No. 14-1425

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ADA MORALES,

Plaintiff – Appellee,

v.

BRUCE CHADBOURNE, DAVID RICCIO, AND EDWARD DONAGHY,

Defendants – Appellants.

APPELLEE'S BRIEF

On appeal from the U.S. District Court for the District of Rhode Island

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/s/ Lena Graber

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court correctly denied Defendant Donaghy's pre-discovery summary judgment motion and granted Ms. Morales's request for discovery under Rule 56(d) with respect to Ms. Morales's claim that Defendant Donaghy caused her to be detained without probable cause in violation of her Fourth Amendment rights.
2. Whether the district court correctly denied Defendant Donaghy's pre-discovery summary judgment motion and granted Ms. Morales's request for discovery under Rule 56(d) with respect to Ms. Morales's claim that Defendant Donaghy issued a detainer against her based on her race, ethnicity, or national origin, in violation of her rights under the Equal Protection Clause.
3. Whether the district court correctly denied Defendants Chadbourne and Riccio's motion to dismiss Ms. Morales's claim that they caused her to be detained without probable cause in violation of the Fourth Amendment.

STATEMENT OF THE CASE

This case concerns a U.S. citizen who has been wrongly detained on two separate occasions, at federal officials' request, for the purpose of investigating her immigration status. Plaintiff-Appellant Ada Morales took the oath to become an American citizen when she naturalized in 1995. Since then, she has *twice* been subjected to baseless immigration "detainers"—documents issued by U.S. Immigration and Customs Enforcement ("ICE") to state or local law enforcement authorities requesting that a person be held in jail for 48 hours, plus weekends and holidays, pending an investigation into her immigration status. This lawsuit arises out of the second incident, which happened in 2009. In spite of Ms. Morales's naturalization, Defendants caused her to be imprisoned for 24 hours—without a warrant, probable cause, or even a chance to contest her detention—merely for the purpose of giving ICE extra time to investigate whether she might be a non-citizen subject to removal.

On appeal, Defendants urge this Court to reverse the district court and grant them qualified immunity. Notably, their appeal brief relies heavily on Defendants' *own* untested declarations, which they ask the Court to accept—without any discovery—in place of the complaint's allegations. Defendant Donaghy asks the Court to take the extraordinary step of granting him pre-discovery summary judgment, in spite of Ms. Morales's timely request for discovery under Federal

Rule 56(d). He further asks the Court to accept *his* factual assertions as true and re-weigh the sufficiency of the evidence in a manner that plainly contravenes the Court's limited jurisdiction on interlocutory appeal. Defendants Chadbourne and Riccio, for their part, seek dismissal based on a misinterpretation of qualified immunity, contending that without a factually identical prior case on point, they cannot be held liable for their roles in overseeing policies and practices that directly and foreseeably led to Ms. Morales's unlawful detention.

The Court should reject Defendants' arguments. Their "detain first, ask questions later" use of immigration detainers predictably resulted in violations of Ms. Morales's clearly established constitutional rights to be free from unreasonable detention and to be treated equally to her fellow citizens. The district court correctly allowed Ms. Morales to proceed to discovery on her claims against Defendants, and its decision should be affirmed.

Facts[1]

Ms. Morales is a U.S. citizen and long-time resident of Rhode Island. Born in Guatemala, she immigrated to the United States in the 1980s and naturalized in 1995. Joint Appendix ("JA") 30 (¶23). In May 2009, Rhode Island officials

[1] The facts in this section are drawn from the Amended Complaint. Defendants' brief relies heavily on their own factual assertions, which they ask the Court to accept as true. As discussed below, this is improper; discovery had not even begun, and Ms. Morales filed a request under Fed. R. Civ. P. 56(d) to test their facts in discovery. *See infra* Section I(A).

arrested her on state charges that have since been resolved and transported her to the Rhode Island Department of Corrections ("RIDOC"). JA 25-26 (¶13). At booking, she told Rhode Island officials that she is a U.S. citizen. JA 30 (¶27).

On the morning of May 4, 2009, after learning of Ms. Morales's arrest from Rhode Island officials, Defendant Edward Donaghy, an agent in ICE's Rhode Island office, faxed RIDOC an immigration "detainer" form. The detainer incorrectly identified Ms. Morales as an "alien," alleged that her "[s]ex" was "M[ale]" and her "[n]ationality" was "Guatemala[n]," and stated that ICE had "initiated" an "[i]nvestigation" into her immigration status. *See* JA 31-32 (¶¶31-33), 61 (detainer). The detainer requested that RIDOC "detain the alien" for 48 hours, plus weekends and holidays, after she would otherwise be released to give ICE extra time to investigate her immigration status and possibly take her into federal custody. *Id.*

The detainer was not based on probable cause to believe Ms. Morales was a non-citizen subject to detention and removal. As Defendant Donaghy acknowledges, he "never met or even talked to Ms. Morales before issuing an ICE detainer." Appellants' Br. at 33. Nor did he give her any other opportunity to assert her citizenship. JA 32 (¶37). Moreover, he failed to take account of readily available evidence of her U.S. citizenship. Ms. Morales stated at booking that she is a U.S. citizen, JA 30 (¶27), and she had a passport that proved it. *See* JA 34

(¶45). The federal government also had confirmation of her citizenship in its own possession, including the certificate of naturalization that it issued to Ms. Morales in 1995 (which Defendants produced in support of their motions in this litigation). JA 32-33 (¶¶38-40), 154. That is not all. Just five years earlier, in 2004, ICE had issued *another* baseless immigration detainer against Ms. Morales, and released her after confirming that she was a U.S. citizen. JA 25 (¶12), 33 (¶40). Defendant Donaghy either ignored this information or failed to perform a minimally adequate inquiry before issuing a detainer that he knew would cause Ms. Morales's imprisonment. JA 32-33 (¶¶38-39).

On May 4, 2009, a state court ordered Ms. Morales released from criminal custody on personal recognizance. But instead of being released, Ms. Morales was re-booked into RIDOC custody, strip searched, and kept in jail for approximately 24 more hours based on the ICE detainer alone. JA 34 (¶47), 37 (¶63). Even though Ms. Morales told Rhode Island officials at every opportunity that she is a U.S. citizen, she was kept in detention nonetheless. JA 34 (¶¶45, 49).

On May 5, 2009, ICE agents arrived at the jail and took Ms. Morales into federal custody. They drove her to an ICE office in Warwick, Rhode Island, interviewed her, confirmed that she is a U.S. citizen, and finally released her to her family. JA 36-37 (¶¶58-61). Upon releasing her, one ICE agent apologized for her detention, but told her "it could happen again in the future." JA 36-37 (¶61).

Procedural History

On April 24, 2012, Ms. Morales filed a civil damages action against Defendants-Appellants and other federal and state defendants who are not parties to this appeal. JA 8. She alleged that, by issuing the detainer against her, Defendant Donaghy caused her to be detained without probable cause in violation of the Fourth Amendment, deprived her of liberty without notice or an opportunity to be heard in violation of her procedural due process rights, and violated her right under the Equal Protection Clause to be free from discrimination on the basis of race, ethnicity, and national origin. JA 45-48. She alleged that Defendants Bruce Chadbourne and David Riccio—both supervisory ICE officials with authority over ICE's detainer issuance practices in Rhode Island—knew or were deliberately indifferent to the fact that their subordinates routinely issued ICE detainers without probable cause, and formulated or condoned policies permitting the issuance of detainers solely for investigation, in violation of the Fourth Amendment and the procedural due process clause. JA 42-43 (¶¶81-85). Ms. Morales sought damages for these constitutional violations under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), as well as injunctive relief to prevent Defendants from subjecting her to baseless immigration detention again in the future.

In lieu of answering the complaint, the defendants filed various motions to dismiss the complaint under Federal Rule 12(b)(1) and (b)(6), only a handful of which are relevant to this appeal. Defendants Chadbourne and Riccio moved to dismiss Ms. Morales's Fourth Amendment claim under Rule 12(b)(6). Defendant Donaghy, in contrast, did *not* move to dismiss the Fourth Amendment claim against him. *See* JA 62, 188. In fact, he and the other federal defendants expressly conceded that "Morales's claim that Defendant Donaghy violated her Fourth Amendment rights . . . *would survive* a motion to dismiss for failure to state a claim that can be granted." Motion to Dismiss, Dkt. #17-1 at *14 n.11, No. 12-0301 (D. R.I. filed Sept. 4, 2012) (attached as Addendum 4) (emphasis added). Defendant Donaghy did, however, move to dismiss the Equal Protection claim. At the same time, although discovery had not yet begun, Donaghy also moved for summary judgment on both the Fourth Amendment and Equal Protection claims, JA 62, based on declarations in which he recounted his own alternative version of the facts. *See* JA 89-90, 149-52.

Ms. Morales opposed the Defendants' motions. With respect to Defendant Donaghy's summary judgment motion specifically, she filed a Rule 56(d) motion explaining that his summary judgment motion was premature and should be denied because she had not yet had any opportunity to conduct discovery. Her motion explained in detail what discovery she needed in order to dispute Defendant

Donaghy's assertions. JA 117-20. In the alternative, if the court denied her 56(d) motion, she requested an opportunity to file her own statement of facts and memorandum of law in opposition to Donaghy's motion. JA 121.[2]

On February 12, 2014, the district court denied Defendants' motions in large part, allowing most of Ms. Morales's claims to move forward.[3] As relevant here, the court held that Ms. Morales plausibly alleged that Defendants Chadbourne and Riccio were directly responsible for the policies and practices that caused her detention in violation of her Fourth Amendment rights, and that "the facts in her complaint permit reasonable inferences to be drawn that these two individuals showed deliberate indifference and therefore are liable for the Fourth Amendment violations she alleges." JA 186. Defendants Chadbourne and Riccio appeal this ruling.

As to Defendant Donaghy, the district court denied his motion to dismiss the Equal Protection claim, holding that Ms. Morales's allegations that he used her national origin as the "basis for her loss of liberty," without other reliable

[2] Ms. Morales's motion was initially styled as a "Rule 56(f) motion," JA 108, referring to the pre-2010 version of the Federal Rules. In 2010, the former Rule 56(f) was redesignated as Rule 56(d) "without substantial change." Fed. R. Civ. P. 56 advisory committee's notes to 2010 amendments. This brief uses the current designation, including when quoting pre-2010 case-law.

[3] The district court granted Defendants' motions to dismiss Ms. Morales's procedural due process claim. That ruling is not at issue in this appeal, as there is not yet a final judgment under Fed. R. Civ. P. 54(b). Ms. Morales's other claims—including her claims for injunctive relief—survived the motions to dismiss, and discovery has recently begun. *See* JA 21.

indications that she was a removable non-citizen, stated a claim for relief under the Equal Protection clause. JA 193. Defendant Donaghy does not appeal this 12(b)(6) ruling; his opening brief contains no argument that the complaint falls short of stating a claim for relief under the Equal Protection clause. *See infra* Section (I).

The district court also denied Defendant Donaghy's summary judgment motion, holding that he was not entitled to qualified immunity on either the Fourth Amendment or Equal Protection claim. JA 190,194. In so holding, the district court implicitly granted Ms. Morales's request for discovery under Federal Rule 56(d), which provides that when a non-movant shows she needs discovery to oppose a summary judgment motion, "the court may . . . deny" the summary judgment motion and permit discovery. Fed. R. Civ. P. 56(d)(1). Defendant Donaghy has appealed the district court's summary judgment ruling as to both the Fourth Amendment and Equal Protection claims—and, although he does not mention Ms. Morales's Rule 56(d) motion in his opening brief, his appeal also necessarily asks this Court to overturn the district court's determination that she was entitled to discovery.

SUMMARY OF ARGUMENT

The district court's decision was correct on all counts.

As to Defendant Donaghy, the district court was well within its discretion in denying his premature motion for summary judgment and allowing Ms. Morales to proceed to discovery. *See infra* Section I(A). It is widely recognized that when a non-moving party makes a timely request for discovery under Rule 56(d), rejecting the request and granting summary judgment to the movant—as Defendant Donaghy contends the district court should have done—is strongly disfavored. That is particularly true here, where Defendant Donaghy moved for summary judgment before discovery *had even begun*. The district court was clearly correct in refusing to grant summary judgment based solely on the movant's own self-serving declarations, before Ms. Morales had any opportunity to question him, test his assertions, or conduct any discovery whatsoever. Defendant Donaghy has offered no reason why the Court should reverse that determination.

Even setting aside the lack of any discovery, Defendant Donaghy's appeal fails because he asks the Court to presume that *his* version of the facts is true, contrary to the rule that "inferences [must be drawn] in favor of the nonmovant," *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014), and to hold that he is entitled to qualified immunity as a matter of law based on the conclusory representations in his own declarations. He argues that the district court gave insufficient weight to his assertions in finding that genuine questions of material fact remained—but this is precisely the sort of fact-bound contention that cannot be reviewed on

interlocutory appeal. *See infra* Section I(B)(1) (Fourth Amendment), I(C)(1) (Equal Protection). Finally, even if discovery *had* been conducted and Donaghy's assertions were truly undisputed, those assertions do not remotely establish that he is entitled to summary judgment on either the Fourth Amendment or Equal Protection claims, as there remain genuine questions of material fact about whether he acted reasonably in light of clearly established law. *See infra* Section I(B)(2) (Fourth Amendment), I(C)(2) (Equal Protection).

As to Defendants Chabourne and Riccio, their appeal of the district court's 12(b)(6) ruling rests on a narrower, but likewise unfounded, ground. They argue that the district court should have granted their motion to dismiss Ms. Morales's Fourth Amendment claim because, in their view, they cannot be held liable without prior case-law specifically holding *supervisors* responsible for promulgating unlawful immigration detainer policies. But as the Supreme Court and this Court have repeatedly held, there is no need for a factually identical prior case for a right to be clearly established. This Circuit's case-law clearly established that supervisors can be personally liable for their role in creating or condoning policies and practices that cause constitutional violations. It was equally well established that detention without probable cause—in the immigration context as in the criminal context—violates the Fourth Amendment. Thus, Defendants were on notice that they could be personally liable for promulgating or condoning policies

and practices that made unlawful detentions like Ms. Morales's a near inevitability. *See infra* Section II. Taking the complaint's allegations as true, as it must on a motion to dismiss, the district court was correct in concluding that Defendants Chadbourne and Riccio are not entitled to qualified immunity.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED DEFENDANT DONAGHY'S PRE-DISCOVERY MOTION FOR SUMMARY JUDGMENT ON THE FOURTH AMENDMENT AND EQUAL PROTECTION CLAIMS.

Defendant Donaghy appeals only the district court's denial of summary judgment. He never moved to dismiss the Fourth Amendment claim before the district court. In fact, he expressly conceded that the complaint "would survive a motion to dismiss for failure to state a claim" under the Fourth Amendment, *see* Addendum 4, and "[i]t is well established that this court will not consider an argument presented for the first time on appeal." *Villafañe-Neriz v. FDIC*, 75 F.3d 727, 734 (1st Cir. 1996). In addition, although he did move to dismiss the Equal Protection claim below, he has waived any challenge to the district court's denial of his 12(b)(6) motion because his opening brief makes no attempt to argue that the complaint's allegations, if taken as true, fail to state a claim for relief. *See* Appellants' Br. at 14-15, 33-36; *see also DeCaro v. Hasbro, Inc.*, 580 F.3d 55, 64 (1st Cir. 2009) ("It is common ground that contentions not advanced in an

appellant's opening brief are deemed waived.").[4] He appeals only the district court's summary judgment ruling—which, as explained below, necessarily includes the court's implicit grant of Ms. Morales's request for discovery under Rule 56(d).

The district court's decision should be affirmed. As explained below, to rule in Defendant Donaghy's favor and award him summary judgment on either the Fourth Amendment claim or the Equal Protection claim, this Court would have to (1) hold that the district court abused its discretion and should instead have denied Ms. Morales's Rule 56(d) request for discovery; (2) disregard the clear jurisdictional limits on interlocutory appeal and weigh Defendant Donaghy's fact-intensive arguments for summary judgment, crediting *his* untested version of the facts; *and* (3) hold that there are no genuine questions of material fact regarding the reasonableness of Donaghy's actions, despite numerous material questions that his declarations leave unanswered and decades of legal precedent clearly establishing that the Constitution does not permit imprisonment without probable

[4] In a footnote at the end of the brief, Defendant Donaghy cites two cases pertaining to the pleading standard under Rule 8, but he uses them to argue that he is entitled to qualified immunity "as a matter of law"—that is, on summary judgment. Appellants' Br. at 36 n.15; *see also* Fed. R. Civ. P. 56(a). This footnote does not appear to advance any separate challenge to the district court's ruling on the motion to dismiss. If Donaghy intended it to do so, that argument would be waived. *Cf. Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 60 n.17 (1st Cir.1999) ("arguments raised only in a footnote or in a perfunctory manner are waived").

cause or on the basis of one's race, ethnicity, or national origin. If the Court disagrees with any one of these propositions—and, as explained below, it should disagree with all of them—the district court's decision must be affirmed.

A. The District Court Acted Well Within Its Discretion in Denying Defendant Donaghy's Premature Summary Judgment Motion and Permitting Discovery as Rule 56(d) Permits.

The district court's decision to deny Defendant Donaghy's summary judgment motion and allow Ms. Morales to begin discovery was unquestionably correct. Defendant Donaghy moved for summary judgment before Ms. Morales had *any* opportunity to conduct discovery in this case. His summary judgment motion is plainly premature, and the district court correctly denied it.

Granting summary judgment before discovery has begun is exceptionally rare. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986) ("Th[e] requirement [that the non-moving party set forth facts showing a genuine issue for trial] . . . is qualified by Rule 56([d])'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition."); *Hellstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000) ("Only in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery."). Even in the qualified immunity context, this Court has explained that claims against a defendant may be dismissed prior to

discovery only if the defendant's entitlement to qualified immunity "is manifest from the pleadings." *Unwin v. Campbell*, 863 F.2d 124, 132 n.5 (1st Cir. 1988), *abrogated on other grounds by Johnson v. Jones*, 515 U.S. 304 (1995). Otherwise, where "defendant's qualified immunity claim takes the form of a full-blown motion for summary judgment, there must be adequate opportunity before the court rules for the parties to engage in discovery or otherwise to generate the appropriate supporting materials." *Unwin*, 863 F.2d at 132 n.5.

Defendant Donaghy does not argue that his entitlement to qualified immunity is "manifest from the pleadings." *Id*. On the contrary, he chose not to seek dismissal of the Fourth Amendment claim before the district court, and he has not appealed the district court's denial of his motion to dismiss the Equal Protection claim. Rather, Donaghy's argument that he is entitled to summary judgment depends entirely on his *own* proffered version of the facts, as set forth in his declarations, which he asks the Court to accept as true. In effect, Donaghy asks this Court to discard Ms. Morales's well pleaded allegations, to credit his own factual assertions in their place, and to grant him summary judgment on the basis of his substitute facts without permitting any discovery whatsoever.

Ms. Morales invoked the protection of Federal Rule of Civil Procedure 56(d), explaining that, without discovery, she "cannot present facts essential to justify [her] opposition." Fed. R. Civ. P. 56(d); *see also* JA 108-22 (Plaintiff's

56(d) motion). In such situations, Rule 56(d) provides that "the court may . . . defer considering the [summary judgment] motion *or deny it*." Fed. R. Civ. P. 56(d)(1) (emphasis added). Here, the district court denied Defendant Donaghy's summary judgment motion, *see* JA 189-90, 204, and in so doing, it also implicitly granted Ms. Morales's Rule 56(d) motion, permitting discovery to begin. *Cf. Sheinkopf v. Stone*, 927 F.2d 1259, 1263 (1st Cir. 1991) (district court "impliedly . . . denied the [56(d)] motion" when it granted summary judgment).

Defendant Donaghy's opening brief omits any mention of Ms. Morales's Rule 56(d) motion. Instead, it repeatedly describes his self-serving declarations as "undisputed," even though Ms. Morales specifically sought to test and contextualize them through discovery. Appellants' Br. at 17, 26. Despite his silence on the topic, Donaghy's appeal necessarily asks this Court to *reverse* the district court's Rule 56(d) ruling and enter summary judgment in his favor without any discovery at all, in the face of Ms. Morales's timely and properly presented Rule 56(d) motion and the district court's implicit grant of that motion. Such a ruling would be unprecedented.

Given the district courts' "considerable discretion" over discovery matters, the First Circuit has made clear that it reviews a district court's ruling on a Rule 56(d) motion "only for abuse of discretion." *Resolution Trust Corp. v. N. Bridge Assocs., Inc.*, 22 F.3d 1198, 1203 (1st Cir. 1994). Normally, Rule 56(d) comes into

play when the parties have already conducted some discovery, one party moves for summary judgment, and the non-movant seeks additional time to discover specific facts necessary for its opposition. In such cases, this Court has instructed that Rule 56(d) motions should be granted "liberally." *Id*. The presumption in favor of granting Rule 56(d) motions is even stronger in a case like this one, where Ms. Morales had no opportunity whatsoever to conduct discovery.

Defendant Donaghy has not cited a single case where an appellate court has done what he is asking this Court to do: to reverse a district court's decision to allow discovery when a non-movant filed a timely motion under Rule 56(d), and to award summary judgment to the movant before any discovery has begun. Nor is Plaintiff aware of any such cases. On the contrary, this Court and others have held time and again that granting summary judgment in such circumstances will generally be an abuse of discretion—particularly where, as here, the summary judgment motion turns on self-serving affidavits or facts in the exclusive control of the moving party. *See, e.g.*, *Resolution Trust Corp.*, 22 F.3d at 1208 (vacating grant of summary judgment and reversing denial of Rule 56(d) request where "the facts needed to oppose summary judgment are in [movant's] exclusive control"); *Carmona v. Toledo*, 215 F.3d 124, 133 (1st Cir. 2000) (same, where "plaintiffs' case turns . . . largely on their ability to secure evidence within the possession of defendants"); *CenTra, Inc. v. Estrin*, 538 F.3d 402, 420 (6th Cir. 2008) (same,

where non-movant "was given no opportunity to conduct the discovery that would be necessary for [it] to oppose [movant's] summary judgment motion"); *Doe v. Abington Friends Sch.*, 480 F.3d 252, 257-58 (3d Cir. 2007) (same, where summary judgment was premised on "a single affidavit offered by the *movant*" and non-movant had no opportunity "to develop the record as to potentially relevant facts") (emphasis in original); *Castro v. United States*, 34 F.3d 106, 112 (2d Cir. 1994) (vacating grant of summary judgment because "[t]he court erred in taking the federal agents' affidavits at face value and denying [non-movant's request for] discovery").

Defendant Donaghy argues generally that qualified immunity confers "'a limited entitlement not to stand trial or face the other burdens of litigation,'" including discovery. Appellants' Br. at 9 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009)). But that is true only if the pleadings are *insufficient* to state a claim for relief. *See Iqbal*, 556 U.S. at 686 (holding that plaintiff's "complaint [wa]s deficient under Rule 8"). The Supreme Court has made clear that "[i]f the plaintiff's action survives the[] initial hurdle[]" of a motion to dismiss, "the plaintiff ordinarily will be entitled to some discovery." *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998). Here, Defendant Donaghy has *conceded* that the complaint states a Fourth Amendment claim against him, and the district court found (and Donaghy does not challenge) that it states an Equal Protection claim as

well. Nothing in *Iqbal* suggests a defendant may misuse Rule 56 to evade discovery under these circumstances.

The district court was entirely correct in denying Donaghy's motion for summary judgment and allowing discovery to proceed. Ms. Morales's Rule 56(d) proffer meets all the requirements set out in *Resolution Trust Corp*., 22 F.3d at 1203. First, it is "authoritative," *id*., as it is based on the "written representations of [Ms. Morales's] counsel subject to the strictures of Fed. R. Civ. P. 11." *Vargas-Ruiz v. Golden Arch Dev., Inc*., 368 F.3d 1, 4 (1st Cir. 2004) (citation omitted). Second, it was "advanced in a timely manner," as Ms. Morales filed it within the deadline for responding to Defendant Donaghy's motion. *Resolution Trust Corp*., 22 F.3d at 1203. And third, it amply explained why Ms. Morales was "unable currently to adduce the facts essential to opposing summary judgment," *id.*, because discovery had not begun and the relevant facts were within Defendant's possession and knowledge. *See* JA 114-17.[5]

[5] In addition to these three requirements, *Resolution Trust Corp*. held that when a non-movant seeks the protection of Rule 56(d) because of "*incomplete* discovery," she must also "show good cause for the failure to have discovered the facts sooner; . . . set forth a plausible basis for believing that specified facts . . . exist; and . . . indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion." 22 F.3d at 1203 (emphasis added). Because discovery had not begun in this case, Ms. Morales was not required to make this additional showing. Nevertheless, she proffered a detailed list of questions raised by Donaghy's declarations, the facts she expects to uncover in discovery, and the reasons why those facts will be central to resolving the summary judgment motion. *See* JA 116-21, 163-69.

In particular, Ms. Morales explained that she had no opportunity to depose Defendant Donaghy or obtain any evidence regarding the databases he allegedly searched, the communications he received, or the information available to him at the time he issued Ms. Morales's detainer—all of which are essential to determining whether he had probable cause to authorize her detention and whether he acted reasonably or discriminatorily. *See* JA 115, 117-20. As this Court has held, when the "facts needed to oppose summary judgment are in [the movant]'s exclusive control[,]" requests for discovery under Rule 56(d) "should be routinely granted." *Resolution Trust Corp*., 22 F.3d at 1208 (internal quotation marks omitted); *accord Carmona*, 215 F.3d at 133. Similarly, where the movant's intent is at issue—as it is here for purposes of the Equal Protection claim—granting summary judgment before the non-movant has had an opportunity to depose the movant would be particularly inappropriate. *See, e.g.*, *Hellstrom*, 201 F.3d at 97-98.

The district court's decision is in good company. Numerous other courts have rejected ICE's attempts to circumvent well pleaded allegations and prevent discovery in similar cases involving ICE's detainer issuance and arrest practices. *See, e.g., Uroza v. Salt Lake County et al.,* No. 11-713, 2014 WL 4457300, at *9 (D. Ut. Sept. 10, 2014) (unpub.) (denying ICE agents' summary judgment motion based on their "untested declarations"); *Mendoza v. Osterberg*, No. 13-65, 2014

WL 3784141, at *1 (D. Neb. July 31, 2014) (unpub.) (declining to consider ICE agent's declaration and summary judgment motion "[i]n light of the fact that no discovery has been undertaken"); *Galarza v. Szalczyk*, No. 10-6815, 2011 WL 1045119, at *2 (E.D. Pa. Mar. 21, 2011) (unpub.) (rejecting ICE agent's opposition to plaintiff's motion for discovery); *Vohra v. United States*, No. 04-0972, 2010 U.S. Dist. LEXIS 34363, at *28-29 (C.D. Cal. Feb. 4, 2010) (R&R) (denying summary judgment motion based on agent's untested declaration), *adopted*, 2010 U.S. Dist. LEXIS 34088 (C.D. Cal. Mar. 29, 2010) (unpub.); *Castillo v. Skwarski*, No. 08-5683, 2009 WL 4844801, at *11 (W.D. Wash. Dec. 10, 2009) (unpub.) (denying pre-discovery summary judgment motion). The district court here was well within its discretion in doing the same.

In sum, Defendant Donaghy's appeal brief asks this Court to do something unprecedented: to reverse the district court—despite the highly deferential nature of abuse-of-discretion review—and grant him summary judgment based on his own closed universe of facts that Ms. Morales had no opportunity to test. He offers no support for this radical argument; there is none. The district court acted well within its "considerable discretion" in denying Defendant Donaghy's pre-discovery summary judgment motion and granting Ms. Morales the opportunity to begin discovery, and its decision should be affirmed. *Resolution Trust Corp.*, 22 F.3d at 1203.

B. Even if There Had Been an Opportunity for Discovery, Defendant Donaghy Is Not Entitled to Summary Judgment on Ms. Morales's Fourth Amendment Claim.

The lack of any discovery is reason enough to affirm the district court's denial of Defendant Donaghy's summary judgment motion in its entirety; the Court need go no further to resolve Donaghy's portion of the appeal. But there are also additional, independent reasons why Defendant Donaghy is not entitled to summary judgment on Ms. Morales's Fourth Amendment claim at this stage.

First, as explained in Section I(B)(1) below, Defendant Donaghy's arguments fall outside the Court's limited jurisdiction over interlocutory appeals, as they depend wholly upon his own untested version of the facts. Second, as explained in Section I(B)(2), even setting aside this jurisdictional bar and taking the assertions in Donaghy's declarations as uncontested, he falls far short of establishing that he is entitled to qualified immunity on the record he has advanced here. Ms. Morales's constitutional right to be free from investigative detention without probable cause has long been clearly established, and Defendant Donaghy's declarations raise many genuine questions of material fact regarding whether he acted reasonably in light of that clearly established law. To prevail in his appeal, Defendant Donaghy would need to overcome both these obstacles. He has not done so.

1. Defendant Donaghy's argument for reversal is barred by the limitations on the Court's interlocutory appeal jurisdiction.

As the Court recently reiterated, its jurisdiction on interlocutory appeal is limited: "We have jurisdiction over an interlocutory appeal of a denial of summary judgment on qualified immunity only insofar as the appeal rests on legal, rather than factual grounds." *Cady v. Walsh*, 753 F.3d 348, 350 (1st Cir. 2014) (citing *Johnson*, 515 U.S. at 313). When deciding an interlocutory appeal, the Court does not weigh the sufficiency of the evidence; rather, it considers only legal questions, taking "the facts in the light most favorable to the non-moving party, [and] taking as unchallenged any inferences that the district court drew in that party's favor." *Cady*, 753 F.3d at 350.

Defendant Donaghy's arguments on appeal fall afoul of this rule. His arguments are heavily fact-dependent and grounded entirely in *his own version* of the facts: the steps he allegedly took before issuing Ms. Morales's detainer, the information allegedly available to him, and the conclusions he drew. *See* Appellants' Br. at 17-21; *see, e.g.*, *id.* at 19 (arguing that Donaghy acted "on the facts available to him based on his investigation"). He characterizes these facts as "undisputed," *id.* at 17, but that is flatly wrong—Ms. Morales has not yet been given a chance to dispute them. *See supra* at Section (I)(A); *see also* JA 121 (if the district court did not grant her request for discovery, Ms. Morales "request[ed] an

opportunity to file a statement of disputed facts and . . . [an] opposition to Defendant Donaghy's motion"). Ultimately, because the district court denied Defendant Donaghy's summary judgment motion, Ms. Morales had neither the opportunity nor the need to file her own statement of facts or a response to Defendant Donaghy's statement of facts.

Defendant Donaghy cannot *both* avail himself of this Court's limited jurisdiction over interlocutory appeals *and* ask it to decide the appeal based on his own hand-picked version of the facts. On the contrary, defendants seeking interlocutory appeal of qualified immunity rulings generally must "accept[] as true all facts and inferences proffered by *plaintiffs*, and . . . argue that even on *plaintiffs'* best case, they are entitled to immunity." *Mlodzinski v. Lewis*, 648 F.3d 24, 28 (1st Cir. 2011) (emphasis added). Where a defendant fails to make such a case, the proper course is to dismiss the appeal. *See Cady*, 753 F.3d at 360-61 (dismissing interlocutory appeal for want of jurisdiction because defendants failed to "develop the argument that, even drawing all the inferences [in plaintiffs' favor] as the district court concluded a jury permissibly could, they are entitled to judgment as a matter of law").

Like the defendants in *Cady*, Defendant Donaghy has made no attempt to show that he is entitled to summary judgment on Ms. Morales's version of the facts. Nor could he. He already conceded before the district court that Ms.

Morales's version of the facts (as set forth in the complaint) stated a cause of action under the Fourth Amendment, and then waived any challenge to the denial of his motion to dismiss the Equal Protection claim. His arguments on appeal are entirely tied to his own substitute allegations. For this additional reason, his appeal must be dismissed.

2. Even if the assertions in Defendant Donaghy's declarations were undisputed, they do not establish that he is entitled to summary judgment on the Fourth Amendment claim.

Given the lack of any discovery and the limited nature of the Court's jurisdiction on interlocutory appeal, Defendant Donaghy's arguments that he is entitled to summary judgment on this one-sided record are not properly before the Court. Nevertheless, this section shows that even if Donaghy's summary judgment motion were not premature and his factual assertions were indeed undisputed as he claims, he still would not be entitled to summary judgment, as numerous genuine questions of material fact remain unanswered.

Ms. Morales's Fourth Amendment claim is straightforward. On May 4, 2009, she was entitled to release on recognizance from state criminal custody. JA 33-34 (¶¶43-46). Yet, based solely on the ICE detainer request from Defendant Donaghy, she was not released. Instead, she was strip-searched, re-booked into RIDOC custody, and held in a jail cell for 24 more hours at ICE's request—

without probable cause, or even the assertion of probable cause, to believe she had violated any law—so that ICE could "investigat[e]" her immigration status. JA 61.

This was inarguably a full-scale seizure for Fourth Amendment purposes. It has long been clear 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." *Dunaway v. New York*, 442 U.S. 200, 216 (1979). Such detention, including in the immigration context, must be based on probable cause. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975). As explained below, each of Defendant Donaghy's attempts to side-step this clearly established law fails.

i. The ICE detainer unequivocally requested and caused Ms. Morales's detention.

First, Defendant Donaghy suggests that he could not have been expected to know that the detainer would cause Ms. Morales's detention. *See* Appellants' Br. at 27 (arguing that "[a]n immigration detainer does not itself constitute an arrest; rather it facilitates access by federal officers to the person in the custody of another government," such as "arranging for an interview").[6] Donaghy did not advance

[6] Donaghy never interviewed Ms. Morales, or even attempted to. *See* Appellants' Br. at 33 (stating that Donaghy "never met or even talked to Ms. Morales before issuing an ICE detainer"); JA 150 (¶13) (admitting he "did not speak to anyone" at RIDOC before issuing the detainer because he believed he "had no reason to."). In any event, if he had simply wanted to interview Ms. Morales without extending her detention, he would not have needed to issue a

this argument before the district court, which is one reason the Court should reject it here. *See Villafañe-Neriz*, 75 F.3d at 734.[7] Even if it were not waived, however, his contention that ICE detainers do not cause detention is preposterous and should be rejected. It is perfectly clear that *detention* was the detainer's express purpose.

Defendant Donaghy issued a detainer that, on its face, directed RIDOC to "detain" Ms. Morales. JA 61. In relevant part, it read as follows:

> Federal regulations (8 CFR 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sunday's [sic], and Federal holidays) to provide adequate time for [ICE] to assume custody of the alien.

JA 61. The federal regulation likewise provides that when ICE issues a detainer to another law enforcement agency, the detainer serves as a "request" that the agency "maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays" after the person would "not otherwise [be] detained." 8 C.F.R. § 287.7(d). Ms. Morales alleged that Defendant Donaghy

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detainer to do so. *See* 8 C.F.R. § 287.8(b)(1) (permitting immigration officers to "ask questions of anyone as long as the immigration officer does not restrain the freedom of [the] individual").

[7] The only hint of such an argument appeared in a footnote in Donaghy's summary judgment reply brief, which asserted, without support, that "[b]ecause a detainer is merely a request and does not necessarily result in custody, probable cause is not required at the time the detainer is issued." JA 128 n.3. This is nonsensical. By Donaghy's logic, an officer applying for a a criminal arrest warrant would not need probable cause either, because it is theoretically possible the executing officer might decide not to execute it. That is not the law. *See Malley v. Briggs*, 475 U.S. 335, 343-46 (1986) (officer who sought warrant without probable cause could be held liable even if another officer executed it).

issued the detainer "with the intention and expectation" that it would cause her extended imprisonment, JA 32 (¶34), and he never contested this allegation below. On the contrary, he and the other federal Defendants affirmatively told the district court that ICE "expects state entities to cooperate *and detain* aliens upon receipt of a detainer," and opined that "[t]he state is entitled to rely on the detainer" as providing legal authority for such detention. Memorandum of Federal Defendants, Dkt. #29 at *3, No. 12-0301 (D. R.I. filed Nov. 5, 2012) (attached as Addendum 9) (emphasis added).[8]

Thus, there is no doubt that the detainer requested Ms. Morales's detention. Moreover it has long been settled that, where one officer requests or authorizes another officer to effectuate a seizure without probable cause, the requesting officer may be liable for the resulting Fourth Amendment violation. *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986) (explaining that each actor is "responsible for the natural consequences of his actions") (citation omitted); *accord Kilbourn v. Thompson*, 103 U.S. 168, 200 (1880).

That principle holds true whether the request is communicated by a warrant, a telephone call, or some other means. *See, e.g.*, *Malley*, 475 U.S. at 343-46

[8] *See also* Order, *Gonzalez v. ICE*, No. 13-04416, Dkt. #42, at *8 (C.D. Cal. July 28, 2014) (unpub.) (holding that because "immigration detainers are intended to—and actually do—induce law enforcement agencies to incarcerate individuals beyond the time they would otherwise be released," the detention is "directly traceable to ICE").

(holding that officer who applied for an arrest warrant could be liable for the resulting arrest if a reasonable officer would have known the application lacked probable cause; remanding for trial); *Torres Ramirez v. Bermudez Garcia*, 898 F.2d 224, 227 (1st Cir. 1990) (marshal who unreasonably "recirculat[ed]" a vacated warrant could be liable for the resulting arrest); *Rogers v. Powell*, 120 F.3d 446, 451, 455-56 (3d Cir. 1997) (trooper who "radioed [other officers] and told them that if they found [plaintiff], they should arrest him," without sufficient basis to believe an arrest warrant existed, could be liable for the resulting arrest). The fact that Defendant Donaghy used an ICE detainer to make the request here, as opposed to a phone call or some other form of communication, does nothing to muddy this clearly established law.

ii. It is clearly established that the Fourth Amendment requires all imprisonment, including imprisonment on an ICE detainer, to be supported by probable cause.

Decades of Supreme Court case-law foreclose Defendant Donaghy's next argument: that it was not clearly established in 2009 whether imprisonment on an ICE detainer must be supported by probable cause. Appellants' Br. at 26.

It is the most basic rule of Fourth Amendment law that being held in jail—regardless of whether it is "termed [an] 'arrest' or [an] 'investigatory detention[]'"—is a full-scale seizure that triggers the Fourth Amendment's protections, including the requirement of probable cause. *Dunaway v. New York*,

442 U.S. 200, 215-16 (1979). Indeed, nearly 40 years ago, the Supreme Court invalidated an arrest "for investigation" that lacked probable cause, noting that "[t]he impropriety of the arrest was *obvious*." *Brown v. Illinois*, 422 U.S. 590, 605 (1975) (internal quotation marks omitted; emphasis added). Defendant Donaghy's request to detain Ms. Morales based on the "initiat[ion]" of an "[i]nvestigation" flies in the face of this longstanding law. JA 61.

Further, when a person who was initially lawfully detained is kept in custody or returned to custody for a new purpose after she should be released, as Ms. Morales was, it is well settled that she is subjected to a new "seizure" for Fourth Amendment purposes—one that must be supported by a new probable cause justification. *See Illinois v. Caballes*, 543 U.S. 405, 407-08 (2005) (once the initial reason for a seizure is resolved, officers may not prolong the detention without a new, constitutionally adequate justification); *Hall v. Ochs*, 817 F.2d 920, 924 (1st Cir. 1987) (where officer initially arrested plaintiff on misdemeanor charges, but then kept him in jail "for the sole purpose" of coercing him into signing a waiver of his rights, officer "violated his [F]ourth [A]mendment right to freedom from unreasonable seizures of his person"); *Ierardi v. Gunter*, 528 F.2d 929, 930 (1st Cir. 1976) (prisoner serving sentence in Massachusetts could not be extradited to Florida to stand trial for a different crime without a new "judicial determination of

probable cause as a prerequisite to interstate extradition," as the Fourth Amendment requires).[9]

It is equally well settled that the Fourth Amendment's probable cause requirement applies in the immigration context, just as it does in the criminal context. In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Supreme Court made clear that "[t]he Fourth Amendment applies to *all* seizures of the person," including those for immigration purposes. *Id.* at 878 (emphasis added). Thus, the Court held, immigration agents may make "brief[]" vehicle stops for questioning based on reasonable suspicion, "but any further detention . . . must be based on . . . probable cause." *Id.* at 881-82.[10]

Indeed, the agency itself has long recognized that the Fourth Amendment's probable cause requirement applies in the detainer context specifically. Over 20

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[9] *Accord Lee v. City of Los Angeles*, 250 F.3d 668, 677-78, 685 (9th Cir. 2001) (plaintiff stated Fourth Amendment claim against officers who, after initially arresting him on unrelated charges, subjected him to a new seizure on an out-of-state warrant); *Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 592 (10th Cir. 1999) ("A legitimate-though-unrelated criminal arrest does not itself give probable cause to detain the arrestee [for a separate civil purpose]."); *Barnes v. Dist. of Columbia*, 242 F.R.D. 113, 118 (D.D.C. 2007) (plaintiffs were "essentially . . . re-seized" for Fourth Amendment purposes when, "despite being entitled to release, they were taken back into custody").

[10] *Brignoni-Ponce* recognized that, in the immigration context as elsewhere, certain brief, "limited" seizures can be supported by the lower evidentiary standard of reasonable suspicion. 422 U.S. at 880 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). In contrast, Ms. Morales's imprisonment for approximately 24 hours on the ICE detainer was a full-scale seizure, not a limited *Terry* stop.

years ago, ICE's predecessor, the Immigration and Naturalization Service ("INS"), stated in its policy manual that "[a] detainer placed under [what is now 8 C.F.R. § 287.7] is an arrest which must be supported by probable cause."[11] Even earlier, the INS stipulated in a class action lawsuit:

> An immigration hold [i.e., a detainer] is an arrest without warrant [and thus] . . . may only be authorized by an officer of the INS . . . when the officer has determined that there is probable cause to believe that the person to be held (a) is an alien, (b) is in the United States in violation of the immigration laws, and (c) is likely to escape before a warrant can be obtained for his arrest.

Cervantez v. Whitfield, 776 F.2d 556, 560 (5th Cir. 1985). As recently as 2011, ICE's counsel reiterated in federal court that "[i]t is beyond argument that an immigration detainer issued on less than probable cause is improper." Reply Brief of ICE Agent Szalczyk, Dkt. #64, at *6, *Galarza v. Szalczyk*, No. 10-06815 (E.D. Pa. filed July 1, 2011).[12]

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[11] INS, *The Law of Arrest, Search, and Seizure for Immigration Officers*, VII-2 (1993), *available at* http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Miller%20Deposition_Exhibit%205.pdf. Plaintiff cited this manual to the district court at JA 168. If the Court reaches this question on appeal, Plaintiff requests that it take judicial notice of this document, which is an official government publication whose accuracy is "'not subject to reasonable dispute.'" *Gent v. CUNA Mut. Ins. Society*, 611 F.3d 79, 84 n.5 (1st Cir. 2010) (citing Fed. R. Evid. 201(b)).

[12] If the Court reaches this question, Plaintiff requests that it take judicial notice of this publicly available filing. *See Kowalski v. Gagne*, 914 F.2d 299, 305 (1st Cir. 1990) ("[F]ederal courts may take judicial notice of proceedings in other courts if those proceedings have relevance to the matters at hand.").

Against this unequivocal backdrop, no reasonable official could have doubted that the Fourth Amendment's most basic requirement—that full-scale seizures must be supported by probable cause—applied here. Ms. Morales's ICE detainer specifically requested and purported to authorize her imprisonment in a jail cell for 48 hours, plus weekends and holidays. Thus, it inarguably caused a full-scale seizure that could only be lawful if supported by probable cause to believe she was a removable non-citizen.

ICE now attempts to inject uncertainty into this settled law, arguing that "it was an open question in 2009 whether an ICE agent was required to have probable cause before issuing a detainer." Appellants' Br. at 26. That argument is flatly at odds with the decades of authority cited above, and numerous courts have rightly rejected this argument where ICE and other defendants have raised it in recent litigation. *See, e.g.*, *Mendoza*, 2014 WL 3784141, at *6 ("in order to issue a detainer there must be probable cause to believe that the subject . . . is . . . an alien who . . . is not lawfully present in the United States") (internal quotation marks and citation omitted); Order, *Gonzalez v. ICE*, No. 13-04416, Dkt. #42, at *12 (C.D. Cal. July 28, 2014) (unpub.) ("[p]robable cause is necessary" for the issuance of ICE detainers); *Miranda-Olivares v. Clackamas County*, -- F.Supp.2d --, No. 12-02317, 2014 WL 1414305, at *9, *10 (D. Or. Apr. 11, 2014) (the "continuation of [plaintiff's] detention based on the ICE detainer" constituted a "new arrest, and

must be analyzed under the Fourth Amendment"); *Uroza v. Salt Lake County*, No. 11-713, 2013 WL 653968, at *6 (D. Ut. Feb. 21, 2013) (unpub.) (finding it clearly established that "immigration enforcement agents need probable cause to arrest . . . [and] that detainees who post bail should be set free in the absence of probable cause to detain them again") (citations omitted); *Galarza v. Szalczyk*, No. 10-6815, 2012 WL 1080020, at *10, *13 (E.D. Pa. Mar. 30, 2012) (unpub.) (where plaintiff "would have been released on bail . . . but for the immigration detainer," it was clearly established that the "detainer caused a seizure" that must be supported by "probable cause"), *rev'd on other grounds*, 745 F.3d 634 (3d Cir. 2014).[13]

To be clear, these decisions post-date Ms. Morales's detention in 2009, but they are based on Fourth Amendment law that long pre-dates 2009, and their unanimity underscores how well settled the law is. For example, in *Galarza*—a case involving a U.S. citizen who was held in jail on an ICE detainer for three days after he posted bail—the court held that his right not to be imprisoned without probable cause to believe that he was a removable non-citizen was clearly established in 2008. *Galarza*, 2012 WL 1080020, at *15. Similarly, in *Lyttle*—a case involving another U.S. citizen who was detained by ICE and subsequently

[13] *Cf. Ortega v. ICE*, 737 F.3d 435, 441 (6th Cir. 2013) (granting qualified immunity because it was not clearly established in 2011 whether "moving a convict from home confinement to prison confinement resulted in a new seizure," as the prisoner is still in criminal custody serving his sentence and the detainer does not extend his detention), *cert. petition filed* (No. 13-1059 filed Mar. 5, 2014).

deported to Mexico—the district court held that it was clearly established in 2008 that, "[t]o seize and detain a person for being an illegal alien, an officer must have probable cause to believe that the individual is an illegal alien." *Lyttle v. United States*, 867 F. Supp. 2d 1256, 1281 (M.D. Ga. 2012) (citing *Brignoni-Ponce*).

Defendant Donaghy protests that the district court here improperly "relied" on *Galarza* and *Lyttle* as establishing the law in this Circuit, Appellants' Br. at 14, 21, 28-29, but the court did no such thing. Rather, the district court rightly cited them as *additional* support for its conclusion—grounded in *Dunaway*, *Brignoni-Ponce*, *Caballes*, and other authority—that the Fourth Amendment right Ms. Morales asserts was clearly established long before 2009. *See* JA 181, 189-90.[14]

In sum, there is no question that being detained in a jail cell for "investigation" into one's immigration status after one would otherwise be released is a full-scale seizure for Fourth Amendment purposes, and that the right to be free from such seizures without probable cause was clearly established in 2009. A

[14] Defendant Donaghy also takes issue with the district court's citation to *Arizona v. United States*, 132 S.Ct. 2492 (2012), because that decision was issued after 2009. Appellants' Br. at 26. But again, the district court based its holding that the law was clearly established on *Dunaway*, *Brignoni-Ponce*, and other longstanding Fourth Amendment cases; it cited *Arizona* merely as additional support for the already settled proposition that "the Fourth Amendment does not permit seizures for mere investigations." JA 181-82. Moreover, Defendant Donaghy misreads *Arizona* when he says "the Supreme Court was not speaking to the Fourth Amendment standard." Appellants' Br. at 25. Although the Court's holding was based on preemption, the quoted passage was specifically responding to Fourth Amendment concerns raised by *amici*. *See Arizona*, 132 S.Ct. at 2509 (citing *Caballes* and other Fourth Amendment cases).

reasonable ICE agent could not have believed it was legal to imprison someone for 48 hours plus weekends and holidays—up to five days over a long weekend—without probable cause and purely "to investigate the [person's] status," as Donaghy contends. Appellants' Br. at 27. The Supreme Court's unequivocal holdings in *Dunaway*, *Brignoni-Ponce*, and the other authorities discussed above soundly foreclose his argument.

iii. There are genuine questions of material fact regarding whether Defendant Donaghy reasonably caused Ms. Morales's detention in light of clearly established law.

Finally, Defendant Donaghy argues that "[e]ven assuming" the Fourth Amendment's probable cause requirement was clearly established in 2009, "the facts available to Agent Donaghy met that standard and, moreover, there is no case law establishing otherwise." Appellants' Br. at 17. He further protests that the district court erred in relying on *Dunaway* and *Caballes* because "[n]one of these cases address whether *the facts possessed by Agent Donaghy* were sufficient to establish probable cause." *Id*. at 21 n.8 (emphasis added).

Donaghy's argument depends entirely on the Court accepting his version of the facts, and thus, as explained above, it falls outside the narrow scope of interlocutory appeal. *See supra* Section I(B)(1). But even if the Court were to weigh the sufficiency of Donaghy's untested declarations to resolve the question of qualified immunity, his argument fails on its own terms. As the Supreme Court

has made clear, for a right to be clearly established, there is no need for "the very action in question . . . [to have] previously been held unlawful." *Wilson v. Layne*, 526 U.S. 603, 615 (1999); *accord Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances").

For example, this Court held in *Suboh* that even though due process claims depend on context-specific "weighing" of the facts of each case, and even though the Court "found no case exactly on all fours with the facts of this case,"

> [w]e have no doubt that there is a clearly established constitutional right at stake . . . . The difference in contexts in which the right is discussed in the case law does not mean such a right does not exist.

Suboh v. Dist. Attorney's Office of Suffolk Dist., 298 F.3d 81, 94 (1st Cir. 2002). Likewise, in *Limone v. Condon*, 372 F.3d 39 (1st Cir. 2004), the Court held that "the right not to be framed" was a clearly established right, and it rejected the defendants' arguments that the right was "defined . . . too broadly" and that no prior decisions "precisely mirror[ed]" the facts of that case. *Id.* at 46, 48. As *Limone* emphasized, "[g]eneral statements of the law are capable of conveying fair warning," even in novel factual circumstances. *Id.* at 48.

Ms. Morales's right not to be imprisoned for investigation without probable cause was settled beyond question in 2009, as argued above. Defendant Donaghy did not need a case that was *factually* identical to Ms. Morales's to put him on

notice of this most basic of Fourth Amendment requirements. Nor is there anything unfair about requiring Defendant Donaghy, a full-time law enforcement official, to know and obey this basic limitation on his arrest authority. *See* JA 149 (Donaghy stated that issuing detainers was part of his "job duties" as an "Immigration Enforcement Agent").

The remaining question is whether Defendant Donaghy acted reasonably in light of this clearly established law, given the facts available to him at the time. *See Prokey v. Watkins*, 942 F.2d 67, 73-74 (1st Cir. 1991). Even if the Court treated his declarations as undisputed, there remain numerous genuine questions of material fact that would preclude summary judgment.

First, Donaghy alleged that he issued Ms. Morales's detainer based on booking records he received from RIDOC. His declarations stated that "[a]ccording to [RIDOC[15]] records, MORALES claimed to be foreign born from the country of Guatemala," JA 89 (¶3), and that "she had made no claim of being a United States citizen," JA 150 (¶10)—an allegation that directly conflicts with Ms. Morales's own allegation that she *did* tell Rhode Island officials she is a U.S. citizen. *See* JA 30 (¶27). Moreover, Donaghy did not explain how he could possibly have come to the conclusion that Ms. Morales "made no claim of being a

[15] Donaghy's declarations refer to "ACI," the Adult Correctional Institution, which is the facility run by RIDOC. *See* JA 29 (¶22). For the sake of consistency with the district court's decision, this brief uses the term "RIDOC" exclusively.

United States citizen" given his own admissions that citizenship is not one of the categories of information included in the RIDOC records he reviewed, *see* JA 149-50 (¶5), and that he did not speak to Ms. Morales or "anyone at [RIDOC] when [he] issued the detainer." JA 150 (¶13). How, then, could he know whether or not Ms. Morales made a claim of U.S. citizenship?

Even if Defendant Donaghy was unaware of Ms. Morales's claim to U.S. citizenship, his account raises serious questions about the reasonableness of his decision to issue a detainer without first speaking to Ms. Morales or anyone else at RIDOC to inquire into her citizenship. Donaghy asserts that he was unaware of any policies requiring him to "conduct any investigation beyond what [he] did," JA 151 (¶14), but that statement certainly does not establish his reasonableness; it could just as well mean that he had an inadequate knowledge of the policies with which he was supposed to comply, or that the policies themselves were constitutionally deficient.

In fact, even without the benefit of discovery, Ms. Morales's counsel identified three agency documents that undercut Defendant Donaghy's assertion. First is a 2006 ICE Field Manual, which provides that ICE officials taking enforcement actions against "aliens incarcerated in . . . state . . . or local jails" have the following "[r]esponsibilities": "[i]dentify foreign-born inmates; *[i]nterview; establish alienage*; [c]onduct extensive records checks . . . [and] [i]ssue Form I-

247, Immigration Detainer . . . ."[16] Second is a 2008 document describing ICE's jail-screening initiatives, which states that when "local law enforcement agencies notify ICE of a foreign-born detainee[,] then an ICE officer *must conduct an interview* to determine the alienage of the suspect and initiate removal proceedings, if appropriate."[17] Third is a 2008 ICE memorandum stating that when "exercising authority under . . . 8 U.S.C. § 1357,"[18] an ICE officer "must ensure that s/he has reason to believe that the individual to be arrested is in the United States in violation of [federal immigration law]," and that "officers must fully investigate all claims to U.S. citizenship immediately upon learning of the assertion of

[16] ICE Office of Detention and Removal Operations, *DRO Policy and Procedure Manual*, § 11.8(a), (c) (updated Mar. 27, 2006), *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/ICE-DetentionDeportation-OfficerFieldManual.pdf (hereinafter "2006 Policy Manual") (emphasis added). Plaintiff cited to this manual before the district court at JA 164 n.3, 168-69. If the Court reaches this question on appeal, Plaintiff requests that it take judicial notice of this document, which is an official government publication whose accuracy is "'not subject to reasonable dispute.'" *Gent*, 611 F.3d at 84 n.5.

[17] ICE, *Fact Sheet: Secure Communities*, 5 (Mar. 28, 2008), *available at* http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/Secure%20Communities%20Fact%20Sheet%20FINAL%20(3-28-08).doc (emphasis added). Plaintiff cited to this document before the district court at JA 169. If the Court reaches this question on appeal, Plaintiff requests that it take judicial notice of this document, which is an official government publication whose accuracy is "'not subject to reasonable dispute.'" *Gent*, 611 F.3d at 84 n.5

[18] 8 U.S.C. § 1357 provides statutory authority for a variety of warrantless enforcement actions by ICE officers, including the issuance of detainers. *See* 8 U.S.C. § 1357(d).

citizenship."[19] These ICE policies strongly suggest that a reasonable ICE agent would not have caused Ms. Morales's detention by remote control, as it were, without interviewing Ms. Morales or allowing her any way to make a claim of U.S. citizenship. Surely a reasonable fact-finder could so conclude.

Discovery may well uncover other agency policies that bear on the reasonableness of Defendant Donaghy's actions. At this stage, however, there are certainly genuine questions about whether a reasonable official in his position would have issued the detainer before interviewing Ms. Morales, or at least contacting Rhode Island officials for more information.

Second, Defendant Donaghy alleged that he searched the FBI's National Crime Information Center ("NCIC") and a database called the Central Index System ("CIS") before issuing Ms. Morales's detainer, and that his search did not "uncover[] information about Morales's naturalization." JA 150 (¶9, ¶11).[20]

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[19] Memorandum from James T. Hayes, Jr., Director of ICE, *Superseding Guidance on Reporting and Investigating Claims to United States Citizenship*, 1 (Nov. 6, 2008). Plaintiff cited to this document before the district court at JA 168 n.9, and Defendants subsequently produced a copy (attached at Addendum 12).

[20] Donaghy's first declaration referred to "[a] review of the Central Index System ('CIS') database" and a "query[] [of] . . . the NCIC," but he did not specify whether he or someone else performed those searches in May 2009 or at some later date. JA 89, 90 (¶5, ¶8). His subsequent declaration clarified that although he allegedly searched the NCIC and CIS before issuing Ms. Morales's detainer, JA 150 (¶9), he "d[id] not remember exactly" what queries he ran or what results he found on that date. JA 151 (¶¶15-16). The assertions he made in his first declaration about the NCIC and CIS queries were in fact based on "more recent" searches performed in 2012 and 2013, after this litigation began. *Id*.

Because Ms. Morales had no opportunity to view these records or ask Defendant Donaghy any questions, she has no way of knowing what sort of search he performed in 2009 and whether it was reasonable under the circumstances.[21] Donaghy essentially asks the Court to *presume* that his searches were reasonable, but of course, he cannot prevail on summary judgment by presenting partial information and asking the Court to draw unsupported inferences in his favor. *See Tolan*, 134 S. Ct. at 1863.

An officer's determination of probable cause must be evaluated in light of "the information *available* at the time." *Torres Ramirez*, 898 F.2d at 228 (emphasis added). Defendant Donaghy's bare-bones declarations, however, do not establish what information was "available" to him. For example, he did not purport to give a comprehensive account of the information included in either database. He did not say whether they typically contain naturalization information, or if so, how far back in time the records go. He did not explain why, upon finding no information about Ms. Morales's citizenship here, he chose not to search the other databases available to him,[22] or to contact the Rhode Island authorities for

[21] ICE's 2006 Policy Manual explains that "'an NCIC search can mean a search of any number of the various databases contained within NCIC, depending on how the search is initiated.'" JA 164 n.3 (quoting 2006 ICE Policy Manual, § 36.3).

[22] *See* JA 164 n.4 (ICE's 2006 Policy Manual provides that ICE officials are "[r]esponsib[le]" for "[c]onduct[ing] extensive records checks" in five different databases when screening individuals for potential enforcement actions) (quoting

more information before issuing a detainer that he knew would cause Ms. Morales to be deprived of her liberty. Nor did he explain why he chose not to run any searches using her previous married name or her social security number, both of which he admitted were linked to her name in the NCIC. JA 90 (¶8).[23] As this Court and others have repeatedly recognized, when deciding whether or not probable cause exists, an officer may not close his eyes to readily available information. *See, e.g.*, *Suboh*, 298 F.3d at 96 (denying qualified immunity where officer "failed to pursue reasonable avenues of investigation").[24]

Even if Defendant Donaghy's database query revealed no *affirmative* evidence of Ms. Morales's citizenship, the mere absence of information means nothing unless one assumes that the databases contained reasonably comprehensive

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2006 ICE Policy Manual, § 11.8(c)).

[23] Donaghy asserted that "two different social security numbers" are associated with Ms. Morales's name in the NCIC, but he has provided Plaintiff with only the last four digits, which are identical in both cases—suggesting that the difference may simply be a database entry error. JA 151 (¶15).

[24] *Accord Logsdon v. Hains*, 492 F.3d 334, 342-43 (6th Cir. 2007) (denying qualified immunity where officers "refused to listen" to "readily available eyewitness accounts"); *Butler v. Elle*, 281 F.3d 1014, 1025 (9th Cir. 2002) (denying qualified immunity based on material questions as to the adequacy of defendant's database search); *Kuehl v. Burtis*, 173 F.3d 646, 650-51 (8th Cir. 1999) (denying qualified immunity where officer "refused to interview" a witness with relevant information, explaining that "law enforcement officers have a duty to conduct a reasonably thorough investigation prior to arresting a suspect"); *Cannon v. Macon Cnty.*, 1 F.3d 1558, 1565 (11th Cir. 1993) *opinion modified on denial of reh'g*, 15 F.3d 1022 (11th Cir. 1994) (denying qualified immunity because "[a] reasonably well trained officer would have at least attempted to obtain information from [plaintiff] for purposes of filling out [plaintiff's] arrest report, rather than copying data from an NCIC computer printout").

records of naturalizations and other immigration contacts. Donaghy has not offered any basis for making that assumption, and in fact, his declarations show exactly the opposite. He stated that, in 2009, "naturalization records were not available to me" in either electronic or paper form. JA 151 (¶18). He also admitted that ICE's Rhode Island office "did not have a system to verify if an individual had previously been subject to a detainer." JA 90 (¶10). Ms. Morales had, in fact, interacted with ICE and its predecessor INS on multiple prior occasions—including when she obtained permanent resident status, JA 30 (¶23), when she became a naturalized U.S. citizen in 1995, *id.*, and when she was subjected to her first erroneous ICE detainer in 2004, JA 25 (¶12), 33 (¶40)—yet Donaghy's database search allegedly revealed no evidence of these past contacts. Surely, then, a reasonable fact-finder could conclude either that his search was inadequate, or that the databases he searched were too incomplete to support any inferences about Ms. Morales's citizenship. *Cf. Orhorhaghe v. INS*, 38 F.3d 488, 497-99, 503 (9th Cir. 1994) (INS agent's testimony that petitioner's "name did not appear in INS computer records of lawful entries into the United States" did not justify temporary detention); *Vohra*, 2010 U.S. Dist. LEXIS 34363, at *29 (denying ICE agent's summary judgment motion despite fact that she "failed to find . . . [plaintiff's] name in databases meant to contain legal aliens"); *Castillo*, 2009 WL 4844801, at *5, *11 (denying ICE agent's motion for summary judgment

despite her declaration that "she searched the Central Index System and could not find any evidence that Plaintiff was a citizen").

Defendant Donaghy argues generally that "officers can reasonably rely on computer databases in determining whether probable cause exists," but the cases on which he relies for this proposition are readily distinguishable. Appellants' Br. at 16 (citing *Marinelli v. Capone*, 868 F.2d 102 (3d Cir. 1989), *McAllister v. Desoto Cnty*, 470 Fed. App'x 313 (5th Cir. May 1, 2012) (unpub.), and *Arizona v. Evans*, 514 U.S. 1 (1995)). Unlike the officers in those cases, Defendant Donaghy was not reasonably relying on a database entry showing the existence of an outstanding *judicial warrant* or other *affirmative* evidence that an arrest was authorized. Rather, he was making his *own* determination of probable cause, based on the *absence* of information he found, and directing other officials to make an arrest on his behalf.[25] The mere fact that he looked at a database does not insulate him from liability as a matter of law.

Thus, there remain genuine questions about what information was available to Defendant Donaghy when he issued Ms. Morales's detainer, whether his search

[25] Donaghy also argues that *Lyttle* supports his position because two of the defendants—agents who arrested the plaintiff at an airport when he attempted to re-enter the United States after being deported—were granted qualified immunity for relying on a database showing that he had been deported before. Appellants' Br. at 22 (citing *Lyttle*, 867 F. Supp. 2d at 1293). Clearly, however, arresting someone at the airport based on *affirmative* evidence of prior deportations is not remotely equivalent to arresting someone inside the United States based on a database search that *fails* to turn up any records.

was adequate, and whether he reasonably concluded that he had probable cause to detain Ms. Morales. These "disputed facts and inferences must be resolved by a fact finder in order to determine whether or not . . . a reasonably competent officer could have found probable cause in these circumstances." *Prokey*, 942 F.2d at 71. Donaghy simply has not provided the information needed for the Court to make that determination as a matter of law.

Third, Defendant Donaghy suggests that he could not have found Ms. Morales's naturalization record because she naturalized under her maiden name, Ada Cabrera, and he searched only for her current married name, Ada Morales. Appellants' Br. at 18-19. In effect, he asks the Court to assume that the only way for him to search the federal government's own records was by surname—and not by social security number, for example. *See* JA 149 (¶5) (Donaghy stated that "social security number" was one of the categories of information he received from RIDOC). If that is true, that makes it all the more unreasonable for him to assume that his inability to find records of Ms. Morales's citizenship meant that she was not a citizen. In light of the well-known fact that many women change their names upon getting married, relying on a name-based search alone would be a particularly unreasonable way to determine citizenship.

Given the limitations on interlocutory appeal, the Court need not—and should not—wade into these factual questions. But even if Defendant Donaghy's

fact-based arguments were properly before the Court, affirmance would be required because his declarations leave far too many material questions unanswered to permit summary judgment in his favor.

C. Even If There Had Been An Opportunity for Discovery, Defendant Donaghy Is Not Entitled to Summary Judgment on Ms. Morales's Equal Protection Claim.

The Court should affirm the denial of Defendant Donaghy's summary judgment motion on the Equal Protection claim for many of the same reasons. Even setting aside the impropriety of granting summary judgment before discovery has begun, *see supra* Section I(A), Defendant Donaghy's Equal Protection arguments—just like his Fourth Amendment arguments—fail for two additional, independent reasons. First, as argued in Section I(C)(1) below, his appeal is based on his own version of the facts and thus falls afoul of the Court's limited jurisdiction on interlocutory appeal. Second, as argued in Section I(C)(2), even if the Court were to take his one-sided, untested declarations into account, there remain genuine questions of material fact that preclude summary judgment.

1. Defendant Donaghy's argument for reversal is barred by the limitations on the Court's interlocutory appeal jurisdiction.

As explained above, this Court has recognized strict limits on its jurisdiction in the context of interlocutory appeals. *See supra* at I(B)(1). Those limits apply with particular force in Equal Protection cases involving claims of discrimination,

which hinge on inherently factual questions of motive and intent. Thus, the Court has held, "where the immunity question turns on disputed factual issues of motivation or animus, interlocutory review is barred." *Mlodzinski*, 648 F.3d at 28 n.1. *See also Berdecía-Pérez v. Zayas-Green*, 111 F.3d 183, 184 (1st Cir. 1997) (where defendants dispute that "the record presents an issue of fact as to their intent," appeal presents "an issue of the type that can no longer be resolved on interlocutory appeal."); *Carter v. State of Rhode Island*, 68 F.3d 9, 12 (1st Cir. 1995) ("Determining the presence or absence of discriminatory 'intent' based on evidentiary proffers at summary judgment entails a quintessential factual assessment" that cannot be reviewed on interlocutory appeal) (internal citation and emphasis omitted).

The district court's decision here is precisely the sort of decision for which interlocutory review is barred. The district court explained its denial of Donaghy's motion for summary judgment on the Equal Protection claim as follows:

> The Court finds, on the record before it, that there are genuine issues of material fact as to the allegations that Ms. Morales'[s] right to equal protection of the law was violated and that Mr. Donaghy acted with the requisite discriminatory purpose and qualified immunity does not bar the claim at this stage.

JA 194. Given the nature of the district court's decision, Circuit precedent makes quite clear interlocutory appeal is not available. *See Mlodzinski*, 648 F.3d at 28 n.1.

Defendant Donaghy offers no argument that would escape this jurisdictional bar. His sole argument on appeal is that the district court "disregard[ed]" his declarations and gave his factual assertions less weight than he believes they deserve. Appellants' Br. at 14, 33; *see also id.* at 33 (citing declaration as evidence that Donaghy did not intend to discriminate against Ms. Morales); *id*. at 35 (relying on declaration as evidence that "[Donaghy] did not target [Ms. Morales] based on an impermissible characteristic"). This sort of determination is simply not subject to interlocutory appeal. His appeal must be dismissed.

2. Defendant Donaghy is not entitled to summary judgment for issuing a detainer against Ms. Morales based on her race, ethnicity, or national origin.

Finally, even setting aside the clear jurisdictional defects with Defendant Donaghy's appeal, his arguments in favor of summary judgment on Equal Protection fail on their own terms.

Defendant Donaghy argues that, had the district court not "disregard[ed]" his assertion that he never met or talked with Ms. Morales before issuing her detainer, it would have concluded that he "had no basis for knowing [what] her race or ethnicity was," and thus that no reasonable fact-finder could possibly find that he targeted her based on these impermissible factors. Appellants' Br. at 33. That is not so. Defendant Donaghy knew Ms. Morales's Spanish-language surname, JA 61, and as this Court and others have noted in a variety of contexts, "names may be

race-linked characteristics." *Caldwell v. Maloney*, 159 F.3d 639, 654 (1st Cir. 1998). *See also Castaneda v. Partida*, 430 U.S. 482, 495 (1977) ("Spanish surnames are just as easily identifiable as race . . . ."); *Castro v. Beecher*, 459 F.2d 725, 732 (1st Cir. 1972) (district court "should have certified a class of black and Spanish-surnamed [job] applicants" with claims for employment discrimination). Donaghy also knew of her Guatemalan national origin, as he noted on the detainer form. JA 61. Thus, his contention that the district court should have found he "had no basis for knowing her race or ethnicity" falls flat. Appellants' Br. at 33.

Defendant Donaghy next protests that the district court erred in "disregard[ing]" his statement that he performed "searches of computer databases" before issuing Ms. Morales's detainer, Appellants' Br. at 35, and that it should have found that Donaghy "*properly* relied, in part," on her national origin. *Id*. at 33 (emphasis added). Even if the Court were to credit Donaghy's allegations about his database searches, they raise many more questions of material fact than they purport to answer, as discussed at length in Section I(B)(2)(iii) above. Drawing inferences in Ms. Morales's favor, as required at summary judgment, a reasonable fact-finder could conclude that Donaghy—having found no affirmative, reliable evidence suggesting that Ms. Morales was a removable non-citizen—issued the detainer based only on her national origin.

The Ninth Circuit found a seizure unconstitutional on similar facts in *Orhorhaghe*, where immigration officers detained the plaintiff for questioning based on his "Nigerian-sounding name" and the fact that his "name did not appear in INS computer records of lawful entries into the United States." 38 F.3d at 497 (internal quotation marks omitted). The court held that this was an egregious constitutional violation meriting suppression because, in addition to lacking Fourth Amendment justification, the seizure "raise[d] . . . concerns regarding racial discrimination":

> [A]llowing INS agents to seize and interrogate an individual simply because of his foreign-sounding name or his foreign-looking appearance risks allowing race or national-origin to determine who will and who will not be investigated. The sound of one's name often serves as a proxy in many people's minds for one's race or national origin.

Id. at 498 (internal emphasis omitted). *See also Galarza*, 2012 WL 1080020, at *16 (E.D. Pa. Mar. 30, 2012) (U.S. citizen sufficiently pled racial discrimination where he alleged that ICE would not have issued detainer against him without further investigation "if plaintiff were not Hispanic").[26]

[26] The *Nasious* case on which Donaghy relies is not to the contrary. *See* Appellants' Br. at 34 (citing *Nasious v. Two Unknown B.I.C.E. Agents*, 657 F. Supp. 2d 1218 (D. Colo. 2009), *aff'd*, 366 Fed. App'x 894 (10th Cir. 2010) (unpub.)). In *Nasious*, a *pro se* plaintiff alleged racial discrimination, but he declined to oppose the defendants' motion for summary judgment in any manner. Thus, the court accepted as undisputed that the plaintiff lied to federal officials about being born in Greece and speaking no English to evade fraud charges. *Id.* at 1228. Under the circumstances, the court found that the plaintiff's lie was "the

Defendant Donaghy appears to suggest that foreign birth gives rise to a "presum[ption]" of removability, putting the burden on the arrestee to prove her citizenship. Appellants' Br. at 33 (in parenthetical). The cases on which he relies for this proposition are wholly inapposite. *See id.* at 15 (citing *Walker v. Holder*, 589 F.3d 12, 18 (1st Cir. 2009)), 33 (citing *Leal Santos v. Mukasey*, 516 F.3d 1 (1st Cir. 2008)). Both *Walker* and *Leal Santos* pertain to a procedural allocation of evidentiary burdens in administrative removal proceedings, in which respondents born abroad who seek to establish "derivative citizenship" under the Immigration and Nationality Act bear the burden of proving their citizenship. This procedural rule, which applies in administrative proceedings conducted before a neutral immigration judge, has no bearing on the constitutional question of whether an ICE enforcement agent could *seize and detain* Ms. Morales based on her national origin in order to investigate her immigration status.[27]

For constitutional purposes, it would surely violate the Equal Protection clause if ICE preemptively detained everyone with a foreign place of birth and put the burden on them to prove their citizenship to gain release. There were more

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sole and proximate cause of [defendant's] believing that Plaintiff was an illegal alien," not his race. *Id*. The facts of *Nasious* are clearly distinguishable from this case, where Ms. Morales truthfully told Rhode Island officials that she was a U.S. citizen at every opportunity. *Nasious* does not remotely establish that ICE may issue detainers based on foreign birth alone.

[27] Not everyone who is placed in removal proceedings is arrested or detained; ICE may issue a Notice to Appear to initiate removal proceedings without making an arrest. *See* 8 U.S.C. § 1229(a)(1).

than 17 million naturalized U.S. citizens in 2010, making up nearly half (44%) of the entire foreign-born population in the United States. JA 193.[28] Thus, when ICE encounters a foreign-born person, it is nearly as likely as not that she is a U.S. citizen. As the district court held, the Constitution does not permit "the approximately 17 million foreign-born United States citizens . . . [to be] automatically . . . subject to detention and deprivation of their liberty rights . . . based solely on their national origin." JA 193. *Cf. United States v. Montero-Camargo*, 208 F.3d 1122, 1134 (9th Cir. 2000) (en banc) (where "a large number of people share a specific characteristic"—there, Hispanic appearance—"that characteristic casts too wide a net to play any part in a particularized reasonable suspicion determination"); *United States v. Jones*, 149 F.3d 364, 369 (5th Cir. 1998) ("the fact that one is of Mexican national origin does not create reasonable suspicion that one is an illegal alien").

If Donaghy means to argue that ICE may presume all foreign-born people are removable non-citizens until they prove otherwise, this radical position would

[28] *See* U.S. Census Bureau, *The Foreign-Born Population in the United States: 2010*, 2, 11 (2012), *available at* http://www.census.gov/prod/2012pubs/acs-19.pdf. An additional 12.6 million members of the foreign-born population were lawful permanent residents who, except in certain circumstances, are not removable. *See* DHS Office of Immigration Statistics, *Estimates of the Legal Permanent Resident Population in 2010*, 1 (2011), *available at* http://www.dhs.gov/estimates-legal-permanent-resident-population-2010. If the Court reaches this question on appeal, Plaintiff requests that it take judicial notice of these documents, which are official government publications whose accuracy is "'not subject to reasonable dispute.'" *Gent*, 611 F.3d at 84 n.5.

inevitably sweep up naturalized U.S. citizens, like Ms. Morales, whom ICE plainly has no authority to detain. *See* 8 U.S.C. § 1357(a)(2) (authorizing ICE agents to arrest "alien[s]"); *id.* § 1357(d) (authorizing ICE agents to issue detainers against "aliens"); *Flores-Torres v. Mukasey*, 548 F.3d 708, 712 (9th Cir. 2008) (ICE lacks authority to detain foreign-born U.S. citizen; such detention would be unconstitutional and unlawful under the Non-Detention Act). A presumption of alienage and removability would be particularly concerning in the detainer context, where ICE causes detention remotely—and potentially even without speaking to the arrestee or giving her a chance to assert her citizenship, as in Ms. Morales's case.

In sum, even setting aside the prematurity of Defendant Donaghy's summary judgment motion and the jurisdictional defects with his appeal, his arguments fail on their own terms. Given that he knew Ms. Morales's recognizably Spanish-language surname, Guatemalan national origin, and little else about her, a reasonable fact-finder could conclude that his decision to issue a detainer under these circumstances—without interviewing her or acquiring any affirmative evidence of her citizenship or immigration status—was based on her race, ethnicity, or national origin, in violation of her right to Equal Protection.

II. THE DISTRICT COURT CORRECTLY DENIED DEFENDANTS CHADBOURNE AND RICCIO'S MOTION TO DISMISS THE FOURTH AMENDMENT CLAIM.

Defendants Chadbourne and Riccio's portion of this appeal concerns only the district court's denial of their motion to dismiss the Fourth Amendment claim. Their argument for reversal is narrow: The only developed argument they advance in their opening brief is that they cannot be held liable under the Fourth Amendment without a prior case specifically holding "*supervisors*" liable for "putting in place or continuing official policies and practices regarding issuances of detainers." Appellants' Br. at 32 (internal quotation marks and brackets omitted; emphasis added). Defendants' argument is misplaced.

As discussed above, both the Supreme Court and this Court have repeatedly made clear that prior decisions need not be "'materially similar'" to provide "fair warning" of what the law requires. *Suboh*, 298 F.3d at 93-94 (quoting *Hope*, 536 U.S. at 739); *see also supra* at Section I(B)(2)(iii). What must be "clearly established" by existing law is the constitutional right at issue—not the identity of the tortfeasor. *See, e.g.*, *Davis v. Rennie*, 264 F.3d 86, 114 (1st Cir. 2001) (holding that "[t]he cases involving police and prison guards clearly established at least the same duty for mental hospital staff at a state institution"); *see generally Suboh*, 298 F.3d at 94 ("The difference in contexts in which the right is discussed in the case law does not mean such a right does not exist"); *Hall*, 817 F.2d at 925 ("The fact

that no court had put these pieces together in the precise manner we do today does not absolve defendants of liability.").[29]

Indeed, there is ample precedent establishing that supervisors may be personally liable under *Bivens* for their role in adopting or overseeing policies or practices that are themselves unconstitutional or that foreseeably create a risk of constitutional violations. A decade before Ms. Morales's detention, the Court observed that "the law is well-settled anent a supervisor's liability for the conduct of his subordinates." *Camilo-Robles v. Zapata*, 175 F.3d 41, 45 (1st Cir. 1999). Officials who are "deliberate[ly] indifferen[t]" to a known or obvious risk of constitutional violations by their subordinates may be held liable when such violations occur. *Id*. at 44. Even supervisors who do not directly participate in a constitutional violation can be liable for "formulating a policy, or engaging in a custom, that leads to the challenged occurrence." *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 582 (1st Cir. 1994) (noting that "even if a supervisor lacks actual knowledge of censurable conduct, he may be liable for the foreseeable consequences of such conduct"); *accord Camilo-Robles*, 175 F.3d at 44

[29] *See also Jones v. Han*, 993 F. Supp. 2d 57, 69 (D. Mass. 2014) (denying qualified immunity to supervisors who raised the identical theory Defendants advance here; holding that "although there is no direct authority for holding state crime laboratory *supervisors* liable for their deliberate indifference to constitutional violations by their subordinates, the constitutional rights and supervisory liability doctrine that underlie plaintiff's claims are clearly established.") (emphasis added).

(supervisors may be liable if there is "an affirmative link between them and the resulting violation, whether through direct participation or through conduct that amounts to condonation or tacit authorization."[30]

Applying this settled law, the district court examined the complaint and determined that it stated a Fourth Amendment claim against Defendants Chadbourne and Riccio. The court found that Ms. Morales plausibly alleged that Defendants "put in place or continued official policies and practices regarding issuances of detainers that directly and foreseeably caused Ms. Morales'[s] constitutional rights to be violated," and that they could be held personally liable for their "deliberate[] indifferen[ce] to the fact that their subordinate agents regularly . . . issued immigration detainer[s] . . . without conducting sufficient investigation and without probable cause." JA 186 (internal quotation marks and citations omitted). Defendants Chadbourne and Riccio cannot escape liability by

[30] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), did not alter the scope of supervisors' liability in this Circuit. *See* Appellants' Br. at 30. Even before *Iqbal*, this Circuit recognized that supervisors could be held liable only for their own acts and omissions, and not on a *respondeat superior* theory. *See Maldonado-Denis*, 23 F.3d at 581; *see also Sanchez v. Perreira-Castillo*, 590 F.3d 31, 48-51 (1st Cir. 2009) (applying both *Iqbal* and prior First Circuit law). Other circuits have reached similar conclusions. *See, e.g., Starr v. Baca*, 652 F.3d 1202, 1217 (9th Cir. 2011) ("*Iqbal* did not alter . . . supervisory liability" for claims concerning deliberate indifference to unconstitutional conditions of confinement); *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010) (same, for claims concerning due process violations).

arguing that they were not on notice in 2009 that supervisors could be held liable if their policies caused foreseeable constitutional violations.[31]

Defendants do not make any discernible argument that the complaint lacks sufficiently specific allegations to hold them liable. Their brief includes a preliminary string-cite of cases in which allegations against supervisors were dismissed as falling short of Rule 8's requirements, but Defendants make no attempt to argue why the same should be true in this case. Appellants' Br. at 30-31. Without "some effort at developed argumentation," Defendants have waived any argument that Ms. Morales's allegations are insufficient. *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990); *see also Tejada-Batista v. Morales*, 424 F.3d 97, 103 (1st Cir. 2005) ("An argument not seriously developed in the opening brief is forfeit."); *United States v. Fahm*, 13 F.3d 447, 450 (1st Cir. 1994) ("a parenthetical to a case citation, unaccompanied by argumentation," is not sufficient to raise an argument).

Even if they had made such an argument, it would fail. Ms. Morales's complaint contains specific and plausible factual allegations about Chadbourne and Riccio's roles in causing her unlawful detention. She alleges that, as the heads of ICE's Boston Field Office and its sub-office in Rhode Island respectively, they

[31] Unlike Defendant Donaghy, Chadbourne and Riccio do not specifically argue that they were not on notice in 2009 that the Fourth Amendment applied to ICE detainers. If they had made such an argument, it would fail for the reasons set forth above in Section I(B)(2)(i)-(ii).

were responsible for overseeing the issuance of ICE detainers by line agents in their area of responsibility, including Defendant Donaghy, and for formulating and implementing policies and practices to govern such issuance. JA 26-27 (¶¶15-16), 42 (¶84). She alleges that they "had the power and the authority to change these policies or customs by . . . training" their subordinates "to perform an adequate investigation . . . before issuing detainers." JA 43 (¶85). She further alleges that they knew or were deliberately indifferent to the fact that their subordinates "regularly . . . issued immigration detainers . . . without conducting sufficient investigation and without probable cause." JA 42 (¶81). Specifically, she alleges that ICE agents in Rhode Island maintained a practice of "routinely collaborat[ing]" with state law enforcement authorities to issue detainers against arrestees who identify as foreign born during the booking process, JA 38 (¶67)—a practice that foreseeably leads to the wrongful detention of U.S. citizens like Ms. Morales. JA 37-39 (¶66, ¶¶67-70).

These allegations go well beyond speculation. Ms. Morales herself has been subjected to ICE detainers in Rhode Island twice, even though she is a U.S. citizen and has been for many years. JA 25-26 (¶¶11-13). After her release from custody in 2009, an agent in ICE's Rhode Island office told her that ICE could issue a detainer against her in the future, even though ICE had *just verified* that she was a U.S. citizen. JA 36-37 (¶61). A Rhode Island immigration attorney confirmed that

she spoke with an agent in ICE's Rhode Island office who told her that the erroneous detention of U.S. citizens "happens not infrequently." JA 37-38 (¶66).

As the district court correctly held, these allegations are far from conclusory and amply support the plausibility of Ms. Morales's claims against Defendants Chadbourne and Riccio. The complaint alleges an "affirmative link" between Defendant Donaghy's issuance of an ICE detainer without probable cause "and the action, or inaction," of Chadbourne and Riccio as supervisors. *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 562 (1st Cir. 1989) (internal quotation marks and citation omitted). It is clear that supervisors may be held liable for constitutional violations that result from their own acts or omissions, including setting a policy, practice, or custom, or failing to train subordinates. *See Marrero-Rodríguez v. Municipality of San Juan*, 677 F.3d 497, 502 (1st Cir. 2012) (reversing dismissal where, among other things, the allegations supported the "inference[]" that police supervisors' "failure to implement policies, protocols, or correct training about use of live firearms" may have led to deaths in training exercise).

Defendants Chadbourne and Riccio cannot evade Fourth Amendment liability for their role in causing the foreseeable and repeated violation of Ms. Morales's Fourth Amendment rights by arguing that they were not on notice of the

law in 2009. The district court's denial of their motion to dismiss should be affirmed.

CONCLUSION

Ultimately, there is very little the Court needs to decide to resolve this appeal and affirm the district court. As to Defendant Donaghy, the district court was well within its discretion to deny the pre-discovery summary judgment motion and allow discovery to begin, as Rule 56(d) permits. *See* Fed. R. Civ. P. 56(d)(1). Even if that were not so, Donaghy's arguments for reversal are entirely premised on his preferred reading of his own set of facts, and thus are barred by the jurisdictional limits on interlocutory appeal. As to Defendants Chadbourne and Riccio, their sole argument on appeal misconstrues the level of specificity needed for a right to be clearly established. It was well settled in 2009 that supervisors could be liable if they were deliberately indifferent to the sort of foreseeable Fourth Amendment violations alleged here. For the foregoing reasons, the district court's decision should be affirmed in its entirety.

September 18, 2014

Respectfully submitted,

/s/ Katherine Desormeau