No. 10-1479

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MARIA ARGUETA; WALTER CHAVEZ; ANA GALINDO; W.C., by and through his parents Walter Chavez and Ana Galindo; ARTURO FLORES; BYBYANA ARIAS; JUAN ONTANEDA; VERONICA COVIAS; YESICA GUZMAN,

Appellees,

v.

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

Julie L. Myers, Bartolome Rodriguez,
John P. Torres, Scott Weber,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE APPELLANTS

TONY WEST
Assistant Attorney General
PAUL FISHMAN
United States Attorney
BARBARA L. HERWIG
202-514-5425
HOWARD S. SCHER
202-514-4814
Attorneys, Appellate Staff
Civil Division, Room 7239
Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Constitution:

Statutes:

Immigration and Nationality Act ("INA"):

Regulations:

Rules:

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

No. 10-1479

_____

MARIA ARGUETA; WALTER CHAVEZ; ANA GALINDO; W.C., by and through his parents Walter Chavez and Ana Galindo; ARTURO FLORES; BYBYANA ARIAS; JUAN ONTANEDA; VERONICA COVIAS; YESICA GUZMAN

v.

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

Julie L. Myers, Bartolome Rodriguez,
John P. Torres, Scott Weber,
Appellants.

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

_____

BRIEF FOR THE APPELLANTS

_____

Statement Subject Matter and Appellate Jurisdiction

The district court entered its order denying qualified immunity and finding personal jurisdiction to exist on Jan. 27, 2010. JA 64A; DDE # 136. See also

District Court Opinion II (JA 46; DDE # 135). Defendants filed their notice of appeal on February 9, 2010 (JA 65; DDE # 139), which was timely under Rule 4(a), Fed. R. App. P.

The Court has appellate jurisdiction over this appeal under 28 U.S.C. 1291. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). *Iqbal* holds that the denial of qualified immunity is immediately appealable under the *Cohen* collateral order doctrine,[1] where, as here, supervisory defendants allege that plaintiffs have not pled sufficient facts to demonstrate the personal involvement of the supervisory defendants in the unconstitutional conduct alleged. See *id*. at 1945-1947.[2]

The Court has also held that it has appellate jurisdiction over challenges to a district court's ruling on personal jurisdiction where the ruling is "inextricably bound" to an appealable order. See, *e.g., Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 149 (3d Cir. 2001); *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S.,* 269 F.3d 187, 203 (3d Cir. 2001). The latter principles apply here; in this case, the personal jurisdiction question overlaps

---

[1] See *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

[2] Plaintiffs agree that the Court has appellate jurisdiction to hear the challenge to the district court's denial of qualified immunity. See Plaintiffs-Appellees' Response to the February 25, 2010, Court Order Regarding Appellate Jurisdiction ("Response"), filed March 22, 2010, at 3, 8-9.

considerably with qualified immunity question. Thus, the Court should exercise jurisdiction over this issue along with the qualified immunity issue.[3]

Statement of the Issues Presented For Review

1. Whether each of the four supervisory defendants was entitled to qualified immunity because plaintiffs failed to plead sufficient factual information to demonstrate each defendant's personal involvement in the constitutional violations asserted. See Motion to Dismiss filed July 8, 2008 (JA 361; DDE # 35-1 at p. 34); Reply to Opposition to Motion to Dismiss (JA 472; DDE # 66 at p. 20); Motion to Dismiss Second Amended Complaint (JA 601; DDE # 108-2 at p. 12); Reply to Opposition to Motion to Dismiss Second Amended Complaint (JA 684; DDE # 119 at p. 2); Opposition to Partial Motion to Dismiss (JA 411; DDE # 57 at p. 26); Sur-Reply in Response to Reply Brief (JA 484; DDE # 71 at p. 5); Opposition to Motion to Dismiss Second Amended Complaint (JA 652; DDE # 115 at p. 6); District Court Opinion ("Opinion I") filed May 7, 2009 (JA 38; DDE # 94 at p. 38); District Court order filed May 7, 2009 (JA 44; DDE # 95); District Court Opinion II ("Opinion II") filed Jan. 27, 2010 (JA 54; DDE # 135 at p. 9); District Court order filed Jan. 27, 2010 (JA 64A; DDE # 136) (district court rulings).

[3] Plaintiffs disagree that the Court has appellate jurisdiction over the challenge to the district court's ruling on personal jurisdiction. See Response, *supra*, n.2 at 10-16.

2. Whether the district court lacked personal jurisdiction over two supervisory federal officials because they were located in Washington, DC, and had no personal contacts in New Jersey. See Motion to Dismiss filed July 8, 2008 (JA 356; DDE # 35-1 at p. 29); Reply to Opposition to Motion to Dismiss (JA 470; DDE # 66 at p. 18); Motion to Dismiss Second Amended Complaint (JA 611; DDE # 108-2 at p. 22); Reply to Opposition to Motion to Dismiss Second Amended Complaint (JA 695; DDE # 119 at p. 13); Opposition to Partial Motion to Dismiss (JA 415; DDE # 57 at p. 30); Opposition to Motion to Dismiss Second Amended Complaint (JA 671; DDE # 115 at p. 25); Opinion I filed May 7, 2009 (JA 35; DDE # 94 at p. 35); District Court order filed May 7, 2009 (JA 44; DDE # 95); Opinion II (JA 47; DDE # 135 at p. 2); District Court order filed Jan. 27, 2010 (JA 64A; DDE # 136)

Statement of Related Cases and Proceedings

This case has not previously been before this Court. Counsel for the appellants is not aware of any related cases or proceedings within the meaning of Local Appellate Rule 28.1(a)(2).

Statement of the Case

This action arises from efforts of the United States Immigration and Customs Enforcement ("ICE") to remove from the United States illegal aliens,

including illegal aliens who are a threat to national security, pose a threat to the community, were convicted of crimes, or have disregarded formal orders of removal. Pursuant to national enforcement initiatives authorized by Congress, ICE conducted operations in North Bergen, Paterson, Clifton, Newark, and Salem County, New Jersey, to apprehend illegal aliens identified as residing in those areas. The operations at issue here occurred in August and November 2006, March and December 2007, and January and April 2008. The Immigration and Nationality Act ("INA"), 8 U.S.C. 1101, et seq., empowers any authorized agent, without a warrant, "to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation [relating to the admission, exclusion, expulsion, or removal of aliens] and is likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. 1357(a)(2).

Plaintiffs contend that individual ICE agents violated the Fourth and Fifth Amendments in conducting searches and arresting individuals and that the supervisory defendants (the appellants in this case) failed to conduct meaningful investigations into the alleged conduct of individual ICE agents, failed to provide guidance or training on how to conduct searches and seizures, and failed to

discipline for the alleged unconstitutional conduct. Plaintiffs sued all defendants in their individual capacities and sought money damages.

Statement of Facts

1. *Factual Background*.

a. In 2002, the Immigration and Naturalization Service ("INS") began the National Fugitive Operations Program to seek out and arrest fugitive aliens — non-United States citizens not currently in the custody or control of an agency of the government who have failed to depart the United States pursuant to a final order of removal, deportation or exclusion, or have failed to report to an immigration officer after receiving notice to do so. After INS was subsumed into the Department of Homeland Security ("DHS"), the Detention and Removal Operations ("DRO") section of ICE continued the program as the number of fugitive aliens in the country rose rapidly.[4] As of October 2006, fifty Fugitive Operations Teams were operational nationwide. DHS launched "Operation Return to Sender," which continued to combine the resources of the former INS program with those of other state and local law enforcement agencies in order to effectuate

[4] In June 2010, Detention and Removal Operations (DRO) became Enforcement and Removal Operations (ERO). This brief refers to Detention and Removal Operations or "DRO" because that was the name of the office during the events at issue in this lawsuit.

the arrest of fugitive aliens. Opinion II (JA 49-50; DDE # 135 at pp. 4-5); First Amended Complaint Ex. C (JA 247; DDE # 15-4 at 1).

Under Operation Return to Sender, officials conduct investigations by "focus[ing] their efforts on specific fugitive aliens at specific locations; that is, by prioritizing fugitive aliens by those who (1) are a threat to national security, (2) pose a threat to the community, (3) were convicted of violent crimes, (4) are convicted felons, and (5) are non-criminal fugitives." Opinion II (JA 49-50; DDE # 135 at 4-5) (internal quotation marks omitted). In order to accomplish their goal of identifying, arresting, and removing fugitive aliens, Fugitive Operation Teams use leads and other intelligence based information. *Id*. at 5 (JA 50).

Arrests of fugitive aliens are most often based on administrative warrants. When an immigration judge orders an alien removed, DRO issues a "Warrant of Deportation/Removal." These warrants are administrative in nature, as opposed to judicial, and are unlike arrest warrants. While an arrest warrant allows police officers to enter a residence to arrest a person, a warrant of removal allows ICE officers to arrest but not to enter a home unless they obtain consent to do so or some other circumstance justifies entry.[5] In order to obtain knowing and

[5] Ancillary to their arrest authority based on the warrant of removal, ICE agents are authorized to question any person about their immigration status. 8 C.F.R. 287.5(a)(1). However, an officer may only detain an individual for further

voluntarily consent from a dwelling's occupants during operations, Fugitive Operation Teams request permission to enter a residence and utilize interpreters where necessary; if granted permission, agents enter and secure the premises to ensure officer safety. If there is an arrest after a search, family members are provided a telephone number to call in order to locate the arrested individual. In addition, arrestees are afforded an opportunity to make a telephone call and to acquire legal services. Opinion II (JA 50-51; DDE # 135 at 5-6).

b. In this case, nine plaintiffs — who include U.S. citizens, lawful permanent residents, aliens who were subject to removal, and aliens who have been removed from the United States — filed suit against former Assistant Secretary of Homeland Security for ICE Julie L. Myers; former ICE Director of DRO, John P. Torres;[6] Field Office Director for the Newark, New Jersey ICE field office, Scott Weber, and Deputy Director, Bartolome Rodriguez; and 90 Doe ICE

---

questioning if the officer has "reasonable suspicion that the individual has committed a crime, is an alien who is unlawfully present, is an alien with status who is either inadmissible or removable from the United States, or is a non-immigrant who is required to provide truthful information to DHS upon demand." First Amended Complaint Ex. D (JA 314; DDE # 15-6 at 2).

[6] Torres served as Director for DRO from 2005 until March 2008. From March 2008 until November 2008 and again for a brief period in 2009, he served as Deputy Assistant Secretary for Operations. Torres now serves as the Special Agent in Charge for ICE in Washington, DC.

Agents and Supervisors stationed in the Newark, New Jersey ICE field office, alleging constitutional violations. Plaintiffs contend that individual ICE agents forced their way into plaintiffs' homes, conducted searches, and arrested occupants without a warrant or consent; that, once inside their homes, some ICE agents engaged in abusive and conscience-shocking conduct, such as drawing their guns and shouting at the occupants; and that the "home raids" were illegal and were a predictable consequence of arrest "quotas" that high-ranking ICE officials established for arresting immigrants with outstanding deportation orders. Plaintiffs sued all defendants in their individual capacities. They seek money damages for alleged Fourth and Fifth Amendment violations, claiming that, as a result of defendants' conduct, they were subject to unreasonable home entries, unreasonable home searches, unreasonable seizures, excessive force, violations of substantive due process, denial of access to counsel and denial of equal protection under the law. Three plaintiffs seek declaratory and injunctive relief against various official-capacity federal defendants and ICE. Plaintiffs have included claims against local law enforcement defendants as well. Opinion II (JA 51-53; DDE # 135 at 6-8). See also Second Amended Complaint (JA 530-532, 536-537; DDE # 106 at ¶¶ 1-6, 27).

In the Second Amended Complaint,[7] plaintiffs alleged that Myers and Torres oversaw an increase in Fugitive Operation Teams without implementing training — unspecified in the Second Amended Complaint — deemed necessary by plaintiffs. Plaintiffs alleged that, although Myers and Torres had been put on notice of the unconstitutional home raid practices of ICE agents through repeated media coverage and lawsuits filed against them, both failed to conduct meaningful investigations, to provide guidelines or training, or to discipline any officer for unconstitutional conduct. Instead, according to plaintiffs, both "foster[ed] an institutional culture of lawlessness" at ICE, Opinion II (JA 52; DDE # 135 at p. 7); Second Amended Complaint (JA 532; DDE # 106 at p. 4 ¶ 5), and contributed to the unlawful conduct by lauding as successful ICE's increase in arrests, see Opinion II (JA 51-53; DDE # 135 at pp. 6-8); Second Amended Complaint (JA 561-563; DDE # 106 ¶¶ 144-148).

According to plaintiffs, Weber and Rodriguez oversaw Operation Return to Sender in New Jersey and supposedly knew that ICE agents were entering and searching homes without a warrant or consent. They allegedly failed to implement

[7] The allegations against the four individuals are identical in both the First and Second Amended Complaints. Compare, *e.g.*, First Amended Complaint (JA 173-174, 177-178, 210-213; DDE # 15 at ¶¶ 5, 24-28, 191-199) with Second Amended Complaint (JA 531-532, 534-535, 561-564; DDE # 106 at ¶¶ 5, 19-22, 144-152).

any guidelines, protocols, training, oversight or record-keeping requirements to ensure officers acted within constitutional limits. Without offering specifics, plaintiffs generally contend that neither Weber nor Rodriguez conducted investigations or disciplined officers responsible for unconstitutional conduct. Instead, plaintiffs assert, both publicized the increase in arrests, while allowing the unconstitutional means by which the arrests were made to continue unchecked. Second Amended Complaint (JA 563-564; DDE # 106 ¶¶ 149-152).

In addition, following each count in the Second Amended Complaint, plaintiffs include generalized boilerplate allegations to the effect that, "[u]pon information and belief, defendants * * * participated in, directed, or knew of and acquiesced in the violation of plaintiffs' rights; tolerated past or ongoing misbehavior of this kind; or were deliberately indifferent to the risk that ICE officers, lacking clear training and under the pressure of sharply-increased quotas, would violate the * * * rights of individuals suspected of being undocumented immigrants * * *." See, *e.g.*, Second Amended Complaint (JA 565, 567, 568, 570, 572, 573; DDE # 106 at ¶¶ 157, 165, 174, 183, 192, 200).

2. *Proceedings Below*.

a. In July 2008, the four named federal supervisory defendants filed a motion to dismiss the First Amended Complaint. JA 318; DDE # 35-1. The

motion to dismiss made five principal arguments. First, defendants argued that the district court lacked subject matter jurisdiction over the claims of some of the plaintiffs who were aliens subject to removal proceedings because the Immigration and Nationality Act ("INA"), specifically, 8 U.S.C. 1252(b)(9) and 1252(g), divested the court of jurisdiction. Motion to Dismiss First Amended Complaint (JA 341; DDE # 35-1 at p. 14). Second, they argued that special factors, including Congress' comprehensive regulation through the INA and the plenary power of the political branches over immigration and national security matters, preclude these same plaintiffs from seeking damages directly under the Constitution. *Id*. at 348; DDE # 35-1 at p. 21. Third, defendants contended that the court lacked personal jurisdiction over the two DC-based officials. *Id*. at 356; DDE # 35-1 at p. 29. Fourth, defendants argued that the court lacked jurisdiction over five anonymous plaintiffs because they had not demonstrated that proceeding anonymously was justified. *Id*. at 337; DDE # 35-1 at p. 10. Finally, defendants asserted that they were entitled to qualified immunity because plaintiffs had not alleged that any of the four of them personally participated in the alleged violations of constitutional rights. *Id*. at 361; DDE # 35-1 at p. 34.

In May 2009, the district court denied in substantial part the motion to dismiss the First Amended Complaint. See Opinion I filed May 7, 2009 (JA 1;

DDE # 94). The court agreed that the anonymous plaintiffs must reveal their identity in order to proceed. The court accordingly dismissed all five anonymous plaintiffs without prejudice, providing them until May 27, 2009, to amend the complaint to reveal their identities. *Id*. at 19 (JA 19; DDE # 94 at p. 19). The court rejected defendants' remaining arguments, finding that plaintiffs had alleged sufficient facts to demonstrate that the court has personal jurisdiction over the two high-level DC-based defendants and that the court has subject matter jurisdiction over the claims of plaintiff Ontaneda (a removed alien). The court determined that no special factors precluded the plaintiffs Ontaneda and Argueta from pursuing a federal constitutional claim. *Id*. at 19-38 (JA 19-38; DDE # 94 at pp. 19-38). Finally, as to qualified immunity, the court determined that there was an insufficient record on which "to shut the door on a qualified immunity defense." *Id*. at 42 (JA 42; DDE # 94 at p. 42). It noted that the allegations in the First Amended Complaint were based on "hearsay" newspaper articles, but that plaintiffs had adequately provided fair notice and the grounds on which the claims rest, which was all the court believed was required at the motion to dismiss stage. *Ibid*. In short, the court determined that it needed more evidence to assess whether defendants were personally involved in any unconstitutional conduct. As such, the court ordered 60 days of "limited" discovery, during which each of the four

defendants could be deposed and interrogatories propounded. *Id*. at 42-43 (JA 42-43; DDE # 94 at 42-43).

b. Shortly after the issuance of the May 2009 opinion and order, the Supreme Court decided *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Accordingly, defendants immediately moved for reconsideration in light of *Iqbal*, see JA 508 (DDE # 99-1), but before briefing on the motion for reconsideration was completed, plaintiffs filed their Second Amended Complaint (in part, identifying one plaintiff who had previously sought to proceed anonymously), see JA 529 (DDE # 106). Out of an abundance of caution, therefore, defendants moved to dismiss the Second Amended Complaint, raising qualified immunity (with supplemental argument based on *Iqbal*), as well as raising and preserving the other threshold arguments previously included in the motion to dismiss the First Amended Complaint. See Motion to Dismiss (JA 583; DDE # 108-2). As noted, the allegations in the Second Amended Complaint and First Amended Complaint are identical with respect to the *Bivens* defendants. See n.7, *supra*.

The court again denied the motion to dismiss and denied the motion for reconsideration except for one equal protection claim raised by one plaintiff. See Opinion II (JA 46, DDE # 135; Order dated Jan. 27, 2010 (JA 64A, DDE # 136). The court denied defendants' personal and subject matter jurisdiction arguments,

citing the "Court's previous opinion." Opinion II (JA 47; DDE # 135 at p. 2). As to qualified immunity, the court determined that plaintiffs' assertions concerning the four supervisory defendants were "sufficient at this stage 'to state a claim to relief that is plausible on its face.'" *Id*. at 18 (JA 63; DDE # 135 at 18) (quoting *Iqbal*, 129 S. Ct. at 1949). The court found that the alleged facts were sufficient to demonstrate that the defendants "'set in motion a series of events' that resulted in the deprivation of the Plaintiffs' Fourth Amendment rights." *Ibid*. (citing *Padilla v. Yoo*, 633 F. Supp.2d 1005, 1036 (N.D. Cal. 2009)). The court distinguished *Iqbal* because, in its view, the claims of invidious discrimination involved there (in violation of the First and Fifth Amendments) — where the claims were against officials at the highest level of the federal law enforcement hierarchy who were concerned with national policy — required a higher level of pleading where supervisory officials were concerned. *Id*. at 10, 12, 14-15 (JA 55, 57, 59-60; DDE # 135 at pp. 10, 12, 14-15). Here, in contrast, the court determined that the allegations of "actual knowledge or acquiescence" by the four defendants — who (according to the district court) were not at the highest level of the federal hierarchy — were sufficient to allege a Fourth Amendment claim against supervisory officials. *Id*. at 10-13 (JA 55-58; DDE # 135 at pp. 10-13). The court held that "there is a plausible claim against each Individual Federal

Defendant that their personal involvement, direction and knowledge or acquiescence permitted a search of the residence of plaintiffs without consent in violation of the Fourth Amendment." *Id*. at 16 (JA 61; DDE # 135 at p. 16).

c. The four supervisory defendants timely filed their notice of appeal on February 9, 2010. See JA 65; DDE # 139. Subsequently, on May 18, 2010, the district court stayed discovery until resolution of the instant appeal. See JA 67; DDE # 170. On June 15, 2010, the court denied reconsideration of the stay order. See JA 68; DDE # 178.

Standard of Review

Review by this Court is plenary when a denial of qualified immunity turns solely on a question of law. See *Atkinson v. Taylor*, 316 F.3d 257, 261 (3d Cir. 2003). Although the Court does not evaluate the sufficiency of the evidence to prove the facts allegedly giving rise to a constitutional claim, the Court determines whether the facts identified by the district court constitute a violation of a clearly established constitutional right. *Ibid*. The Court also engages in plenary review over an appeal concerning personal jurisdiction. *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 258 (3d Cir.1998).

Summary of the Argument

1. Plaintiffs seek damages from four supervisory federal officials. In *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Supreme Court held that government officials may not be held liable for the unconstitutional conduct of their sub-ordinates. Even a supervisor's knowledge of, and acquiescence in, a subordinate's wrongful conduct is not sufficient to hold a supervisor liable in an action pursuant to *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Instead, plaintiffs must plead that each government-official defendant, through the official's own individual actions, has violated the Constitution. Based on these principles, the district court erred in not dismissing the *Bivens* claims against the four supervisory defendants on qualified immunity grounds.

First, plaintiffs' Second Amended Complaint describes the claims against the defendants in terms of "supervisory liability." As *Iqbal* makes clear, there is no *respondeat superior* liability in *Bivens* actions; liability can only be based on each supervisor's individual conduct.

Second, *Iqbal* rejected the very legal theory proffered by plaintiffs here. Plaintiffs essentially alleged that the supervisory defendants developed lawful policies that led to the allegedly unlawful conduct at issue, supervised agents who implemented those lawful policies, failed to provide guidelines for, or train line

agents in, the proper implementation of the policy, and/or failed to discipline line agents who engaged in allegedly unconstitutional conduct. However, in virtually identical circumstances — where the complaint described the supervisory official as the "principal architect" of an *unconstitutional policy* as well as someone allegedly instrumental in the adoption, promulgation, and implementation of that policy — *Iqbal* found qualified immunity to apply. Moreover, plaintiffs' complaint here is even weaker than the complaint in *Iqbal* because plaintiffs have not alleged the implementation of an unconstitutional policy by any of these defendants. *A fortiori*, plaintiffs' complaint here should have been dismissed.

Importantly, there is not one allegation in plaintiffs' complaint that the four defendants searched or seized any of the plaintiffs or participated in or planned any of the specific operations at issue. Even if the Second Amended Complaint could be said to allege constitutional violations by individual ICE agents who were involved in the searches and arrests at issue, those agents are several layers of command removed from Weber and Rodriguez and even further removed from Myers and Torres. In this connection, Myers and Torres (as of 2007) oversaw an agency with more than 15,000 employees (working in the United States and around the world) and a budget of more than $3.1 billion. The district court's conclusion that Myers and Torres are two or three position levels below the

Secretary of Homeland Security and, therefore, somehow distinguishable from the Director of the FBI in *Iqbal* is simply wrong. For example, like the FBI Director, Myers reported to her agency head (the Secretary of DHS), was Presidentially-appointed and Senate-confirmed, was concerned with both national and international policy, and, thus, was at the same level of the hierarchical structure as the FBI Director in *Iqbal*. Indeed, Myers' supervisory authorities and responsibilities extended well beyond the Detention and Removal Operations program at issue here.

Allegations that Myers and Torres oversaw the implementation of a five-fold increase in Fugitive Operation Teams and an increase in arrest goals — notwithstanding alleged "notice" "via press reports, lawsuits, and congressional testimony" of alleged unconstitutional conduct — does not describe illegal or unconstitutional conduct. Rather, these allegations are entirely consistent with lawful conduct. The same is true of plaintiffs' assertions that defendants were directly responsible for overseeing the operations and for executing Operation Return to Sender in New Jersey and made certain statements to the media regarding the success of the program. These assertions are conclusory and therefore not entitled to be presumed true. Even if these allegations were considered factual rather than conclusory, the conduct described — promoting

increased enforcement efforts, senior-level oversight of nationwide initiatives, and making statements to the media — is plainly constitutional and appropriate in light of the government's interest in implementing the immigration laws. The allegation that certain defendants ignored newspaper articles or lawsuits containing allegations of unlawful activity that occurred somewhere in the United States, like many of the allegations, was based "upon information and belief," and has no more content than the allegations found insufficient to survive a motion to dismiss on qualified immunity grounds in *Iqbal*.

2. The district court also erred in denying Myers' and Torres' motion to dismiss for lack of personal jurisdiction. Plaintiffs' did not make a prima facie showing that these defendants are subject to personal jurisdiction in New Jersey. Neither Myers nor Torres was present at any ICE enforcement action conducted in New Jersey. And neither lives or works in New Jersey; at all times relevant to the claims in the Second Amended Complaint, they served in senior positions at ICE headquarters in Washington, DC. The district court itself did not cite to any contact that these defendants had in New Jersey; rather, the court asserted personal jurisdiction over them because they allegedly "directed their supervisory activities at New Jersey." As other authorities make clear, that is an insufficient basis for exercising personal jurisdiction over federal officials in a *Bivens* suit.

Argument

A.

Because Defendants Did Not Individually Participate In The Alleged Unconstitutional Conduct, Qualified Immunity Applies.

The plaintiffs seek damages from the personal resources of four supervisory federal government officials: the former Assistant Secretary of Homeland Security, ICE; the former Director, DRO; and both the Field Office Director and the Deputy Field Office Director for ICE/DRO in Newark. Government officials, however, are immune from civil liability when their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). See also *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The qualified immunity doctrine enunciated in *Harlow* was formulated precisely to allow government officials, such as these four supervisory officials, the necessary latitude to vigorously exercise their authority without the chill and distraction of damages suits, by ensuring that only personal conduct that unquestionably violates the Constitution will subject an official to individual liability. Thus, while "[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations," *Correctional Serv. Corp. v. Malesko*, 534 U.S. 61, 70-71 (2001), qualified

immunity is a broad doctrine and protects "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

1. In *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Supreme Court clarified the general pleading standards under Rule 8, Fed. R. Civ. P., and the specific requirements for *Bivens* actions. The Court reaffirmed the principle that Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S. Ct. at 1949 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Conclusory allegations — described by the Court as "formulaic recitation[s] of the elements of a cause of action," or "naked assertions devoid of further factual enhancement" — are insufficient to survive a motion to dismiss. *Ibid*. (citing *Twombly*, 550 U.S. at 577) (internal quotation marks omitted).

The Court also clarified the "plausibility" standard previously announced in *Twombly*. Under that standard, "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ibid*. (quoting *Twombly*, 550 U.S. at 570). This test is not satisfied if the complaint alleges facts that are "merely consistent with," or allow room for, the "possibility" that the defendant acted unlawfully. *Twombly*, 550 U.S. at 557. Rather, "[a] claim has facial plausibility when the plaintiff pleads factual content

that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. In other words, to survive a motion to dismiss, the complaint must contain enough factual content, "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

Iqbal rejected the idea that "a claim just shy of a plausible entitlement to relief" should be allowed to proceed in the hopes that groundless claims will "be weeded out early in the discovery process through careful case management." 129 S. Ct. at 1953 (internal quotation marks omitted). Such an idea is fundamentally at odds with the qualified immunity doctrine's "basic thrust of * * * free[ing] officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" *Ibid*. (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991)). If a complaint fails to allege facts sufficient to state a non-conclusory, plausible claim for relief, the plaintiff "is not entitled to discovery, cabined or otherwise." *Id*. at 1954.

Iqbal also examined the elements necessary for pleading in a *Bivens* action against supervisory defendants, and stated that "Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." 129 S. Ct. at 1948. See also *ibid*. (supervisors "may not be

held accountable for the misdeeds of their agents.").[8] Accordingly, a supervisor's knowledge of, and acquiescence in, a subordinate's wrongful conduct is not sufficient to hold a supervisor liable in a *Bivens* action. *Ibid*. See also *Correctional Serv. Corp. v. Malesko*, 534 U.S. at 70-71 (federal officers may only be subject to suit for constitutional violations if they are "directly responsible" for them). Instead, a plaintiff must plead that "each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id*. at 1948. See also *id*. at 1949 ("[i]n a * * * *Bivens* action — where masters do not answer for the torts of their servants — the term 'supervisory liability' is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct"). Conclusory allegations of unlawful acts or motives are insufficient; a plaintiff must allege facts that plausibly support the legal conclusions. Allegations "consistent with" illegal conduct are insufficient when they are "more likely" explained by legal conduct, 129 S. Ct. at 1950, and "[t]hreadbare recitals of the elements of a cause of

[8] See also 129 S. Ct. at 1955 ("the majority * * * does away with supervisory liability under *Bivens*") (Justice Souter, dissenting).

action, supported by mere conclusory statements" "do not suffice" to overcome the qualified immunity defense, *id*. at 1949.[9]

2. a. Pursuant to the foregoing principles, the *Bivens* claims against the four supervisory defendants should have been dismissed on qualified immunity grounds. First, plaintiffs themselves describe their claims against the defendants in terms of "supervisory liability." See Second Amended Complaint (JA 531-532, 561-564; DDE # 106 ¶¶ 5, 144-152). *Iqbal* makes clear that a *Bivens* action cannot be premised on such liability.

---

[9] As far as we are aware, this Court has yet to address whether *Iqbal* altered the analysis for holding supervisory officials liable in *Bivens* actions. In the one case we are aware of, *Bayer v. Monroe County Children & Youth Servs.*, 577 F.3d 186, 191 n.5 (3d Cir. 2009), the Court stated that, "[i]n light of the Supreme Court's recent decision in *Ashcroft v. Iqbal*, * * * it is uncertain whether proof of such personal knowledge [of a constitutional violation], with nothing more, would provide a sufficient basis for holding [a supervisor] liable * * * under § 1983." Recently, the Ninth Circuit relied on prior precedent establishing that a supervisor can be held liable "for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which they knew or reasonably should have known would cause others to inflict constitutional injury." *al-Kidd v. Ashcroft*, 580 F.3d 949, 965 (9th Cir. 2009), *petition for cert. filed*, __ S. Ct. __, 79 U.S.L.W. 3062 (U.S. July 16, 2010) (No. 10-98). It is unclear whether this Ninth Circuit standard remains viable after *Iqbal*. See *Hunter v. Hydrick*, 129 S. Ct. 2431 (2009) (Mem.), *vacating Hydrick v. Hunter*, 500 F.3d 978 (9th Cir. 2007) (which relied on the "setting into motion" standard of liability). See also *al-Kidd v. Ashcroft*, 580 F.3d at 992 n.13 (Bea, J., dissenting) ("It is doubtful that the majority's 'knowing failure to act' standard survived *Iqbal*."). Even so, that standard has not been adopted by the this Court.

Second, *Iqbal* rejected the very legal theory proffered by plaintiffs here, which is essentially that defendants developed lawful policies that were implemented unlawfully by line agents over which they had national or regional supervisory authority. See Second Amended Complaint (JA 531-532, 534-535, 537-538, 561-564; DDE # 106 ¶¶ 5, 19-22, 28-32, 144-152). Indeed, in *Iqbal*, the Court found qualified immunity to apply where the complaint described the supervisory official as the "principal architect" *of an unconstitutional policy*, allegedly "instrumental in [the] adoption, promulgation, and implementation" of that policy, and who purportedly knew or should have known that constitutional violations were occurring, but failed to correct them. 129 S. Ct. at 1951. The complaint here is even weaker because *inter alia* plaintiffs have not alleged the implementation of an unconstitutional policy by any of these defendants.

b. Plaintiffs summarize their allegations as follows:

> Despite aggressively increasing the arrest quotas and the number of agents participating in "Operation Return to Sender," and thereafter being notified — via press reports, lawsuits, and congressional testimony — of the widespread allegations of unconstitutional and abusive conduct by ICE agents as part of this program, the DHS supervisory officials named in this Complaint have continued to foster an institutional culture of lawlessness. Specifically, they have failed to develop meaningful guidelines or oversight mechanisms to ensure that home arrests are conducted within constitutional limits, to provide the agents involved with adequate training (or for some newer agents, any training) on the lawful execution of fugitive

> operations, or otherwise ensured accountability for the failure to conduct fugitive operations within constitutional limits. On the contrary, on many occasions, DHS supervisory officials have proudly publicized the increasing numbers of arrests made as a result of the unconstitutional raids that continue to be carried out in the shadows and the dark of night.

Second Amended Complaint (JA 531-532; DDE # 106 ¶ 5). See also Opinion II (JA 52; DDE # 135 at 7).

Consistent with the foregoing, the allegations with respect to the four supervisory defendants fall into two categories, neither of which is sufficient under *Iqbal* to survive a motion to dismiss based on qualified immunity grounds. One, plaintiffs allege that defendants were on notice (had knowledge) that some ICE agents in jurisdictions other than New Jersey were allegedly engaging in unconstitutional and abusive conduct and essentially permitted or encouraged the conduct by doing nothing. And, two, relatedly, plaintiffs allege that defendants failed to develop guidelines or other mechanisms to ensure that ICE agents implemented the Operation Return to Sender program in a constitutional manner. See Opinion II (JA 52; DDE # 135 at 7). And see Second Amended Complaint (JA 534-535, 561-564, 565, 567, 568, 570, 572, 573-574; DDE # 106 ¶¶ 19-22, 144-152, 157-158, 165-166, 174-175, 183-184, 192-193, 200-201) (allegations regarding each defendant).

Plaintiffs' "knowledge" allegations are virtually identical to the allegations found insufficient in *Iqbal* — where the plaintiff alleged that the then-Attorney General (Ashcroft) and Director of the FBI (Mueller) "knew of, condoned, and willfully and maliciously agreed to subject [Iqbal]" to harsh conditions, that Ashcroft was the "principal architect" of the policy, and that Mueller was "instrumental" in adopting and executing it, *id.* at 1951 (internal citations omitted) — and thus are plainly insufficient. See *ibid*. (such allegations are "bare assertions" whose "conclusory nature * * * disentitles them to the presumption of truth."). A complaint simply does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 129 S. Ct. at 1949 (alterations in original). Cf. *Moss v. U.S. Secret Service,* 572 F.3d 962, 967-972 (9th Cir. 2009) (as to Secret Service *line agents*, plaintiffs' allegations were entirely conclusory and therefore did not meet *Iqbal* pleading standards; case remanded to allow plaintiffs to amend because complaint was pre-*Iqbal*).[10]

---

[10] Even in *al-Kidd v. Ashcroft*, 580 F.3d 949, *supra*, n.9, where the Ninth Circuit established a very permissive, post-*Iqbal* interpretation of the pleading standard vis-a-vis supervisory officials, the court dismissed a conditions-of-confinement claim brought by a person detained as a material witness. See *al-Kidd v. Ashcroft*, 580 F.3d at 979. The dismissed claim alleged that the Attorney General promulgated highly restrictive detention policies that caused plaintiff to be subjected to the harsh conditions about which he was complaining. *Ibid*. In addition, the court said that, "[w]hile it is possible that [certain] reports were sufficient to put Ashcroft on notice by spring of 2003 that there was a systemic

Plaintiffs' allegations that defendants failed to train, investigate, and discipline (hereinafter "failure to train") are also insufficient to state a *Bivens* claim. First, these allegations are not independent of, and in fact derive their essence from, plaintiffs' "notice" and "knowledge" allegations: defendants could not be guilty of a failure to train unless they were on notice (had knowledge) of the allegations of unconstitutional conduct by ICE agents in implementing the Operation Return to Sender program. Thus, because they are entirely dependent on the "knowledge" allegations, the "failure to train" allegations suffer from the same infirmity as the "knowledge" allegations as discussed above.

Second, the "failure to train" allegations are devoid of any factual enhancement. Although the complaint provides some factual support for what allegedly took place at each residence, absent from the complaint are facts to indicate that any action taken (or not) by these particular defendants constituted a clearly established constitutional violation. *Iqbal* requires some subsidiary facts to "nudge" a plaintiff's claims across the line from "conceivable to plausible." 129

---

problem at the [Department of Justice] with respect to its treatment of material witnesses, the non-specific allegations in the complaint regarding Ashcroft's involvement fail to nudge the *possible* to the *plausible*, as required by *Twombly*." *Ibid*. As noted in n.9, *supra*, the government has filed a petition for certiorari challenging *al-Kidd*'s conclusion that al-Kidd met *Iqbal*'s pleading standard vis-a-vis the other claims in the complaint.

S. Ct. at 1950-51. Although plaintiffs include conclusory allegations that all four defendants failed to train, investigate or discipline, they do not identify any specific training that was warranted, not provided, and would have prevented the alleged unconstitutional conduct; nor do they allege any official was directly responsible for line agent training. Similarly, they fail to identify any discipline or investigation that was required, warranted, or would have prevented the claimed constitutional violations. In fact, their only allegations actually attributable to the defendants are Myers' statements that "officers are required to obtain consent before they are permitted to enter private residences" and that officials at DHS and ICE "take reported allegations of misconduct seriously and will fully investigate all allegations * * *." First Amended Complaint Ex. D (JA 313, 314; DDE # 15-6 at 1, 2). Both statements are clearly consistent with constitutional requirements and thus undermine any claim of unconstitutional conduct. Furthermore, if plaintiffs' "failure to train" allegations were sufficient to establish a cause of action, *Iqbal* would be rendered virtually meaningless: such boilerplate allegations can *always* be made against high-ranking or supervisory government officials.

Third, even if plaintiff's failure-to-train allegations had been properly pled, they still would not state a *Bivens* claim. Negligence is insufficient to state a

constitutional claim. See, *e.g.*, *Ferrone v. Onorato*, No. 07-4299, 298 Fed. Appx. 190, 194 (3d Cir. 2008) ("negligent ministerial action falls short of the affirmative abuse of governmental power against which the Constitution guards"); *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) ("liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process"); and *Daniels v. Williams*, 474 U.S. 327, 333 (1986) ("[I]njuries inflicted by government negligence are not addressed by the United States Constitution."). See also *Farmer v. Brennan*, 511 U.S. 825 (1994); *Estelle v. Gamble*, 429 U.S. 97 (1976). Failure-to-train allegations may be pertinent to entity liability under 42 U.S.C. 1983, see, *e.g.*, *Farmer v. Brennan*, 511 U.S. at 840-841 (citing cases); *City of Canton v. Harris*, 489 U.S. 378, 388, 391 (1989), but not to individual-capacity liability under *Bivens*.

c. Importantly, there is not one allegation that the four defendants searched or seized any of the plaintiffs or participated in or planned any of the operations at issue. Even if the Second Amended Complaint could be said to allege constitutional violations by individual ICE agents who were involved in the searches and arrests at issue, those agents are several layers of command removed from Weber and Rodriguez and even further removed from Myers and Torres. In this connection, Myers and Torres (during the events at issue) oversaw an agency

with more than 15,000 employees (working in the United States and around the world) and a budget of more than $3.1 billion. First Amended Complaint Ex. C (JA 248; DDE # 15-4 at 2). (The exhibits to the First and Second Amended Complaints are the same.) The district court's conclusion that Myers and Torres "are two or three position levels below the Secretary of Homeland Security" and, therefore, somehow distinguishable from the Director of the FBI in *Iqbal* is simply wrong. Opinion II (JA 60; DDE # 135 at 15) (distinguishing *Iqbal*). For example, like the FBI Director, Myers reported to her agency head (the Secretary of DHS), was Presidentially-appointed and Senate-confirmed, was concerned with both national and international policy, and, thus, was at the same level of the hierarchical structure as the FBI Director in *Iqbal*. Indeed, Myers' supervisory authorities and responsibilities at ICE Headquarters extended well beyond the Detention and Removal Operations program at issue here. See First Amended Complaint Ex. C ("Organization Chart") (JA 248; DDE # 15-4 at 2).

d. The allegations that defendants aggressively increased arrest "quotas"[11] as well as the number of agents participating in the Operation Return to Sender program — notwithstanding alleged "notice" "via press reports, lawsuits, and

[11] Plaintiffs use the term "quotas" in the complaint, but the documents attached to the complaint refer to "goals," *not* "quotas." See, *e.g.*, First Amended Complaint Ex. C (JA 254, DDE # 15-4 at 8) ("annual apprehension goals").

congressional testimony" of alleged unconstitutional conduct — does not describe illegal or unconstitutional conduct. These allegations are entirely consistent with lawful conduct and are best understood as focusing on techniques for the lawful enforcement of the immigration laws, rather than illegal conduct. See *Twombly*, 550 U.S. at 567 (concluding that although conduct was consistent with unlawful behavior, allegations did not suggest illicit accord because it was not only compatible with, but indeed more likely explained by, lawful behavior). Indeed, promoting vigorous enforcement of the law is a central aim of the qualified immunity doctrine. See, *e.g.*, *Harlow v. Fitzgerald*, 457 U.S. at 818 (qualified immunity "is designed to shield government officials from the burdens and costs of litigation and to prevent disruption of governmental responsibilities"); and see, *supra*, at pp. 21-22. Simply put, one cannot infer unconstitutional conduct from mere allegations that enforcement efforts of a lawful program have increased.

Plaintiffs do not allege that the enforcement of the immigration laws of which Fugitive Operation Teams and Operation Return to Sender were part is illegal, and, as previously noted, Myers' statement — that "officers are required to obtain consent before they are permitted to enter private residences" and that officials at DHS and ICE "take reported allegations of misconduct seriously and will fully investigate all allegations," First Amended Complaint Ex. D (JA 313;

DDE # 15-6 at 1) — indicates that the supervisory officials understood the constraints of the law in implementing these enforcement techniques. Increasing arrest goals and enforcement efforts thus does not equate to, or even suggest, illegal conduct; both allegations are, simply put, completely consistent with enforcing lawful policies.

e. Plaintiffs' unadorned claim that defendants were aware of allegations of misconduct by ICE agents somewhere in the United States is simply insufficient to demonstrate that defendants had personal knowledge of their subordinates' alleged conduct in this case.[12] See, *e.g., Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir. 1988). In *Rode*, this Court held that numerous newspaper articles, the introduction of a legislative resolution seeking an investigation into retaliation, the filing of grievances in the Governor's office of administration, and telephone calls and correspondence with the Lieutenant Governor's office were insufficient to show that the Governor had actual knowledge of the alleged misconduct. *Id*. at 1208.

Here, the unsubstantiated claims (to which plaintiffs point) of a handful of alleged violations occurring over the course of several years somewhere in the United States in an agency of over 15,000 employees does not trigger a constitutional obligation to undertake particular actions. See *Rode v.*

[12] But see Op. II (JA 53; DDE # 135 at 8) (rejecting that argument).

Dellarciprete, 845 F.2d at 1208. This is especially true where, as here, the policy as described by Myers, see First Amended Complaint Ex. D (JA 314; DDE # 15-6 at 2), is that agents are required to obtain consent to enter homes. In any event, even if the official capacity lawsuits, media reports, and Congressional testimony could be deemed to have put defendants on notice of allegations of unconstitutional conduct, plaintiffs alleged nothing that defendants should have done in the form of training or investigation nor did they point to anything beyond their own generalized ipse dixit ("[u]pon information and belief," Second Amended Complaint (JA 565, 567, 568, 570, 572, 573-574; DDE # 106 ¶¶ 157-158, 165-166, 174-175, 183-184, 192-193, 200-201) that nothing was done.

Even more troubling, perhaps, is that such boilerplate assertions about failing to act — without any factual allegations about what should have been done, but was not — can be made against any high-ranking government official in any agency. It simply cannot be the case that the principles established in *Iqbal* can be so easily circumvented. See also *Rode v. Dellarciprete*, 845 F.2d at 1208.

3. As to Myers and Torres, specifically, plaintiffs allege that they "facilitated the creation of a culture of lawlessness and lack of accountability within an agency they supervise," and failed to provide specific guidelines or training to fugitive operations agents, or to meaningfully discipline any officer

responsible for unconstitutional conduct. Second Amended Complaint (JA 561, 562-563; DDE # 106 ¶¶ 144, 148). For reasons already stated, these allegations are insufficient to hold high-ranking *supervisory* federal officials subject to personal liability. They are conclusory, devoid of factual content, and are implausible given Myers' statement — upon which both plaintiffs and the district court rely — that the operations at issue require consent and that officials at DHS and ICE "take reported allegations of misconduct seriously and will fully investigate all allegations," First Amended Complaint Ex. D (JA 313; DDE # 15-6 at 1). See *Iqbal*, 129 S. Ct. at 1949-50; *Twombly*, 550 U.S. at 553-54 ("[f]actual allegations must be enough to raise a right to relief above the speculative level"); *Benzman v. Whitman*, 523 F.3d 119, 129 (2d Cir. 2007) ("a bare allegation that the head of a Government agency * * * knew that her statements were false and 'knowingly' issued false press releases is not plausible in the absence of some supporting facts").

Plaintiffs also allege that Myers and Torres oversaw the implementation of a five-fold increase in Fugitive Operation Teams and an increase in arrest goals, Second Amended Complaint (JA 561; DDE # 106 ¶ 144); that arrests were made "pursuant to the nationwide interior immigration enforcement strategy *announced* by defendant Myers and [Secretary] Chertoff," Second Amended Complaint (JA

562-563; DDE # 106 ¶ 148 (emphasis added)), that Torres had "direct responsibility for the execution of fugitive operations" within Operation Return to Sender, Second Amended Complaint (JA 562; DDE # 106 ¶ 147); and that Myers and Torres allegedly lauded as successful an increase in arrests, Second Amended Complaint (JA 562-563; DDE # 106 ¶ 148). As noted previously, these actions are plainly constitutional and appropriate in light of the government's interest in implementing the immigration laws. See *Iqbal*, 129 S. Ct. at 1951; *Twombly*, 550 U.S. at 567.

Contrary to the district court's recitation of allegations contained in the Second Amended Complaint, nowhere in the Second Amended Complaint do plaintiffs allege that Myers "directly implemented the specific [Operation Return to Sender] program," Opinion II (JA 59; DDE # 135 at 14), that Myers and Torres "worked on these issues every day," *id*. (JA 60; DDE # 135 at 15), or that Myers and Torres "wrote the policy," *ibid*. The court plainly erred in this regard. Even so, none of these actions is constitutionally suspect. The court also erroneously stated that plaintiffs alleged that individual federal defendants "directly initiated the unconstitutional home raid practices at issue," Opinion II (JA 59; DDE # 135 at 14); that allegation, too, is not found in the Second Amended Complaint. In the Second Amended Complaint, plaintiffs simply allege that ICE press releases

describing arrests under Operation Return to Sender have stated that those arrests were made pursuant to a nationwide immigration strategy "announced by * * * Myers and Michael Chertoff." Second Amended Complaint (JA 534, 562-563; DDE # 135 ¶¶ 19, 148). Plaintiffs do allege that Torres "had direct responsibility for the execution of fugitive operations," Second Amended Complaint (JA 562; DDE # 106 ¶ 147), which, again, alleges nothing untoward or unconstitutional and is, in any event, conclusory.

4. As to Weber and Rodriguez, the allegations the district court relied on were: 1) that as directors of the Newark field office, Weber and Rodriguez were directly responsible for overseeing the operations and for executing Operation Return to Sender in New Jersey; 2) that both made specific comments to the media that emboldened alleged unconstitutional practices; and 3) that they ignored specific allegations of unlawful activity. See Opinion II (JA 60; DDE # 135 at 15). The first allegation describes plainly constitutional conduct.[13]

The second allegation claims that Weber and Rodriguez both "publicize[d] ICE's 'successful' increase in New Jersey immigration arrests over the past two years," Second Amended Complaint (JA 564: DDE # 106 ¶ 152), and that each

[13] In its recitation of the facts, the court states that Rodriguez and Weber also "direct[ed] the searches of the residences," Opinion II (JA 53; DDE # 135 at p. 8), although that allegation is not contained in the Second Amended Complaint.

"makes frequent reports and comments on the number of arrests made by ICE agents and speaks publicly on behalf of ICE about the implementation of 'Operation Return to Sender' in New Jersey," Second Amended Complaint (JA 563-564; DDE # 106 ¶ 149). These allegations are entirely consistent with lawful conduct. See *Iqbal*, 129 S. Ct. at 1950-51; *Twombly*, 550 U.S. at 567.

Moreover, plaintiffs' contention that the comments "suggest that Defendants Rodriguez and Weber at best acquiesced in, and at worst, encouraged such behavior," Second Amended Complaint (JA 563-564; DDE # 106 ¶ 149), is precisely the kind of naked statement held insufficient in *Iqbal* to overcome a motion to dismiss on qualified immunity grounds. The same is true with Weber's comment (not attributed or attributable to Rodriguez) that he did not "see [the conduct at issue] as storming a home" but, rather, "as trying to locate someone," *ibid*.[14]

As to the third allegation, plaintiffs simply allege that "upon information and belief," Weber and Rodriguez "knew that ICE agents were entering and

[14] Even if the quotation attributed to Weber alone were somehow indicative of "knowledge and acquiescence" in the conduct alleged in the news report — which it cannot be — the 2008 news report has no bearing on the claims of Ontaneda, Guzman, Flores, Arias, and Covias, which involved alleged conduct that predated that comment. See Second Amended Complaint (JA 551-558; DDE # 106 ¶¶ 89-139).

searching homes in New Jersey without search warrants and without obtaining voluntary, informed consent" but failed to train, investigate or discipline officers under their supervision, and allowed the unconstitutional means for many of the arrests to continue unchecked. Second Amended Complaint (JA 563-564; DDE # 106 ¶¶ 149-152). See also Second Amended Complaint (JA 563-564; DDE # 106 ¶ 149) (alleging Weber and Rodriguez "at best acquiesced in, and at worst, encouraged such behavior"). Not one *fact* is alleged to suggest such allegations are possible or plausible. Indeed, these allegations have no more content than those rejected in *Iqbal*. See *Iqbal*, 129 S. Ct. at 1944 (alleging that Ashcroft and Mueller "each knew of, condoned, and * * * agreed to subject" Iqbal to harsh conditions).

5. Finally, following each Count in the Complaint, plaintiffs include boilerplate allegations that, "[u]pon information and belief, defendants * * * participated in, directed, or knew of and acquiesced in the violation of plaintiffs' rights; tolerated past or ongoing misbehavior of this kind; or were deliberately indifferent to the risk that ICE officers, lacking clear training and under the pressure of sharply-increased quotas, would violate the * * * rights of individuals suspected of being undocumented immigrants.* * *." Second Amended Complaint (JA 536, 563, 564, 565, 567, 568, 570, 572, 573; DDE # 106 ¶¶ 23,

148, 150-152, 157, 165, 174, 183, 192, 200). These boilerplate allegations add nothing of substance to the other allegations in the complaint discussed above and do "'not nudge[] [plaintiffs'] claims * * * across the line from conceivable to plausible.'" *Iqbal*, 129 S. Ct. at 1950-1951 (quoting *Twombly*, 550 U.S. at 570).

In sum, plaintiffs failed to demonstrate the personal involvement of any of the supervisory defendants in the conduct alleged to be unconstitutional in this case. Accordingly, under *Iqbal*, the district court erred in failing to dismiss on qualified immunity grounds plaintiffs' complaint against the four supervisory defendants.

B.

The District Court Lacked Personal Jurisdiction Over Myers And Torres.

The district court also erred in denying Myers' and Torres' motion to dismiss for lack of personal jurisdiction.[15] Plaintiffs' did not make a prima facie showing that these defendants are subject to personal jurisdiction in New Jersey. See *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 97 (3d Cir.2004) ("To survive a motion to dismiss for lack of personal jurisdiction, a plaintiff bears the burden of

[15] The other two named defendants, Scott Weber and Bart Rodriguez, both were based in New Jersey during the events at issue.

establishing the court's jurisdiction"; "when the court does not hold an evidentiary hearing on the motion to dismiss, the plaintiff need only establish a prima facie case of personal jurisdiction and the plaintiff is entitled to have its allegations taken as true and all factual disputes drawn in its favor."). Neither Myers nor Torres was present at the ICE enforcement actions conducted in New Jersey. And neither lives or works in New Jersey; at all times relevant to the claims in the Second Amended Complaint, they served in senior positions at ICE headquarters in Washington, DC. The district court itself did not cite to any contact that these defendants had in New Jersey; rather, the court asserted personal jurisdiction over them solely because they allegedly "purposefully directed their supervisory activities at New Jersey." Opinion I (JA 38; DDE # 94 at 38). That rationale is insufficient for exercising personal jurisdiction over federal officials in a *Bivens* suit, *i.e.*, federal officials sued in their *individual* capacities.

1. "[T]o exercise personal jurisdiction over a defendant, a federal court * * * must undertake a two-step inquiry. First, the court must apply the relevant state long-arm statute to see if it permits the exercise of personal jurisdiction; then, the court must apply the precepts of the Due Process Clause of the Constitution. In New Jersey, *this inquiry is collapsed into a single step* because the New Jersey long-arm statute permits the exercise of personal jurisdiction to the fullest limits of

due process." *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d at 258-259 (emphasis added) (citing *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 284 (3d Cir.1981)). Moreover, the New Jersey Supreme Court has made it clear that New Jersey courts look to federal law for the interpretation of the limits on in personam jurisdiction. *Id*. at 259. See also *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d at 96.

2. Due process requires that a defendant have "sufficient 'minimum contacts'" within a state to subject him or her to suit there. *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d at 96. See also *Provident Nat'l Bank v. California Federal Sav. & Loan Ass'n*, 819 F.2d 434, 436-437 (3rd Cir. 1987) (under the Due Process Clause, a federal court has personal jurisdiction over a non-resident defendant only where the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'") (alteration in original) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). "[T]he defendant's conduct and connection with the forum State [should be] such that he should reasonably anticipate being haled into court there." *D'Jamoos ex rel. Estate of Weingeroff v. Pilatus Aircraft Ltd.*, 566 F.3d 94, 105 (3rd Cir. 2009), *cert denied*, 130 S. Ct. 2340 (2010).

"The two types of personal jurisdiction are general jurisdiction and specific jurisdiction." *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 317 (3d Cir. 2007). See also *Remick v. Manfredy*, 238 F.3d 248, 255 (3d Cir. 2001); and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn.8&9 (1984). General jurisdiction requires, among other things, "systematic and continuous" contacts between a non-resident defendant and the forum state, *Spuglio v. Cabaret Lounge*, No. 09-2195, 344 Fed. Appx 724, 725 (3rd Cir. 2009) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)), but the district court did not find such contacts, see Opinion I (JA 35-38; DDE # 94 at 35-38), nor did plaintiffs allege any, see Second Amended Complaint (JA 534-536, 561-564; DDE # 106 ¶¶ 18-26, 144-152). Thus, the question is whether the district court correctly determined that plaintiffs established a prima facie case of specific jurisdiction, see Opinion I (JA 37-38; DDE # 94 at 37-38), and on this question, the district court clearly erred.

3. This Court undertakes a three-part inquiry to determine whether specific jurisdiction exists: "[f]irst, the defendant must have 'purposefully directed [its] activities' at the forum"; "[s]econd, the litigation must arise out of or relate to at least one of those activities"; and "third, if the first two requirements have been met, a court may consider whether the exercise of jurisdiction otherwise

comport[s] with fair play and substantial justice." *D'Jamoos ex rel. Estate of Weingeroff v. Pilatus Aircraft Ltd.*, 566 F.3d at 102 (internal quotation marks and citations omitted). See also *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d at 317. The district court found that all three requirements were met. See Opinion I (JA 37-38; DDE # 94 at 37-38). It is clear, however, that plaintiffs failed at the first step and, therefore, that the district court erred for two reasons: (1) Myers and Torres did not "purposefully direct" their conduct at New Jersey simply by fulfilling their national oversight responsibilities; and (2) plaintiffs alleged jurisdiction over Myers and Torres because of their *failure* to act, but a failure to act cannot satisfy the "purposefully direct[ed]" standard.

a. Both due process and sound policy require a meaningful connection with the forum before such an official can be haled into any district court in the country. See generally *Marten v. Godwin*, 499 F.3d 290, 297 (3d Cir. 2007) ("Even if a defendant's conduct could cause foreseeable harm in a given state, such conduct does not necessarily give rise to personal jurisdiction in that state."). Courts therefore routinely find lack of personal jurisdiction over DC-based policy makers. See, *e.g. McCabe v. Basham*, 450 F. Supp.2d 916, 926 (N.D. Iowa 2006) ("Courts across the country have recognized that personal jurisdiction cannot be premised solely on a defendant's supervisory status."); *Nwanze v. Philip Morris*

Inc., 100 F. Supp.2d 215, 220 (S.D.N.Y. 2000) (collecting cases) (mere supervision over a federal agency, "the reach of which extends into every state," does not support personal jurisdiction in an individual capacity suit). Indeed, numerous courts have held that specific jurisdiction may not be exercised over federal officials based on the adoption and implementation of a national policy. See, *e.g.*, *Moss v. U.S. Secret Service*, No. 06-3045, 2007 WL 2915608, at *18-19 (D. Or. Oct. 7, 2007) ("Plaintiffs have alleged that [Director of the U.S. Secret Service] Basham and the Secret Service have a nation-wide policy of engaging in viewpoint discrimination, but this standing alone is insufficient to establish that Basham purposefully directed activity towards Oregon or any of plaintiffs.") (citing *McCabe v. Basham*, 450 F. Supp.2d at 924, 926), *rev'd in part, dismissed in part on other grounds*, *Moss v. U.S. Secret Service,* 572 F.3d 962 (9th Cir. 2009); *Mahmud v. Oberman*, 508 F. Supp.2d 1294, 1301-02 (N.D. Ga. 2007), *aff'd sub nom. Mahmud v. DHS*, No. 07-13311, 262 Fed. Appx 935 (11th Cir. 2008); *Rank v. Hamm*, No. 04-0997, 2007 WL 894565 at *11-13 (S.D.W.Va. Mar. 21, 2007); *McCabe v. Basham*, 450 F. Supp.2d at 924-27 (it "is not permissible" to "premis[e] jurisdiction [of] * * * two senior-level federal government officials, upon the acts of low-level federal * * * employees") (footnote omitted)). See also, *e.g.*, *Doe v. Am. Nat'l Red Cross*, 112 F.3d 1048, 1050-51 (9th Cir. 1997); *James*

v. Reno, No. 99-5081, 1999 WL 615084, at *1 (D.C. Cir. July 2, 1999); *Vu v. Meese*, 755 F. Supp. 1375, 1378 (E.D. La. 1991) ("[T]he fact that federal government officials enforce federal laws and policies on a nationwide basis is not sufficient in and of itself to maintain personal jurisdiction in a lawsuit which seeks money damages against those same governmental officials in their individual capacities"). As *McCabe* observed, "'[i]f a federal agency head could be sued personally in any district within his or her official authority merely for supervising acts of subordinates * * * the minimum contacts requirement would be rendered meaningless.'" 450 F. Supp.2d at 926 (quoting *Wag-Aero*, *Inc. v. United States*, 837 F. Supp. 1479, 1486 (E.D. Wis. 1993)); see also *Doe v. American Nat'l Red Cross*, 112 F.3d at 1050-51 (dismissing individual capacity suit against FDA official working in Washington, DC, because of lack of contacts with forum).[16]

[16] These decisions are consistent with the holding in *Stafford v. Briggs*, 444 U.S. 527 (1980), that the statute making any district court a proper venue for official-capacity suits against federal officials does not extend to *Bivens* suits. See *id*. at 544 ("Suits for money damages for which an individual office-holder may be found personally liable are quite different. If * * * suits could be brought against these federal officers while in Government service — and could be pressed even after the official has left federal service — in any one of the 95 federal districts covering the 50 states and other areas within federal jurisdiction[,] [t]his would place federal officers * * * in a very different posture in personal damages suits from that of all other persons * * *.").

Consistent with the foregoing, numerous courts have also held that agency officials with supervisory responsibilities over particular regions are not subject to jurisdiction in every state that falls within their supervisory purview. See *Hill v. Pugh*, No. 02-1561, 75 Fed. Appx 715, 719 (10th Cir. 2003) (no jurisdiction over Federal Bureau of Prisons Regional Director for responsibility over prison operations in the forum); *Johnson v. Rardin*, No. 91-1211, 952 F.2d 1401, 1992 WL 9019 at *1 (10th Cir. Jan. 17, 1992) (no jurisdiction over Federal Bureau of Prisons Regional Counsel for reviewing inmate's appeals and occasionally advising prison staff members in forum state); *Randall v. Pettiford,* No. 08-3594, 2010 WL 1072164 at *3 (D.S.C. Feb. 22, 2010) (no jurisdiction over Federal Bureau of Prisons officials who handled plaintiff's appeals from their offices outside the forum); *Durham v. Lappin*, No. 05-1282, 2006 WL 2724091 at *5 (D. Colo. Sept. 21, 2006) (no jurisdiction over Federal Bureau of Prisons regional and national officials for responding to plaintiff's grievances).

All of plaintiffs' allegations against Myers and Torres concern their supervisory responsibilities as agency officials overseeing nationwide policies. For Myers, who served as the highest-ranking, Presidentially appointed official within ICE, and Torres, a former director of ICE's Office of Detention and Removal Operations, plaintiffs challenge their oversight of a national policy, see

Second Amended Complaint (JA 531-532, 561-563; DDE # 106 ¶¶ 5, 144-148), and focus on Myers' and Torres' administration of the Operation Return to Sender program nationwide, see *id*. (JA 534-535, 561-563; DDE # 106 ¶¶ 18-20, 144-148). See also pp. 35-38, *supra* (discussing claims against Myers and Torres). Other than the boilerplate paragraph that plaintiffs inserted in each claim, plaintiffs do not allege any facts to indicate that Myers or Torres participated in, or helped plan and execute, any aspect of the operations at issue in the Second Amended Complaint or anywhere in New Jersey for that matter. And, most significantly, there are no allegations that Myers or Torres *personally* has a substantial connection with New Jersey. In fact, the allegations concerning management and implementation of a national policy undercut the showing that plaintiffs must make because a national policy, by definition, cannot be expressly targeted at a particular state. See *McCabe*, 450 F. Supp.2d at 926. Ultimately, the fact that Myers and Torres oversaw the administration of a national policy as part of their responsibilities in Washington, DC, cannot subject them to jurisdiction in New Jersey.

b. There is also no jurisdiction over Myers and Torres because jurisdiction is premised on a *failure* to act. See, *e.g.*, Second Amended Complaint (JA 562-563; DDE # 106 ¶ 148). See also Opinion I (JA 38; DDE # 94 at 38

("omissions"). It is well-settled that an overt act is required for due process to permit the exercise of personal jurisdiction:

> [I]t is essential in each case that there be *some act* by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.

Hanson v. Denckla, 357 U.S. 235, 253 (1958) (emphasis added). And, in accordance with this principle, this Court has held that a failure to act does not satisfy the minimum contacts requirement. See *Carty v. Beech Aircraft Corp.*, 679 F.2d 1051, 1061 (3d Cir. 1982) (exercising jurisdiction based on a failure to act "would dangerously trench upon the constitutional prohibition against assertion of jurisdiction where the defendant has not purposefully availed itself of the privilege of conducting activity within the forum"). See also, *e.g.*, *Clebda v. H.E. Fortna and Brother, Inc.*, 609 F.2d 1022, 1023-24 (1st Cir. 1979) ("a failure to act" is insufficient; "there still must be some form of submission to the state," citing *Hanson v. Denckla*, 357 U.S. at 253); *Nat'l Union Fire Ins. Co. v. Am. Eurocopter Corp.*, No. CV 09-136, 2009 WL 2849130 at *7 (D. Haw. Aug. 26, 2009); *Pettengill v. Curtis*, 584 F. Supp.2d 348, 357-58 (D. Mass. 2008); *cf. Reingold v. Deloitte Haskins & Sells*, 599 F. Supp. 1241, 1259 n.16 (S.D.N.Y. 1984) ("we

hesitate to premise the exercise of jurisdiction on a failure to act" citing the concerns expressed in *Carty* and *Clebda*).

The decision in *Pettengill* is particularly relevant. The plaintiff premised jurisdiction over executives of the Boy Scouts of America who resided outside the forum on allegations that they "had actual knowledge of [sexual] abuse problems in general and at least one incident in [the forum]" but failed to take corrective actions. *Id.* at 345-56. Like the plaintiffs here, the plaintiff in *Pettengill* alleged that the defendants failed "to put policies in place to prevent [sexual abuse]" or "did so negligently," and these failures led to plaintiff's injuries. *Id.* at 354. The court held that it could not exercise personal jurisdiction over the defendants because their only contacts with the forum were "omissions relating to their policymaking roles at [Boy Scouts of America] and correspondence with scoutmasters in [the forum] regarding abuse allegations unrelated to [the perpetrator]." *Id.* at 357. The court observed that transforming "a failure to act that was directed at nowhere in particular into a purposeful availment of the laws of one specific state" would make the defendants "subject to personal jurisdiction everywhere," and thus "eviscerate the minimum contacts test for satisfying the requirements of due process." *Id.* at 358-59. That principle applies with equal force here. Plaintiffs fault Myers and Torres for *failing* to undertake action in

New Jersey; due process does not permit the exercise of jurisdiction over them with respect to those allegations.[17]

[17] The decision in *Iqbal* — that a supervisor should not be vicariously liable for the acts of his subordinates — should apply with equal force to personal jurisdiction. Myers and Torres, throughout the events at issue, were located in Washington, DC. See Opinion I (JA 37; DDE # 94 at 37). Just because subordinates in New Jersey allegedly engaged in certain unconstitutional conduct does not mean that a supervisor, based in Washington, DC, with no personal contacts or individual conduct occurring in New Jersey, should be subject to that court's jurisdiction.

Conclusion

For the foregoing reasons, the decision of the district court denying qualified immunity to the four supervisory defendant-appellants should be reversed. In the alternative, the complaint against defendants Myers and Torres should be dismissed for lack of personal jurisdiction.

Respectfully submitted,

TONY WEST
Assistant Attorney General

PAUL FISHMAN
United States Attorney

BARBARA L. HERWIG
202-514-5425

/s/ Howard S. Scher
HOWARD S. SCHER
(DC Bar No. 200626)
202-514-4814
Attorneys, Appellate Staff
Civil Division, Room 7239
Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

OCTOBER 2010

Certificate of Compliance

I hereby certify that, according to the word count provided in Corel WordPerfect 12, the foregoing brief contains 11,754 words. The text of the brief is composed in monospaced, 14-point Times New Roman typeface, which has 10 characters per inch.

The text of the hard copy of this brief and the text of the "PDF" version of the brief filed electronically through ECF ("the E-brief") are identical. A virus check was performed on the E-brief, using Microsoft Forefront Client Security software (version 1.91.805.0), and no virus was detected.

s/ *Howard S. Scher*
HOWARD S. SCHER, Attorney

Certificate of Bar Membership

Counsel for the defendants-appellants are federal government attorneys and are not required to be members of the Bar of this Court.

Certificate of Service

I hereby certify that on this **6th day of October, 2010**, I caused the foregoing Brief of the Appellants to be filed electronically with the Court and an original and nine (9) copies to be filed in hard copy via **overnight delivery service**. On this date, counsel below were served by operation of the Court's electronic filing system, and an appropriate number of hard copies of the brief were served **via overnight delivery service**. Finally, an appropriate number of copies of the Joint appendix were filed with the Court **via overnight delivery service** and served on the counsel below **via overnight delivery service**:

Baher Azmy
Seton Hall University
School of Law
833 McCarter Highway
Newark, NJ 07102
973-642-8700

Catherine Weiss
Scott Walker
Auroro Parrilla
David Reiner
Heather Bishop
Kenneth Zimmerman
Natalie Kraner
R. Scott Thompson
Lowenstein Sandler PC
65 Livingston Ave
Roseland, NJ 07068
973-597-2500

s/ *Howard S. Scher*
HOWARD S. SCHER, Attorney