UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RASHAD AHMAD REFAAT EL BADRAWI	:	CIVIL ACTION NO.
Plaintiff	:	3:07CV1074 (JCH)
	:	
v.	:	
	:	
DEPARTMENT OF HOMELAND	:	
SECURITY, et al.	:	
Defendants	:	DECEMBER 29, 2007

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OR FOR SUMMARY JUDGMENT OF DEFENDANTS MANACK AND LOSER

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[*] *Plaintiff respectfully requests oral argument regarding this motion*

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INTRODUCTION

This is a civil rights lawsuit to redress the arbitrary arrest, wrongful detention, coerced departure, and other malicious abuse suffered by Rashad El Badrawi, a foreign national who had lawfully studied and worked in the United States for nearly eleven years. In October 2004, while working *in lawful immigration status* as a researcher at the University of Connecticut Health Center, Mr. El Badrawi was wrongfully arrested and detained by Gregory Manack and Michael Loser, agents of the U.S. Immigration and Customs Enforcement ("ICE"). At the time, both Manack and Loser were fully aware of Mr. El Badrawi's *lawful* immigration status.

Although Defendants Manack and Loser claim that Mr. El Badrawi was arrested for allegedly overstaying his period of authorized residence, his arrest was in fact pursuant to a secret ICE program called "Operation Frontline II," designed to investigate and detain non-citizens with alleged national security concerns in the month before the November Presidential 2004 election. However, Mr. El Badrawi had no national security concerns, nor any criminal history, and was at all times lawfully present and authorized to work in the United States. Overzealous in their pursuit of implementing Operation Frontline II, Manack and Loser knew or should have reasonably known Mr. El Badrawi had not violated any immigration law, but instead they acted with reckless disregard and deliberate indifference to Mr. El Badrawi's constitutional rights.

Mr. El Badrawi had complied with the same procedure followed yearly by thousands of essential workers legally present pursuant to H1-B visas. The timely filing of Mr. El Badrawi's application for an extension of stay automatically extended his permission to remain employed and present in the United States for 240 days or until he was notified that his extension had been denied. Manack and Loser claim that, at the time of his arrest, Mr. El Badrawi was authorized to legally *work* in the United States but not authorized to *stay* in the United States. This interpretation of 8 C.F.R. § 274a.12(b)(20) not only defies logic, it also would unjustly render deportable thousands of non-

citizens currently legally present in the United States. Manack and Loser's argument has been rejected by high-level ICE officials and never upheld by any court.

Defendants argue that Plaintiff's complaint should be dismissed for three reasons, all of which should be rejected by this Court. First, this Court has subject matter jurisdiction over the claims present in Mr. El Badrawi's Complaint. No provision of the Immigration and Nationality Act ("INA") bars judicial review of a non-citizen's damages action challenging the constitutionality of his arrest and detention after he has been released from ICE custody. Second, no "special factors" preclude review of Plaintiff's *Bivens* claim because Congress provided no alternative remedial scheme, nor is there any evidence that it sought to preclude damages actions against government officials who systematically violated the constitutional rights of foreign nationals by arresting and detaining them without probable cause or legitimate immigration purpose. Third, Defendants are not entitled to qualified immunity. By arresting and detaining Plaintiff without probable cause or reason to believe he had committed an immigration violation, and by continuing to detain him without any immigration justification but instead to investigate him pursuant to Operation Frontline, Defendants violated Mr. El Badrawi's clearly established Fourth and Fifth Amendment constitutional rights.

Moreover, Defendants' attempt to bring a motion for summary judgment along with their motion to dismiss is clearly premature, as Plaintiff has not had the opportunity to conduct discovery. *See, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986); *see also Trammell v. Keane*, 338 F.3d 155, 161 n.2 (2d Cir. 2003); *Trebor Sportswear Co. v. The Ltd. Stores, Inc*., 865 F.2d 506, 511 (2d Cir. 1989). Even when deciding the application of qualified immunity, "[d]ismissal . . . is not appropriate where there are facts in dispute that are material to a determination of reasonableness," *Thomas v. Roach*, 165 F.3d 137, 143 (2d Cir. 1999). *See generally* Pl. Rule 56(f) Motion.

FACTS AND PROCEEDINGS

Rashad El Badrawi is a foreign national who had lawfully studied and worked in the United States for nearly eleven years. Mr. El Badrawi first entered the United States in September 1993 on a nonimmigrant student (F-1) visa to pursue a master's degree in pharmacology at Northeastern University in Boston, Massachusetts. Compl. ¶ 19; El Badrawi Decl. ¶¶ 1-2. In December 1999, he was granted his first of several H1-B work petitions (and accompanying visas), sponsored by various employers in the biotechnology industry. Compl. ¶ 20; El Badrawi Decl. ¶ 3.

Mr. El Badrawi meticulously maintained legal immigration status throughout his time living and working in the United States. He sought renewal of his H1-B petitions as necessary, and periodically departed the country to re-apply as required, remaining outside the United States for the requisite period of time. Compl. ¶ 21; El Badrawi Decl. ¶ 4.

A. Mr. El Badrawi's Recent Visa History

Mr. El Badrawi's most recent H1-B sponsor was the University of Connecticut Health Center's Richard D. Berlin Center for Cell Analysis and Modeling in Hartford, Connecticut. Compl. ¶¶ 22, 27; El Badrawi Decl. ¶ 5. In April 2003, the Department of Homeland Security ("DHS") granted the University of Connecticut Health Center's visa petition authorizing his employment as a research associate. Compl. ¶ 23; El Badrawi Decl. ¶ 6; Defs. Ex. C., attachment 3. The Department of State ("DOS") subsequently issued Mr. El Badrawi an H1-B nonimmigrant visa authorizing him to enter the United States to accept his offer of employment. Compl. ¶ 24; El Badrawi Decl. ¶ 7. Pursuant to this visa, Mr. El Badrawi lawfully entered the United States and commenced employment in June 2003. Compl. ¶ 25; El Badrawi Decl. ¶ 8. While employed at the University of Connecticut Health Center, Mr. El Badrawi worked on a grant project funded by the National Institutes of Health to develop computational software for modeling cell biology. Compl. ¶ 28; El Badrawi Decl. ¶ 9.

In October 2003, DOS administratively revoked Mr. El Badrawi's visa without notice to him or to his employer. Compl. ¶ 29; El Badrawi Decl. ¶ 10; Defs. Ex. C., attachment 6. By the terms of the Certificate of Revocation, the revocation was effective only upon Mr. El Badrawi's "departure from the United States." Compl. ¶ 30; Defs. Ex. C., attachment 6. From October 2003 until his coerced and wrongful departure on December 22, 2004, Mr. El Badrawi never departed the United States, and therefore the DOS visa revocation by its own terms never became effective. Compl. ¶ 36; El Badrawi Decl. ¶ 11.

On March 31, 2004, the University of Connecticut Health Center filed a timely application for an extension of stay of Mr. El Badrawi's H1-B petition, U.S. Citizenship and Immigration Services ("USCIS") form I-129, including a request for premium processing. Compl. ¶ 31; El Badrawi Decl. ¶¶ 12-13; Defs. Ex. C., attachment 4. The timely filing of Mr. El Badrawi's application for extension of stay automatically extended his permission to remain employed and present in the United States for 240 days or until he was notified that his extension of stay had been approved or denied. 8 C.F.R. § 274a.12(b)(20); *see also* Compl. ¶ 32; Defs. Ex. D at 2 (Memorandum from Michael A. Pearson, Executive Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, et al. 2 (Mar. 3, 2000)) [hereinafter *Pearson Memo*] (beneficiary of timely, non-frivolous petition to extend H1-B visa "should be considered to be in a period of stay authorized by the Attorney General"); Ex. 1 at 4-5 (Memorandum from Thomas E. Cook, INS Acting Assistant Commissioner, to Regional Directors, et al. (Apr. 2, 2003)) [hereafter *Cook Memo*] (same). In Mr. Badrawi's case, this period should have run from May 1, 2004, when his initial H1-B was due to expire, up to and including December 27, 2004 (or until USCIS adjudicated his petition, had that occurred prior to the expiration of the automatic extension). Despite contacting USCIS multiple times to inquire about the application, neither Mr. El Badrawi nor

his employer was ever notified whether his extension of stay had been approved or denied.[1] Compl..¶¶ 34-35; El Badrawi Decl. ¶ 14; Defs. Ex. C, attachment 5. Because Mr. El Badrawi's I-129 extension of stay was still pending at the time of his wrongful arrest on October 29, 2004, he remained legally present in the United States until and throughout his unlawful arrest and detention by Defendants Manack and Loser. Compl. ¶¶ 33, 102; El Badrawi Decl. ¶ 15.

B. Mr. El Badrawi's Wrongful Arrest and Detention

In spring 2004, ICE launched Operation Frontline, a secretive program targeting foreign nationals alleged to be threats to national security for arrest and detention. *See* Ex. 5.[2] Unlike many of its law enforcement programs, ICE has never fully disclosed the operation or purposes of Frontline. *See* Ex. 7; *cf.* Ex. 3 (Fact Sheet, The White House, Operation Predator (July 7, 2004)) (describing another ICE enforcement program). In fall 2004, ICE initiated a second phase of Operation Frontline, which the agency has termed "Operation Frontline II." *See* Ex. 6. Operation Frontline II was designed specifically to "detect, deter, and disrupt terrorist operations leading up to the Presidential Election" of 2004 and intended to last through the January 2005 U.S. presidential inauguration. Ex. 7 at 1. Pursuant to Operation Frontline II, ICE targeted, rounded up, and arrested at least 237 non-citizens. Ex. 4 at 1; Ex. 8 at 17, 18 (ICE counsel stating that pursuant to Operation Frontline, ICE "targeted" and "rounded up" individuals). Operation Frontline II investigations are conducted by ICE's field offices, not through ICE headquarters. Ex. 7 at 2; Ex. 14 at 2 ("ICE then

[1] In fact, because Mr. El Badrawi's application included a request for premium processing, USCIS was obligated to approve, deny, or issue a Request For Evidence within 15 days of filing. Because USCIS failed to do so, UConn is entitled to receive its $1,000 premium processing fee back from the government. *See* Ex. 2 at 1.

[2] Subsequent to the filing of the complaint in this case, Plaintiffs' counsel obtained a number of documents concerning Operation Frontline and Operation Frontline II through litigation under the Freedom of Information Act. Wishnie Decl. ¶ 20. As Defendants have moved both to dismiss Plaintiffs' suit and for summary judgment on all claims, we cite these documents in response to the motion for summary judgment. Should the Court determine that facts from these documents are necessary to the disposition of Defendants' motion to dismiss, Plaintiff would respectfully request leave to file an amended complaint pursuant to Federal Rule of Civil Procedure 15(a)(2).

generates leads for ICE field offices to further develop violations and eventually remove persons in violation [withheld]").

In March 2004, an ICE agent interviewed Mr. El Badrawi and confirmed that he was fully in compliance with his visa status. Ex. 15. In October 2004, however, Gregory Manack, the Resident Agent in Charge of the Hartford ICE Office, assigned Senior Special Agent Michael Loser to investigate Mr. El Badrawi pursuant to Operation Frontline II. Loser Dec. ¶ 4; Manack Dec. ¶ 4; *see also* Compl. ¶ 37; Ex. 9 at 1 ("An investigation [of Mr. El Badrawi] was launched by RAC Hartford personnel . . ."); Ex. 12.

During his initial investigation of Mr. El Badrawi, Loser confirmed that the University of Connecticut Health Center's I-129 extension of stay form was pending with the ICE Benefit Fraud Unit/Eastern Service Center in Vermont. Loser Decl. ¶ 4; Compl. ¶ 37. Because he was still well within the 240-day period of authorized extended stay, Mr. El Badrawi was lawfully present and work authorized in the United States at that time.[3] *See* Compl. ¶¶ 32-33; 8 C.F.R. § 274a.12(b)(20). Nevertheless, Loser signed an ICE Form I-213, Record of Deportable/Inadmissible Alien, which wrongfully and falsely alleged that Mr. El Badrawi had unlawfully overstayed his H1-B authorization by remaining in the United States beyond May 1, 2004. Compl. ¶ 38; Ex. 12 (ICE Form I-213); El Badrawi Decl. ¶ 16; *see also* Loser Decl. ¶ 4. Execution of the I-213 set in motion the wrongful arrest and detention of Mr. Badrawi. *See* Compl. ¶¶ 38-39, 42-50; El Badrawi Decl. ¶¶ 16-21.

Manack subsequently issued a Warrant for Arrest of Alien for Mr. El Badrawi, which wrongfully and falsely alleged that he was within the country in violation of the immigration laws of the United States. Compl. ¶¶ 42-43; El Badrawi Decl. ¶ 16; *see also* Manack Decl. ¶ 5; Defs. Ex. B, attachment 2. Manack also signed a Notice to Appear ("NTA") seeking Mr. El Badrawi's removal

[3] Indeed UConn was already entitled to a refund of its Premium Processing fee because of USCIS's delays. *See* Ex. 2.

from the United States. The sole ground asserted in the NTA for Mr. El Badrawi's arrest and deportation was that he had overstayed his H1-B authorization by remaining in the United States beyond May 1, 2004. Compl. ¶¶ 45-46; Manack Decl. ¶ 5; Defs. Ex. B, attachment 3. Finally, Manack signed an ICE form I-286, Notice of Custody Determination, resolving that Mr. El Badrawi should be detained without bond in the custody of ICE. Compl. ¶ 48; Manack Dec. ¶ 6; Defs. Ex. B, attachment 4.

On October 29, 2004, with no notice or warning of any possible violation, and pursuant to the warrant signed by Manack, Mr. El Badrawi was arrested by Loser and two other ICE agents in the parking lot of his Hartford, Connecticut residence. Compl. ¶ 49; El Badrawi Decl. ¶¶ 15, 17; *see also* Loser Decl. ¶ 7. Mr. El Badrawi was humiliated by the arrest, which occurred in front of his neighbors. Compl. ¶ 51; El Badrawi Decl. ¶ 17. After searching Mr. El Badrawi's apartment, the ICE agents took Mr. El Badrawi—fully handcuffed and restrained—to an ICE facility in Hartford. Compl. ¶ 52; El Badrawi Decl. ¶¶ 17-18.

At the ICE facility, Defendant Loser interrogated Mr. El Badrawi regarding potential national security concerns. El Badrawi Decl. ¶ 19. For example, Loser asked him if he had any knowledge of "jihadist/extremist groups or individuals, organizations, websites, etc." Ex. 9 at 3. Because Mr. El Badrawi had not been involved in any activities that would reasonably raise national security concerns, he answered all of Loser's questions while denying any knowledge, information or contact with violent jihadist or extremist groups. El Badrawi Decl. ¶ 20; Ex. 9 at 3. Mr. El Badrawi remained in ICE custody for the remainder of his time in the United States. Compl. ¶ 61; El Badrawi Decl. ¶¶ 29, 35.

C. Detention Conditions

The same day as his arrest, Mr. El Badrawi was transported to the Hartford Correctional Center, where he was photographed, strip-searched, and placed in the general population of

convicted criminals and criminal pretrial detainees, and subjected to traumatic, punitive, and excessively harsh conditions of confinement. Compl. ¶¶ 62, 64-65; El Badrawi Decl. ¶¶ 21-22. While detained at the Hartford Correctional Center, Mr. El Badrawi was denied both medication necessary to treat his Crohn's disease and the right to practice his Islamic faith. Prison officials repeatedly rejected his request for a meal schedule allowing him to fast from dawn to sunset during the holy Muslim month of Ramadan. Compl. ¶¶ 66-67, 70-72, 77-81; El Badrawi Decl. ¶¶ 22, 25.[4]

D. Immigration Hearings

Instead of recognizing Mr. El Badrawi's legal status, Defendants Manack and Loser proceeded to prosecute removal proceedings, and to detain him without bond pending completion of those proceedings. On November 3, 2004, Mr. El Badrawi appeared before Immigration Judge Michael W. Straus in Hartford, Connecticut. At this hearing, Judge Straus pursued a line of questioning suggesting that Mr. El Badrawi was under suspicion for national security-related concerns. Compl. ¶¶ 95-96; El Badrawi Decl. ¶ 23. Counsel for ICE made two false allegations regarding Mr. El Badrawi's immigration status. First, she wrongly claimed that because Mr. El Badrawi had remained in the United States after the October 2003 revocation of his visa, his application for an extension of stay was void. Compl. ¶ 97; Defs. Ex. C at 7-8. In light of the plain terms of the visa revocation, which made the revocation effective only upon Mr. El Badrawi's departure, Defendants' counsel now concedes that this justification for Mr. El Badrawi's removal was incorrect. Defs. Br. at 4, 25 n.5. Second, ICE counsel wrongly alleged that, despite his timely pending extension of stay application, Mr. El Badrawi was out of status because he had remained in

[4] Plaintiff does not oppose Defendants' motion to dismiss *solely* with regard to the allegation that Defendant Loser caused him to be denied his medication for the first week of his incarceration. Evidence put forward by the Defendants has demonstrated that Defendant Loser was not personally responsible for this Fifth Amendment violation. However, Plaintiff maintains that he did not receive medication for the first week of his incarceration and that Defendant Lee should be held liable for his unnecessary and substantial suffering.

the United States past May 1, 2004. Compl. ¶ 100; Defs. Ex. C at 10-11. Mr. El Badrawi was represented at this hearing by counsel. El Badrawi Decl. ¶ 24; Defs. Ex. C at 4-11.

On November 10, 2004, Mr. El Badrawi again appeared before Judge Straus with counsel. Eager finally to be free from his wrongful detention and the traumatic and punitive conditions of confinement and fearful because he had been falsely linked with national security concerns, Mr. El Badrawi was coerced into accepting voluntary departure, a form of immigration relief allowing a person to voluntarily leave the United States within a certain number of days. Compl. ¶¶ 106-107; El Badrawi Decl. ¶ 25. Mr. El Badrawi's acceptance of voluntary departure terminated the removal proceedings, effectively acquitting him of any insinuation of wrongdoing. Compl. ¶ 108; El Badrawi Decl. ¶ 26. Judge Straus ordered that Mr. El Badrawi be granted voluntary departure and depart the country under DHS/ICE safeguards. Compl. ¶¶ 109-10; Defs. Ex. G; Defs. Ex. H. The DHS prosecutor verbally informed Mr. El Badrawi that he would leave the United States within six days. Compl. ¶ 111; El Badrawi Decl. ¶ 27. Mr. El Badrawi was never provided with a bond hearing, and, therefore, Judge Straus never denied him bond. El Badrawi Decl. ¶ 28.

E. Mr. El Badrawi's Detention After Accepting Voluntary Departure

Instead of being released within six days, Mr. El Badrawi was imprisoned at Hartford Correctional Center for forty-two additional days. Compl. ¶ 117; El Badrawi Decl. ¶ 29. During this time, he repeatedly sought to learn why ICE continued to detain him. Compl. ¶ 118; El Badrawi Decl. ¶ 31. His passport and other necessary documents were in order, and he made several requests to ICE officials, through his attorney, to help expedite his removal. Compl. ¶ 119; El Badrawi Decl. ¶ 31. For example, Mr. El Badrawi offered to pay for a plane ticket on the earliest available flight to either country in which he has citizenship. Compl. ¶ 120; El Badrawi Decl. ¶ 31. Despite these requests, ICE officials provided no justification for Mr. El Badrawi's needlessly prolonged detention. Compl. ¶ 121; El Badrawi Decl. ¶ 32.

Although they had no legitimate immigration purpose to keep Mr. El Badrawi detained, Defendants Manack and Loser continued their Operation Frontline II investigation of Mr. El Badrawi even after he had accepted voluntary departure. *See* Ex. 10 at 2 (ICE investigation report on November 18, 2004, stating that Mr. El Badrawi's "investigation continues."). On December 22, 2004—presumably once Manack and Loser's investigation had concluded—ICE agents at long last removed Mr. El Badrawi from Hartford Correctional Center, brought him to John F. Kennedy International Airport, and he left the country. Compl. ¶ 123; El Badrawi Decl. ¶ 30. Mr. El Badrawi had been detained for nearly two months without bond or release. Compl. ¶ 124; El Badrawi Decl. ¶ 36.

F. Severe Harm Suffered by Mr. El Badrawi

Defendants Manack and Loser's wrongful arrest and prolonged detention of Mr. El Badrawi has caused him to suffer severe and lasting emotional and mental distress, including but not limited to fear, depression, loss of reputation, and personal humiliation. Compl. ¶¶ 130, 134; El Badrawi Decl. ¶ 33. Mr. El Badrawi also lost his job with the University of Connecticut Health Center. Compl. ¶ 137; El Badrawi Decl. ¶ 34. He continues to face adverse consequences—including the prospect of future arrest as well as the denial of employment opportunities and banking services—because the U.S. government maintains and disseminates information and records about his unlawful arrest and detention as well as inaccurate investigatory records. Compl. ¶¶ 138-40; El Badrawi Decl. ¶ 35.

ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S CLAIMS CHALLENGING THE CONSTITUTIONALITY OF HIS ARREST AND DETENTION BECAUSE THESE CLAIMS ARE NOT SUBJECT TO THE INA'S EXCLUSIVE REVIEW SCHEME.

Defendants Gregory Manack and Michael Loser contend that various provisions of the Immigration and Nationality Act ("INA") bar this Court's jurisdiction over Plaintiff's claims that his arrest and detention were unconstitutional. Defendants argue (1) that the exclusive avenue for judicial review of any removal order is a petition for review of such removal order filed in the court of appeals, and (2) that in any event the INA and the doctrine of *Heck v. Humphrey* bar review of many of Plaintiff's claims. Defs. Br. at 9. In light of "the strong presumption in favor of judicial review of administrative action," *INS v. St. Cyr*, 533 U.S. 289, 298 (2001), as well as "'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien,'" *id.* at 320 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)), these arguments are erroneous.

Defendants' first argument fails because the exclusive avenue for review to which Defendants point refers to judicial review of a final agency action and *not* to an independent damages action. Plaintiff El Badrawi does not seek to reverse or undo his underlying order of voluntary departure; nor does he seek relief from that order in the form of vacatur or a new removal proceeding. In this action, Mr. El Badrawi seeks damages and injunctive relief for harm stemming from his arrest and detention, unconstitutional treatment that could not have been redressed on a petition for review. Thus, the "alternative" to which Defendants would relegate Plaintiff is no alternative at all. Since the grievances claimed here could not have been redressed in a petition for review, they are not subject to the INA's exclusive review scheme.

Defendants' second argument mistakenly relies on INA provisions that bar judicial review of various exercises of discretion. Plaintiff El Badrawi does not seek review of any lawful exercise of discretion; rather he challenges actions undertaken wholly beyond Defendants' discretionary authority. Defendants do not have any discretion to violate the Constitution, and therefore these provisions do not preclude review of Plaintiff's constitutional claims. To read them otherwise would violate the principle that jurisdictional statutes should not be construed to preclude review of

constitutional claims absent the most explicit of directives from Congress. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 517 (2003); *St. Cyr*, 533 U.S. at 299; *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974).

A. 8 U.S.C. § 1252(b)(9) Does Not Bar Jurisdiction Over Plaintiff's Challenges to His Unconstitutional Arrest and Detention Because These Challenges Could Not Have Been Pursued in a Petition for Review.

Defendants maintain that Plaintiff El Badrawi should have pursued his challenges to his unconstitutional arrest and detention by filing a petition for review of his grant of voluntary departure in the court of appeals and that under 8 U.S.C. § 1252(b)(9),[5] if an issue is reviewable in a court of appeals on a petition for review, such a petition is the exclusive means of review. Defs. Br. at 11-13. The flaw in this argument is that the issues raised by Plaintiff's claims were not reviewable in the court of appeals on a petition for review, and the relief sought here—damages—was not available in those INA review proceedings. Plaintiff's complaint is not that he was granted voluntary departure but that the Defendants arrested him without probable cause and continued to detain him without any legitimate immigration purpose. Plaintiff further alleges that the basis of his unconstitutional arrest and detention was not solely to remove him from the United States but to investigate him for national security concerns pursuant to a secret ICE program called Operation Frontline. *See* Ex. 9 at 2; Ex. 11; *see also* Compl. ¶¶ 117-22. In fact, the reason why Plaintiff accepted voluntary departure was because, once detained, he (correctly) believed he was arrested, not pursuant to any immigration violation, but to investigate him regarding national security concerns. Plaintiff was under the belief that he could have been detained indefinitely and his unconstitutional conditions of confinement would continue. Therefore, he understandably agreed to leave the United States at the earliest possible moment. Compl. ¶ 107; El Badrawi Decl. ¶¶ 25-26.

[5] 8 U.S.C. § 1252(b)(9) provides: "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section."

Thus, his claims arise from his unconstitutional arrest, detention, and treatment while detained. Since Plaintiff did not challenge his grant of voluntary departure, he could not have filed a petition for review. Therefore, the constitutional challenges presented here could not have been reviewed on a petition for review. *See, e.g.*, *Turkmen v. Ashcroft*, No. 02-CV-2307, 2006 U.S. Dist. LEXIS 39170, at *81 (E.D.N.Y. June 14, 2006), *appeal docketed*, No. 06-3745-cv (2d Cir. Aug. 10, 2006) (Fourth and Fifth Amendment *Bivens* claims relating to immigration detainees' detentions not precluded under § 1252(b)(9)); *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 268-70 (E.D.N.Y. 2006) (Fifth Amendment *Bivens* claim relating to Arar's detention not precluded under § 1252(b)(9)); *Medina v. United States*, 92 F. Supp. 2d 545, 553 (E.D. Va. 2000) (Fourth Amendment *Bivens* claim relating to arrest by INS agent not precluded under § 1252).

Moreover, a court of appeals could not have provided redress for Plaintiff's injuries. Injunctive relief, even if it were available, would have come too late in the day, and the petition for review process provides no occasion whatsoever for obtaining damages from individual officers. Because 8 U.S.C. § 1252(b)(9) only applies to "review of orders of removal," no court has found it to apply to damages cases that do not seek to directly challenge a removal order. Accordingly, because the issues raised by Plaintiff's claims were not reviewable in the court of appeals on a petition for review, jurisdiction is proper here under 28 U.S.C. § 1331. This result is supported by *St. Cyr*, 533 U.S. at 313, which held that § 1252(b)(9) "does not bar habeas jurisdiction over removal orders *not* subject to judicial review under § 1252(a)(1)." In upholding habeas jurisdiction to hear the challenge of a "criminal alien" to his removal, the Court reasoned that the "purpose [of § 1252(b)(9)] is to consolidate 'judicial review' of immigration proceedings into one action in the court of appeals, but that it applies only 'with respect to review of an order of removal under subsection (a)(1).'" *Id.* As a "criminal alien," St. Cyr could not obtain review of his removal order in a petition for review under § 1252(a)(1), and therefore the Court held that § 1252(b)(9) did not apply. *Id.* Here, too, Plaintiff El Badrawi could not have obtained review of his arrest and detention claims on a petition for review,

and therefore § 1252(b)(9) is equally inapplicable. *See also Calcano-Martinez v. INS*, 232 F.3d 328, 336 (2d Cir. 2000), *aff'd*, 533 U.S. 348 (2001).

Not surprisingly, the government cites nothing in the text or legislative history of the INA indicating that Congress sought to preclude *Bivens* actions to remedy unconstitutional practices in connection with immigration-related arrests and detentions, nor is Plaintiff aware of any such evidence. In fact, 8 U.S.C. § 1252, from which this provision as well as § 1252(a)(2)(B)(ii) and § 1252(g) are drawn, is entitled "Judicial review of orders of removal." To the extent any ambiguity exists, § 1252 in its entirety should be construed only to limit review of removal orders, not actions for damages and specifically not challenges to arrest or detention. *See INS v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text.")

For the same reasons, the INA's "exhaustion" requirement, 8 U.S.C. § 1252(d)(1), is inapplicable here. *Cf.* Defs. Br. at 12. That provision requires foreign nationals to exhaust administrative remedies before filing a petition for review of a final removal order. But because Plaintiff El Badrawi does not challenge his grant of voluntary departure—but instead challenges actions collateral to removal that could not have been addressed through a petition for review—that requirement does not apply. Moreover, the administrative remedies to which Defendants point could not have provided effective relief. Plaintiff suffered constitutionally cognizable injuries from the moment he was arrested and detained, for which the administrative process could not provide damages or any other retrospective relief.

In *McCarthy v. Madigan*, the Supreme Court excused exhaustion under analogous circumstances, where a convicted prisoner sought damages under *Bivens* that were unavailable through the administrative process. 503 U.S. 140, 149-52 (1992). Exhaustion is also excused when Defendants interfere with the availability of administrative remedies. *See J.G. v. Bd. of Educ.*, 830 F.2d 444, 447 (2d Cir. 1987); *see also Johnpoll v. Thornburgh*, 898 F.2d 849, 850-51 (2d Cir. 1990)

(exhaustion not required if administrative remedies are not reasonably available); *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) ("A remedy that prison officials prevent a prisoner from utiliz[ing] is not an available remedy . . . ."). Here Plaintiff chose not to appeal ICE's denial of bond in reliance on false statements by federal officials that he would be allowed to voluntarily depart within days. *See* Compl. ¶ 111; El Badrawi Decl. ¶¶ 27, 29.

B. No Other INA Provision Precludes Review of Plaintiff's Constitutional Challenges to Defendants' Actions.

Defendants also argue that certain of their actions are immune from all judicial review whatsoever—namely, the decision to "commence proceedings, adjudicate cases, or execute removal orders," Def. Br. at 13 (citing 8 U.S.C. § 1252(g)), and all "discretionary decisions" in the removal process. *Id.* at 14 (citing 8 U.S.C. § 1252(a)(2)(B)(ii)). These arguments share a common flaw—if accepted, they would bar judicial review of unconstitutional government action. As the Supreme Court has repeatedly stated, because preclusion of judicial review of unconstitutional actions would itself raise serious constitutional concerns, statutes should not be construed to have that effect unless Congress has unequivocally and expressly barred review of constitutional claims. "'[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.'" *Demore v. Kim*, 538 U.S. 510, 517 (2003) (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)). None of the provisions that Defendants cite even mention constitutional claims, much less expressly preclude judicial review thereof. In fact, none apply here.

1. 8 U.S.C. § 1252(g) Does Not Bar Jurisdiction over Plaintiff's Constitutional Challenges to Defendants' Actions.

8 U.S.C. § 1252(g) merely underscores the exclusive nature of the petition for review process, by providing that—except as otherwise provided in § 1252—decisions to "commence proceedings, adjudicate cases, or execute removal orders" are not reviewable. Defendants claim that this provision bars review of Plaintiff's unconstitutional arrest and detention. But the Supreme Court

has rejected any broad reading of § 1252(g) and has interpreted it narrowly to apply "only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders'"—all essentially "challenges to the Attorney General's exercise of prosecutorial discretion." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482, 485 n.9 (1999) (quoting § 1252(g)); *see also id.* at 482 ("It is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings.").

8 U.S.C. § 1252(g) does not apply to Plaintiff's claims for three reasons. First, as mentioned above, *see* Section I.B *supra*, in order to avoid raising serious constitutional concerns, § 1252(g) must be interpreted to foreclose review only of issues arising from *discretionary* prosecutorial decisions to commence proceedings—that is, only those decisions that Congress has committed to the discretion of the Attorney General. Because Defendants were acting beyond their discretion by violating the Constitution when arresting and detaining Mr. El Badrawi, § 1252(g) would not bar Plaintiff's claims. *See also* Subsection I.B.2, *infra*.

Second, § 1252(g) does not preclude monetary damages claims when immigration proceedings have already ended. *See, e.g.*, *Medina v. United States*, 92 F. Supp. 2d 545, 553 (E.D. Va. 2000), *vacated on other grounds*, 259 F.3d 220 (4th Cir. 2001) (finding that 8 U.S.C. § 1252(g) does not bar a "claim for monetary damages for intentional torts and violations of constitutional rights . . . where the immigration proceedings have terminated"). As the court correctly noted, Mr. Medina did not challenge his removal, nor did he wage a collateral attack; rather he demanded compensation for the violation of his rights. *Id*. at 552. The court continues: "If the Court were to adopt the United States' broad reading of § 1252, there would be no judicial review of a claim by an alien that stems from an arrest on an INS detention order even where there is blatantly lawless and unconstitutional conduct by the INS agents—placing their conduct beyond judicial review and creating grave constitutional issues." *Id*. at 553. Similarly, § 1252(g) does not bar Plaintiff's *Bivens*

claims against ICE agents Manack and Loser for monetary damages because, like Mr. Medina, his immigration proceedings have already terminated.

Third, if this Court holds that § 1252(g) bars certain monetary damages claims when immigration proceedings have already ended, Plaintiff El Badrawi's claims are still not precluded under that section. Plaintiff does not challenge the decisions by ICE to "*commence* proceedings, *adjudicate* cases, or *execute* removal orders," but rather challenges his unconstitutional *arrest* and *detention*. The denial of Plaintiff's Fourth and Fifth Amendment rights are the result of Defendants Manack and Loser's unconstitutional actions, not the commencement of removal proceedings. In fact, because Plaintiff was at all times legally present in the United States, Defendants Manack and Loser did not have jurisdiction to commence removal proceedings against Plaintiff. Plaintiff's claims arise from "the discriminatory animus that motivated and underlay the actions" of Defendants Manack and Loser "which *resulted in* [ICE's] decision to commence removal proceedings and ultimately to remove" Plaintiff El Badrawi from the United States. *See Kwai Fun Wong v. United States*, 373 F.3d 952, 964 (9th Cir. 2004). *Cf. Sissoko v. Rocha*, No. 02-56751, 2007 U.S. App. LEXIS 26488, at *7 (9th Cir. Nov. 15, 2007) (finding that § 1252(g) bars a *Bivens* action for false arrest in the "limited context" where the "claim directly challenges . . . decision to commence . . . removal proceedings, and an alternative habeas remedy directly addressing the claimed injury was available through 8 U.S.C. § 1252(e)(2)").[6]

[6] *Sissoko* is clearly distinguishable from Mr. Badrawi's claims. In *Sissoko*, the plaintiff had filed a habeas challenge to his arrest and detention, which had already been dismissed, but had failed to raise his constitutional concerns there. *Id*. at *6-*7 & n.2; *see also Sissoko v. Rocha*, 440 F.3d 1145, 1149-53 (9th Cir. 2006) (laying out procedural history), *withdrawn and replaced by* 2007 U.S. App. LEXIS 26488 (9th Cir. Nov. 15, 2007). In contrast, Mr. El Badrawi did not have the opportunity to raise his constitutional claim in any other proceeding. More importantly, the logic of *Sissoko* is clearly erroneous. As described above, while a non-citizen may challenge his or her detention upon a petition for habeas, there is no remedy available there to challenge an unconstitutional arrest. *See Medina*, 92 F. Supp. 2d at 553. It should also be noted that *Sissoko* is subject to a pending petition for rehearing in the Ninth Circuit. *See* Petition for Rehearing, S*issoko v. Rocha*, 2007 U.S. App. LEXIS 26488 (9th Cir. Nov. 15, 2007) (No. 02-56751, 03-55667) (pet. for reh'g filed Nov. 29. 2007).

Contrary to Defendants' assertion, Plaintiff alleges that he was not "arrested solely because ICE decided to commence removal proceedings against him for remaining in the country illegally." Defs. Br. at 14. In fact, Plaintiff was arrested without probable cause by overzealous ICE agents pursuant to a secret ICE program called Operation Frontline to investigate him for national security concerns. Compl. ¶ 2; Ex. 9 at 2; Ex. 11. ICE officials subsequently coerced Plaintiff into accepting voluntary departure even though they knew, or reasonably should have known, there was no reason to believe Plaintiff had violated any immigration law. *See* Compl. ¶¶ 97-107; El Badrawi Decl. ¶¶ 15, 25-26. Plaintiff El Badrawi's arrest and detention claims are clearly beyond the scope of § 1252(g), and instead pertain to the "many other decisions or actions that may be part of the deportation process" acknowledged by the Supreme Court in *AADC*, 525 U.S. at 482.[7] To allow Defendants to cloak themselves with the provisions of § 1252(g) and the Supreme Court's ruling in *AADC* on the basis of their unconstitutional actions, i.e., arresting and detaining Plaintiff without probable cause, is inconsistent with the narrow statutory interpretation of section 1252(g) mandated by *AADC* and the undisputed facts of this case.

2. 8 U.S.C. §§ 1252(a)(2)(B)(ii) and 1226(e) Do Not Bar Jurisdiction over Plaintiff's Constitutional Challenges to Defendants' Actions.

Defendants are similarly mistaken in contending that two other provisions of the INA, 8 U.S.C. §§ 1226(e) and 1252(a)(2)(B)(ii), bar judicial review of Plaintiff's claims. These provisions, which limit judicial review of certain exercises of discretion in the context of removal proceedings, are inapplicable for two reasons. First, Plaintiff does not contest how discretionary authority was

[7] It is unclear whether Defendants argue that Plaintiff's 5th Amendment due process claims regarding his wrongful detention are also barred by 8 U.S.C. § 1252(g). If so, Defendants' argument has no merit. Courts have repeatedly held that § 1252(g) does not bar constitutional claims challenging wrongful detention. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 687-88 (2001) (holding that no statutory provision, including § 1252(g), bars 5th Amendment challenges to the lengthy detention of non-citizens); *Turkmen v. Ashcroft*, No. 02-CV-2307, 2006 U.S. Dist. LEXIS 39170, at *83 (E.D.N.Y. June 14, 2006) ("[D]etaining an alien *in between* the discrete actions specified in § 1252(g) . . . is beyond the scope of § 1252(g) . . . ."); *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 270-71 (E.D.N.Y. 2006) (holding that Mr. Arar's due process claims were not precluded under § 1252(g) because he could not have resolved—and could not have received compensation—for his claims in the INA process).

exercised but instead claims that Defendants were acting beyond their discretion, *ultra vires*, by violating the Constitution. As the Attorney General has no discretion to violate the Constitution, these provisions by their terms do not bar jurisdiction over Plaintiff's claims, all of which present constitutional challenges. *See Kwai Fun Wong*, 373 F.3d at 963; *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988); *see also Berkovitz v. United States*, 486 U.S. 531, 536 (1988); *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1196 (D.C. Cir. 1986).

The Supreme Court reached precisely this result in finding that § 1226(e) poses no jurisdictional bar to a constitutional challenge to the detention of "criminal aliens." *Demore*, 538 U.S. at 517; *see also id.* at 516-17 ("Respondent does not challenge a 'discretionary judgment' by the Attorney General or a 'decision' that the Attorney General has made regarding his detention or release."). Similarly, in *Webster*, the Court held that although Congress had precluded judicial review of CIA employment decisions by committing them to "agency discretion," this preclusion did not bar judicial review of *constitutional* claims. 486 U.S. at 603. The same reasoning applies here. As in *Zadvydas v. Davis*, Plaintiff El Badrawi does "not seek review of the Attorney General's exercise of discretion; rather, [he] challenge[s] the extent of the Attorney General's authority. . . . And the extent of that authority is not a matter of discretion." 533 U.S. at 688.[8]

Second, these provisions apply only to claims arising from removal proceedings, and therefore do not apply to Plaintiff's challenge to his unconstitutional arrest and detention. *See Talwar v. INS*, 2001 WL 767018, at *3-*5 (S.D.N.Y. July 9, 2001) (holding jurisdiction is not barred

[8] *See also Chimbo v. Sec'y of the Dep't of Homeland Sec.*, No. 3:04cv1671, 2004 U.S. Dist. LEXIS 23847, at *24 (D. Conn. Nov. 18, 2004) (upholding jurisdiction because petitioner was "not challenging a discretionary denial of bail, but rather the constitutionality of the statutory framework that permits detention without bail") (citation omitted); *Bezmen v. Ashcroft*, 245 F. Supp. 2d 446, 448 (D. Conn. 2003) (exercising jurisdiction because petitioner does "not seek review of the Attorney General's exercise of discretion; rather, challenges the extent of the Attorney General's authority [under the stay provision]. And the extent of the authority is not a matter of discretion.") (citation omitted); *Oliva v. INS*, No. 98 Civ. 6526, 1999 U.S. Dist. LEXIS 1269, at *6-8 (S.D.N.Y. Feb. 10, 1999) (holding 8 U.S.C. § 1226(e) could not be relied on to bar jurisdiction where continued custody of the petitioner was alleged to be in violation of the Constitution or laws of the United States); *Abdul v. McElroy*, No. 98 Civ. 2460, 1999 U.S. Dist. LEXIS 1103 at *4-*6 (S.D.N.Y. Feb. 4, 1999) (same).

since 1252(a)(2)(B) is limited to the context of removal proceedings); *Ncube v. INS Dist. Dirs.*, 1998 WL 842349, at *7 (S.D.N.Y. Dec. 2, 1998) (holding jurisdiction-stripping provisions of 8 U.S.C. § 1226 "simply [] not applicable" where petitioner is subject to a final removal order and awaiting removal).

C. The Doctrine of *Heck v. Humphrey* Does Not Preclude Review of Plaintiff's Constitutional Challenges to Defendants' Actions.

Defendants finally claim that the doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994), bars judicial review of Plaintiff's claims. Defs. Br. at 15-16. Under this doctrine, no cause of action exists under 42 U.S.C. § 1983 that, if proven, would "necessarily imply" the invalidity of an underlying conviction or sentence, unless that conviction or sentence is first invalidated either on appeal or through habeas. *Heck*, 512 U.S. at 486-87. However, this doctrine does not apply to Plaintiff El Badrawi's *Bivens* claims because the Second Circuit has clearly held that *Heck* does not preclude review when the plaintiff currently does not have a habeas corpus remedy nor could have sought damages in his prior judicial proceeding. *See Leather v. Eyck*, 180 F.3d 420 (2d Cir. 1999).

In *Leather*, the Second Circuit held that where a convicted criminal defendant was not or was no longer confined, and thus did not have a habeas corpus remedy, and also could not have sought damages for alleged constitutional injuries in the prior (criminal) proceeding, a § 1983 suit for damages was not barred—even where defendant had not previously had his conviction invalidated or called into question on direct appeal or by writ of habeas corpus. *Id. at* 423-24. To require a plaintiff to first pursue such relief, *Leather* explains, would be equivalent to reading an exhaustion requirement into § 1983—a position which the Supreme Court expressly rejected in *Patsy v. Board of Regents*, 457 U.S. 496 (1982). *Id* at 424.

Likewise, because Plaintiff El Badrawi lacks the option to pursue habeas relief (as he is currently not in ICE custody), and damages would not have been available had he sought review of a

removal order pursuant to 8 U.S.C. § 1252, *Heck* clearly does not bar his *Bivens* claims.[9] *See also Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001) (*Heck* does not bar a § 1983 claim by a convict out-of-custody seeking to establish the unconstitutionality of a conviction or confinement that had not previously been overturned); *Jenkins v. Haubert*, 179 F.3d 19, 24-26 (2d Cir. 1999) (noting that majority of Supreme Court would likely hold that § 1983 action challenging fact or duration of confinement may be viable, even if jurisdictional predicate articulated in *Heck* was not satisfied, where federal habeas corpus is no longer available because plaintiff no longer in custody); *Dallas v. Goldberg*, 143 F. Supp. 2d 312, 323 (S.D.N.Y. 2001) (elaborating *Jenkins* rationale).

II. CONGRESS HAS NOT EXPRESSLY PRECLUDED A *BIVENS* CAUSE OF ACTION FOR DAMAGES, NOR DO ANY "SPECIAL FACTORS" BAR SUCH A CAUSE OF ACTION.

Defendants argue that even if none of the jurisdiction-limiting provisions of the INA or the doctrine of *Heck v. Humphrey* bars a *Bivens* action, Plaintiff cannot bring such an action because "special factors" counsel against it. Defs. Br. at 17-22. This argument fails because Congress did not provided an alternative remedial scheme, nor is there any evidence that Congress sought to preclude damages actions against government officials who systematically violate the constitutional rights of foreign nationals by arresting and detaining them without probable cause or legitimate immigration purpose. Nor do the reasons offered by the government explain why ICE agents, alone among federal, state, and local law enforcement officers, should receive immunity from ordinary liability for constitutional violations they commit. A *Bivens* action is available for constitutional violations unless "defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective," or there are "special factors counseling hesitation in the absence of affirmative

[9] The cases cited by Defendants are clearly distinguishable from Mr. El Badrawi's claims. In both, *Calix-Chavarria v. Gonzalez*, Civil No. 1:CV-06-0820, 2006 U.S. Dist. LEXIS 41934 (M.D. Pa. June 22, 2006), and *Kulakov v. INS*, No. 06-CV-0754, 2007 U.S. Dist. LEXIS 33669 (W.D.N.Y. May 7, 2007), plaintiffs were currently in ICE custody when filing their *Bivens* claims and had the option to pursue habeas relief.

action by Congress." *Carlson v. Green*, 446 U.S. 14, 18-19 (1980). Defendants have made neither showing here.

Routine judicial assessment of the constitutionality of particular immigration enforcement actions would not unduly interfere with federal immigration policy. Adjudication of constitutional claims relating to pending criminal investigations creates some interference in the analogous field of criminal law enforcement, but nevertheless such claims are allowed to proceed. *Regan v. Sullivan*, 557 F.2d 300, 303 (2d Cir. 1977). Moreover, nothing in the text, history, or purpose of 8 U.S.C. § 1252 or any other immigration statute addresses damages actions or seeks to bar them. *See St. Cyr*, 533 U.S. at 313 ("Its purpose is to consolidate 'judicial review' of immigration proceedings into one action in the court of appeals, but it applies only '[w]ith respect to review of an order of removal under subsection (a)(1).'") (quoting 8 U.S.C. § 1252(b)). Given the application of qualified immunity to law enforcement officers and the lack of a Congressional aim to eliminate liability for constitutional torts, assessment of constitutional claims would neither reshape policy nor deter zealous enforcement. It would solely ensure that the rights of all persons are respected throughout the immigration process.

A. The INA's Regulatory Scheme Does Not Preclude a *Bivens* Remedy.

Defendants first maintain that because the INA creates a "comprehensive remedial scheme," it should be read to implicitly preclude a *Bivens* remedy for the constitutional violations alleged here. Defs. Br. at 18. However, Defendants have cited no cases to support their contention that the INA's comprehensive regulatory scheme bars a *Bivens* remedy. On the contrary, courts have repeatedly held that the INA's regulatory scheme is not a special factor precluding *Bivens* claims for constitutional violations by federal immigration officials related to the arrest and detention of foreign nationals. *See Turkmen v. Ashcroft*, 02 C 2307, 2006 U.S. Dist. LEXIS 39170, at *29 (E.D.N.Y. June 14, 2006) ("Although . . . the INA provides a comprehensive *regulatory* scheme for managing

the flow of immigrants in and out of the country, it is by no means a comprehensive *remedial* scheme for constitutional violations that occur incident to the administration of that regulatory scheme."); *Khorrami v. Rolince*, 493 F. Supp. 2d 1061, 1074 (D. Ill. 2007) ("While [the INA] is comprehensive in terms of regulating the in-flow and outflow of aliens, it is not comprehensive in terms of providing a remedy for [constitutional violations]."); *Arar*, 414 F. Supp. 2d at 280-81 (holding that the INA's thorough coverage of the admission, exclusion and removal of aliens "does not automatically lead to an adequate and meaningful remedy" for alleged constitutional violations); *see also id.* at 280 ("[T]o argue that the INA precludes federal jurisdiction and, at the same time, affords [Plaintiff] a 'comprehensive scheme' for review has a certain dissonance, even under the most liberal construction of alternative pleading.").

Bivens has only been found to be precluded where Congress has created a satisfactory alternative remedy for the violations alleged. Thus in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), *Bivens* relief was denied to Social Security Disability recipients who claimed Fifth Amendment due process violations, due to the existence of "elaborate administrative remedies." *Id.* at 424. The Court explained, "[w]hen the design of a Government program suggests that Congress has provided what it considers *adequate remedial mechanisms* for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." *Id*. at 423 (emphasis added). Likewise, in *Bush v. Lucas*, 462 U.S. 367 (1983), *Bivens* relief was denied to a federal employee claiming violation of his First Amendment rights, because of "comprehensive . . . provisions *giving meaningful remedies* . . ." *Id.* at 368 (emphasis added).[10] On the contrary, the INA

[10] The cases cited by Defendants do not suggest a different rule. *Sugrue v. Derwinski* denied *Bivens* relief because the administrative scheme at issue "provides meaningful remedies in a multitiered and carefully crafted administrative process." 26 F.3d 8, 12 (2d Cir. 1994). Similarly, *Spagnola v. Mathis* barred application of *Bivens* when the governing statutory regime provided "claimants in their respective positions substantially the same relief." 859 F.2d 223, 225 (D.C. Cir. 1988) (en banc); *see also Dotson v. Griesa*, 398 F.3d 156, 166-67 (2d Cir. 2005) (reviewing the same statutory regime), *cert. denied*, 126 S. Ct. 2859 (2006). Finally, in *Hudson Valley Black Press v. IRS*, the court declined to allow a *Bivens* suit only after noting the availability of a cause of action for damages relating to tax collection that Congress had limited to exclude claims such as those brought by the plaintiff. 409 F.3d 106, 111-12 (2d Cir. 2005). No tailored cause of action for damages can be found in the INA.

cannot be a meaningful and adequate comprehensive remedial regime because the procedures Defendants cite—procedures governing bond, habeas, etc.—do not afford non-citizens a means to redress the constitutional violations alleged by Mr. El Badrawi regarding his arrest and detention. Moreover, none of the INA procedures would be considered adequate remedies for a non-citizen, like Mr. El Badrawi, who is no longer in detention, and he would be completely barred from challenging Defendants' unconstitutional actions. Finally, the statutes in *Schweiker* and *Bush* both provided a compensatory scheme. Here, by contrast, as illustrated in Part I above, the INA provides *no* compensatory remedies whatsoever for the violations Plaintiff alleges, much less the sort of meaningful relief that could substitute for a *Bivens* action.[11]

B. Bivens Suits Are Available to Challenge Unconstitutional Conduct in Fields Over Which Congress Has Plenary Power.

No court has held that *Bivens* suits are uniformly unavailable in fields over which Congress has plenary power. In fact, courts have found *Bivens* available in many such areas. For example, in *Goldstein v. Moatz*, 364 F.3d 205 (4th Cir. 2004), the Fourth Circuit found that Patent and Trademark Office officials were not absolutely immune to *Bivens* suits, despite Congress's long-established plenary power over patents.[12] Despite Congress's failure to establish a damages remedy for constitutional violations, the Court allowed the claim after acknowledging that *Bivens* claims lie entirely outside of the law established by Congress to govern the field. 364 F.3d at 210 n.8. *See also, e.g., Wilkinson v. United States*, 440 F.3d 970 (8th Cir. 2006) (noting availability of *Bivens* actions against officials of the Bureau of Indian Affairs); *Mace v. Skinner*, 34 F.3d 854 (9th Cir. 1994) (allowing claim against officials of the Federal Aviation Administration); *Brown v. United*

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[11] Defendants completely mischaracterize *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007), while attempting to support their argument that the INA's regulatory scheme precludes a *Bivens* remedy. *See* Defs. Br. at 20. In fact, the Supreme Court in *Wilkie* stated that "It would be hard to infer that Congress expected the Judiciary to stay its *Bivens* hand." *Wilkie*, 127 S. Ct. at 2600.

[12] *See also McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843) ("[T]he powers of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution.").

States, 742 F.2d 1498 (D.C. Cir. 1984) (en banc) (allowing a *Bivens* suit against District of Columbia Officials where the incident predated the inclusion of such claims under 42 U.S.C. § 1983).[13] Even when the Executive was utilizing both its own and Congress's delegated authority to protect the country from terrorist threats in the aftermath of the September 11th attacks, special factors did not preclude *Bivens* claims to protect the constitutional rights of "high interest" detainees. *Iqbal v. Hasty*, 490 F.3d 143, 159 (2d Cir. 2007); *see also id.* at 150 (noting that these considerations were expressly rejected as "special factors" by the court below).

Perhaps most importantly, while Congress possesses plenary power over the field of immigration,[14] at least one court has entertained a *Bivens* action against immigration enforcement agents based on unlawful arrest without any assertion that Congress's plenary power immunized officials' unconstitutional acts. In *Velasquez v. Senko*, the court denied qualified immunity to field agents of the INS and Border Patrol, as well as the district director, chief patrol agent, and patrol agents-in-charge. 643 F. Supp. 1172 (N.D. Cal. 1986), *appeal dismissed* 813 F.2d 1509 (9th Cir. 1987) (Kozinski, J.). Although at that time the Supreme Court had already barred *Bivens* suits by active members of the armed forces, *Chappell v. Wallace*, 462 U.S. 296, 298 (1983), no party asserted that "special factors" might immunize unconstitutional activity related to immigration.

Unlike these numerous areas where *Bivens* is allowed, the unique bar on *Bivens* claims by active members of the armed forces hinges upon the general absence of the judiciary from military affairs. *Chappell v. Wallace* 462 U.S. 296, 300 (1983); *see also Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.");

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[13] *See also United States v. Lopez*, 514 U.S. 549, 589 n.3 (1995) ("Congress has plenary power over the District of Columbia and the territories."); *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994) ("The Framers granted Congress plenary authority over interstate commerce."); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs.").

[14] *See Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952).

Schlesinger v. Councilman, 420 U.S. 738, 746 (1975) (noting the presence of a parallel system of competent courts to protect members of our military). Thus *Chappell* emphasized "the necessarily *unique* structure of the military establishment" and "the *unique* relationship between the government and military personnel." 462 U.S. at 299, 301 (emphasis added). On the other hand, in its most recent *Bivens* decision, the Supreme Court did not take the simple route of finding that no *Bivens* remedy could ever be available from Bureau of Land Management officials, on the basis of Congress's plenary power to regulate government land. *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007).[15] Rather it engaged in substantial analysis of the feasibility of crafting a remedy in the particular case. *Id.* at 2601-05.

The Defendants' contention that immigration matters are "largely immune from judicial inquiry," Defs. Br. at 21 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)), is belied by a complete reading of the case they cite. In *Harisiades*, the Court went on to state that restraints based on deference "do not control today's decision," where the challenge rested on constitutional claims, rather than policy considerations. 342 U.S. at 589 (1952). Similarly, Mr. El Badrawi does not contest the wisdom of the federal immigration scheme; he seeks redress for unconstitutional treatment in its application. Moreover, the Article III judiciary is deeply involved in modern immigration matters. *See, e.g.*, *Lopez v. Gonzales*, 127 S. Ct. 625, 629-30 (2007) (curtailing executive authority to deport non-citizens based on mere drug possession and not distribution); *Clark v. Martinez*, 543 U.S. 371, 386 (2005) (rejecting executive claims that judicial restriction on indefinite detention of undocumented immigrants would "compromise" "the security of our borders"); *St. Cyr*, 533 U.S. at 298 (finding a "strong presumption in favor of judicial review of administrative action" in the field of immigration); *Zadvydas*, 533 U.S. at 687 (finding that—despite elaborate field-specific legislation—"the primary federal habeas corpus statute confers jurisdiction

[15] *See also Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987) ("The Property Clause grants Congress plenary power to regulate and dispose of land.").

upon the federal courts to hear these case") (internal citations omitted); *see also* 8 U.S.C. § 1252(a)(2)(D) (supporting review of constitutional claims related to removal).

The Courts of Appeals have taken on an increased role in this field, as recent executive branch action "has fallen below the minimum standards of legal justice." *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (Posner, J.); *see also Ba v. Gonzales*, 228 Fed. Appx. 7, 11 (2d Cir. 2007) (noting that the immigration judge's demeanor and remarks "erode the appearance of fairness and call into question the results of the proceeding" and recommending that the BIA "closely reexamine[] all of his cases that are still pending on appeal") (quoting *Islam v. Gonzales*, 469 F.3d 53, 56 (2d Cir. 2006)); *Chen v. U.S. Dep't of Justice*, 426 F.3d 104, 115 (2d Cir. 2005) (holding that an immigration judge's findings were "grounded solely on speculation and conjecture"). Shocking actions during recent immigration raids have shown that the need for judicial review of enforcement actions may exceed even the BIA review duties that have been so grievously burdening the Courts of Appeals.[16]

The central question posed in Mr. El Badrawi's complaint—whether his arrest and detention were unjustified, unconstitutional, unlawful, and without probable cause—requires only the application of law to his unconstitutional maltreatment in the United States by federal and state officials. Such assessments are routinely conducted by courts. To do so here would not hamper federal policy; to fail to do so would grant federal immigration enforcement officers free rein to violate U.S. residents' constitutional rights.

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[16] *See, e.g.*, Nina Bernstein, *Raids Were a Shambles, Nassau Complains to U.S.*, N.Y. Times, Oct. 3, 2007 (describing a raid in New York State in which federal immigration agents "wearing cowboy hats and brandishing shotguns and automatic weapons" mistakenly drew their guns on local police, U.S. citizens, and other legal residents); Jennifer Medina, *Arrests of 31 in U.S. Sweep Bring Fear to New Haven*, N.Y. Times, June 7, 2007 (describing dragnet-style raid in which "immigration officials knocked on their doors and demanded to speak with every adult in the house, then asked for identification" as well as giving preferential treatment to the mothers—but not the fathers—of children); Monica Rhor, *Kids Left Behind in Immigration Raids*, Assoc. Press, Mar. 11, 2007. (describing the arrest of a woman who was still nursing her baby, the separation of the mother from the baby, and the subsequent hospitalization of the baby for dehydration).

III. DEFENDANTS MANACK AND LOSER DO NOT HAVE QUALIFIED IMMUNITY FROM SUIT.

Defendants correctly note that to overcome qualified immunity, Plaintiff El Badrawi must show both a violation of his constitutional rights and that the violated rights were "clearly established." Defs. Br. at 23. Defendants are entitled to qualified immunity only if "their [official] conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Under this standard, the Court must apply a two-step analysis. It must first decide, "as a threshold matter," whether the facts alleged, liberally construed, show a violation of a constitutional right. If so, the Court then decides whether that right was "clearly established" at the time of the violation. *Poe v. Leonard*, 282 F.3d 123, 132 (2d Cir. 2002). As Defendants acknowledge, these two questions must be addressed "in the proper sequence." *Saucier v. Katz*, 533 U.S. 194, 200 (2001); *see also Brousseau v. Haugen*, 543 U.S. 194, 198 n. 3 (2004).

A constitutional right is clearly established if "its contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal citation and quotation omitted). Plaintiff need not demonstrate that "the very action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also Johnson v. Newburgh Enlarged School Dist.*, 239 F.3d 246, 251 (2d Cir. 2001) ("[T]he absence of legal precedent addressing an identical factual scenario does not necessarily yield a conclusion that the law is not clearly established."). Nor need Plaintiff identify legal precedent arising from "materially similar" facts to the case at bar. *Hope*, 536 U.S. at 739. Plaintiff need only show that prior decisions gave "fair warning" that official conduct depriving someone of that right would be unconstitutional. *Id.* at 740; *see also Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004) (noting that *Hope* "shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put

officials on fair notice that the described conduct was unconstitutional"). Government officials may have such fair warning "even in novel factual circumstances." *Hope*, 536 U.S. at 741. Prior decisions may "clearly foreshadow" a ruling that the challenged conduct is unconstitutional, *African Trade & Info. Ctr., Inc. v. Abromaitis*, 294 F.3d 355, 362 (2d Cir. 2002) (internal citation and quotation omitted), or a previously announced "general constitutional rule" may apply "with obvious clarity to the specific conduct in question." *United States v. Lanier*, 520 U.S. 259, 271 (1997).

As demonstrated below, each of Plaintiff El Badrawi's *Bivens* claims adequately alleges a violation of his constitutional rights, and these rights were clearly established at the time the violations took place. Moreover, Defendants' attempt to bring a motion for summary judgment on qualified immunity grounds is clearly premature, as Plaintiff has not had the opportunity to conduct discovery. *See Thomas v. Roach*, 165 F.3d 137, 143 (2d Cir. 1999) (when deciding the application of qualified immunity, "[d]ismissal . . . is not appropriate where there are facts in dispute that are material to a determination of reasonableness"); *see generally* Pl. Rule 56(f) Motion.

A. Defendants Manack and Loser Wrongfully Arrested and Detained Plaintiff Without Probable Cause, Reason To Believe An Immigration Violation Had Been Committed, or Valid Justification.

As Plaintiff properly alleged in his complaint, "Defendants Manack and Loser knew or reasonably should have known that there was no reason to believe or probable cause that Mr. El Badrawi was illegally in the United States." Compl. ¶ 60. Defendants have not reasonably refuted that proposition. Instead, they have utilized facts to which Plaintiff has not yet had access in this premature motion for summary judgment. Moreover, a judicial inquiry into whether Manack and Loser had probable cause to arrest and detain Mr. El Badrawi deals with issues of fact not properly resolved on summary judgment at this stage. Because the probable cause inquiry emphasizes context and reasonableness, the existence of probable cause depends upon "factual and practical considerations of everyday life." *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (quotation omitted); *see*

also Boyd v. City of New York, 336 F.3d 72, 77 (2d Cir. 2003) ("The issue of probable cause cannot be resolved by summary judgment. This is a conclusion that does not issue easily from these extraordinary facts, but we think there is enough here to put before a jury."); *Murphy v. Lynn*, 118 F.3d 938, 947 (2d Cir. 1997) ("Where the question of whether an arresting officer had probable cause is predominantly factual in nature, as where there is a dispute as to the pertinent events, the existence *vel non* of probable cause is to be decided by the jury.").

In the Second Circuit "probable cause to arrest exists when police officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." *Walczyk v. Rio*, 496 F.3d 139, 156 (2d Cir. 2007) (internal quotations and citations omitted). Mr. El Badrawi's unlawful arrest and detention was purportedly based on a violation of 8 U.S.C. § 1227(a)(1)(B). *See* Compl. ¶ 46; Defs. Ex. B., attachment 2 (warrant); Ex. 12 (I-213 Record of Deportable/Inadmissible Alien). The statute states, "Any alien who is present in the United States in violation of this chapter or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 1201(i) of this title, is deportable." Therefore, probable cause for arrest under this provision requires knowledge or a trustworthy basis sufficient for a reasonable officer to believe either that a non-citizen's visa has been revoked or that the individual is presently violating Title 8 of the United States Code, the sum of federal immigration law. *Cf. Westover v. Reno*, 202 F.3d 475, 480 n.6 (1st Cir. 2000) (requiring probable cause to believe the factual predicates for removal prior to arrest under 8 U.S.C. § 1227(a)(1)(B)(i)).

The facts set forth in the complaint, as well as in the declarations and exhibits submitted in response to Defendants' Motion for Summary Judgment, clearly indicate that Defendants Manack and Loser did not have knowledge or trustworthy information sufficient to indicate that Mr. El Badrawi had violated the immigration laws at the time of his arrest. At the very least, there is a

material dispute of fact as to the existence of probable cause, making summary judgment inappropriate at this time. First, it is incontrovertible that Mr. El Badrawi's visa had not been revoked at the time of his arrest, because DOS's revocation was effective only upon his departure. *See* Compl. ¶ 30; Defs. Ex. C., attachment 6. Second, as the contemporaneous records of Defendants demonstrate, Mr. El Badrawi remained in proper immigration status at the time of his arrest, and therefore Defendants could not have had affirmative knowledge of any such violation. *See* Compl. ¶¶ 22-36; Defs. Ex. B, attachment 1 (visa); Defs. Ex. C, attachment 3 (approved 2003 H1-B petition); Defs. Ex. C, attachment 4 (valid application for an extension dated March 31, 2004). At the very least, the Defendants' own acknowledgment in the I-213 that UConn's petition to extend Mr. El Badrawi's visa was pending at the time of his arrest—and that the arrest and entire detention were within the 240-day extension period—creates a material dispute of fact as to whether Defendants had probable cause to believe Mr. El Badrawi had violated any immigration law.[17] *See* Ex. 12.

Moreover, the Defendants have not set forth a trustworthy source of information that would have led a reasonable officer to believe that Mr. El Badrawi was subject to arrest. *Cf. Zellner v. Summerlin*, 494 F.3d 344, 372 (2d Cir. 2006) (holding that summary judgment could not be granted for the defendants when an assertion of the basis for probable cause "is unaccompanied by any supporting citation"). Rather, they carried out Operation Frontline II by arresting Mr. El Badrawi under an unreasonable and unprecedented reading of the law which allowed him to legally remain in the United States. To the extent that the Manack and Loser declarations hold out the Defendants to be their own source of information, a material dispute of fact exists as to whether the information they possessed would have led a reasonable officer to believe that probable cause existed.

[17] DHS Counsel also conceded this point during Plaintiff's November 3, 2004 hearing. *See* Defs. Ex. C at 8-9.

The Defendants have acknowledged they did not have probable cause to arrest Mr. El Badrawi on the basis of his visa revocation. *See* Defs. Br. at 25 n.5.[18] Rather they assert that he "remained in the United States for a time longer than permitted." Defs. Br. at 25 (quoting Defs. Ex. B, attachment 3). The Second Circuit has established a three-part test to address such alleged visa overstays. At the time of arrest, the Defendants needed probable cause to believe that Mr. El Badrawi "[1] was admitted as a nonimmigrant for a temporary period, [2] that the period ha[d] elapsed, and [3] that [he] ha[d] not departed." *Zerrei v. Gonzales*, 471 F.3d 342, 345 (2d Cir. 2006). Mr. El Badrawi does not contest that at the time of his admission to the United States, "he was admitted as a nonimmigrant worker for a temporary period not to exceed May 1, 2004," that "that period had elapsed," and that "he had not departed the country." Defs. Br. at 25.

However, the Defendants' formulation does not take into account that Mr. El Badrawi's temporary period of authorized stay was extended beyond May 1, 2004 when he applied for an extension of his H1-B visa. Therefore, the Defendants still run afoul of step two, as they neither knew nor had reasonably trustworthy information that indicated that the period of Mr. El Badrawi's temporary admission had elapsed.

Under federal regulations, a nonimmigrant who files for an extension of stay pursuant to an H1-B visa in a timely manner is authorized to continue employment with the same employer for an additional 240 days or until the extension application is denied. 8 C.F.R. § 274a.12(b)(20). It is undisputed that Mr. El Badrawi's employer filed a timely application for an extension of stay on or about March 31, 2004, including a request for premium processing. Compl. ¶ 31; Defs. Ex. C,

[18] During Mr. El Badrawi's first immigration hearing, the attorney appearing on behalf of the Department of Homeland Security asserted that Mr. El Badrawi's visa had been revoked. *See* Defs. Ex. C at 7-9. This is not the case. The Department of State Certificate of Revocation states, "This revocation shall become effective immediately on the date on which this certificate is signed unless the alien is present in the United States at that time, in which case it will become effective immediately upon the alien's departure from the United States." Defs. Ex. C attachment 6. Between the October 2, 2003 issuance of the Certificate of Revocation and Mr. El Badrawi's arrest on October 29, 2004, Mr. El Badrawi never departed the United States. Compl. ¶ 36. Therefore, the Department of State visa revocation never became effective prior to Mr. El Badrawi's arrest and detention.

attachment 4. Therefore, Mr. El Badrawi continued to be authorized to work for the University of Connecticut Health Center, until 240 days after May 1, 2004. That work obviously required him to remain in the United States. Moreover, that 240-day period had not yet elapsed when he was unlawfully arrested by the Defendants and their agents on October 29, 2004.

This interpretation of the governing regulation conforms to the longstanding policy of USCIS and its precursor, the INS. As established in a memorandum issued by Michael A. Pearson, Executive Associate Commissioner of the INS, in March 2000 the INS "determined that nonimmigrants who were admitted until a specific date and who apply for [a change of status] or [an extension of stay] and whose applications have been pending beyond the 120-day tolling period[19] should be *considered to be in a period of stay authorized by the Attorney General* if certain requirements are met." Defs. Ex. D at 2 (emphasis added). Those requirements are simply that the application for an extension of stay was filed timely, that the applicant did not work without authorization prior to filling the application, and that the extension has been pending for more than 120 days after the initial I-94 admission has expired. *Id.* at 4.

This same interpretation was repeated in a more recent memorandum currently maintained on the USCIS website. *See* Ex. 1 at 4 (*Cook Memo*) ("[T]he Service will deem the alien to be within a period of stay authorized by the Attorney General (and not unlawfully present), if the alien has filed a non-frivolous [Extension of Stay] or [Change of Status] application with the Service Center and that application is still pending, provided that such application was timely filed").[20] Under the plain terms of the regulations, the Pearson Memo, and the Cook Memo, it is undisputed that Mr. El

[19] This refers to is a tolling provision providing that individuals who have remained in the United States beyond their lawful period of admission should not be subject to the three and ten year bars on admissibility under 8 U.S.C. § 1182(a)(9)(B)(i) if they were lawfully admitted or patrolled into the U.S., have filed a non-frivolous application for a change or extension of status, and have not been employed without authorization. 8 U.S.C. § 1182(a)(9)(B)(iv). It does not relate directly to the 240-day tolling provision in 8 C.F.R. § 274a.12(b)(20).

[20] Any contrary interpretation of § 274a.12(b)(20) is a position taken purely for the purpose of litigation and should not be afforded judicial deference. *See, e.g.*, *Southern Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 828 (10th Cir. 2000).

Badrawi was work authorized, "within a period of stay authorized by the Attorney General," and "not unlawfully present" on the date of his arrest.

The Defendants have urged that "the regulation only affects [Mr. El Badrawi's] ability to legally *work* in the United States—it does not change his status as an overstay." Defs. Br. at 28. This construction of the regulation defies logic. First, authorization to continue to work in the United States, issued to an individual already present in the United States, cannot be given effect without continuing one's presence. Moreover, the regulation put forward by Defendants to suggest that immigration authorities "may choose to pursue other actions to seek removal of a person notwithstanding the pending application," Defs. Br. at 28 (quoting 8 C.F.R. § 103.2(b)(10)(ii)), only describes the effects of "a request for initial or additional evidence." 8 C.F.R. § 103.2(b)(10). There is no regulation suggesting that an individual whose employer has filed a complete and timely application for an extension of stay may still be arrested and detained.[21]

The Defendants rely heavily on *Matter of Teberen*, 15 I. & N. Dec. 689 (B.I.A. 1976), for the notion that Mr. El Badrawi's pending application for an extension of stay did not provide him with a 240-day extension of his authorized stay, but that case is plainly inapposite, and cannot overcome the force of the present work authorization regulation (promulgated in 1991), the Pearson Memo (2000), and the Cook Memo (2003). In *Teberen*, the non-citizen found to be deportable had applied for a visa extension in order to attend graduate school. At the time that his visa expired, he had not received a response concerning the requested extension, as the INS had misplaced his application. *Id.* at 690. The crucial difference between the two cases is that Mr. Teberen did not allege that he had received an automatic authorization to continue the activity for which he had been admitted,

[21] The Defendants have also suggested that that "the goal of the rule allowing aliens to continue working while their applications are pending is to protect employers" rather than conferring "legal status on the aliens themselves." Defs. Br. at 28. This contradicts the specific text of the regulation, which provides the right to the individual. 8 C.F.R. §274a.12(b)(20) ("These aliens are authorized . . . . to continue employment with the same employer for a period not to exceed 240 days beginning on the date of the expiration of the authorized period of stay."). Furthermore, the Defendants' construction would provide little comfort to employers, as the arrest and deportation of a specialized worker providing essential services can be far more costly than the fines levied under the INA.

upon timely filing an application for an extension of stay. Nor did any such provision exist at the time for any category of visa, as *Teberen* pre-dates 8 C.F.R. § 274a.12(b)(20) by fifteen years.[22] *See* 56 FR 41767 (Aug. 23, 1991) (promulgating the final regulation). The Defendants cite no additional precedent for the notion that a non-citizen is subject to deportation during the period authorized under an automatic stay provision. While *Teberen's* basic analytic framework concerning overstays has been adopted by the Second Circuit, *see Zerrei*, 471 F.3d at 345, no federal appellate court has found an individual currently residing in the United States under an automatic authorization provision to be deportable.[23]

B. Defendants' Initial Arrest and Detention of Plaintiff Violated Clearly Established Due Process and Fourth Amendment Rights.

Plaintiff contends that Defendants Manack and Loser arrested and detained him without probable cause, reason to believe an immigration violation had been committed, or valid justification, in violation of both the Fourth Amendment prohibition of unreasonable seizures and the Fifth Amendment's Due Process Clause.[24] Plaintiff's claims regarding his initial arrest and detention rest on fundamental and well-established principles of law prohibiting arrest without probable cause and arbitrary detention, and therefore state claims for relief that are not subject to a defense of qualified immunity.

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[22] The regulations at 8 C.F.R. § 274a implement INA § 274A, 8 U.S.C. § 1324a, which was not enacted by Congress until 1986.

[23] The Defendants cite numerous circuit court opinions for the notion that only a final grant of an extension of stay can prevent an individual who has remained in the country beyond the initial end date of his or her period of admission from deportability. Defs. Br. at 26 n.6. Each of these decisions predate 8 C.F.R. § 274a.12(b)(20), and they likely did not take into account the possibility of an *explicit*, automatic authorization pending processing of an extension. *Cf., e.g., Sadegh-Nobari v. INS*, 676 F.2d 1348, 1351 (6th Cir. 1982) (noting petitioner's assertion that a deportation proceeding is wrongful solely on the basis that an extension of stay is pending had no affirmative basis).

[24] These rights are guaranteed to "all persons" in the United States, including non-citizens such as Mr. El Badrawi. They are even guaranteed to non-citizens who entered the United States unlawfully and non-citizens who have been found deportable. *Zadvydas v. Davis*, 533 U.S. 678, 679-80 (2001); s*ee also Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 413 (D.N.J. 1999) (INS detainee "removed from his community, his home, and his family . . . has been denied rights that '[rank] high among the interests of the individual'") (quoting *Landon v. Plasencia*, 459 U.S. 21, 34 (1982)).

1. Defendants Manack and Loser's Arrest and Detention of Plaintiff Violated His Fourth Amendment Right To Be Free from Unreasonable Searches and Seizures.

Plaintiff El Badrawi has a clearly established Fourth Amendment right to be free from arrest without probable cause. It is a well-settled principle of constitutional jurisprudence that an arrest without probable cause constitutes an unreasonable seizure in violation of the Fourth Amendment. *See Beck v. Ohio*, 379 U.S. 89, 91 (1964) ("Whether an arrest is constitutionally valid depends in turn upon whether, at the moment the arrest is made, the officers have probable cause to make it."); *Brown v. City of Oneonta*, 235 F.3d 769, 775 (2d Cir. 2000) (noting "arrests . . . require a demonstration of probable cause" under the Fourth Amendment). The authority of government officials to interrogate or arrest an alien, even where specifically authorized by statute, is limited by the strictures of the Fourth Amendment. *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975); *United States v. Singh*, 415 F.3d 288, 294 (2d Cir. 2005); 8 C.F.R. § 287.8(c)(2); *see also United States v. Karathanos*, 531 F.2d 26, 29 (2d Cir. 1976) (holding that INS agents violated Fourth Amendment when failing to show probable cause in search of illegal aliens); *Orhorhaghe v. INS*, 38 F.3d 488, 497-501 (9th Cir. 1994) (holding that INS investigators violated a non-citizen's Fourth Amendment rights by detaining him for questioning about his immigration status). Moreover, there has long been a clearly established cause of action available for damages from federal agents who, acting under the color of law, arrest and detain an individual without probable cause. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 389 (1971).

Here, Defendants do not dispute that Plaintiff had a clearly established Fourth Amendment right to be free from arrest without probable cause. Instead, Defendants offer three reasons why they did not violate Mr. El Badrawi's Fourth Amendment rights. First, Defendants argue that they had probable cause to arrest and detain Plaintiff. Defs. Br. at 24-27. Second, Defendants argue that because Mr. El Badrawi was arrested pursuant to a warrant, his seizure should be "presumed valid." Defs. Br. at 27. Third, Defendants argue that they should be entitled to qualified immunity because

their actions were reasonable even if they had violated statutes, agency regulations, or had made mistakes. Defs. Br. at 27-29, 37. However, none of Defendants' arguments provide valid defenses on which to dismiss Plaintiff's Fourth Amendment claims. Moreover, summary judgment at this stage of the pleadings is improper, as material disputes of fact exist regarding all three of these points.

First, regarding Defendants' claim that they arrested Plaintiff with probable cause, as shown above, *see* Section III.A *supra*, because Manack and Loser had no legal basis to deem Plaintiff in violation of immigration laws, there was no legal basis or probable cause to arrest and detain Plaintiff, and his Fourth Amendment right to be free from unlawful arrest and detention was clearly violated.

Second, while an arrest pursuant to a warrant is "ordinarily presumed valid" in the criminal context, it clearly is not in the immigration context. Defendants cite no case law to suggest otherwise. In the criminal context, a warrant is ordinarily presumed valid because it is issued by a "neutral and detached magistrate" not "by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948); *see also Shadwick v. City of Tampa*, 407 U.S. 345, 348, 351 (1972) (Constitution generally requires that "someone independent of the police and prosecution" review a warrant application to determine whether there is "probable cause to believe a citizen guilty" of a crime and to issue an arrest warrant); *Coolidge v. New Hampshire*, 403 U.S. 443, 449-50 (1971) (similar requirement for search warrant). As the Supreme Court has explained, "[t]he Fourth Amendment does not contemplate the executive officers of the Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute." *United States v. United States Dist. Court*, 407 U.S. 297, 317 (1972). While the Supreme Court has tacitly approved the use of administrative immigration arrest warrants, *Abel v. United States*, 362 U.S. 217, 230 (1960), no court has granted them the same deference afforded to a warrant signed by a neutral judicial officer, and logically no deference should

be extended to a warrant signed by the official ordering the arrest. Here, the warrant for Mr. El Badrawi's arrest was not presented to a neutral and detached magistrate, was not based on sworn evidence, and was in fact issued by Defendant Manack, the same executive officer who directed that the arrest be made. *See* Defs. Ex. C, attachment 2 (noting that the warrant relied on evidence but not specifically on *sworn* evidence); Manack Decl. ¶ 5 (noting that Defendant Manack signed the warrant based solely on his own determination). For these reasons there can be no presumption that the warrant was valid.[25]

The probable cause standard regarding whether an ICE arrest is valid under the Fourth Amendment does not depend on whether a warrant has been issued, but whether the immigration officer had "reason to believe that the alien so arrested is in the United States in violation of any . . . law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens."[26] 8 U.S.C. § 1357(a)(2); *see also* 8 C.F.R. § 287.8(c)(2)(i) ("An arrest shall be made only when the designated immigration officer has reason to believe that the person to be arrested has committed an offense against the United States or is an alien illegally in the United States."); *United States v. Sanchez*, 635 F.2d 47, 63 n.13 (2d Cir. 1980) (citing *Au Yi Lau v. INS*, 445 F.2d 217, 222 (D.C. Cir. 1971)) (requirement for valid arrest under 8 U.S.C. § 1357(a)(2) that

[25] However, even in the criminal context, where a warrant is "ordinarily presumed valid" because it has been issued by a "neutral and detached magistrate," Defendants still would have violated Mr. El Badrawi's Fourth Amendment right to be free from arrest without probable cause. The Supreme Court has clearly held that a judicial officer's finding of probable cause to issue a warrant does not prevent a suit against the officer who sought the warrant if a reasonably well-trained officer in the position of the defendant would have known that his affidavit failed to establish probable cause. *See Malley v. Briggs*, 475 U.S. 335, 345 (1986); *see also* 32 Am. Jur. 2d False Imprisonment § 87 (affiant who falsely and maliciously misstates facts and procures a warrant is responsible for the arrest). As the Plaintiff alleges, Defendants Manack and Loser "acted intentionally, knowingly, and/or with reckless disregard and deliberate indifference" when misstating the facts on which Plaintiff's immigration warrant was issued. *See* Complaint ¶¶ 57-58. Moreover, Defendants "knew or reasonably should have known" that the facts on which Plaintiff's immigration warrant was issued failed to establish probable cause. *See* Complaint ¶¶ 59-60.

[26] Section 8 U.S.C. § 1357 even allows ICE agents to arrest non-citizens without a warrant if the non-citizen "is likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. § 1357(a)(2); *see also* 8 C.F.R. § 287.8(c)(2)(ii) ("A warrant of arrest shall be obtained except when the designated immigration officer has reason to believe that the person is likely to escape before a warrant can be obtained for his arrest."). This provides further proof that the fact Defendants obtained an immigration warrant does not determine whether or not Manack and Loser had probable cause to arrest Plaintiff.

officers have "reason to believe" that alien is in country illegally must be considered to be equivalent of probable cause requirement); *United States v. Karathanos*, 399 F. Supp. 185 (E.D.N.Y 1975), *aff'd* 531 F.2d 26 (2d Cir. 1976), *cert. den.* 428 U.S. 910 (1976) (powers granted in 8 U.S.C. § 1357 do not in any way lessen the requirement that probable cause exist when search warrant is sought in connection with search for illegal aliens).[27]

As demonstrated above, *see* Section III.A *supra*, Defendants had no "reason to believe" Mr. El Badrawi had violated any immigration law, and had no factual or legal basis for his immigration arrest, and, therefore, had no probable cause to arrest Plaintiff in clear violation of his Fourth Amendment rights. In fact, Plaintiff alleges that Defendants' overzealous behavior in regards to his unconstitutional arrest and detention was due to the fact that they were investigating him for national security concerns pursuant to Operation Frontline. *See* Ex. 9; Ex. 11; Ex. 12. If this is true, ICE has devised a separate set of procedures to establish probable cause in cases where the basis for the arrest is a threat to national security:

> [I]nternal ICE policy and procedure require that the national security law division of ICE conduct a probable cause review for legal sufficiency purposes prior to the issuance of either an NTA or an administrative arrest warrant. In order to facilitate the probable cause review, ICE agents must submit an affidavit or other document, such as a national security declaration, setting forth the factual basis for an administrative arrest based on national security concerns.

United States v. Abdi, 463 F.3d 547, 551 (6th Cir. 2006) (internal citations omitted). In Mr. El Badrawi's case, none of these procedures were followed, further demonstrating that Manack and Loser had no probable cause in arresting Plaintiff. *Cf. Los Angeles County v. Rettele*, 127 S. Ct. 1989, 1991 (2007) (noting that adherence to proper procedures in obtaining a warrant lends credence to the reasonableness of a search). If Manack and Loser had followed their own procedures

[27] *See also Orhorhaghe v. INS*, 38 F.3d 488, 497 (9th Cir. 1994) ("[T]o justify the seizure [of a non-citizen, an ICE] agent must articulate objective facts providing a reasonable suspicion that [the subject of the seizure] was an alien illegally in this country. The specific facts articulated by the agents must provide a rational basis for separating out the illegal aliens from American citizens and legal aliens.") (internal quotations and citations omitted).

regarding ICE arrests pursuant to national security concerns, they would have realized that no such national security declaration could have been issued regarding Plaintiff because he, in fact, raises no national security concerns. Therefore, the national security division of ICE would have concluded that there was no probable cause to issue an immigration arrest warrant against Mr. El Badrawi, and he would not have been unconstitutionally arrested and detained by Defendants. At the very least, a material dispute of fact exists as to whether Mr. El Badrawi was arrested and detained pursuant to national security concerns or on Defendants' faulty assertion that Mr. El Badrawi was out of status.

Finally, Defendants' argument that they are entitled to qualified immunity because their actions were reasonable even if they had violated statutes, agency regulations, or had made mistakes is without merit to dismiss the complaint at this stage in the pleadings.

First, while the Defendants would rebrand their unconstitutional actions as "an alleged regulatory violation," Defs. Br. at 27, they attempt to formulate a uniform defense to arrest without probable cause based on the arresting officers' mistake of law. Under their logic, any arrest absent probable cause would "merely . . . violate[] some statutory or administrative provision," as the arresting officers had failed to determine whether the individual they were arresting was in violation of a statute or regulation. For example, if police officers arrested an individual for statutory rape without any reason to believe that the alleged victim was sixteen or younger, as required by statute, it would not be a mere statutory violation. Rather, the police would have made an arrest without probable cause to believe that the individual had committed any real crime, violating clearly established Fourth Amendment rights.

No court has ever established such an exception, and the Defendants misleadingly strip the quoted passage of *Davis v. Scherer* of its context to attempt to lay one out. *See* Defs. Br. at 27-28 (quoting 468 U.S. 183, 194 (1984)). *Davis* addressed a scenario whereby the plaintiffs attempted to prove that their constitutional rights were "clearly established" for purposes of qualified immunity when such rights had been codified in state statutes and regulations. *Id.* at 193. The Court merely

acknowledged that a concurrent violation of a statutory right does not necessarily prove that a constitutional right to the interests also protected by statute is clearly established. *Id.* at 195-96. In contrast, here the constitutional right protected is freedom from arrest and detention absent probable cause. 8 C.F.R. § 274a.12(b)(20) merely lays out the terms of Mr. El Badrawi's continued compliance with U.S. immigration laws.

Moreover, the Defendants suggest that the breadth of federal immigration law is so great that no enforcement official should be held responsible for violating an individual's constitutional rights while those laws are being enforced. Defs. Br. at 29-30. Such blanket calls for immunity based upon ignorance of the law have been resoundingly rejected by the courts. Rather, "a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982); *see also Salahuddin v. Coughlin*, 781 F.2d 24, 27 (2d Cir.1986) ("Officials are held to have constructive notice of established law."). Specifically, in *Velasquez v. Senko*, the court denied qualified immunity to immigration officials for immigration arrests absent probable cause, despite the plethora of statutes and regulations unavoidably involved in any immigration matter. 643 F. Supp. 1172 (N.D. Cal. 1986), *appeal dismissed* 813 F.2d 1509 (9th Cir. 1987) (Kozinski, J.).

Second, although Defendants would also like to characterize their unconstitutional arrest and detention as a reasonable mistake, as stated above, it is clearly established that, at the time of Plaintiff's arrest, an ICE agent would have no probable cause to arrest and detain a non-citizen during the 240-day extension period while the application was still pending. The fact that Defendants have cited no case law or demonstrated any occasion in which Plaintiff's arrest would have been considered valid, clearly proves that any reasonable ICE officer should have known Mr. El Badrawi was at all times legally present in the United States and there was no reason to believe he had violated any immigration law. Moreover, regarding Defendants' motion to dismiss, plaintiff's allegations must be taken as true. Plaintiff's allegations clearly contradict Defendants' assertion that they may have reasonably but mistakenly concluded that probable cause existed regarding Mr. El

Badrawi's arrest. *See* Complaint ¶¶ 57-58 (Defendants' Manack and Loser "acted intentionally, knowingly, and/or with reckless disregard and deliberate indifference . . ."); Complaint ¶¶ 59-60 (Defendants Manack and Loser "knew or reasonably should have known that their actions violated Mr. El Badrawi's constitutional and legal rights . . . [and] that there was no reason to believe or probable cause that Mr. El Badrawi was illegally in the United States"). Additionally, regarding Defendants' motion for summary judgment, the Defendants' own acknowledgment in the I-213 Record of Deportable/Inadmissible Alien that Plaintiff's extension of stay was pending at the time of his arrest—and that the arrest was within the 240-day extension period—creates a material dispute of fact as to whether Manack and Loser were reasonably mistaken. Ex. 12. Therefore, it is too early at this stage in the pleadings to grant Defendants' motion for summary judgment without allowing Plaintiff to conduct further discovery regarding this issue under Fed. R. Civ. P. 56(f). *See* Pl. Rule 56(f) Motion; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986) ("[S]ummary judgment [should] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition."); *Castro v. United States*, 34 F.3d 106, 112 (2d Cir. 1994) ("Where the claimant's description of the events suggests that the defendants' conduct was unreasonable, and the facts that the defendants claim are dispositive are solely within the knowledge of the defendants and their collaborators, summary judgment can rarely be granted without allowing the plaintiff an opportunity for discovery as to the questions bearing on the defendants' claims of immunity.")

The Defendants' abrupt seizure of Mr. El Badrawi, without warning or an opportunity to place his affairs in order, profoundly damaged his life. That is why the qualified immunity question revolves around Mr. El Badrawi's constitutional right to be free from seizure, rather than his right to a 240-day extension of his visa: seizure presents the greatest potential source of harm, and thus freedom from it is constitutionally protected. *See Boyd v. United States*, 116 U.S. 616, 630 (1886) (describing the "indefeasible right of personal security, personal liberty, and private property" as "the

very essence of constitutional liberty"). "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate." *Harlow*, 457 U.S. at 819. The Defendants in this case failed to hesitate, and as a result they violated the Plaintiff's clearly established constitutional rights.

2. Defendants Manack and Losers' Arrest and Detention of Plaintiff Violated His Fifth Amendment Right to Due Process.

The Fifth Amendment prohibits the government from "depriv[ing]" any person of "liberty . . . without due process of law." This prohibition applies to citizens and non-citizens, "whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas*, 533 U.S. at 693 (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982)). Under the Fifth Amendment, Plaintiff El Badrawi has a clearly established right to be free from imprisonment. It is well established that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. The *Zadvydas* Court further stated that civil confinement of non-citizens must be limited with respect to both the length of detention and the underlying purpose justifying the detention. *Id*. at 671. Thus, government detention of non-citizens is not permissible if the respondent's liberty interest outweighs the government's justification for the detention. Because Plaintiff was lawfully present at the time of his initial detention by Defendants Manack and Loser, the government did not state any valid justification for his detention, and his liberty interest outweighs whatever justification the government might have had.

Defendants Manack and Loser do not dispute that Plaintiff El Badrawi had a Fifth Amendment right to be free from imprisonment; instead they argue that they did not violate Plaintiff's clearly established right to due process regarding his initial detention for three reasons. First, they argue that if Plaintiff's arrest was lawful, then he may not recover any damages related to his detention. Defs. Br. at 30. Second, Defendants claim they had no involvement with Plaintiff's

detention. Defs. Br. at 30. Third, they argue that Mr. El Badrawi did not have a constitutional right not to be detained during his removal proceedings. Defs. Br. at 31. However, none of Defendants' arguments provide valid defenses on which to dismiss Plaintiff's Fifth Amendment claims.

First, Defendants' contention that Plaintiff cannot state a Fifth Amendment claim regarding his initial detention because the arrest was lawful fails because, as shown above, *see* Section III.A *supra*, Plaintiff's arrest was clearly unlawful. Defendants had no legal basis to arrest and detain Plaintiff because he was not in violation of any immigration law. However, even if this Court finds that probable cause existed initially to arrest Plaintiff, Plaintiff still has a constitutional right to be free from continued detention once Defendants knew or should have known that Mr. El Badrawi was legally present in the United States. *See Lee v. City of Los Angeles*, 250 F.3d 668, 683 (9th Cir. 2001) (holding that an alien detainee has "a constitutional right to be free from continued detention after it was or should have been known that the detainee was entitled to release") (quoting *Cannon v. Macon County*, 1 F.3d 1558, 1563 (11th Cir. 1993)).[28] In Mr. El Badrawi's case, Immigration Judge Straus raised the flaws in Defendants' interpretation of 8 C.F.R. § 274a.12(b)(20) at the hearing on November 3, 2004, only days after the unlawful arrest. Defs. Ex. C at 10 ("Judge Straus: But doesn't the fact that he filed a timely extension mean that he's in status?"). Thus Defendants, placed on clear notice that their purported rationale for detaining Plaintiff was incorrect, failed to take necessary and reasonable steps to correct their mistake. *Cf. Lee*, 250 F.3d at 684 (noting that those responsible for detention have an ongoing duty to take reasonable steps to verify the legality of an individual's detention). At a minimum, Plaintiff has established a material dispute of fact as to when the

[28] While *Cannon* held that a detainee's right to be free from continued detention was a Fifth Amendment due process right, the Second Circuit has recently held that it is a Fourth Amendment right. *See Russo v. City of Bridgeport*, 479 F.3d 196, 208 (2d Cir. 2007). Regardless of whether the right is protected by the Fourth or Fifth Amendments (or both), Defendants violated Mr. El Badrawi's clearly established right to be free from continued detention once Defendants reasonably knew or should have known that he had not violated any immigration laws.

Defendants knew or should have known that Mr. El Badrawi was legally present in the United States. Therefore, summary judgment at this stage of the proceedings is inappropriate.

Second, Defendants' argument that Manack and Loser did not have any involvement with Plaintiff's initial detention is also without merit. Defendants cannot, and likely do not,[29] contend that they were not personally involved in Plaintiff's detention before his hearing with the Immigration Judge and before he was granted voluntary departure. In fact, Defendant Manack has explicitly stated that "I determined that ICE should detain El Badrawi." Manack Decl. ¶ 6. Moreover, Plaintiff's initial detention was precisely caused by Defendant Loser's investigation and arrest of Mr. El Badrawi, Loser Decl. ¶¶ 5, 7, and by the Defendants' refusal to set bond for Mr. El Badrawi once he had been arrested. *See* Manack Decl. ¶ 6 (implying that the decision "that ICE should detain El Badrawi" meant detention without bail); *see also* 8 U.S.C. § 1226(a) (granting the power to the Attorney General and his delegates to set bond in the first instance); 8 C.F.R. § 236.1(d) (noting that a bond hearing before an immigration judge is only to reconsider ICE's initial determination). These actions clearly demonstrate that Defendants have "personally participated" in Mr. El Badrawi's initial detention, one of several ways this Circuit has recognized a plaintiff can show personal involvement under *Bivens*. *Davis v. United States*, 430 F. Supp. 2d 67 (D. Conn. 2006) (citing *Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir. 1986)).

Finally, Defendants' argument that Mr. El Badrawi does not have due process rights while his removal proceedings are pending is also incorrect. The Second Circuit squarely acknowledges that even non-citizens illegally in the United States have "a substantive due process right to be free of arbitrary confinement pending deportation proceedings." *Doherty v. Thornburgh*, 943 F.2d 204, 209

[29] It appears that Defendants might have made this personal involvement argument only with respect to Mr. El Badrawi's other Fifth Amendment claim, that his prolonged detention after accepting voluntary departure violated his due process rights. However, as demonstrated below in Section III.C.1, Plaintiff has sufficiently alleged that Defendants were personally involved in his post-voluntary departure detention and has produced sufficient evidence to create a material dispute of fact in this premature motion for summary judgment.

(2d Cir. 1991). Defendants' reliance on *Demore v. Kim*, 538 U.S. 510, 516-17 (2003), is inapposite. In *Demore*, the Court did not adopt Defendants' view that non-citizens have no liberty interest, but held that while due process applied, it was satisfied because Congress had relied on substantial evidence of flight risk by "criminal aliens" to justify identifying that class as posing a flight risk and acceptable for mandatory pre-removal order detention. *Id.* at 528. *But see Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (holding—even after *Demore*—that prolonged no-bond detention pending removal proceedings violated due process); *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005) (same); *Hyppolite v. Enzer*, No. 3:07cv729, 2007 WL 1794096 (D. Conn. June 19, 2007) (same).

Furthermore, while Defendants are correct that a decision on whether to grant bond is left in the first instance to ICE's discretion, *see* 8 U.S.C. § 1226(a), subject to review by an Immigration Judge and then a U.S. District Court on habeas, as stated above, Defendants Manack and Loser have no discretion to violate the Constitution.[30] As in *Zadvydas*, Plaintiff El Badrawi does "not seek review of the Attorney General's exercise of discretion; rather, [he] challenge[s] the extent of the Attorney General's authority. . . . And the extent of that authority is not a matter of discretion." 533 U.S. at 688. Defendants Manack and Loser clearly violated Mr. El Badrawi's due process rights by denying him bond when they had no valid justification to detain him in the first place.

C. Defendants' Prolonged Detention of Plaintiff Violated Clearly Established Due Process and Fourth Amendment Rights Because It Was Not Necessary to Secure His Removal.

1. Defendants' Prolonged Detention of Plaintiff Denied Him Substantive and Procedural Due Process.

[30] Defendants make the entirely unprecedented claim that non-citizens have no due process right whatsoever to liberty pending their removal proceedings and that federal officials are therefore free to deny bond for any reason or indeed no reason at all, without any process at all. On Defendants' theory, the Constitution would have nothing to say even if the government adopted a policy to deny bond to all non-citizens who lost a flip of the coin. The breadth of this argument is its own refutation—if accepted, due process would be wholly irrelevant to immigration detention. It is also plainly inconsistent with *Demore*, *Ly*, *Tijani*, *Hyppolite*, and their progeny.

Plaintiff contends that Defendants Manack and Loser violated his clearly established due process rights by continuing to detain him long after he accepted voluntary departure, and well beyond any reasonable period necessary to effectuate his removal, for the non-immigration purpose of investigating him for national security concerns pursuant to Operation Frontline.[31] *See* Compl. ¶ 121-22; Ex. 10 at 2 (explicitly stating that after Mr. El Badrawi had accepted voluntary departure, his "investigation continues."). Plaintiff's claim rests on the clearly established due process right to be free from unlawful imprisonment, which continues even after a non-citizen has been ordered removed. *See Zadvydas*, 583 U.S. at 690.

Defendants argue that Plaintiff's due process claims relating to his post-voluntary departure detention should be dismissed for three reasons. First, Defendants Manack and Loser claim that they had no "involvement with [Mr. El Badrawi's post-voluntary departure] detention]." Defs. Br. at 30. Second, Defendants contend that Plaintiff's prolonged post-voluntary departure detention for the non-immigration purpose of investigating him pursuant to Operation Frontline fails to state a claim under the Due Process Clause. Defs. Br. at 31. Third, Defendants claim that even if Plaintiff's detention was improper, it did not violate substantive due process because Defendants' actions failed to "shock the conscience." Defs. Br. at 33-34. All of these arguments are without merit.

First, Plaintiff has adequately alleged facts that show that Defendants Manack and Loser were both personally involved in detaining Mr. El Badrawi for 42 days after he accepted voluntary departure. *See* Compl. ¶ 125 ("Defendants Manack and Loser authorized, and, by their unlawful actions, caused Mr. EI Badrawi's unlawful detention for forty-two days after he had accepted voluntary departure."); *see also* Compl. ¶¶ 122, 126-28; Ex. 9 at 3 (Loser investigating Plaintiff regarding national security concerns); Ex. 10 at 2 (stating explicitly on November 18, 2004 that the

[31] Defendants' contention that Plaintiff's post-voluntary departure detention claims should be dismissed because Defendants Manack and Loser had no "involvement with his detention," Defs. Br. at 30, is plainly false given the facts shown here.

"investigation continues"); Ex. 7 at 2 (ICE agents in Field Offices responsible for Frontline investigations); Ex. 14 at 2 ("ICE field offices will coordinate Operation Frontline leads . . . in order to determine if subjects may be of further investigative interest"). These statements and documents clearly demonstrate that Defendants Manack and Loser "personally participated" in Mr. El Badrawi's detention by continuing to investigate him for national security concerns pursuant to Operation Frontline even after he had accepted voluntary departure.[32] *See Davis v. United States*, 430 F. Supp. 2d 67 (D. Conn. 2006) (citing *Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir. 1986) ("personally participat[ing] in the infraction" is one of several recognized ways in which a plaintiff can show personal involvement under *Bivens*). At a minimum, Plaintiff has established a material dispute of fact as to Defendants' involvement in his detention after accepting voluntary departure. Thus, summary judgment at this stage of the proceedings is inappropriate.

Moreover, Defendants' argument that they cannot be held accountable for Mr. El Badrawi's post-voluntary departure detention because the Immigration Judge's actions broke the "chain of causation" against Manack and Loser, Defs. Br. at 30, is also without merit. The Immigration Judge ordered Mr. El Badrawi to voluntarily depart the country under the conditions that he departs on or before December 10, 2004 under ICE safeguards. Compl. ¶ 110; Defs. Ex. H. In a grant of voluntary departure, an Immigration Judge is allowed to impose conditions "necessary to ensure the alien's timely departure from the United States." 8 C.F.R. § 1240.26(b)(3)(i). Defendants Manack and Loser clearly disobeyed the judge's conditions not only by preventing Mr. El Badrawi's departure on or before December 10, but also by investigating Mr. El Badrawi after his grant of voluntary departure, which blocked rather than effectuated removal, in clear contravention of the

[32] In the event this Court concludes that Plaintiff's allegations of Defendants Manack and Loser's personal involvement are insufficient to state a claim for relief, Mr. El Badrawi respectfully requests leave pursuant to Rule 15(a)(2) to file a first amended complaint that will allege, *inter alia*, the following facts: (1) Pursuant to Operation Frontline, Defendants Manack and Loser were authorized to investigate Mr. El Badrawi for national security concerns; (2) After Mr. El Badrawi's arrest, Defendant Loser asked him many questions relating to national security concerns; and (3) Defendants Manack and Loser's investigation of Mr. El Badrawi pursuant to Operation Frontline continued even after Plaintiff had accepted voluntary departure. *See* note 2, *supra*.

regulation. Furthermore, because Plaintiff's post-voluntary departure detention claims rests on Defendants' unconstitutional investigation without any legitimate immigration purpose and not their initial arrest and detention of Plaintiff without probable cause, the fact that Mr. El Badrawi had a hearing in front of an Immigration Judge is not relevant to these claims. Moreover, because Mr. El Badrawi never had a bond hearing, Judge Straus never denied him bond, and his continued detention was solely due to Defendants' unconstitutional actions. El Badrawi Decl. ¶ 28.

Second, Plaintiff's prolonged detention not authorized by the INA or any other statute violates clearly established due process rights. Even if there had been a basis for detaining Plaintiff before and up to the moment the Immigration Judge granted him voluntary departure on November 10, 2004—and as noted above, *see* Section III.A *supra*, there was not—Defendants' only legitimate basis for detaining him *after* the grant of voluntary departure on November 10 was to aid his removal from the United States. *Zadvydas*, 533 U.S. at 689; *see also Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (holding that detention of deportable aliens for punitive ends violates substantive due process); *Demore*, 583 U.S. at 532-33 (Kennedy, J., concurring) (suggesting that immigration detention is unlawful where its purpose is "not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons"). Such "investigative detention" violated Plaintiff's substantive due process right to be free from arbitrary detention. *See infra* Subsection III.C.1.a; *see also Rodriguez v. McElroy*, 53 F. Supp. 2d 587, 591 n.6 (S.D.N.Y. 1999) ("Detention is intended for the sole purpose of effecting deportation."); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 793 (D. Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981); *United States ex rel. Blankenstein v. Shaughnessy*, 117 F. Supp. 699, 703-04 (S.D.N.Y. 1953) ("[C]ourts have power to release on habeas corpus an alien held for deportation on a showing . . . that the detention cannot in truth be said to be for deportation"). Also, Defendants violated Plaintiff's procedural due process rights by failing to provide him with notice of the reasons for their detention or an opportunity to contest those reasons. *See infra* Subsection III.C.1.b; *see also Turkmen*, 2006 U.S. Dist. LEXIS

39170, at *81 (holding that where notice of the grounds for detention have not been given, it. . . "cannot be said that the purpose of the detention is 'to remove an alien'").

Defendants attempt to sidestep Plaintiff's claim altogether with the comment that no court has held that non-citizens have "a constitutional right to be removed from the United States at the earliest possible time." Defs. Br. at 31. Mr. El Badrawi's claim does not depend on the existence of so broad a right. Plaintiff does not complain that his removal was delayed, but that he was *arbitrarily detained* for 42 days after he had accepted voluntary departure and was ready to return to his home country, where that detention was *not* necessary to effectuate his removal and in fact was done for the illegitimate purpose of facilitating ICE interrogations of Mr. El Badrawi relating to Operation Frontline. *See* Ex. 10 at 2.

Defendants' similar contention, citing *Wang v. Ashcroft*, 320 F.3d 130, 146 (2d Cir. 2003), that Mr. El Badrawi cannot challenge his post-voluntary departure detention as long as his removal was "reasonably foreseeable" is also without merit. *See* Defs. Br. at 32. Defendants' argument focuses on the wrong question. The question is not *how long* could Mr. El Badrawi be detained, but *for what reason*. Under the Fifth Amendment and *Zadvydas*, the answer is that Mr. El Badrawi could only be held for the statutory purpose of removal from the United States. The "reasonably foreseeable" formulation, which *Zadvydas* sets forth as a *limit* to the detention of non-citizens *who cannot be removed*, turns out to be no limit at all in Plaintiff's situation. Because Plaintiff's removal from the United States never posed any difficulty, and was thus always "foreseeable," Defendants' formulation allows indefinite detention at the whim of the jailor.[33]

Finally, Defendants' argument that even if they detained Mr. El Badrawi without statutory authority, his detention did not violate due process because it did not "shock the conscience" is

[33] *Wang v. Ashcroft* does not hold otherwise. Wang's removal was delayed by his own pursuit of legal remedies. 320 F.2d at 132-33. There is nothing in that case to suggest that the government would have been free to detain Wang after all his appeals were completed, and despite the availability of immediate removal, without probable cause.

without merit. While not every statutory infraction violates due process, it is clearly established that *detention* without legal authority does.[34] Indeed, it was precisely a concern about violating substantive due process that led the Supreme Court in *Zadvydas* to restrict detention to the "period reasonably necessary to secure removal." 533 U.S. at 699. Locking a prisoner up without legal authority and without a legitimate legal purpose is the paradigmatic "exercise of power without any reasonable justification in the service of a legitimate governmental objective," and therefore violates substantive due process. *County of Sacramento v. Lewis* 523 U.S. 833, 846 (1998); *see also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (due process at its core protects against detention based on "arbitrary government action").

Even before *Zadvydas*, this Court and others had long recognized that extending immigration detention where not necessary to secure removal could violate due process. *See Doherty v. Thornburgh*, 943 F.2d 204, 211 (2d Cir. 1991) ("[W]ere Doherty's lengthy detention largely the result of a government strategy intended to delay, we might find a due process violation"); *United States ex rel. Ross v. Wallis*, 279 F. 401, 404 (2d Cir. 1922) ("[A]ny further or other detention under pretense of awaiting opportunity for deportation would amount, and will amount, to an unlawful imprisonment"); *Nwankwo v. Reno*, 819 F. Supp. 1186, 1188 (E.D.N.Y. 1993) (same); *Doherty v. Thornburgh*, 750 F. Supp. 131, 137 (S.D.N.Y. 1990) ("[C]ontinued [immigration] detention becomes punitive and unconstitutional . . . [where] the Government was not continuing to make a reasonable, good faith effort to deport.").[35]

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[34] The Supreme Court has routinely adjudicated substantive due process challenges to civil detention schemes without even using the phrase "shocks the conscience." *See, e.g., Demore v. Kim*, 538 U.S. 510 (2003); *Kansas v. Crane*, 534 U.S. 407 (2002); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *see also Zadvydas v. Davis*, 533 U.S. 678 (2001).

[35] Defendants' cases do not hold otherwise. *Russo v. City of Bridgeport*, 479 F.3d 196, 205-10 (2d Cir. 2007), supports Plaintiff's claim, holding that continued detention of an individual could be unconstitutional if defendants intentionally extended the plaintiff's detention beyond that legally authorized. That is precisely what Mr. El Badrawi alleges here. *Lombardi v. Whitman*, 485 F.3d 73 (2d Cir. 2007), did not involve detention, but rather a claim that inaccurate government press releases about air quality at the site of the 9/11 World Trade Center attacks facilitated harms caused by third parties.

a) Plaintiff's claim rests on the clearly established principle of substantive due process that the Constitution permits post-voluntary departure detention only to the extent that it facilitates removal.

In *Zadvydas*, the Supreme Court affirmed the fundamental principle that detention following an order of removal is tolerated by the Due Process Clause only to the extent that it serves to facilitate removal. Recognizing that the indefinite detention of non-citizens admitted into the United States and ordered removed "would raise serious constitutional concerns," the Court construed the INA to "limit[] an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States."[36] *Zadvydas*, 533 U.S. at 690. The Court further directed that reasonableness be measured "in terms of the statute's basic purpose, namely assuring the alien's presence at the moment of removal." *Id.* at 699. Thus, *Zadvydas* rests squarely on the principle that immigration detention is permissible only where necessary to aid removal.

In *Zadvydas*, the Court applied this principle to non-citizens who were ordered removed on the basis of criminal convictions and held in detention beyond the removal period because no country would accept them. The Court was presented with, on the one hand, the prospect of releasing potentially dangerous criminal aliens into the general population and, on the other hand, the prospect of detaining them indefinitely—and potentially permanently. The Court ultimately set six months as a "presumptively reasonable period of detention" to permit the government to pursue efforts at removal. *Id*. at 701.

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[36] The *Zadvydas* Court considered only the post-removal period detention statute, 8 U.S.C. § 1231(a)(6), and not the statute relating to Mr. El Badrawi's claim, 8 U.S.C. § 1229c(e), which authorizes ICE to attach to a grant of voluntary departure "any conditions it deems necessary *to ensure the alien's timely departure from the United States*, including . . . continued detention pending departure . . . ." 8 U.S.C. § 1229c(e); 8 C.F.R. § 240.25(b) (emphasis added). But the due process principles the Court embraced apply to the entire period of detention following the issuance of a removal order or grant of voluntary departure. Arguably, because voluntary departure is a form of discretionary relief based on a finding that Plaintiff was a person of good moral character who could be trusted to leave the United States voluntarily, *see* 8 U.S.C. § 1229c; 5 Charles Gordon et al., Immigration Law & Procedure §§ 63.10(2)(c) & (4)(a) (2004), non-citizens granted voluntary departure should receive greater due process rights regarding their detention than those ordered removed.

By contrast, Plaintiff remained ready, willing, and able to return to his home country throughout his post-voluntary departure detention. No ground was ever offered for his continued detention for 42 more days. In fact, Mr. El Badrawi was not detained to facilitate his removal or any other legitimate immigration purpose, but rather to continue to investigate him for national security concerns pursuant to Operation Frontline. Compl. ¶¶ 121-22; Ex. 10 at 2. In fact, the ICE prosecutor at his immigration hearing notified Mr. El Badrawi that he would leave the country within six days. Compl. ¶ 111; El Badrawi Decl. ¶ 27. The only statutorily authorized purpose for detaining Mr. El Badrawi after he accepted voluntary departure would be "to ensure [his] timely departure from the United States." *See* 8 U.S.C. § 1229c(e); 8 C.F.R. § 240.25(b); *see also* 8 C.F.R. § 1240.26(b)(3)(i). As Mr. El Badrawi alleges, and Defendants' own documents show, Plaintiff was held in post-voluntary departure detention for the purposes of investigating him for national security concerns pursuant to Operation Frontline—a purpose that *blocks* rather than effectuates removal and is therefore unauthorized under the analysis laid out in *Zadvydas*. Therefore, Mr. El Badrawi's detention was clearly "excessive in relation to the regulatory goal" of ensuring his timely departure from the United States. *United States v. Salerno*, 481 U.S. 739, 747 (1987). At a minimum, Plaintiff has established a material dispute of fact as to the purpose of his 42-day detention after Immigration Judge Straus granted voluntary departure, and in particular whether such detention was in fact necessary to "ensure [his] timely departure from the United States." Accordingly, summary judgment at this stage of the proceedings is inappropriate.

Defendants nonetheless ask the Court to import wholesale to this case the six-month detention period found presumptively reasonable in *Zadvydas*. Defendants boldly propose that "detentions of up to six months are constitutionally valid under *Zadvydas*" regardless of their purpose. Defs. Br. at 34. Under Defendants' reasoning, the Executive could lock up, with complete impunity, any non-citizen who has been ordered removed for as long as six months based on arbitrary, capricious, and invidiously discriminatory reasons. But *Zadvydas* does not grant the

executive *carte blanche* to hold every non-citizen who has accepted voluntary departure for any fixed period of time, much less for a full six months. The six month period was crafted as a rebuttable presumption, to deal with non-citizens who *cannot* be deported because no country will accept them and who thus face the prospect of indefinite detention, not for non-citizens who Defendants *chose* not to deport because of investigative, non-immigration purposes.

Defendants have cited only one case to support their contention that Plaintiff's post-voluntary departure detention without any legitimate immigration purpose fails to state a due process claim. *See Turkmen v. Ashcroft*, No. 02-CV-2307, 2006 U.S. Dist. LEXIS 39170 (E.D.N.Y. June 14, 2006), *appeal docketed*, No. 06-3745-cv (2d Cir. Aug. 10, 2006). However, in *Turkmen*, the court's entire analysis depends on whether the post-removal order detention of the *Turkmen* plaintiffs was "otherwise authorized," despite the fact that they had been criminally investigated without probable cause. *Id.* at *127. In *Turkmen*, the plaintiffs conceded that their detention was otherwise authorized by the post-removal period detention statute, 8 U.S.C. 1231(a)(6), because they had violated immigration laws and remained in the United States out of status. *Id.* at *127-28. In this case, Plaintiff does not concede that his detention was otherwise authorized, as he was at all times *legally* present in the United States prior to his arrest. Compl. ¶ 37; El Badrawi Decl. ¶¶ 1, 3, 7, 11-12. In fact, as Plaintiff contends, *both* his initial arrest and detention, as well as his post-voluntary departure detention, violated his clearly established Fourth and Fifth Amendment rights.

Moreover, the *Turkmen* court's worry that permitting the plaintiffs' claim would "flood the courts with habeas petitions brought by aliens seeking to be removed as soon as they deemed it practicable . . . [and] significantly encroach on the executive branch in a realm where it has particular expertise" is overblown. *Id.* at *123. First, while it might sometimes be difficult to determine whether detention is being maintained for lawful immigration purposes, this cannot warrant giving immigration authorities a blank check to detain arbitrarily. Determining whether removal was deliberately delayed for improper purposes is the kind of factual inquiry that courts regularly pursue.

As shown in Section III.B.1 above, courts applying the Fourth Amendment routinely examine the purpose of searches and seizures where they are ostensibly conducted for administrative purposes, without probable cause. Second, the *Turkmen* court's concern is entirely speculative. Because immigration authorities in the ordinary course would have no incentive to delay removal, cases of continued detention with no obstacle to removal are likely to be exceedingly rare, and therefore will not flood the courts. While there have been hundreds of post-*Zadvydas* cases, besides *Turkmen*, counsel have located none in which a plaintiff complained that immigration authorities sought to defer removal in order to detain, as they did here. That stands to reason; every consideration of cost and efficiency will, in the ordinary course of immigration enforcement, push in the direction of carrying out removal as expeditiously as possible. And while improper delay might be alleged in a case where it had not occurred, the mere possibility of a mistaken claim cannot be invoked to reject every such claim out of hand.

The Supreme Court's outcome in *Zadvydas* was driven by the Due Process Clause's demand that immigration detention serve a legitimate immigration purpose and that, once immigration proceedings have ended and removal has been ordered, this purpose is limited to the effectuation of removal. *See Zadvydas*, 533 U.S. at 689.[37] In the case of Plaintiff El Badrawi, who was prepared to leave the United States but was prevented from doing so by Defendants, post-voluntary departure detention served no legitimate immigration purpose and was, under the analysis set out in *Zadvydas*, entirely unreasonable.

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[37] Federal government officials have supported this reading of *Zadvydas.* The preamble to immigration regulations issued by then-Attorney General Ashcroft shortly after September 11, 2001 declares that *Zadvydas* "generally permits the detention of aliens who have been admitted to the United States and who are under a final order of removal, *only for a period reasonably necessary to bring about their removal from the United States*." 66 Fed. Reg. 56967, 56967-69 (Nov. 14, 2001) (emphasis added).

The INS General Counsel's Office reached precisely this conclusion in a memorandum addressing the detention of the special interest detainees dated January 28, 2002 ("INS Memorandum"). The INS Memorandum emphasized that "removal could not be delayed for the exclusive purpose of allowing the FBI to conduct an investigation to see if the person is a terrorist." Ex. 13 at 101 (Office of the Inspector General ("OIG") Report). As the INS General Counsel explained to the OIG, "the INS had no authority to continue holding [a] detainee if removal could otherwise be effectuated," because such a delay would not be "related to removal." Ex. 13 at 92.

b) Plaintiff's claim also rests on the clearly established procedural due process requirement that detainees must be given notice of the basis for detention and a hearing to contest the detention.

Additionally, Defendants violated Plaintiff's clearly established procedural due process rights by failing to provide him with notice of the reasons why he was detained after his immigration proceedings had ended, much less a fair opportunity to contest his detention. Defendants do not—and cannot—argue that Plaintiff's procedural due process claim challenging the length of his detention should be dismissed.

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."

Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. 223, 233 (1864)).

An application of the balancing test for evaluating procedural due process claims that the Supreme Court laid out in *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976), compels the conclusion that Plaintiff was entitled to notice and an opportunity for a hearing. The "interest in being free from physical detention by one's own government" is "the most elemental of liberty interests." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004). Plaintiff was held by ICE for forty-two days after his immigration proceedings had been adjudicated. Without knowing why he was being detained or how he might obtain his release, Plaintiff was left to languish in prison until Defendants completed their investigation pursuant to Operation Frontline II.

Defendants cannot identify any interest in depriving Plaintiff of his fundamental right to liberty where, as alleged here, there was no basis to suspect Plaintiff of national security concerns. *See* Compl. ¶ 96 (describing the fruitless line of national-security related questions raised at Plaintiff's hearing); El Badrawi Decl. ¶¶ 19-20. A generic interest in national security cannot justify detaining persons who do not pose a security threat. To the extent that Defendants assert that Mr. El

Badrawi raised legitimate national security concerns, this raises a material dispute of fact that cannot be resolved on a motion for summary judgment prior to discovery.

Finally, the cost to the government of providing Plaintiff with notice and a hearing would have been negligible. ICE already had in place regulations providing for written notice and a formal administrative hearing in the case of non-citizens whose departure is blocked by the government because it has been "deemed prejudicial to the interests of the United States." *See* 8 C.F.R. §§ 215.3-.5. Yet Defendants never invoked these processes in the case of Plaintiff El Badrawi. Defendants can hardly claim that providing Plaintiff with existing regulatory protections would constitute an impermissible "fiscal or administrative burden," much less one that would justify dispensing with process altogether.

2. Plaintiff's Prolonged Detention Without Legitimate Immigration Purpose or Probable Cause Violated His Fourth Amendment Right To Be Free From Unreasonable Searches and Seizures.

Whether stated as a Fourth Amendment or a Due Process principle,[38] Defendants' continued detention of Plaintiff long after his immigration proceedings were resolved violated his clearly established constitutional rights. The Fourth Amendment prohibits law enforcement authorities both from *arresting* individuals on mere suspicion that they have engaged in criminal activity and from *continuing to detain* individuals merely on suspicion of criminal activity:

> To continue [the defendants'] custody without presentment [before a judicial officer] for the purpose of trying to connect them with other crimes [than the ones for which they were lawfully arrested] is to hold in custody for investigation only, and that is illegal; its operative effect is essentially the same as a new arrest and, if not supported by probable cause, it is an illegal detention.

[38] Because Plaintiff has pleaded the essential facts underlying this violation, the Court is free to find a violation under either the Fourth or Fifth Amendments. "A complaint should not be dismissed [under Rule 12(b)(6)] merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." *Bowers v. Hardwick*, 478 U.S. 186, 201 (1986), *overruled on other grounds*, *Lawrence v. Texas*, 539 U.S. 558 (2003); *see also* 5A C. Wright and A. Miller, Federal Practice and Procedure § 1357, at 336-37 (2d ed. 1990).

Adams v. United States, 399 F.2d 574, 577 (D.C. Cir. 1968); *see also United States v. Perez*, 733 F.2d 1026, 1036 (2d Cir. 1984) ("The AUSA's and DEA agents' desire to investigate other crimes is not a legitimate excuse for their failure to respect [defendant's] right to a prompt arraignment.").[39] Not only did Defendants have no grounds to arrest and detain Plaintiff initially, they also had no probable cause to *continue detaining* him long after he could have been removed from this country.

While Plaintiff alleges that his initial arrest violated his clearly established Fourth Amendment rights,[40] even if it were lawful, Defendants would still have violated his Fourth Amendment rights by continuing to detain him for forty-two days without any legitimate immigration purpose, after he had accepted voluntary departure. Defendants claim that "because his arrest was lawful, [Mr. El Badrawi] may not recover any damages related to his detention [under the Fourth Amendment]." Defs. Br. at 30. But the very case Defendants rely on flatly refutes this proposition. In *Gerstein v. Pugh* the Supreme Court held that the Fourth Amendment requires a prompt judicial determination of probable cause as a condition of any *prolonged pretrial detention*, recognizing that "[t]he consequences of [such] detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."[41] 420 U.S. 103, 114 (1975); *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) ("[P]rolonged detention based on incorrect or

[39] *See also Ricks v. United States*, 334 F.2d 964, 968 (D.C. Cir. 1964) ("the delay of a preliminary hearing [cannot] be justified on the ground that police activity for that period was required to investigate other unsolved crimes for which there was no probable cause to arrest the accused"); *Sanders v. City of Houston*, 543 F. Supp. 694, 701 (S.D. Tex. 1982) (same).

[40] *See* Section III.B.1, *supra*.

[41] While Defendants may argue that Mr. El Badrawi's immigration hearings satisfies *Gerstein's* Fourth Amendment requirements, as mentioned earlier, *see supra* pp. 52-53, the hearings are not relevant to Mr. El Badrawi's post-voluntary departure detention claims. These claims do not rest on Mr. El Badrawi's alleged immigration violation, but on Defendants' investigation pursuant to Operation Frontline II without any legitimate immigration purpose, which blocked Mr. El Badrawi's removal in clear contradiction to the Immigration Judge's order. Moreover, because Mr. El Badrawi never had a bond hearing, Judge Straus never denied him bond, and his continued detention was solely due to Defendants' unconstitutional actions. *See* El Badrawi Decl. ¶ 28.

unfounded suspicion may unjustly imperil [a] suspect's job, interrupt his source of income, and impair his family relationships.") (internal quotations omitted). Moreover, Second Circuit law extends Fourth Amendment protections well beyond the moment of arrest. *See Lauro v. Charles*, 219 F.3d 202, 212 (2d Cir. 2000) (Fourth Amendment shields a lawfully arrested individual from "police conduct that unreasonably aggravates the intrusion on privacy properly occasioned by the initial seizure"); *Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir. 1989) ("Fourth Amendment standard probably should be applied at least to the period prior to [charge, while] . . . in the custody (sole or joint) of the arresting officer."); *Valencia v. Wiggins*, 981 F.2d 1440, 1444 (5th Cir. 1993) (noting that the Second Circuit is among a "number of circuits [that] . . . endorsed the extension of the Fourth Amendment" beyond arrest and charge).[42]

From at least the point in time at which there was no longer any legitimate immigration purpose for Mr. El Badrawi's detention, *i.e.*, when detention was no longer necessary to effect his removal, any further detention of Plaintiff was illegal without probable cause and a prompt hearing. *County of Riverside*, 500 U.S. at 56-57. Plaintiff has adequately alleged that Defendants Manack and Loser's post-voluntary departure detention in order to investigate him for national security concerns pursuant to Operation Frontline violated a clearly established constitutional right—the right to be free from investigatory detention without probable cause.

[42] The other case Defendants rely on involves whether the Fourth Amendment reached conditions of confinement claims, rather than a fundamental challenge to detention. In *Bell v. Wolfish*, the legality of ongoing detention was undisputed, "as [Plaintiffs] had each had "'a judicial determination of probable cause as a prerequisite to [the] extended restraint of [their] liberty.'" 441, U.S. 520, 536 (1979) (quoting *Gerstein*, 420 U.S. at 114). *Bell* does not suggest, let alone hold, that individuals ever lack Fourth Amendment rights to be free from prolonged detentions based on mere suspicion.

CONCLUSION

For the reasons stated above, Defendants' Motion to Dismiss or for Summary Judgment should be denied.

PLAINTIFF
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CERTIFICATION

I herby certify that on December 29, 2007, a copy of the foregoing memorandum in opposition to the Defendants Manack and Loser's motion to dismiss or for summary judgment was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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