agent Donaghy personally liable and is outside the scope of this appeal.

clearly established in 2009 that the circumstances which Agent Donaghy was confronted with did not constitute probable cause, he is entitled to qualified immunity and the district court's ruling to the contrary should be reversed. *See Anderson*, 483 U.S. at 640-41.

2. Neither *Lyttle* nor *Arizona* (2012) supports the district court's decision denying Agent Donaghy qualified immunity.

The district court relied primarily on two decisions in denying Agent Donaghy qualified immunity with respect to Ms. Morales's Fourth Amendment claim, *Lyttle* and *Arizona* (2012). *See* Dkt. 64, pp. 18-19.[8] Initially, it bears noting that these two decisions were not issued until after 2009 and neither addressed the question of under what circumstances an ICE agent may properly issue an ICE detainer. Thus, they do not support the district court's conclusion that it was

[8] With respect to its analysis of Ms. Morales's Fourth Amendment claim, the district court also cited three additional cases, *Arizona v. Johnson*, 555 U.S. 323, 333 (2009), *Illinois v. Caballes*, 543 U.S. 405, 407 (2005), and *Dunaway v. New York*, 442 U.S. 200, 216 (1979). Dkt. 64, p. 19. None is controlling. *Arizona v. Johnson* stands for the proposition that the "temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop." 555 U.S. at 333. The district court cited *Caballes* for the proposition that a "seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete the mission." 543 U.S. at 407. The district court cited *Dunaway* for the proposition that "detention for custodial interrogation – regardless of its label – intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." 442 U.S. at 216. None of these cases address whether the facts possessed by Agent Donaghy were sufficient to establish probable cause.

"clearly established" in 2009 that Agent Donaghy lacked probable cause to issue an ICE detainer. *Id*. at 19. Even if they were relevant, however, the district court misapplied their holdings.

In *Lyttle*, a United States citizen with diminished mental capacity was removed to Mexico. 867 F. Supp. 2d at 1266. In a subsequent *Bivens* action, he asserted claims (i) against two ICE officers who detained him upon his return to the United States based on information in a government database, and (ii) against various other additional ICE officers in connection with his removal from the United States.

With respect to his claims against the two ICE officers who detained him upon his return, the district court found that the ICE officers were entitled to qualified immunity. 867 F. Supp. 2d at 1292-93. The district court explained that the two ICE officers "discovered from a routine database search that Lyttle was previously deported alien with a criminal history . . . [and] had been lawfully deported . . ." 867 F. Supp. 2d 1292-93. Lyttle provided the two ICE officers with documents showing that he was, in fact, a U.S. citizen, including his U.S. passport. *Id.* Nonetheless, the district court held that it could not find "that a reasonable officer under these circumstances would have been on notice that their detention of Lyttle was a clear violation of Lyttle's constitutional rights." 867 F. Supp. 2d 1293.

Thus, to the extent *Lyttle* has any bearing on the present action, it suggests that an officer may reasonably rely on information in a government database in making a probable cause determination. Significantly, the district court in *Lyttle* dismissed *Bivens* claims against the two ICE officers even though Lyttle told them he was a U.S. citizen and presented them with conclusive proof of his citizenship. 867 F. Supp. 2d at 1292-93.[9] In contrast, here, it is undisputed that Ms. Morales never spoke with Agent Donaghy and never presented him with proof of U.S. citizenship, *see generally*, Dkt. 4, ¶ 37, and Agent Donaghy did not receive any such information from another source. Therefore, if anything, the *Lyttle* court's finding of qualified immunity applies with greater force to the present case.

With respect to his claims against the ICE officers involved in his removal from the United States, the plaintiff in *Lyttle* alleged, and the district court assumed as true, that he consistently provided the ICE agents with his true name; that he stated unequivocally and repeatedly that he was a U.S. citizen; that he denied being a citizen of Mexico; that he was mentally disabled; and that the ICE agents were

[9] To be clear, in *Lyttle*, the computer check revealed an order of removal that should not have been entered against the plaintiff. *See* 867 F. Supp. 2d 1293. In contrast, here, there was no order of removal. Instead, the name check performed by Agent Donaghy did not reveal any record of Ms. Morales "ever applying for any immigration benefits or naturalization" and another alias of Ms. Morales with "two different social security numbers." Dkt. 20-3, ¶¶ 5, 6, 8.

aware of his disability.[10] Nonetheless, ICE officers continued to detain him and, ultimately, remove him to Mexico. The district court held that under these circumstances a plaintiff could bring a *Bivens* action against these ICE officers. *See Lyttle*, 867 F. Supp. 2d at 1278.

This holding is not relevant to the present case because Ms. Morales, unlike the plaintiff in *Lyttle*, never told Agent Donaghy she was a U.S. citizen, never denied to Agent Donaghy that she was a citizen of another country, and is not mentally disabled, and Agent Donaghy did not obtain the information about her citizenship from any other source. *See generally*, Dkt. 4, ¶ 37. Thus, even if *Lyttle* had been decided by 2009, it would not support the claim that it was "clearly established" that Agent Donaghy lacked probable cause to issue the ICE detainer under the circumstances of the present case. *See al-Kidd*, 131 S. Ct. at 2083.

Arizona (2012) has an even more attenuated connection to the present action. As a threshold matter, it is not even a Fourth Amendment case. Rather, it involved a claim that a state statute was preempted by federal law. In relevant part, the state statue required state officers to make a "reasonable attempt . . . to

[10] The Notice of Intent to Issue Final Administrative Removal Order in *Lyttle*, prepared by one of the ICE officers, accurately stated that the plaintiff was "a native of United States and a citizen of United States" but nonetheless charged him as deportable from the United States because of his criminal conviction. 867 F. Supp. 2d at 1284. This document suggests, at least in the view of the district court, that some ICE agents knew the plaintiff was a U.S. citizen but decided to deport him anyway. *See id*. This portion of the *Lyttle* opinion highlights an important factual difference between it and the present case.

determine the immigration status" of any person they stop, detain, or arrest if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." 132 S. Ct. 2507 citing Ariz. Rev. Stat. Ann. § 11-1051(B). Amici Curiae argued that this provision would require the delay of some detainees for "no reason other than to verify their immigration status." 132 S. Ct. 2509. The Supreme Court did not address this argument because it found that the provision could be read to "avoid these concerns." *Id*. It explained that, given the procedural posture of the case, there "is a basic uncertainty about what the law means and how it will be enforced," and it would be inappropriate to assume that this provision would be construed in a way that creates a conflict with federal law. *Id*. at 2510. The Supreme Court added:

> Detaining individuals solely to verify their immigration status would raise constitutional concerns . . . And it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision.

Id. Significantly, the Supreme Court was not speaking to the Fourth Amendment standard or the types of facts that would support probable cause. Indeed the court disclaimed reaching that issue explaining that there "is no need in this case to address whether reasonable suspicion of illegal entry of another immigration crime would be a legitimate basis for prolonging a detention, or whether this too would be preempted by federal law." *Id*. Nonetheless, the district court relied on *Arizona*

(2012), concluding that it precluded a finding of qualified immunity for Agent Donaghy.

Because *Arizona* (2012) was not a Fourth Amendment case, language from the opinion regarding an unanswered question about preemption does not have any bearing on the question whether Agent Donaghy violated Ms. Morales' Fourth Amendment rights in 2009 when he issued an ICE detainer based on the undisputed facts in this case. The district court committed reversible error when it relied on *Arizona* (2012) to find it was clearly established in 2009 that Agent Donaghy lacked probable cause to issue the ICE detainer.

3. In the alternative, it was an open question in 2009 whether an ICE agent was required to have probable cause before issuing a detainer.

Because it was not clearly established that Agent Donaghy lacked probable cause to issue the immigration detainer in this case, this Court need not reach the question whether it was clearly established in 2009 that a federal official taking such an action even needed probable cause to believe that the subject of the detainer was not authorized to be present in the United States. Nevertheless, the standard for issuing an immigration detainer was itself not "beyond debate" when Agent Donaghy acted, and he is therefore "entitled to qualified immunity" on that basis as well. *See Lane v. Franks*, 134 S. Ct. 2369, 2383 (2014) (internal quotation marks omitted).

A reasonable officer in Agent Donaghy's position in 2009 could reasonably have believed that probable cause was not required for the issuance of an immigration detainer. Such a detainer addresses a difficult and unique circumstance in which the federal government believes that an individual in state custody may have violated federal immigration laws. *See Arizona*, 132 S. at 2498-99 ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. . . . Federal governance of immigration and alien status is extensive and complex."); *see also* 8 C.F.R. § 287.7(d). In that setting, federal officials charged with enforcing the immigration laws – under which "[e]vidence of foreign birth . . . gives rise to a rebuttable presumption of alienage," *Scales v. I.N.S.*, 232 F.3d 1159, 1163 (9th Cir. 2000); *see Santos*, 516 F.3d at 4; 8 C.F.R. § 1240.8(c) -- may require time to investigate the status of the person in the State's custody, including arranging for an interview of that person during which important information may be gathered. An immigration detainer does not itself constitute an arrest; rather, it facilitates access by federal officers to the person in the custody of another government. As such, a reasonable officer in 2009 could have thought that the constitutional standards governing a federal arrest on immigration or other grounds, *see*, *e.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975), were not applicable to the issuance of the detainer. That is particularly so given that an officer like Agent

Donaghy – who was responsible for issuing the detainer -- was not himself in a position to control how quickly, or under what conditions, any subsequent interview or other additional investigation would be completed or when or under what circumstances Ms. Morales would be taken into custody by ICE.

Ms. Morales has pointed to no decision in existence in 2009 establishing that the standard specifically for issuing an immigration detainer is probable cause, and the federal defendants are not aware of any such case. The district court cited several cases for the proposition that placing a person in custody requires probable cause, *see* 2014 WL 554478, at *5, *10, but those cases did not involve immigration detainers like the one Agent Donaghy issued and are therefore not sufficiently on point to defeat his qualified-immunity claim. *See*, *e.g.*, *al-Kidd*, 131 S. Ct. at 2083-84 (Courts are not to define the constitutional question at a "high level of generality."); *see also Anderson*, 483 U.S. at 640 ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."); *Brosseau*, 543 U.S. at 198 ("Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted."). The court below also relied on an unpublished district-court decision from 2012 to support the conclusion that probable cause is required "to issue a detainer," 2014 WL 554478, at *5 (citing *Galarza*, 2012 WL

1080020, at *13, *rev'd on other grounds*, 745 F.3d 634 (3d Cir. 2014)), but that case is not relevant to the qualified-immunity analysis here because it was decided well after Agent Donaghy took the action giving rise to plaintiff's Fourth Amendment claim against him.[11]

The law cannot be deemed clearly established for qualified-immunity purposes in the absence of a "robust consensus of cases of persuasive authority." *al-Kidd*, 131 S. Ct. at 2084. Regardless of how a court would rule if it confronted de novo the question of what standard should govern the issuance of an immigration detainer, Agent Donaghy cannot be held personally liable unless he ran afoul of decisional law that was clear in 2009. *See Crawford-El v. Britten*, 523 U.S. 574, 593 (1998) (qualified immunity applies where there is "doubt as to the illegality of the defendant's particular conduct"); *Malley*, 475 U.S. at 341 (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"). He did not, and the district court therefore erred in denying his motion for qualified immunity.

[11] Another district court recently stated that probable cause is "necessary" as a matter of statutory law to issue a detainer. *Gonzalez v. Immigration and Customs Enforcement*, 2:13-cv-04416-BRO-FFM, Dkt. 42 at 12 (C.D. Cal. July 28, 2014) (unpublished). That opinion, too, has no relevance in determining whether it was clearly established in 2009 that probable cause was required to issue a detainer.

C. The district court erred in denying qualified immunity to Supervisors Chadbourne and Riccio.

In finding that Supervisors Chadbourne and Riccio were not entitled to qualified immunity, the district court concluded that Ms. Morales's allegations supporting her claim for supervisory liability are "are specific, not conclusory or threadbare" and that they "permit reasonable inferences to be drawn that these two individuals showed deliberate indifference and therefore are liable for the Fourth Amendment violations she alleges." Dkt. 64 at 15. "Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondent superior." *Iqbal*, 556 U.S. at 676. This Court does not appear to have directly addressed the question of whether *Iqbal* alters the circuit's preexisting law on supervisory liability and, instead, has rejected post-*Iqbal* claims against supervisors under that preexisting law. *See, e.g., Maldonado v. Fontanes*, 568 F.3d, 274-275 (1st Cir. 2009); *Soto-Torres*, 654 F.3d at 158 ("[A] supervisor may not be held liable for the constitutional violations committed by his or her subordinates, unless there is an affirmative link between the between the behavior of a subordinate and the action or inaction of his supervisor . . . such that the supervisor's conduct led inexorably to the constitutional violation"; internal citations and quotations omitted). This Court has held on a number of occasions that broad or conclusory allegations against high-ranking officials – that they did not properly carry out their supervisory duties, and that if they had done so then the

alleged constitutional violation would not have occurred – fail to state a claim. *See, e.g., Feliciano-Hernandez v. Pereira-Castillo*, 663 F.3d 527, 533-535 (1st Cir. 2011) (claims against high-level officials insufficient where allegations were conclusory and complaint did not allege that officials had any actual of constructive knowledge of violations of rights); *Soto-Torres*, 654 F.3d at 160 (allegations against FBI Special Agent in Charge of field office insufficient because complaint failed to allege facts showing defendant had knowledge of alleged violations of constitutional rights); *Maldonado*, 568 F.3d at 274-75 (allegations against mayor insufficient because complaint did not allege an "affirmative link" between mayor and alleged violations).

The district court here focused on the allegations that the supervisors "put in place or continued official policies and practices regarding issuances of detainers that directly and foreseeably caused Ms. Morales' constitutional rights to be violated" and "formulated, implemented, encouraged, or willfully ignored policies with deliberate indifference to the high risk of violating Ms. Morales' constitutional right." Dkt. 64, p. 8.

A right must be established "in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official." *Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012) (quoting *Anderson*, 483 U.S. at 640). Only after first properly framing the right may a court move to the next step, asking whether "every

reasonable official would [have understood] that what he is doing violates that right." *Reichle*, 132 S. Ct. at 2093 (citation and internal quotation marks omitted; brackets in original). For that to be true, "existing precedent must have placed the * * * constitutional question confronted by the official beyond debate." *Plumhoff* , 134 S. Ct. at 2023 (internal quotation marks and citation omitted). Accordingly, "controlling authority" or at least "a robust 'consensus of cases of persuasive authority' " must establish that the official's conduct was unconstitutional. *al-Kidd*, 131 S. Ct. at 2084 (quoting *Wilson*, 526 U.S. 603(1999). Although the authority need not be "directly on point," it must be sufficiently similar to place the relevant constitutional question "beyond debate." *Id.* at 2083.

At the time relevant to this matter, no such authority had addressed the issue of supervisors "put[ting] in place or continu[ing] official policies and practices regarding issuances of detainers that directly and foreseeably cause[]" the violation of an individual's rights based on an immigration detainer or whether supervisors "formulated, implemented, encouraged, or willfully ignored policies with deliberate indifference to the high risk of violating Ms. Morales' constitutional right." *See* Dkt. 64, p. 8. Absent controlling authority, even if Ms. Morales suffered a violation of her constitutional rights, Supervisors Riccio and Chadbourne could not have understood that their actions violated her rights. *Reichle*, 132 S. Ct. at 2093.

The other allegations in the complaint are similarly non-specific, based almost entirely on the fact that the supervisor defendants hold the particular high-level positions that put them in charge of Agent Donaghy and other subordinates who issued detainers. *See, e.g.*, Dkt. 4, ¶¶ 4-5, 20.

Thus, they are insufficient to state a claim against Supervisors Chadbourne and Riccio and should be dismissed. *See Soto-Torres*, 654 F.3d at 160.

II. The district court erred in disregarding Agent Donaghy's sworn declarations and finding that he issued the ICE detainer solely because Ms. Morales was born in a foreign country.

In contrast to other Fifth Amendment/Equal Protection cases, here it is undisputed that Agent Donaghy never met or even talked to Ms. Morales before issuing an ICE detainer. *See generally*, Dkt. 4, ¶ 37 ("No ICE official interviewed Ms. Morales before the detainer was issued."). As a result, at the time he issued the ICE detainer, Agent Donaghy had no basis for knowing her race or ethnicity was. *See* Dkt. 20-3, ¶ 13 (denying that he discriminated against Ms. Morales based on her race, ethnicity, national origin, or "on any other basis").[12] He did know that she was born in another country *id*, ¶ 3, and properly relied, in part, on this fact in deciding to issue an ICE detainer. *See Walker*, 589 F.3d at 18 ("Because it is undisputed that Petitioner was born abroad . . . he is presumed to be an alien . . .";

[12] Ms. Morales contends that based on her name, Agent Donaghy may have inferred her national origin. But there was no need for Agent Donaghy to infer this fact because he knew that she claimed to be born in Guatemala. *See* Dkt. 20-3, ¶ 3.

citations and quotations omitted); *see also Nasiouus v. Two Unknown BICE Agents, Gonzales*, 495 F. Supp. 2d 1218, 1231-32 (D. Colo. 2010) (holding that officer was "entitled to judgment as a matter of law" as to plaintiff's equal protection claim based on plaintiff's allegation of profiling based on his Greek heritage).[13]

The district court concluded that notwithstanding the *Walker* decision, Agent Donaghy was not entitled to qualified immunity because he investigated "Ms. Morales simply because she was born in another country." Dkt. 64, pp. 21-22. This conclusion is wrong. Ms. Morales herself alleges that she was "arrested" by Rhode Island State Police and that they "relayed Ms. Morales's name, place of birth, and other information to ICE defendants . . ." Dkt. 4, ¶¶ 26, 29. Thus, based on her own admission, she was investigated by ICE, at least initially, because Rhode Island State Police detained her.[14]

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[13] In *Nasiouus*, the plaintiff admitted he was born in Greece. 495 F. Supp. 2d at 1231-32. *Id*. After checking for a valid alien visa or other immigration documents, he was considered presumptively subject for removal and a detainer was filed. *Id*. at 1232 (entering judgment in favor of the officer who issued the detainer).

[14] To be clear, she alleges Rhode Island police profiled her Dkt. 4, ¶ 29 (information relayed to ICE "because of her race, ethnicity, and/or national origin") and have a policy of profiling arrestee have a "foreign country of birth . . . a foreign-sounding last name, speak[] English with an accent, and/or appear to be Hispanic." Dkt 4, ¶ 69. But these allegations have nothing to do with Agent Donaghy, whether he violated Ms. Morales's Fifth Amendment rights, or whether he is entitled to qualified immunity.

ICE did not target her based on an impermissible characteristic. Rather, she came to ICE's attention as part of a routine check on the immigration status of individuals taken in custody by Rhode Island State Police. As Agent Donaghy stated in a declaration, he began each weekday of his on-call duty week by logging into an ACI database that contains information about "the individuals who were taken into state custody that day and the day before." Dkt. 47-1, ¶ 4. "After obtaining the list of inmates from the daily commitment report . . . [he] searched the information according to each inmate's identification number. *Id.*, ¶ 6. He further stated under oath, "After completing a search for each individual on the list, I frequently made notations on a printout of the daily commitment report, to keep track of the information for each name." *Id.*, ¶ 8. Thus, this sworn testimony indicates that Ms. Morales was not subject to disparate treatment or targeted in any way.

Additionally, Agent Donaghy's sworn declarations indicate he did not issue a detainer based solely on the fact that she was born in a foreign country. *See* Dkt. 20-3, ¶¶ 3, 5-8, 11; Dkt 47-1, ¶¶ 5-14. Rather he did so based on searches of computer databases. *See* Dkt. 20-3, ¶ 12. The district court was not free to disregard this unchallenged sworn testimony and imply – without any factual basis – that these searches never occurred and that the ICE detainer was issued "simply because she was born in another country." *See* Dkt. 64, pp. 22. For these reasons,

the district court should be reversed and judgment entered in favor of Agent Donaghy has a matter of law.[15]

CONCLUSION

For these reasons, the district court's decision should be vacated and this Court should: (i) enter judgment as a matter of law in favor of Agent Donaghy and dismiss all claims against Supervisors Chadbourne and Riccio, and (ii) grant such other and further relief as is proper.

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[15] Ms. Morales also alleges that Agent Donaghy would have conducted "further research had it not been for her race, ethnicity, and/or national origin." Dkt. 4, ¶ 38. But she fails to allege any factual basis for this conclusion or specify what "further research" would have been conducted. The Supreme Court has instructed that "bare assertions" amounting "to nothing more than a formulaic recitation of the elements of a constitutional discrimination claim" are "conclusory and not entitled to be assumed true." *Iqbal*, 556 U.S. at 681 (citations and quotations omitted); *see Rivera-Colon v. Toledo-Davila*, Civil No. 08-1590 (SEC), 2010 WL 1257480, at *6 (D.P.R. March 24, 2010) ("Complaint does not compellingly plead a racial motivation for the alleged use of excessive force."). Without more, Ms. Morales's conclusory allegations are insufficient as a matter of law.

Respectfully submitted,

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