UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADRIANA AGUILAR, et al., Plaintiffs, -against- IMMIGRATION AND CUSTOMS ENFORCEMENT DIVISION OF THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al., Defendants.	:	ECF Case Civil Action No. 07 CIV 8224 (JGK) (FM)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS CHERTOFF, MYERS, TORRES AND FORMAN'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiffs bring this putative class action in the wake of hundreds of warrantless raids of Latino homes conducted by the Immigration and Customs Enforcement ("ICE") division of the Department of Homeland Security ("DHS"). As set forth in Plaintiffs' Fourth Amended Class Action Complaint ("FAC"),[1] beginning in 2006, the Detention and Removal Office ("DRO") and the Office of Investigations ("OI") of ICE began conducting raids in which they racially profiled Latino homes and violently entered and searched Plaintiffs' and other Latino homes without judicial warrants, exigent circumstances or voluntary consent, all in violation of the Fourth and Fifth Amendments to the United States Constitution. Far from being isolated incidents, these unconstitutional home raids were, and continue to be, part of a widespread pattern and practice of unlawful conduct that was created, approved, implemented and endorsed by, *inter alia*, Defendants Michael Chertoff, Julie Myers, John Torres and Marcy Forman ("ICE Officials"). It is for this active involvement that Plaintiffs seek to hold these four defendants individually liable pursuant to *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics,* 403 U.S 388 (1971).

The ICE Officials enacted an aggressive nationwide enforcement strategy which emphasized the use of home raids. Additionally, they ordered or approved impossible quotas, which due to faulty intelligence, all but required the agents to cut Fourth Amendment corners and to racially profile Latinos to meet their numbers. Moreover, Torres and Forman, under the supervision of Chertoff and Myers, issued constitutionally infirm memoranda instructing teams to utilize ruses, even in consent-based operations. The ICE Officials implemented these

[1] The FAC is attached as Exhibit A to the Declaration of Donna L. Gordon dated May 6, 2010 ("Gordon Decl.").

aggressive policies without mandating appropriate training and with the knowledge that the teams were not sufficiently well-trained.

As a result of these policies, ICE's widespread pattern and practice was to have large teams of heavily armed ICE agents surround Latino homes in the early morning hours, demand entry and use ruses to obtain consent. As recognized by the courts, under such circumstances, the validity of any consent would be highly questionable, if not presumptively invalid. Indeed, shortly after the raids commenced, congressional complaints, lawsuits, and countless media reports showed that on a regular basis, *throughout the country,* ICE agents were entering homes without requesting consent and were racially profiling Latinos. In fact, *ICE agents* involved in the raids made internal complaints regarding racial profiling and nonconsensual entries. Testimony from local law enforcement corroborates the allegations, noting in addition that the ICE agents used racial slurs like "wetbacks" to refer to the Latinos who were encountered in the raids.

The responses of the ICE Officials are nothing less than shocking. In the face of credible and serious allegations, they did nothing more than offer reckless and false denials of wrongdoing which impeded any further inquiry into these rampant violations, thus perpetuating this pattern and practice of denying people, particularly Latinos, basic constitutional rights.

That these ICE Officials' responses were reckless at best is beyond reproach. Indeed, at least four judges in at least seven different proceedings have already held that the very Operations that the ICE Officials whitewashed violated the Fourth Amendment. Significantly, two courts have already found that two of the *very raids of Plaintiff homes that are at issue in this case* were conducted *without consent,* thereby undermining the heart of the defendants'

defense. In fact, those judges held that the operations did not merely violate the Fourth Amendment, but *egregiously* violated the Fourth Amendment.

In a separate case against many of the same defendants with almost identical facts, the United States District Court for the District of New Jersey made clear that the leaders of these operations could be held accountable. In denying Myers and Torres's motion to dismiss, the court discussed those defendants' involvement in the operation, concluding that "there is no doubt that Myers and Torres had sufficient knowledge of the searches being conducted. Myers and Torres worked on these issues everyday." Chertoff and Forman had similar knowledge and were equally aware of the critical flaws in the operations. In fact, Congressional representatives as well as local elected officials complained directly to Chertoff regarding ICE's unconstitutional conduct. His response: blanket and false denials. Thus, all Plaintiffs seek is that those responsible for the structure, scope and impact of these operations be held accountable and not be permitted to hide behind their subordinates.

Ascroft v. Iqbal, 129 S. Ct. 1937 (2009), the centerpiece of the ICE Officials' motion, offers no protection for the ICE Officials' conduct. Rather, it reiterates the principle that a government official remains "liable for his or her own misconduct." *Iqbal,* 129 S. Ct. at 1949. Defendants' clearest error is their misapplication of *Iqbal* to Plaintiffs' Fourth Amendment claims. *Iqbal* itself distinguished between constitutional violations; as noted by numerous courts, *Iqbal* has no direct relevance to claims that require no element of intent, as is the case with Fourth Amendment violations. And as for Plaintiffs' Fifth Amendment claims, *Iqbal* did not alter settled law on supervisory liability or eliminate the longstanding methods by which Equal Protection claims can be established.

In sum, this was a nationwide program and these were nationwide policies. It was these ICE Officials who implemented the policies that resulted in these aggressive raids, these ICE Officials who imposed the pernicious quotas, and these ICE Officials who made unsubstantiated and hasty denials of wrongdoing. In these circumstances, no interpretation of *Iqbal* permits the ICE Officials to avoid liability.

STATEMENT OF FACTS[2]

I. The Parties and Claims

A. Plaintiffs

Plaintiffs are twenty-five Latino individuals living in eight separate residences in the New York area who endured unconstitutional home raids conducted by two different divisions of ICE, pursuant to three different nationwide operations, over the span of more than a year. None of the Plaintiffs was the target of any ICE enforcement activities. The raids are discussed in Plaintiffs' FAC as follows:

- On February 20, 2007, at 4:30 or 5:00 a.m., Plaintiffs Adriana Aguilar, Andres Leon, Elena Leon, Erika Gabriela Garcia-Leon, and Carson Aguilar ("Aguilars"), all of whom are United States citizens, were subjected to a raid at their home located at 30 Copeces Lane, East Hampton, New York. ICE's DRO conducted this raid pursuant to Operation Return to Sender, during which eight armed agents pounded on the front door of the home, entered and searched the home without requesting consent to do either, stormed into a bedroom with a sleeping mother and four-year-old child, rousting them from bed, and detained and interrogated family members while blocking exits. The agents threatened to return. FAC ¶¶ 190-241.

- On that same date, also between 4:00 and 5:00 a.m., the same team of eight agents stormed through the East Hampton home of Plaintiff Nelly Amaya without requesting or receiving consent from the Spanish-speaking tenants, detained and interrogated residents, and twisted Ms. Amaya's already-injured arm. FAC ¶¶ 242-85.

[2] On a motion to dismiss, the court must accept the facts alleged in the FAC as true. In so doing, the court may also consider "documents that are referenced in the complaint, documents that the plaintiff relied on in bringing suit and that are either in the plaintiff's possession or that the plaintiff knew of when bringing suit, or matters of which judicial notice may be taken." *White v. Dep't of Corr. Servs.*, No. 08 Civ. 0993(JGK), 2009 WL 860354, at *1 (S.D.N.Y. March 30, 2009) (Koeltl, J.).

- On March 19, 2007, at or about 4:00 a. m., Plaintiffs David Lazaro Perez, William Lazaro, and T arcis Sapon-Diaz were subjec ted to a raid a t their home located at 165 Main Street, Mount Kisco, New York. DRO conducted this raid pu rsuant to Operation Retu rn to Sender, during w hich ten arm ed agents invaded the apartm ent building, burst into apartm ents and bedrooms by force, caused widespread physical damage throughout the building, and detained and arrested S panish-speaking residents in a state of undress prior to questioning them. FAC ¶¶ 307-23. Judge George Chew concluded that this raid constituted an egregious viola tion of W illiam Lazaro's Fourth Amendment rights.

- On April 18, 2007, at about 4:30 a.m ., Plaintiffs Mario Patzan DeLeon, Gonzalo Escalante, Victor Pineda Mora les, Yoni Revolorio, and Juan Jose Mijangos were subjected to a raid by DR O agents at their hom e located at 417 East Avenue, Riverhead, New York. DRO conducted this raid pursuant to Operation Cross Check during which eig ht armed agents forcefully entered their hom e, caused physical dam age to the doors and walls of the home during entry, and burst into bedr ooms without requesting or receiving consent while residents were in a state of undress. FAC ¶¶ 286-306. Judge Noel Brennan concluded that this raid constituted an egregious violation of Victor Pineda Morales's Fourth Amendment rights.

- On September 24, 2007, between 5:30 and 6:00 a.m ., Plaintiffs Sonia Bonilla, a legal perm anent resident, and her m inor daughters Beatriz Velasquez (age 12) and Dalia Velasquez (age 9), both United States citizens, were subjected to a raid at their home located at 710 Jefferson Street, Westbury, New York. ICE's OI conducte d this raid pursuant to Operation Community Shield, during which ten armed agents approached and surrounded the home. While Ms. Bonilla was driving her husband to work, agents pounded on the front door shouti ng "Police!" and told twelve-year-old Beatriz that "someone was dying upstairs" in order to gain entry. W hen Beatriz opened the front door, agents st ormed into the house, detained the girls in their bedroom , searched the en tire residence without requesting or receiving consent, and refused to expl ain themselves to th e girls' mother when she returned hom e while the raid was still in progress. FAC ¶¶ 324-42.

- On that same date, at approximately the same time, Plaintiffs Elder Bonilla, a lawful p ermanent resident, and Diana R odriguez, an asylee, were subjected to a raid at their hom e located at 22 Dogwood Lane, W estbury, New York. OI conducted this raid as part of Operation Community Shield, during which another team of twelve heavily arm ed agents surrounded the home, shouting "Police!" and pointed a gun at Mr. Bonilla's chest when he opened the front door. Agents ente red and searched through the house without requesting or receiving c onsent, entered bedroom s without requesting or receiving consent, handcuffed residents prior to any

questioning, and caused physical damage to doors and walls. FAC ¶¶ 343-53.

- On September 27, 2007, at approximately 7:30 a.m., Plaintiffs Raul Amaya, a United States citizen, and his wife Gloria Vanessa Amaya, a lawful conditional resident, were subjected to a raid at their home located at 58 East 6th Street in Huntington Station, New York. OI conducted this raid as part of Operation Community Shield, during which ten armed agents invaded the home, searched through the house without requesting or receiving consent from Spanish-speaking residents, and shouted profanities. As the agents departed, they threatened to return. FAC ¶¶ 354-76.

- Armed ICE agents *twice* invaded the Huntington home of Plaintiffs Pelagia De La Rosa-Delgado, Anthony Jimenez, Christopher Jimenez, and Bryan Jimenez, all of whom are United States citizens. The first raid occurred in August 2006, and the second occurred on September 27, 2007, as part of Operation Community Shield. Both times, agents pounded loudly on the door, burst into the home without requesting or receiving consent from residents in their nightclothes, detained the family in the living room and basement, and stated that they were searching for someone named "Miguel," a man the family informed the agents they did not know. During the second raid, agents looking for the same man surrounded the home, entered by pushing past a seventeen-year-old who opened the door, detained teenagers and adults in a state of undress, drew a gun on a tenant, and entered the bedroom of a sleeping woman without requesting or receiving consent. FAC ¶¶ 377-418.

In short, Plaintiffs allege that ICE agents seized their homes and detained them without consent, judicial warrants, or exigent circumstances. FAC ¶¶ 23, 25, 27, 29, 31, 33, 35, 37-38. [3] In all of these raids, large teams of armed agents pounded on their doors in the early morning, often before dawn, shouting that they were "Police!" and ordering residents to open the door. FAC ¶¶ 5, 23, 25, 27, 31, 33, 37-38, 192, 245, 289, 309, 326. Using ruses, the agents misrepresented the purpose of their searches to gain entry into the homes, and in at least one case deceived residents by falsely stating that "someone is dying upstairs." FAC ¶¶ 85, 91, 328. If a minor child opened the door, the agents simply entered without bothering to speak with an adult

[3] In fact, ICE admits that it did not have probable cause, judicial warrants or exigent circumstances. Answer of Immigration and Customs Enforcement and Official Capacity Defendants ("Answer") ¶¶ 204, 205, 233, 262, 263, 321, 339, 350, 360, 394, 399, 400.

or request consent and then detained terrifi ed children inside. FAC ¶¶ 329-30, 396-98. Agents entered the homes when residents, including wo men, young children and adolescents, were in a state of undress, some still asleep when agents burst into their be drooms to roust them from their beds. FAC ¶¶ 5, 207, 209-10, 245, 252-53, 282, 293, 312, 344-45, 381, 404-05, 412. At several homes, agents drew or clutched their holstered weapons in an excessive show of force during encounters they claim were consensual. FAC ¶¶ 218, 345.

In all the h omes, agents stood guard at exit s, corralled residents into central locations, refused to permit free movement and, without ba sis, interrogated Latino persons whom the ICE agents knew were not the targets of the operation. FAC ¶¶ 23, 31, 33, 214-15, 257, 336, 346, 362, 388, 392, 406, 409. During the course of the raid s, ICE agents sometimes caused extensive physical damage to the doors and walls of the homes, FAC ¶¶ 302, 319, 346, and/or handled residents with excessive force. FAC ¶¶ 267, 293, 345. Upon exitin g, several ICE agents threatened to return. FAC ¶¶ 238, 371. In fact, at one home, agents did return a second time and conducted themselves in the same unconstitutional manner. FAC ¶¶ 37-38.

Plaintiffs further allege that ICE raided Latino homes even when faced with evidence that ICE's purported targets did not reside there. FAC ¶ 10. Inside these homes, agents detained and seized Latinos prior to eliciting or reviewing any eviden ce of unlawful status and without articulable suspicion, even when the individuals could not reasonably have been mistaken for the purported target of the raid. FAC ¶ 10. In c ontrast, when non-Latino i ndividuals represented that the purported target did not reside within the home, ICE promptly departed without entering. FAC ¶ 10; *see also* FAC ¶ 434 & Exh. 23 (recounting tw o separate instances of such discriminatory treatment in Greenport, New York). In fact, depositi on testimony has revealed that ICE targeted certain bars and restaurants during Operation Community Shield solely on the

basis that Latinos were likely to be found at such bars and restaurants, not because of any other legitimate law enforcement objective. FAC ¶ 12. Similarly, the Nassau County Police Department 30(b)(6) witness testified that during the course of that same operation, ICE agents on multiple occasions used derogatory and racist terms such as "wetback" to refer to the Latinos whose homes were being raided. FAC ¶ 12.[4]

B. Defendants

As a result of the aforementioned conduct, Plaintiffs brought suit against the United States of America, ICE, DRO, OI, and the ICE agents who participated in the planning and execution of the home raids. Plaintiffs assert both injunctive relief and monetary damages claims against some of these defendants and only injunctive relief claims against others.

In addition, Plaintiffs brought *Bivens* claims against Michael Chertoff, former United States Secretary of DHS; Julie Myers, former Assistant Secretary of Homeland Security for ICE; John Torres, ICE's former Director of the Office of Detention and Removal Operations;[5] and Marcy Forman, ICE's former Director of the Office of Investigations.[6] As set forth in greater detail below, each of these four former officials (a) created the policies governing how the ICE

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[4] Defendants attempt to minimize the importance and accuracy of this testimony by introducing purportedly conflicting testimony. First, reliance on such extraneous sources is fundamentally misguided; as the allegations must be credited for purposes of a motion to dismiss. Second, there is no conflict. The fact that some witnesses testify that they individually did not hear any such slurs does not in any way prove that they were not spoken. And the testimony relied upon by Plaintiffs in the FAC is not the testimony of an individual deponent but rather the testimony of the Nassau County Police Department pursuant to a Rule 30(b)(6) subpoena. The department has taken the position, as an entity, that it received complaints that these slurs were made by ICE agents during the operation. Further, not all relevant Nassau County law enforcement employees have yet been deposed, and on a motion to dismiss, all inferences are resolved in favor of Plaintiffs.

[5] As Director of DRO, Torres was responsible for apprehension, detention and removal of foreign nationals charged with immigration law violations. FAC ¶ 83. Torres was directly involved in the raids, issuing protocols regarding the coordination of raids, case management, procedures for keeping records, and dispute resolution between DRO and OI employees. FAC ¶ 85.

[6] As the Director of OI, Forman was responsible for overseeing the investigative arm of ICE and the supervision of sworn law enforcement officers assigned to OI. She played an active and extensive role in formulating, planning and implementing ICE's strategy for alien apprehension, FAC ¶ 89, including the planning, implementation and supervision of training and the conduct of the Operation Community Shield raids in Nassau and Suffolk Counties, New York in September 2007. FAC ¶ 90.

agents operated during the raids at Plaintiffs' homes, and (b) actively endorsed the conduct about which Plaintiffs complain, thereby fostering and perpetuating it.[7]

II. The Raids in Context

ICE's conduct was neither happenstance nor isolated. To the contrary, the conduct was pervasive and the direct, intended result of policies and procedures promulgated by the ICE Officials. FAC ¶¶ 426-38, 456, 458, 472.

A. The ICE Officials Make 2005 and 2006 Policy Changes

Chertoff identified expansion of alien apprehension programs as one of his "overarching goals" at DHS shortly after he assumed his role as Homeland Security Secretary. FAC ¶ 74. Consistent with that goal, in late 2005 and early 2006, he – along with Myers – conceived and promulgated the Secure Border Initiative ("SBI"), a multi-stage comprehensive and aggressive immigration enforcement strategy for the United States. The ICE Officials' aspiration for the SBI, the second phase of which was focused on interior enforcement of the immigration laws, was to "move beyond the current level of activity to a higher level in each month and year to come." *See* Gordon Decl. ¶ 3, Exh. B. Chertoff placed heavy emphasis on his desire to report "real results" following implementation of the initiative. *Id.*

In connection with implementing the second phase of the SBI, Chertoff, Myers, Torres and Forman implemented a series of policy changes that authorized and led inevitably both to an increased use of home raids as an enforcement tool and to constitutionally infirm behavior on the part of ICE agents during those home raids.

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[7] Plaintiffs do not assert injunctive relief claims against Chertoff, Myers, Torres or Forman. To the contrary, the paragraphs of the FAC describing each of the defendants set forth whether that individual was being sued in their individual or official capacities. The paragraphs asserting claims against the ICE Officials deal with individual capacity claims, that is, *Bivens* claims. *See* FAC ¶¶ 72, 78, 83, 89.

First, in conjunction with implementing the SBI, Chertoff and Myers quickly and significantly increased the number of DRO fugitive operations teams ("FOTs") authorized to conduct enforcement operations. Gordon Decl. ¶ 3, Exh. B. These FOTs, which are teams of approximately seven members charged with apprehending fugitive aliens typically without judicial warrants, primarily conduct their work through enforcement operations at residences. FAC Exh. 1 at 3-6, 22. This change, then, affirmatively signaled the use of large teams of armed agents to enter homes purportedly in search of one immigration law violator as a favored enforcement tool.

Second, Chertoff and Myers approved and lauded a dramatic 800% arrest quota increase for ICE agents, a quota ICE agents have characterized as "not doable." FAC ¶¶ 74, 80, 84. Pre-SBI, each FOT was expected to apprehend 125 fugitive aliens per year, 75% of whom had to be fugitive aliens with criminal convictions. FAC Exh. 1 at 10. Following the implementation of the SBI, each FOT was required to apprehend 1,000 fugitive aliens per year. That quota change occurred in 2006 when Torres, with the approval of Chertoff and Myers, issued a series of policy memoranda that not only dramatically increased the quota, but also eliminated the requirement that 75% of the individuals apprehended be fugitive aliens, thereby explicitly permitting agents to meet the new quota through the arrest of non-target immigrants, or "collaterals." FAC ¶ 8. Thus, these defendants disseminated policies that essentially overnight increased by 800% the number of fugitive aliens each FOT was expected to apprehend, and simultaneously eliminated the incentive for ICE agents to focus apprehension efforts on purported targets of the operations. *See* FAC Exh. 1 at 10-11; Gordon Decl. ¶ 3, Exh. B.

Third, with the assistance of Torres and Forman, Chertoff and Myers implemented the SBI by increasing the use of enforcement operations such as Operation Return to Sender,

Operation Cross Check and Operation Community Shield, the operations pursuant to which Plaintiffs' homes were raided (the "Operations"). *See* Gordon Decl. ¶ 3, Exh. B; FAC ¶¶ 2, 73, 75(a), 75(c), 79, 86, 90. Chertoff, Myers, Torres and Forman similarly increased the use of multi-week "initiatives," or bursts of enforcement activity, designed to result in the arrest of as many people as possible pursuant to these and other national operations and policies. *See* Gordon Decl. ¶ 3, Exh. B.

Fourth, in March and August 2006, under the supervision and with the approval of Chertoff and Myers, Torres and Forman issued policy memoranda specifically authorizing and encouraging the use of ruses during enforcement operations. FAC ¶¶ 85, 91. These memoranda failed to distinguish between operations conducted pursuant to judicial warrants and consensual operations, and did not alert agents that the use of deception could vitiate consent. *See* Gordon Decl. ¶ 6, Exh. E; *id.* ¶ 7, Exh. F; *id.* ¶ 8, Exh. G. [8] Thus, through these memoranda the ICE Officials promulgated policies that not only allowed, but actively encouraged the use of deception even in consent-based operations. FAC ¶¶ 85, 91.

In sum, working in conjunction with one another, the ICE Officials implemented policies that (a) solidified the use of home raids a routine enforcement tool, (b) created unrealistic quotas that incentivized agents to arrest individuals regardless of whether they were "targets" of the operation and to take extraordinary measures to meet those quotas, and (c) actively encouraged the use of deception in enforcement operations, including operations purportedly based on "consent."

Despite the inherent dangers presented by these aggressive tactics, the ICE Officials failed to provide the requisite training and supervision to ICE agents to ensure that the operations were implemented in a manner consistent with the United States Constitution. FAC ¶¶ 13- 16.

[8] These documents are incorporated by reference into the FAC. *See*, *e.g.*, FAC ¶¶ 85, 91.

The necessity of such training is not only self-evident, but also, in fact, recommended by the Office of the Inspector General ("OIG"). In late 2006 and again in early 2007, an OIG report recommended that the ICE Officials take steps to improve deficient FOT training. FAC ¶¶ 15, 189; FAC Exh. 16 at 29-31. That report, which was drafted in late 2006 and submitted for comment to Myers and Torres before becoming final in March 2007, observed that, "not all team members [of operations had] attended" the required Fugitive Operations Training Program, and that "there is no national refresher course for the Fugitive Operations Teams." FAC Exh. 16 at 29-30. In the final report, distributed to Chertoff and Myers in March 2007, OIG therefore recommended that the ICE Officials take steps to ensure that "all Fugitive Operations Team members complete their training requirements," and "consider establishing a fugitive operations refresher course." *Id.* at 31. The ICE Officials ignored those recommendations. In fact, although Myers acknowledged the benefits of a nationwide refresher course in her December 22, 2006 response to the draft OIG report, *see* FAC Exh. 16 at 52-53, to date – more than three years later – ICE has failed to implement nationwide refresher training, *see* FAC ¶¶ 13-15.

B. Nationwide Patterns and Practices Emerge

As a result of implementing SBI's interior enforcement phase and the corresponding policy changes discussed above, and in the absence of necessary training and supervision, a number of disturbing and inevitable unlawful patterns and practices emerged.

1. Widespread Home Raids Violate the Fourth Amendment

Because of the policy changes made by the ICE Officials, the *modus operandi* of the Operations was to have teams of six or more armed ICE agents raid Latino homes without probable cause or court-issued warrants. ICE agents obtained entry to targeted homes without providing occupants any meaningful opportunity to consent or refuse entry and without exigent circumstances, all in violation of the Fourth Amendment. FAC ¶¶ 4-6; Answer ¶¶ 233, 262, 321,

339, 350, 360, 394, 399, 400 (averring that ICE agents did not need warrants or exigent circumstances for any of the raids discussed in the FAC). Or, as the Migration Policy Institute put it, ICE began widespread home raids "structured as a national security program: officers are armed, appear at residences late at night and early in the morning … lead[ing] to excessive force, overuse of high-powered weapons, and other escalations." FAC Exh. 1 at 25. This *modus operandi* was implemented in operation plans endorsed by at least Torres and Forman. FAC ¶¶ 86, 90.

ICE's new *modus operandi* is evident not only from the consistency among Plaintiffs' descriptions of their home raids, *see supra* Statement of Facts § I.A., but also from the extensive catalogue of similar incidents set forth in the independent report entitled *Constitution on ICE: A Report on Immigration Home Raid Operations* ("Constitution on ICE") prepared by the Benjamin N. Cardozo School of Law (attached as Exhibit 2 to the FAC), and the widespread reports of similar conduct chronicled in newspaper articles around the country, *see* FAC ¶¶ 426-437, and letters to Chertoff from, among others, Senators Dodd and Lieberman, U.S. Representatives Serrano and DeLauro, and Former Nassau County Executive Suozzi. *See* FAC ¶¶ 17-19, 75(b)-(d); FAC Exhs. 4, 5, 12, 13.

Lest there be any doubt that violating the Fourth Amendment became ICE's *modus operandi* as a result of the ICE Officials' policy changes, since 2006 when the policies were enacted, "there has been a twenty-two fold increase in [the filing of] suppression motions related to home raids" in immigration proceedings, and "a five-fold increase in the grant rate of suppression motions." FAC Exh. 2 at 14. This is all the more telling considering that such motions are generally rarely brought and are extremely difficult to win: to prevail on such a

motion, a party bringing a suppression motion must demonstrate not only that his or her constitutional rights were violated, but that they were *egregiously* violated. *Id.* at 13-14.

Significantly, two judges found that ICE egregiously violated the Fourth Amendment rights of two Plaintiffs in two different homes *in the very raids at issue in this case*. These two Plaintiffs, who were subjected to the ICE Officials' new policies, presented their suppression motions to the immigration court and resoundingly prevailed, *see supra* Statement of Facts § I.A. (discussing William Lazaro and Victor Pineda Morales). Both courts found a lack of consent in the home raids, undermining the ICE Officials' position in this case. Similar judicial findings have been made with respect to at least five non-plaintiffs in the northeast region who were victimized in 2006 and 2007 by ICE conduct similar to that endured by Plaintiffs. *See, e.g.*, FAC ¶ 75(b) & Exhs. 7–10 (findings of Connecticut immigration judge in New Haven raids and news report discussing such findings), FAC Exh. 2 at 18-20 (discussing findings of immigration judges in New York cases).

This *modus operandi* was not merely an incidental by-product of the ICE Officials' new policies, but in fact was intended by the ICE Officials. Indeed, the operation plans governing the Operations affirmatively *mandated* much of this conduct. *See* FAC ¶ 86. For example, the Operational Order/Plan for the February 2007 Operation Return to Sender in New York, the implementation of which caused violations of Plaintiffs' constitutional rights, ordered teams executing home operations to (a) consist of fifteen agents (twelve deportation officers and three supporting agents) (Gordon Decl. ¶ 4, Exh. C at USE00968), (b) commence operations at 5:30 a.m. (*id.* at USE00970), (c) assign agents "along the perimeter" of targeted locations (*id.* at USE00970), and (d) don body armor and fully equipped tactical duty belts (*id.* at USE00971). Torres approved this plan, which was conducted pursuant to the National Fugitives Operation

Program ("NFOP").[9] Gordon Decl. ¶ 4, Exh. C. All of these requirements were for operations that the Defendants have repeatedly argued were, and were intended to be, "consensual."

Moreover, in July 2007, Chertoff indicated his awareness of the practice of ICE agents questioning minors in the absence of their guardians, notwithstanding the fact that obtaining "consent" from minors is constitutionally infirm. In particular, in response to a Congressional inquiry about ICE operations in New Haven, Chertoff noted with approval that "ICE agents stayed with an 11-year-old child who had been left home alone by her parents and awaited the father's arrival from work," FAC Exh. 6 at 2-3, begging the question of who granted the ICE agents consent to enter the home. The inference from this statement is that Chertoff approved the practice of seeking consent from minors, thereby authorizing ICE agents in the field to continue that practice during home raids.

2. Racial Profiling Violates the Equal Protection Clause of the Fifth Amendment

As a foreseeable, intended result of the ICE Officials' 2005 and 2006 policy changes, a second pattern and practice emerged: racial profiling in violation of the Equal Protection Clause of the Fifth Amendment. FAC ¶¶ 9-10. Several facts establish that racial profiling became an entrenched pattern and practice of ICE following implementation of the SBI initiatives and that the ICE Officials were aware of these unconstitutional *de facto* policies and did nothing to change them.

First, in determining the non-residential locations for Operation Community Shield, ICE's selections were based not on the presence of targets, but rather on the presence of non-

[9] Torres similarly approved the Operational Plan for the April 2007 Operation Cross Check initiative in New York, which likewise resulted in violations of Plaintiffs' constitutional rights and ordered teams of agents to (a) arrest, detain, and place into removal proceedings all removable aliens (Gordon Decl. ¶ 5, Exh. D at USE01016, FAC Exh. 16 at 8), (b) look for aliens in locations such as homes (Gordon Decl. ¶ 5, Exh. D at USE001017), (c) commence arrest operations no later than 5:30 a.m. (*id.* at USE00126), and (d) don body armor and fully equipped tactical duty belts (*id.* at USE01019).

target Latino individuals. FAC ¶¶ 9-10. Specifically, according to deposition testimony of local law enforcement, two bars or clubs chosen for the September 2007 Operation Community Shield raids were not known as hangouts of targeted gang members – rather, they were merely establishments frequented by Latino individuals. FAC ¶ 12; *see also* FAC ¶ 9.

Second, a statistical review of the races of targets and collaterals reveals that the raids were marked by racial profiling. The *Constitution on ICE* study analyzing ICE arrest data between January 1, 2006 and April 18, 2008, found that in the Long Island, New York area, while 66% of the targets of ICE raids arrested were Latino, Latinos made up 94% of the collateral arrests.FAC Exh. 2 at 12. In the vast majority of those collateral arrests, ICE agents *noted no basis for seizing and questioning individuals who were Latino*. FAC Exh. 2 at 12.

Third, and most critical, authorized official comments by ICE spokespersons evidence that the raids were marked by racial profiling. In particular, ICE spokespersons asserted that at targeted homes, agents could automatically "reasonably suspect" that residents of target homes had illegal status. FAC ¶¶ 432-33; FAC Exhs. 21, 22. However, given the well-known investigatory deficiencies and flawed intelligence that pervaded these raids, ICE had no good reason to believe that any identified address *was actually the target's home*. Thus, the sole fact that an address appeared on an agent's list of places to raid, without more, could not be the basis for reasonable suspicion justifying detentive interrogations. In fact, in an article dated April 27, 2007, Blake Chisam, legal counsel to the House Judiciary Committee's subcommittee on immigration, reflected that some of ICE's rationales for reasonable suspicion might not stand up in court. FAC Exh. 21. An analysis of the information available to ICE at the time of the raids strongly suggests that, as the *Constitution on ICE* put it, "during home raids ICE agents seize

Latino residents based simply on their ethnic appearance or limited English proficiency." FAC Exh. 2 at 12.

Fourth, the contrasting conduct of ICE agents when they approached homes occupied by non-Latinos demonstrates racial profiling. As set forth above, when ICE agents approached homes of Latinos, they routinely entered and searched the entire home regardless of whether they had reason to believe their purported target resided there. *See supra* Statement of Facts § I.A. At homes where non-Latinos opened the front door, however, agents routinely walked away without entering or conducting any further search for the target and, in fact, in one instance affirmatively stated, "I think we have the wrong address," and departed. FAC ¶ 434 & Exh. 23. In other words, ICE not only treated Latinos differently than non-Latinos during the course of the home raids, but in fact appeared surprised when they encountered non-Latinos and changed their conduct accordingly.

Although the purported purpose of the operations was to apprehend the targeted fugitives, FAC ¶ 3, FAC Exh. 1 at 18, the facts show that this stated purpose was pretextual; the true intent of the operations was to target Latinos. ICE knowingly initiated raids without adequate investigation or surveillance confirming the location of the purported target. Indeed, one ICE supervisor estimated that only about 50% of the information in one of the primary databases ICE relied on to identify target locations was accurate. FAC Exh. 16 at 15. Tellingly, ICE in some cases refused assistance from local law enforcement that could have provided more accurate intelligence as to a target's whereabouts, FAC ¶ 7, and in at least one instance, used a photograph that was twenty-one years out of date for the purpose of identifying a target during a raid, FAC ¶ 16. Law enforcement officials reported that fewer than 10% of administrative warrants issued for the Operation Community Shield raids of September 2007 in Long Island contained accurate

addresses. FAC Exh. 11. Similarly, the ICE Officials have never promulgated policies that require agents to document or input information into their records or databases noting incidents of failed attempts to find a target or incorrect address information; such conduct is inconsistent with any professed goal of locating actual targets. FAC ¶ 11.[10]

III. The ICE Officials Failed to Investigate and Remedy Numerous Highly-Publicized Reports of Constitutional Violations

As demonstrated above, the ICE Officials designed and implemented policies that inevitably led to constitutional violations. Moreover, when faced with actual complaints of such violations, they turned a blind eye and through their misleading or uninformed responses impeded full and fair investigations of such violations.

First, the ICE Officials either commented upon or received a highly critical OIG Report that predated the plaintiff raids at issue in this case.[11] Among other things, the OIG report relayed that: (1) only about 50% of the information in the database ICE used to locate targets was accurate (FAC Exh. 16 at 15); (2) ICE historically failed to obtain and reconcile information about targets from other agencies (FAC Exh. 16 at 26); and (3) not all agents received the relevant training program and ICE should implement a national refresher course (FAC Exh. 16 at 30). ICE still has not taken adequate steps to address these issues. *See* FAC ¶ 7 (ICE has refused offers of assistance from local law enforcement agencies that could have provided more accurate information about the whereabouts of targets); FAC ¶ 13 (ICE has continued to provide inadequate training); FAC ¶ 16 (raids after the OIG report lacked current intelligence and possessed incorrect addresses for many of the targeted homes).

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[10] As a result, ICE agents raided 15 West 18th Street twice in little more than a year, both times looking for the same individual who did not reside there and had not resided there for at least three years. FAC ¶ 379.

[11] Specifically, Myers provided two responses to a draft of the OIG report, first on December 22, 2006, and then again on February 13, 2007. Torres also provided a response to the OIG draft on December 1, 2006. All such responses were included in the final OIG report. The distribution list for the OIG report indicates that Chertoff and Myers received it. *See* FAC Ex. 16.

Likewise, on May 23, 2007, Chertoff received a letter from counsel for Reinaldo Gonzales detailing the ICE Agents' warrantless, nonconsensual entry into 165 Main Street, Mt. Kisco, New York. This letter expressly told Chertoff that Mr. Gonzales was restrained and "herded into a van" without ICE agents identifying themselves, questioning Mr. Gonzales about his status or asking him for identification. Only after much pleading was Mr. Gonzales allowed to produce his Alien Registration Card, proving his lawful status. FAC ¶ 75(a).

Additionally, numerous articles in the national media as well as judicial opinions chronicle the widespread, consistent violations. For example:

- On **April 10, 2007**, the New York Times reported that in East Hampton, New York, ICE agents entered a home at 5 a.m., purportedly looking for a target who had not lived in the house since 2003. After failing to find the target, the agents threatened to return. *See* FAC ¶ 75(a).

- An **April 27, 2007** San Francisco Chronicle article described arrests at a target's former residence and the ICE practice of allowing agents to identify themselves as "Police" to gain entry into homes and question individuals solely because of an association with the target of a warrant. The article also noted the charge that the agents violated the Fourth and Fifth Amendments in their conduct of the raids. *See* FAC ¶ 432 & Exh. 21.

- An **April 28, 2007** article in The Daily Review described early-morning raids in the San Francisco, California area and reported that ICE conducted home raids with only arrest warrants. ICE failed to address the charge that a search warrant was required for the home entry at issue, and an official ICE spokesperson merely responded that warrants are obtained for all arrests. *See* FAC ¶ 431 & Exh. 20.

- On **July 23, 2007,** the New York Times described ICE practices of pushing past New Haven, Connecticut residents who opened the door to agents and of arbitrarily knocking at homes near to the residence listed in a deportation order after finding the target residence empty. *See* FAC ¶ 428 & Exh. 17.

See also Exh. 2 at 16-22 (chronicling instance after instance of complaints). Further, in April of 2006, Judge Gershon in the Eastern District of New York suppressed evidence obtained pursuant to a purportedly consensual search conducted and/or supervised by several DRO agents in April of 2006, *including three of the individual defendant agents present at home raids detailed in the*

FAC. *See United States v. Ali*, No. 05-CR-785 (NG) (SMG), 2006 WL 929368 (E.D.N.Y. April 7, 2006).

Contrary to Defendants' contention that these numerous complaints, articles and court decisions post-date the operations, the majority of events underlying these complaints took place well before the bulk of the raids at issue in the FAC and put the ICE Officials on notice of the unconstitutional conduct occurring within their department by their workforce.

The ICE Officials perpetuated such conduct by insisting, or having others insist on their behalf, that ICE was comporting with constitutional mandates. The ICE Officials made these representations either with knowledge of their falsity or without performing any adequate investigation of the facts and, in so doing, impeded investigations that could and should have taken place. Thus, despite being informed of a widespread pattern and practice of misconduct during ICE operations, the ICE Officials conducted a "grossly inadequate investigation," failed to discipline agents for their improper conduct, failed to remedy the conduct, and in many cases actively and misleadingly defended unlawful practices. FAC ¶¶ 20, 75(a)-(d), 80, 81, 87, 92.

The ICE Officials were also sent direct letters relaying the pattern of unconstitutional conduct of agents in the field. On June 11, 2007, Senators Dodd and Lieberman and U.S. Representative DeLauro sent Chertoff a letter stating that they were "troubled" by reports concerning the manner in which ICE conducted the raids in New Haven, Connecticut five days earlier. Specifically, they remarked that only 4 of the 31 individuals who were detained were the subject of deportation orders, despite the fact that the operation was part of a nationwide initiative to target and apprehend individuals with final orders of removal. Further, they reported that "ICE agents pushed their way into homes," that they "treated both adults and children inappropriately," and that the operation appeared to be in retaliation for a new initiative to issue

identification cards to the undocumented community. They then posed a number of inquiries to Chertoff, including, but not limited to, whether consent was obtained at each home, how agents identify people who are targets, and what type of warrants ICE used. *See* FAC Exh. 5.

Chertoff sent a reply letter a mere three days later, which speaks volumes as to the depth of the investigation he conducted or initiated in response to these serious allegations. The more serious problem with Chertoff's letter, however, was not its haste, but its veracity. Chertoff uniformly denied all allegations and delivered bald conclusions such as, "[a]t no time did any ICE FOTs enter a dwelling without consent." *See* FAC Exh. 6. Chertoff's response has proven to be untrue. Judge Michael Straus found in four separate proceedings that ICE FOTs egregiously violated the Fourth Amendment rights of individuals during pre-dawn raids where ICE failed to obtain consent. FAC Exh. 8 at 27, Exh. 9 at 26, Exh. 10 at 23.[12] Similarly, while Chertoff asserted that "each team had a Spanish speaking officer," this statement was misleading at best given the judge's finding that agents spoke English to Spanish speakers and had to call in an interpreter. *Compare* FAC Exh. 6 at 2 *with* FAC Exh. 10 at 25. Similarly, while Chertoff asserted that an "individual being interviewed must voluntarily agree to remain," this too was at odds with the court's findings that in the raids at issue, agents ignored requests of the Latino victims that they not be subjected to questioning. *Compare* FAC Exh. 6 at 2 *with* FAC Exh. 10 at 25.

In short, courts have now found that ICE's conduct during various Connecticut home raids that were the subject of Chertoff's denials "worked an egregious violation" of Fourth Amendment rights. FAC Exhs. 8, 9. These judicial findings strongly suggest that Chertoff's dismissive reply to the June 11, 2007 Congressional inquiry was made either with actual

[12] "Without saying a word, agents immediately and forcibly pushed the door wide open." FAC Exh. 8 at 27; *see also* Exh. 9 at 26, Exh. 10 at 23.

knowledge of falsity or with reckless disregard as to the truth or falsity of the allegations.[13] Either way, the denials served to impede an investigation of legitimate complaints of constitutional violations.

Chertoff and Myers continued to receive high-profile complaints of ICE misconduct. On September 27, 2007, Lawrence W. Mulvey, Commissioner of Police for Nassau County, sent a letter to Joseph A. Palmese, Resident Agent in Charge of ICE investigations in Bohemia, New York, criticizing ICE's conduct during raids that week and immediately withdrawing his department's assistance from the operations. FAC Exh. 3. This letter was forwarded to Chertoff. FAC ¶ 19. Commissioner Mulvey asserted that the September 24 operations lacked current intelligence, that most addresses were wrong, and that, in one case, ICE agents were looking for a 28-year-old suspect using a photograph of the suspect from when he was seven years old. FAC Exh. 3. He added that the operation was "structured poorly," that the teams consisted of border patrol personnel from different parts of the country who clearly did not train together, that agents were armed with a mix of tactical weapons including shotguns and MP-5's, and that his own officers complained of the "undisciplined conduct of the federal agents." FAC Exh. 3; *see also* FAC Exh. 11. He asserted, in short, that the ICE agents displayed a "cowboy mentality." Incredibly, in the confusion of a purportedly a "consensual" operation, ICE agents even drew their guns on Nassau County police officers. FAC Exh. 3 at 2; FAC Exh. 4 at 1-2; FAC Exh. 11 at 1 Confirming the trend stated in Senator Dodd's letter, of the 40 people apprehended, only 3 were "affiliated actively with gangs" in Nassau County, the remainder consisting of people ICE determined to be undocumented. *See* FAC Exh. 3.

[13] The court stated, "Notably, there are scant facts that might furnish a plausible basis upon which communicated consent might reasonably have been interpreted by the agents during their initial entry into the apartment." FAC Exh. 8 at 27. And, "[t]he facts at bar reflect that . . . the evidence gathered here was not in connection with 'peaceful arrests' made by immigration officers." *Id.* at 28.

Nassau County Executive Thomas R. Suozzi also complained to Chertoff about the actions and behavior of ICE agents conducting raids in Nassau County in September 2007. FAC Exh. 4. In a letter to Chertoff dated October 2, 2007, Suozzi attached Mulvey's letter and reiterated its scathing observations. *Id.* He requested that Chertoff investigate the "serious allegations of misconduct and malfeasance committed by Immigration and Customs Enforcement personnel in executing arrest warrants in various Nassau County communities on September 24 and 26, 2007." *See id.* Myers was copied on the letter. *Id.* Consistent with his practice of responding in haste, Chertoff drafted a reply letter to Suozzi on October 4, 2007, just two days later. FAC ¶ 75(c). Instead of sending this draft letter, however, Chertoff elected to have Myers reply on his behalf. *Id.* On October 19, 2007, Myers replied to Suozzi. *Id.* Her letter was substantially the same as Chertoff's initial draft, and like the response to Senator Dodd, contained a blanket denial of all allegations.

Similarly, following the Operation Community Shield raids in Long Island, an ICE agent made internal allegations of racial profiling. FAC ¶ 12. Although Myers was knowledgeable about the allegations, she did not ensure an adequate investigation and imposed no discipline or corrective measures in response to the claims of racial profiling. FAC ¶¶ 12, 80. Had Defendant Myers – or any of the other ICE Officials – properly investigated the charge, they would have discovered that local law enforcement corroborated the allegations. FAC ¶ 12.

In blindly defending ICE from these allegations of misconduct, Chertoff and Myers authorized and endorsed a *de facto* policy of unconstitutional entries into and searches of homes. FAC ¶¶ 19, 75(c). This attitude is further reflected by the fact that ICE spokespersons, under the supervision of the ICE Officials, have repeatedly and aggressively defended ICE's conduct and offered ill-informed support of the agents' behavior. The Special Agent in Charge of the

Operation Community Shield raids told the *New York Times* that even in the context of home entries, "We don't need warrants to make arrests. These are illegal immigrants." FAC ¶ 427, FAC Exh. 11. This, of course, is a misstatement of the applicable legal standards, which provide the home with special constitutional protection. These active, public, untruthful defenses of unlawful conduct sent the clear and erroneous message to ICE agents that they did not have to comply with the constitutional mandates applicable to other law enforcement agencies.

ARGUMENT

The factual allegations in the FAC clearly implicate the ICE Officials in routine and repeated constitutional violations. Contrary to the ICE's Officials' intimations, *Iqbal* does not absolve them from liability for their own failures to supervise their subordinates. In fact, even the broadest reading of *Iqbal* holds supervisors liable for implementing and perpetuating policies, practices and procedures that all but required, and in fact induced, a pattern of unconstitutional conduct. Defendants' reliance on *Iqbal*, the centerpiece of their motion, is thus misplaced and their motion should be denied.

I. A Complaint, Taken as a Whole, Must Allege Only Sufficient Factual Matter to Support an Inference That Plaintiff is Entitled to Relief

All that must be stated in a complaint is "a short and plain statement of the claim." Fed. R. Civ. P. 8. Neither *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), nor *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), alter the basic tenet of Rule 8 that notice pleading is sufficient. The Supreme Court itself has reiterated that *Twombly* did not change this basic element of federal practice. *See Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (under *Twombly* "[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what the ... claim is and the grounds upon which it rests. ") (internal citation and quotation omitted); s*ee also Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009) (notice pleading "continues to be the case after *Iqbal*").

Thus, even after *Iqbal*, this Court must accept all of the allegations in the FAC as true and must then draw all inferences in Plaintiffs' favor. *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, No. 09-2613-cv, 2010 WL 1337225, at *3 (2d Cir. Apr. 7, 2010). This is true "even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Iqbal*, 129 S.Ct. at 1955 (quoting *Twombly*).

In light of the limited purpose of notice pleading, to survive a motion to dismiss all a complaint must allege are facts that raise more than a "sheer possibility" that the plaintiff is entitled to relief. *Iqbal*, 129 S. Ct. at 1950; *see also Fritz v. Charter Tp. of Comstock,* 592 F.3d 718, 729 (6th Cir. 2010) (reversing grant of judgment because "factual allegations are sufficient to raise more than a mere possibility" of unlawful conduct) (citing *Iqbal*). All *Iqbal* requires is that plaintiffs present the factual basis for the allegations. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009) ("[I]t is sufficient for a plaintiff to plead facts indirectly showing unlawful behavior, so long as the facts pled give the defendant fair notice of what the claim is and the grounds upon which it rests.") (internal quotations omitted) (citing *Iqbal*); *Rouse v. Berry*, No. 06-2088 (RWR), 2010 WL 325569, at *4 (D.D.C. Jan. 29, 2010) (denying motion to dismiss where plaintiff "made a factual allegation that provides independent corroboration of his belief" of discrimination based on disability); *see also al-Kidd v. Ashcroft*, 580 F.3d 949, 975 (9th Cir. 2009) (denying motion to dismiss on the grounds that "unlike in *Twombly* and *Iqbal,* where the plaintiffs alleged a conspiracy or discriminatory practice in the most conclusory terms, [plaintiff] does not rely *solely* on his assertion that Ashcroft ordered, encouraged, or permitted 'policies and practices'") (emphasis added).

Critically, this evaluation must be done taking the complaint as a whole, *i.e.,* considering all the allegations contained in the complaint. *Vila v. Inter-American Inv. Corp.*, 570 F.3d 274,

285 (D.C. Cir. 2009) (citing *Iqbal*) ("Viewed in their totality, and according [plaintiff] all favorable inferences, [plaintiff's] allegations plausibly give rise to an entitlement to relief.") (internal citation and quotation omitted); *Braden*, 588 F.3d at 594 (citing *Iqbal)* ("The complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible.").

Thus, if the sum of the allegations in the FAC – assumed true and granted all reasonable inferences – offer more than the sheer possibility that the Plaintiffs are entitled to relief, Plaintiffs have met their burden. As explained below, the facts alleged here support an inference that the ICE Officials are directly responsible for Plaintiffs' injuries.

II. Under *Iqbal*, Supervisors, Like the ICE Officials, Are Liable For Their Own Misconduct

A. *Iqbal* Did Not Alter the Well-Settled Law of Supervisory Liability

Defendants are simply wrong when they assert that *Iqbal* has done away with supervisory liability. Quite the opposite: *Iqbal* itself emphasizes that a federal official's liability may "'result from his own neglect in not properly superintending the discharge' of his subordinates' duties." *Iqbal*, 129 S.Ct. at 1948 (citing *Dunlop v. Munroe*, 11 U.S. (7 Cranch) 242, 269 (1812). Thus, far from eliminating supervisory liability, *Iqbal* reaffirmed that a federal official may be held liable for his own failure to supervise subordinates, as that is "his own neglect," not mere *respondeat superior*. This standard is precisely the one that has long been applied by federal courts. *Dunlop*, 11 U.S. (7 Cranch) at 269.

The Second Circuit expounded on the principle that a supervisor is liable solely for his or her own wrongs in *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995). As set forth in *Colon*, such "*personal involvement* of a supervisory defendant may be shown" by the fact that "(1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after

being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring." *Id*. (emphasis added).

Nothing in *Iqbal* is to the contrary. As noted above, the very authority relied upon by the Supreme Court states that a supervisor can be liable for a failure to supervise. Rather, *Iqbal*'s central holding, that "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct," *Iqbal*, 129 S.Ct. at 1949, is entirely consistent with *all* of the *Colon* tests. This is because a failure to supervise or remedy is the supervisors' *own* failure. *See, e.g., Menotti v. City of Seattle*, 409 F.3d 1113, 1149 (9th Cir. 2005) ("Supervisory liability is imposed against a supervisory official in his individual capacity for *his own culpable action or inaction* in the training, supervision, or control of his subordinates, for his acquiescence in the constitutional deprivations of which the complaint is made, or for conduct that showed a reckless or callous indifference to the rights of others.") (emphasis added). Nothing in *Iqbal* undermines the Second Circuit's long-standing rule that supervisory liability may be founded on any one of five bases.

Indeed, even post-*Iqbal* both the Second Circuit and numerous courts in this District have reiterated the *Colon* factors as the test for supervisory liability.[14] "A supervisory official

[14] The majority of judges in this District that have addressed the issue have cited the *Colon* factors post-*Iqbal*. *See Cunningham v. Dep't of Corr. Servs.*, No. 04-CV-5566 (CS), 2009 WL 1404107 (S.D.N.Y. May 20, 2009) (Seibel, J.) (citing *Colon* factors post-*Iqbal*); *Cole v. Fischer*, No. 07 Cv. 11096 (BSJ), 2009 WL 1514699 (S.D.N.Y. May 29, 2009) (Jones, J.) (same); *Harrison v. Goord*, No. 07 Civ. 1806 (HB), 2009 WL 1605770 (S.D.N.Y. Jun. 9, 2009) (Baer, J.) (same); *5 Borough Pawn, LLC v. City of New York*, 640 F. Supp. 2d 268 (S.D.N.Y. 2009) (McMahon, J.) (same); *Williams v. Smith*, No. 02 Civ. 4558 (DLC), 2009 WL 2431948 (S.D.N.Y. Aug. 10, 2009) (Cote, J.) (same); *Dawkins v. Gonyea*, 646 F. Supp. 2d 594 (S.D.N.Y. 2009) (Marrero, J.) (same); *JG & PG ex rel. JGIII v. Card*, No. 08 Civ. 5668 (KMW), 2009 WL 2986640 (S.D.N.Y. Sept. 17, 2009) (Wood, J.) (same); *Doe v. Cuomo*, No. 08 Civ. 8055 (LAP), 2009 WL 3123045 (S.D.N.Y. Sept. 29, 2009) (Preska, C.J.) (same); *Burton v.*

personally participates in challenged conduct not only by direct participation, but by (1) failing to take corrective action; (2) creation of a policy or custom fostering the conduct; (3) grossly negligent supervision, or deliberate indifference to the rights of others." *Rolon v. Ward*, 345 Fed.Appx. 608, 611 (2d Cir. Sept. 4, 2009) (summary order). Importantly, courts have repeatedly *denied* motions to dismiss in reliance on the various allegedly "overruled" *Colon* prongs. In *Kellogg v. New York State Dep't of Corr. Serv.,* No. 07 Civ. 2804 (BSJ) (GWG), 2009 WL 2058560, at *7 (S.D.N.Y. July 15, 2009), for example, the court denied a supervisor defendant's motion to dismiss where a prison guard compelled Plaintiff to submit to multiple, inappropriate strip-searches. In so holding, the court reasoned that dismissal would be improper because the supervisor "was notified of sexual harassment, abuse and retaliation against Plaintiff and failed to stop or remedy these violations." *See also, e.g., Felix-Torres v. Graham,* No. 9:06-CV-1090, 2009 WL 3526644, at *12 (N.D.N.Y. Oct. 23, 2009); *Sadler v. Lantz,* No. 3:07-cv-1316, 2009 WL 3013716, at *7 (D. Conn. Sept. 16, 2009).[15]

Lynch, 664 F. Supp. 2d 349 (S.D.N.Y. 2009) (Sand, J.); *Vera v. New York State Dep't of Corr. Servs.*, No. 08 Civ. 9636 (DC), 2009 WL 4928054 (S.D.N.Y. Dec. 21, 2009) (Chin, J.) (same); *Mateo v. Fischer*, No. 08 Civ. 7779 (RJH) (DCF), 2010 WL 431229 (S.D.N.Y. Feb. 8, 2010) (Holwell, J.) (same); *Solar v. Annetts*, No. 08 Civ. 5747 (WHP), 2010 WL 1253473 (S.D.N.Y. Mar. 16, 2010) (Pauley, J.); *Braxton v. Nichols*, No. 08 Civ. 08568 (PGG), 2010 WL 1010001 (S.D.N.Y. Mar. 18, 2010) (Gardephe, J.) (same); *Cortes v. City of New York*, No. 08 Civ. 4805 (LTS) (RLE), 2010 WL 1253946 (S.D.N.Y. Mar. 30, 2010) (Swain, J.) (same); *Coward v. Town & Vill. of Harrison*, 665 F. Supp. 2d 281, 305 (S.D.N.Y. 2009) (applying *Colon*-derived factors post-*Iqbal*) (Karas, J.). As of this briefing, Defendants have identified only a handful a cases where *Colon* is supposedly overruled. *See* Memorandum of Law in Support of Motion to Dismiss the Complaint Against Defendants Michael Chertoff, Julie Myers, John Torres, and Marcy Forman (Mar. 11, 2010) at 16-17; *Joseph v. Fischer*, No. 08 Civ. 2824 (PKC)(AJP), 2009 WL 3321011 (S.D.N.Y. Oct. 8, 2009) (Castel, J.) (not citing *Colon* factors); *Spear v. Hugles*, No. 08 Civ. 4026 (SAS), 2009 WL 2176725 (S.D.N.Y. Jul. 20, 2009) (Scheindlin, J.) ("only the first and third *Colon* factors have survived the Supreme Court's decision in *Iqbal*"); *Bellamy v. Mount Vernon Hosp.*, No. 07 Civ. 1801 (SAS), 2009 WL 1835939 (S.D.N.Y. June 26, 2009) (Scheindlin, J.) (same); *Newton v. City of New York*, 640 F. Supp. 2d 426 (S.D.N.Y. 2009) (Scheindlin, J.) (passive failure to train claims . . . have not survived *Iqbal*).

[15] Defendants have acknowledged that courts continue to apply *Colon*, arguing only that those courts are mistaken, and urging this court to follow the contrary argument in *Bellamy*, 2009 WL 1835939, at *4. However, *Bellamy* offers little support for its assertion that *Iqbal* has eliminated categories of supervisory liability. It contains *no* analysis and little explanation, citing only *Iqbal*'s rejection of the argument that "mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution." That one line entirely fails to support the proposition that *Iqbal* rewrote the standards for supervisory liability. *See Diaz-Martinez v. Miami-Dade County*, No. 07-20914-CIV, 2009 WL 2970468, at *15 (S.D. Fla. Sept. 10, 2009) (rejecting defendants

B. *Iqbal* Did Not Alter the Relevant Standard for Fourth Amendment Claims

Even if *Iqbal* were taken to have altered the law of supervisory liability as to Fifth Amendment Equal Protection claims, it has no bearing on Plaintiffs' Fourth Amendment claims. Thus, even if the Court were to hold Plaintiffs' Fifth Amendment allegations a higher standard of personal involvement, Plaintiffs' Fourth Amendment claims are not subject to that standard.

As recognized in many post-*Iqbal* decisions, the Court's holding in *Iqbal* was directly and fundamentally linked to the nature of the claims asserted. The Court both "beg[a]n by taking note of the elements" of the asserted claim, and thereafter distinguished the claims presented by *Iqbal* from other causes of action, highlighting that "[t]he factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue." *Iqbal*, 129 S.Ct. at 1948. In the words of the Court, the *Iqbal* plaintiffs' claims failed because the "complaint d[id] not contain any factual allegation sufficient to plausibly suggest [defendant's] discriminatory state of mind." *Id.* at 1952.

Because a law enforcement agent's state of mind is irrelevant in Fourth Amendment claims, *see, e.g.*, *United States v. Klump*, 536 F.3d 113, 118 (2d Cir. 2008), *Iqbal* is, by its own terms, inapposite. This fundamental limitation on *Iqbal's* reach has been stated by numerous courts, which have recognized that the Supreme Court so limited its discussion. As one court put it, "[t]he Supreme Court, in *Iqbal,* even prefaced its analysis of this issue by recognizing that '[t]he factors necessary to establish a *Bivens* . . . violation will vary with the constitutional provision at issue. . . . *Iqbal* thus does not support the proposition that general allegations are never sufficient to support a . . . claim.'" *Young v. Speziale,* No. 07-03129 (SDW-MCA), 2009 WL 3806296, at *7 (D.N.J. Nov. 10, 2009) (citation omitted); *Masters v. Gilmore*, 663 F. Supp.

"reading of *Iqbal* as overbroad. . . . *Iqbal* stands for the proposition that a supervisor cannot be vicariously liable solely for the acts of a subordinate. However, there is no indication that the Supreme Court intended to wipe out the well-developed body of law surrounding supervisory liability").

2d 1027, 1051 (D. Colo. 2009) (same); *Wiseman v. Hernandez*, Civ. 08cv1272-LAB (NLS), 2009 WL 5943242, at *9 n.8 (S.D. Cal. Nov. 24, 2009) (same); *Womack v. Smith*, No. 1:06-CV-2348, 2009 WL 5214966, at *5 (M.D. Pa. Dec. 29, 2009) (same, distinguishing *Iqbal* on the basis that "the Supreme Court ma[de] clear in *Iqbal,* [that] the factors necessary to establish a *Bivens* violation will vary with the constitutional provisions at issue"); *Bovarie v. Tilton*, No. 06CV687 JLS (NLS), 2010 WL 743741, at *4 (S.D. Cal. March 1, 2010) (noting that *Iqbal* addressed purposeful discrimination and holding that "*Iqbal* did not change th[e] standard, nor what must be pled under th[e] standard" for Eighth Amendment claims).

Thus, courts have continued to find high-level supervisors liable for Fourth Amendment violations for their "mere" knowledge and tolerance of violations as well as for failure to supervise. *See al-Kidd*, 580 F.3d at 976 (holding that plaintiff stated a claim for supervisory liability in the wake of *Iqbal* where "'abuses occurring under the material witness statute after September 11, 2001 were highly publicized in the media, congressional testimony and correspondence, and in various reports by governmental and non-governmental entities,' which could have given Ashcroft sufficient notice to require affirmative acts to supervise and correct the actions of his subordinates"); *Vance v. Rumsfeld*, No. 06 C 6964, 2010 WL 850173, at *7 (N.D. Ill. March 5, 2010) (denying motion to dismiss where allegations, taken as true, "would substantiate plaintiffs' claim that Rumsfeld was aware of the direct impact that his newly approved treatment methods were having on detainees held in Iraq"); *Barrett v. Maricopa County Sheriff's Office*, No. CV 08-2094-PHX-GMS (MHB), 2010 WL 46786, at *7-8 (D. Ariz. Jan. 4, 2010) (holding that plaintiff stated a claim for supervisory liability where plaintiff alleged that supervisor's failure to implement necessary policies amounted to customs and practices that resulted in deprivation to plaintiff); *Hernandez v. Foster,* No. 09-cv-2461, 2009 WL 1952777, at

*9 (N.D. Ill. July 6, 2009) (holding that supervisors could be held liable for Fourth Amendment violations where plaintiffs alleged "that the conduct causing the constitutional deprivation occurred at their direction or with their knowledge and consent"); *Williams v. Fort Wayne Police Dep't*, No. 1:08-cv-152, 2009 WL 1616749, at *4 (N.D. Ind. June 9, 2009) (holding that supervisors can be held liable for Fourth Amendment violations when they "know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see") (internal citation omitted). Indeed, as described below, in the most factually analogous case to the instant matter, a suit based on the same operation against similar ICE defendants, the District of New Jersey so held. *See infra* Argument § III.C.

C. Defendants Admit That Supervisors Can Be Found Liable For Creating or Permitting a Policy or Custom Under Which Unconstitutional Practices Occurred

As Defendants concede, supervisors are liable for creating or permitting a policy or custom under which unconstitutional practices occurred. Defendant's Memorandum of Law in Support of Motion to Dismiss the Complaint Against Defendants Michael Chertoff, Julie Myers, John Torres, and Marcy Forman ("Def. Br.") at 15-17. However, Defendants mistakenly assume that such liability can be founded only on policies that expressly "require" or "authorize" the unconstitutional conduct. Def. Br. at 20. This argument is facially absurd and would virtually eliminate any governmental liability or accountability, as it would be the rare policy indeed that would say, in effect, "Thou shall violate the Constitution."

Not surprisingly, Defendants are unable to cite a single case that supports their interpretation of the standards for supervisory liability.[16] Rather, for a supervisor to be liable for

[16] In fact, the cases cited by Defendants affirm the opposite: that a policy need not require or authorize violations. "[A] complaint must allege that the need for more or better supervision was obvious, but that the defendant made no meaningful attempt to prevent the constitutional violation." *Missel v. County of Monroe*, 351 Fed. Appx. 543, 546 (2d Cir. 2009) (internal citations and quotations omitted) (municipal liability).

creating *or permitting* a policy, all that courts have required is the creation or maintenance of "a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation." *Thompkins v. Belt*, 828 F.2d 298, 304 (5th Cir. 1987) (internal quotations omitted); *Player v. Gomez*, 243 F.3d 549 (9th Cir. 2000) (same); *see also, e.g., Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 128 (2d Cir. 2004) (Sotomayor, J.) (for municipal liability, "plaintiffs' evidence must establish only that a policymaking official had notice of a potentially serious problem of unconstitutional conduct, such that the need for corrective action or supervision was 'obvious,' and the policymaker's failure to investigate or rectify the situation evidences deliberate indifference, rather than mere negligence or bureaucratic inaction") (internal citation omitted); *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1034 (N.D. Cal. 2009) (senior government attorney liable for "set[ting] in motion a series of events" that resulted in constitutional violations).

III. Plaintiffs' Allegations Demonstrate the ICE Officials Violated the Fourth Amendment

Here, Plaintiffs' allegations demonstrate that the ICE Officials were "personally involved" in the violations both by creating and perpetuating policies that would inevitably lead to constitutional violations, as well as by failing to stop the violations after the relevant facts came to their attention.

A. The ICE Officials Created and Perpetuated Policies Under Which Unconstitutional Practices Occurred and Harmed Plaintiffs

Creating or perpetuating a policy that causes constitutional violations is sufficient for supervisory liability under any interpretation of *Iqbal*. The FAC contains clear, plausible allegations that the policies and practices adopted and endorsed by the ICE Officials produced an inevitable pattern of constitutional violations. The resultant violations that Plaintiffs suffered were not isolated incidents of unconstitutional conduct but rather the direct consequences of the

very structure and nature of the Operations that implemented the ICE Officials' policies. Moreover, given the widespread nature of these violations and the ICE Officials' refusal to modify ICE's persistent illegal practices, these violations can be traced directly to their door.

The FAC contains plausible allegations that the ICE Officials adopted and endorsed policies that foreseeably led to a pattern of constitutional violations. Plaintiffs' specific allegations – that large teams of heavily armed agents forcibly entered and swept through the homes, caused extensive physical damage to walls and doors, rousted residents in a state of undress from their beds, blocked exits, detained family members for interrogation, and terrorized children – document not isolated incidents of unconstitutional conduct but rather direct consequences of the very structure, nature and *modus operandi* of the enforcement programs. FAC ¶ 4. These characteristics were neither specific to the Plaintiffs' homes, nor, as numerous reports across the country demonstrate, particular to the New York area. To the contrary, the unlawful conduct that harmed Plaintiffs was part of a widespread pattern or practice. *Cf. Saleh v. City of Buffalo*, No. 97-CV-0872E(M), 2000 WL 1773472, at *5 (W.D.N.Y. Nov. 27, 2000) (holding that allegations were "sufficiently diffuse to constitute a custom or usage with the force of law") (internal quotation marks omitted). These patterns and practices that were national in scope – they received coast-to-coast media coverage and Congressional attention and correspondence – thus directly implicated ICE's national hierarchy and required the ICE Officials to take affirmative acts to supervise and correct the actions of their agents. *See infra* Argument § III.B.

The conduct constituting the patterns and practices described in the FAC were inherent in, and/or a natural consequence of, the policies promulgated by the ICE Officials. It is clear that this conduct violates the Fourth Amendment. Courts have long held that the circumstances

constituting the pattern and practice of which Plaintiffs complain violate the Fourth Amendment and undermine and vitiate consent, which "must be a product of [an] individuals' free and unconstrained choice, rather than mere acquiescence in a show of authority." *United States v. Wilson*, 11 F.3d 346, 351 (2d Cir. 1993); *Bumper v. North Carolina*, 391 U.S. 543, 549 (1968). Courts have routinely held that the following circumstances, all of which are hallmarks of ICE's nationwide pattern and practice, and all of which are at issue in this case, result in violations of constitutional rights and undermine voluntary, duress-free consent:

- **The presence of multiple officers when consent is sought**. *See United States v. Mendenhall*, 446 U.S. 544, 552 (1980) (holding that the "threatening presence of several officers, the display of a weapon by an officer, the physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled" are all hallmarks of nonconsensual encounters); *see also Abdella v. O'Toole*, 343 F. Supp. 2d 129, 142-43 (D. Conn. 2004); *Djonbalic v. City of New York*, No. 99 Civ. 11398, 2000 WL 1146631, at *10 (S.D.N.Y. Aug. 14, 2000).

- **The request for and purported grant of "consent" occurs at late night or early morning hours.** *See LaDuke v. Nelson,* 762 F.2d 1318, 1321 (9th Cir. 1985) (finding a pattern of unlawful seizures where ICE agents conducted warrantless searches "during early morning or late evening hours, surrounded the residences in emergency vehicles with flashing lights . . . and stationed officers at all doors and windows"); *see also Kaupp v. Texas*, 538 U.S. 626, 631-32 (2003) (rousting resident dressed in underwear out of bed in the "middle of the night" vitiated consent); *Djonbalic*, 2000 WL 1146631 at *10.

- **The visible presence of heavy arms at the time consent is sought.** *See United States v. Mapp*, 476 F.2d 67, 78 (2d Cir. 1973); *United States v. Restrepo-Cruz*, 547 F. Supp.1048, 1057 (S.D.N.Y. 1982).

- **Agents conduct protective sweeps where officers have no reason to perceive any threat.** *See Maryland v. Buie*, 494 U.S. 325, 327 (1990); *United States v. Gandia,* 424 F.3d 255, 262 (2d Cir.2005) (cautioning that "when police have gained access to a suspect's home through his or her consent, there is a concern that generously construing *Buie* will enable and encourage officers to obtain that consent as a pretext for conducting a warrantless search of the home."); *Ali*, 2006 WL 929368, at *7 (invalidating protective sweep by DRO agents).

- **Agents seek consent from minors.** *See Abdella*, 343 F. Supp. 2d at 135 (invalidating "consent" by a twelve-year-old invalid).

- **The individual purportedly granting consent does not speak or understand the language of the government official seeking consent**. *See Wilson*, 11 F.3d at 351 (holding that " limited education and knowledge of the English language" casts doubt on consent, particularly in light of the intrusive nature of agents' entry"); *United States v. Isiofia* , 370 F.3d 226, 233 (2d Cir. 2004).

- **The use of ruses, including false emergency ruses, when seeking consent**. *See* Def. Br. at 20 n.7; *United States v. Montes-Reyes* , 547 F. Supp. 2d 281, 288 n.10 (S.D.N.Y. 2008); [17] *see also Hoffa v. United States*, 385 U.S. 293, 301 (1966); *United States v. Hardin*, 539 F.3d 404, 424-25 (6th Cir. 2008)**.**

Indeed, many of these factors have formed the basis of court determinations that these Operations egregiously violated the Fourth Amendment. A court in Connecticut, for example, noted that the "early morning" nature of the raids and the ICE agents' failure to limit their entry into the immediate area of the apartment were factors in determining a flagrant violation of the Fourth Amendment. *See* FAC Exh. 8 at 27. In another instance, the judge remarked on the "aggressive nature of the forced entry" where the agents pushed open the door, requiring the resident to move back out of fear of being struck by the door. *See* FAC Exh. 9 at 27. Additionally, the judge found it "troubling" that agents continued to ask questions in English after it was clear that the respondent did not understand what they were asking and communicated through his son, in Spanish, that he did not want to answer any questions. *See* FAC Exh. 10 at 25.

[17] Defendants erroneously rely on *Montes-Reyes*, 547 F. Supp. 2d 281 to justify the ICE Officials' ruse memoranda. Defs. Br. at 20 n. 7. In fact, *Montes-Reyes* holds that the use of ruses in warrantless entries and searches can invalidate consent, particularly when agents give "the impression that …consent cannot be lawfully withheld" or make "false claims of exigent circumstances." *Id.* at 288 n.10. Indeed, Judge Cote pointed out that several courts have articulated a *per se* rule invalidating consent where agents use deception to misrepresent their purpose. *Id*. at 288 n.7 (collecting cases). The ICE Officials' failure to make these principles clear to agents endorsed a policy of routine use of unlawful ruses during raids on Plaintiffs' homes, the most dramatic example of which is an agent's false claim that "someone is dying upstairs" to convince twelve-year-old Beatriz Velasquez to open the front door. FAC ¶ 328.

It is precisely this type of conduct that Plaintiffs experienced and caused them harm. *See supra* Statement of Facts § I.A. Specifically, consistent with the unconstitutional patterns and practices set forth above, Plaintiffs say: large teams of armed agents pounded on Plaintiffs' doors, in the early morning, often before dawn, shouting "Police!" and ordered them to open the door (FAC ¶¶ 5, 23, 25, 27, 31, 33, 37-38, 192, 245, 289, 309, 326); agents entered Plaintiffs' homes and bedrooms when Plaintiffs, including women, young children and adolescents, were in a state of undress, some still asleep (FAC ¶¶ 5, 207, 209-10, 245, 252-53, 282, 293, 312, 344-45, 381, 404-05, 412); and agents carried submachine guns and shotguns and drew or clutched their holstered weapons (FAC ¶¶ 4, 218, 345), caused extensive physical damage to the doors and walls of the homes (FAC ¶¶ 302, 319, 346), and/or handled residents with excessive force (FAC ¶¶ 267, 293, 345). Despite the fact that some of the individuals spoke only Spanish, ICE did not ensure that Spanish-speaking agents were present and, in many cases, agents spoke only English to Spanish-speaking persons. FAC ¶¶ 5, 408. Similarly, at two of the homes, ICE purportedly sought and obtained consent from minors. FAC ¶¶ 326-339, 395-401, 410. Critically, pursuant to the express policy permitting ruses in consensual encounters authored by Torres and Forman and approved by Chertoff and Myers, the agents misrepresented the purpose of their searches, and in one case deceived residents by falsely stating "someone is dying upstairs." FAC ¶¶ 85, 91, 328.

In sum, the FAC alleges, in significant factual detail, that the *modus operandi* of the raids, as encouraged and mandated by the ICE Officials' policies and directives, made regular constitutional violations inevitable. *See*, *e.g.*, FAC ¶¶ 2-9. ICE's habitual practice of conducting raids under the circumstances described in the FAC resulted in violations of Plaintiffs' constitutional rights. Even post-*Iqbal*, such involvement is sufficient to hold the ICE Officials

liable. *See, e.g., Stevens v. New York*, No. 09 Civ. 5237 (CM), 2009 WL 4277234, at *7 (S.D.N.Y. Nov. 23, 2009) (post-*Iqbal* decision holding that "[s]upervisors can be sued individually … if they promulgated unconstitutional policies or plans under which action occurred, or otherwise authorized or approved challenged misconduct"); *Felix-Torres,* 2009 WL 3526644, at *12 (denying supervisor summary judgment where "the record contain[ed] ... evidence from which a rational fact finder could conclude that a reasonable supervisor would have been put on notice that there was a high risk that Plaintiff's constitutional rights would be violated"); *Sadler,* 2009 WL 3013716, at *7 (denying motion to dismiss where "[p]laintiff asserts facts and attaches exhibits to his amended complaint demonstrating that [supervisor] was aware of plaintiff's [condition] through grievances and letters"); *see also al-Kidd*, 580 F.3d at 969 ("alleg[ations] that . . . arrest[] [was made] . . . pursuant to a general policy, designed and implemented by Ashcroft" was sufficient under *Iqbal*); *Padilla*, 633 F. Supp. 2d at 1033 ("Like any other government official, government lawyers are responsible for the foreseeable consequences of their conduct.").

In addition to their implicit endorsement of patterns and practices of known Fourth Amendment violations, Chertoff, Meyers and Torres can and should be held liable for their personal involvement in creating and approving the impossible goal of 1000 arrests, particularly given the fact that they were put on notice of the unconstitutional effects of that policy. That policy compelled, or at least encouraged, agents to behave in an unconstitutional manner, particularly in the absence of corrective training. FAC ¶¶ 8, 9. *Cf. Argueta v. United States Immigration and Customs Enforcement*, No. 2:08cv01652, 2010 WL 398839 at *4, *10 (D.N.J. Jan. 27, 2010) ("Plaintiffs allege that [defendants] . . . 'approved a remarkable 800% increase in the arrest quota of each team in the corresponding period of time without providing the necessary

training to prevent ICE agents ... from acting abusively and unlawfully.' . . . Accepting as true the allegations set forth in the Second Amended Complaint, the Court finds the allegations sufficient at this stage 'to state a claim to relief that is plausible on its face.' Plaintiffs have alleged sufficient facts demonstrating that the Individual Federal Defendants 'set in motion a series of events' that resulted in the deprivation of Plaintiffs' Fourth Amendment rights.") (internal citations omitted); *Spell v. McDaniel*, 591 F. Supp. 1090, 1109 (E.D.N.C. 1984) ("Plaintiff also alleges the City encouraged misconduct by rewarding and commending abusive and assaultive behavior, by use of an arrest quota system. . . . On the basis of these allegations, this court finds that the City of Fayetteville is not being sued on the basis of *respondeat superior*.").

B. ICE Officials Are Also Liable Under the Other *Colon* Factors

Apart from their liability under the third *Colon* factor for their implementation and perpetuation of the policies that led to the constitutional violations, the ICE Officials are also liable under the other *Colon* factors for their knowledge and acquiescence to the illegal activities, gross negligence in supervision, and deliberate indifference to Plaintiffs' rights.

The ICE Officials can and should be held liable for their inadequate responses to countless complaints. *See Amnesty Am.*, 361 F.3d at 128 ("[P]laintiffs' evidence must establish only that a policymaking official had notice of a potentially serious problem of unconstitutional conduct, such that the need for corrective action or supervision was "obvious," and the policymaker's failure to investigate or rectify the situation evidences deliberate indifference, rather than mere negligence or bureaucratic inaction."); *Kellogg*, 2009 WL 2058560, at *6 (a supervisor can be liable when "notified of sexual harassment, abuse and retaliation against Plaintiff and failed to stop or remedy these violations."); *cf. Joseph*, 2009 WL 3321011, at * 16 (even under a broad reading of *Iqbal*, "response [to plaintiff's letter] … is action on [supervisor

defendant's] part"); *Walker v. Pataro*, No. 99 Civ. 4607 (GBD) (AJP), 2002 WL 664040, at *14 (S.D.N.Y. Apr. 23, 2002) (denying summary judgment on the issue of a superintendent's personal involvement because responses to grievances "which attempt to defend or explain constitutional violations" are sufficient to sustain a claim of personal involvement).

The ICE Officials had numerous warnings of the ongoing pattern of unconstitutional practices from credible sources, including United States Senators and Representatives, local law enforcement agencies and officials who had first hand knowledge of the operations, and factual accounts contained in widely circulated high-profile newspapers such as the *New York Times*, *The Washington Post* and *U.S. News and World Reports*. FAC ¶¶ 10-12, 15-21, 75(a)-(d), 81, 426-38. In response, the ICE Officials did nothing to modify the habitual ICE violations. They instead offered uniform, unqualified and recklessly unsupported defenses of such conduct. Similar behavior has been held to support liability, even in the wake of *Iqbal*. *See T.E. v. Grindle*, 599 F.3d 583, 589 (7th Cir. 2010) (summary judgment properly denied where plaintiffs "offered evidence … that [the supervisor] knew about [the] abuse of the girls and deliberately helped cover it up by misleading the girls' parents, the superintendent, and other administrators."); *Stevens*, 2009 WL 4277234, at *8 (denying motion to dismiss where plaintiff alleged that the defendant failed to act; reasoning in part that it was "reasonable to infer that [the defendant] had some sort of authority to correct or alter the actions taken against [Plaintiff]")[18]; *see also Vann v. City of New York*, 72 F.3d 1040, 1049 (2d Cir. 1995) ("[D]eliberate indifference may be inferred if the complaints are followed by no meaningful attempt on the part of the municipality to investigate").

[18] The court reached this conclusion despite the fact that the plaintiff "d[id] not outline in his Complaint exactly what it is the Inspector General does at OSC – that is, [he] d[id] not state what action he believes the Inspector General should have taken in accordance with his role." *Id.*

Indeed, this is particularly true where, as here, supervisors knew or should have known that by virtue of their position and the number of complaints, continued violations would occur absent their supervision. *See Jean-Laurent v. Wilkinson*, 540 F. Supp. 2d 501, 512 (S.D.N.Y. 2008) (denying summary judgment on a failure to supervise claim where supervisor "knew or should have known there was a probability that [circumstances] would result in a violation of [plaintiff's] constitutional rights"); *Beatty v. Davidson*, No. 06-CV-571S, 2010 WL 1407311, at *10 (W.D.N.Y. March 31, 2010).

In sum, the ICE Officials enacted policies and procedures that inherently led to the deprivation of Plaintiffs' constitutional rights and failed to respond adequately to numerous credible, high profile complaints, Plaintiffs have stated a claim for supervisory liability against them under the balance of the *Colon* factors.

C. The District of New Jersey Upheld Similar Claims Against Similar Defendants

Just over three months ago, the United States District Court for the District of New Jersey declined to dismiss a remarkably similar Fourth Amendment complaint against Myers and Torres. *Argueta*, 2010 WL 398839, at *6-7.[19] In *Argueta*, as here, plaintiffs alleged that Myers and Torres, among others, could and should be held liable for plaintiffs' injuries on account of their (1) role in planning and implementing Operation Return to Sender, the nationwide operation pursuant to which plaintiffs' homes were raided, (2) implementation and oversight of the 800% arrest quota increase, and (3) defense of and failure to respond adequately to repeated and widespread allegations of unconstitutional conduct by ICE agents in the field. *Id.* at *7.

[19] In Argueta, the court dismissed one plaintiff's Equal Protection claim based on the plaintiff's concession that Iqbal precluded it. Plaintiffs here disagree with that position. *See infra* Argument § IV.

In response to Myers's and Torres's arguments that *Iqbal* foreclosed the imposition of liability on them, the court handily distinguished *Iqbal*, noting the numerous manifest differences in both the context and substance of the allegations:

> [U]nlike in *Iqbal*, the [defendants] were not urgently reacting in the immediate aftermath of a terrorist attack. The alleged acts being challenged occurred pursuant to more aggressive immigration policies undertaken over a two year period. The [defendants] in this suit are alleged to have directly initiated the unconstitutional home raid practices at issue. The complaint sets forth numerous allegations about the searches, and *there is no doubt that Myers and Torres had sufficient knowledge of how the searches were being conducted*. Myers and Torres worked on these issues everyday. As noted above, this is far different than what was alleged against Ashcroft and Mueller, where there were few, if any, concrete facts alleged…. *In this case, Torres and Myers wrote the policy, implemented it, and monitored its progress*.

Id. at *8 (emphasis added). The above reasoning applies equally to Chertoff and Forman in this case. Chertoff was the direct recipient of high-level complaints about the Operations, including concerns expressed by U.S. Senators and House Representatives, and his response was simply to whitewash the ICE Operations without directing any remedial action. FAC ¶¶ 75-76. Similarly, Forman was directly involved in the planning for Operation Community Shield, and had notice of many of the public complaints regarding ICE's pattern and practice of unconstitutional conduct and "worked on these issues everyday." FAC ¶¶ 89-92.

Given the parallels between this case and *Argueta*, which involves a similar nationwide ICE operation, nearly identical fact patterns, and substantively analogous complaint allegations, denial of Plaintiffs' motion would mark a noticeable divergence from a sister court's holding and application of *Iqbal*. Defendants concede as much. *See* Defs' Br. at 18 n.5. Indeed, rather than attempting to distinguish the cases, Defendants argue that the holding in *Argueta* was simply wrong.

Defendants' arguments that *Argueta* is not a well-supported or well-reasoned opinion should be rejected. First, it is not the *Argueta* court but Defendants who misunderstand the import and effect of *Iqbal*. Because Fourth Amendment claims, unlike the specific claims at issue in *Iqbal*, do not require a showing of intent, courts have repeatedly held that a supervisor's knowledge and acquiescence of unconstitutional conduct remains a sufficient basis on which to hold that supervisor liable for Fourth Amendment violations post-*Iqbal*. *See supra* Argument § III.B.

Second, contrary to Defendants' suggestion, the *Argueta* court did not improperly limit the applicability of *Iqbal* to apply only to claims against the highest-level officials and to cases involving governmental disaster response. While the *Argueta* court did note that these two facts distinguished *Iqbal* from the case before it, the court immediately proceeded to analyze the plaintiffs' complaint precisely as prescribed by *Iqbal*. Namely, the court properly analyzed plaintiffs' particularized allegations of involvement by the Defendants. Indeed, the *Argueta* court carefully examined the extent and nature of Myers's and Torres's involvement in the constitutional violations alleged in Plaintiffs' complaint. *Id*. at *7-8. Just as the court should do here, the *Argueta* court properly concluded after that examination that plaintiffs had adequately alleged that the defendants could be held personally responsible for plaintiffs' injuries. In sum, the ICE Officials have offered no reason to depart from the findings and reasoning of *Argueta*, and the result in this case should be the same as the result in that one.

IV. Plaintiffs' Allegations Are Sufficient to State Violations of the Fifth Amendment by the ICE Officials

As explained above, neither the language nor the spirit of *Iqbal* undermines settled law that a supervisor is liable both for instituting a discriminatory policy and for failing to discharge

his or her duties. Here, the facts alleged support an inference that ICE Officials intentionally instituted and maintained policies that targeted individuals based on racial classifications.

A. ICE Officials Implemented Operations and Policies that Created a Pattern and Practice of Racial Profiling

The Equal Protection Clause of the United States Constitution prohibits racial discrimination by government officials. Indeed, the touchstone of equal protection is that the government may not subject persons to unequal treatment based on race. *Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999).[20] Thus, the express classification of individuals by race, "regardless of purported motivation, *is presumptively invalid*" and plaintiffs need not demonstrate a discriminatory intent. *Shaw v. Reno,* 509 U.S. 630, 642-644 (1993) (emphasis added and citation omitted).

This principle of presumptive invalidity "applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination." *Id.; Donahue v. Hillman*, No. 98-5522, 2004 WL 5049451 (Mass. Super. Sep 03, 2004) ("[A] classification that appears neutral on its face but is an obvious pretext for racial discrimination will also require strict scrutiny.") (citations omitted). Broad allegations of racial profiling sufficiently allege the existence of an express racial classification. *See Nat'l Cong. for Puerto Rican Rights by Perez v. City of New York*, 191 F.R.D. 52, 54 (S.D.N.Y. 1999); *see also Martinez v. Village of Mt. Prospect*, 92 F. Supp. 2d 780, 784 (N.D. Ill. 2000) (citing racial profiling cases). Considering the braid and pervasive racial profiling, Plaintiffs therefore need not show an intent to discriminate.

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[20] That this case involves allegedly consensual interactions is immaterial. *United States v. Avery*, 137 F.3d 343, 352-53 (6th Cir. 1997) (holding that "a general practice or pattern that primarily targeted minorities for consensual interviews," is sufficient to demonstrate a violation of the Equal Protection clause) (internal citations omitted).

Plaintiffs allege that ICE – using the pretext of searching for targets – in fact racially profiled *Latino* homes and other locations in search of non-targets. A plethora of allegations in the FAC support the conclusion that ICE engaged in a pattern and practice of racial profiling during the Operations at issue here:

- The Operations disparately impacted Latinos: even controlling for the percentage of Latino targets, ICE arrested a disproportionate number of Latinos. *See* FAC ¶¶ 9, 10; FAC Exh. 2 at 12.

- As stated by local law enforcement officers, ICE selected the target locations for Operation Community Shield non-residential raids based on the presence of Latinos, not the presence of purported targets of the raid (namely, alleged gang members). FAC ¶¶ 10, 12, 459.

- The Operations were marred by allegations of racial profiling, internally by ICE agents themselves, by police officers involved with the raids, and externally in media reports. FAC ¶¶ 12, 75, 426, 434, 437, 438. Local law enforcement testified that the ICE agents called the Latinos they encountered "wetbacks." FAC ¶ 12.

- When ICE encountered homes where Latinos opened the door, agents routinely and across jurisdictions used force or trickery to enter the home, searched the home, corralled everyone present into a central location, and interrogated each individual present at the home, even where the residents clearly were not the targets of the operation, simply because they were there. Conversely, when ICE encountered homes where non-Latinos opened the doors, agents expressed surprise at finding a non-Latino person, explained that they had the wrong house and walked away without further inquiry or interaction with the individuals at the home. *See* FAC ¶¶ 10, 434; FAC Exh. 23.

- Once ICE was in the homes, ICE immediately subjected Latinos to identity checks based simply on occupants' accents, "ethnic appearance or limited English proficiency." *See* FAC Exh. 2 at 12.

That such racial profiling occurred here is unsurprising and is directly attributable to the ICE Officials. Due to manifestly bad intelligence and preparation, ICE Officials knew a "target home" was not in fact very likely to actually have a target. *See* FAC Exh. 16. Moreover, the FAC includes detailed allegations that the ICE Officials adopted quotas that could be met only through the use of racial profiling. FAC ¶¶ 8-10, 74, 80, 84. Simply put, absent an underlying

assumption of racial profiling, the SBI initiatives and corresponding Operations would not make sense. As alleged in the FAC, often only a small percentage of the actual "targets" of the raids were actually apprehended. FAC ¶¶ 3, 8, FAC Exh. 2 at 11, 15. Rather, the vast majority of individuals arrested were, like the Plaintiffs here, Latino and non-targets. *See also* FAC Exh. 5 (4 of 31 arrestees were targets). According to the *Constitution on ICE*, a study of raids in Long Island (including raids which are part of the subject of this litigation) revealed that ICE arrested only 6 of 96 targets. FAC Exh. 2 at 15. Likewise, in the New Haven raids, only 4 of 16 targets were arrested. FAC Exh. 2 at 15. But for the use of racial profiling, which generated numerous collateral arrests, the operations instituted, continued, and lauded by the ICE Officials, would have made almost no arrests at all. Indeed, ICE failed utterly in achieving its stated goal of apprehending specified targets.

Considering the alleged facts as a whole, Plaintiffs have plausibly alleged that ICE agents discriminated against Latinos based on their race and that ICE Officials established and endorsed such conduct.

B. ICE Officials Intended to Discriminate Against Latinos

Lest there be any doubt that the ICE Officials acted with discriminatory intent, the FAC contains specific allegations in that regard. As "discriminatory intent is rarely susceptible to direct proof, litigants may make a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Hayden v. Paterson*, 594 F.3d 150, 163 (2d Cir. 2010) (internal quotation omitted). A plaintiff may show discriminatory intent indirectly in several ways, including by showing disparate impact on a racial group, *id.*, or by showing that factors usually considered important by the decision maker strongly favor a decision contrary to the one reached, *see Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 267

(1977). As just illustrated, these operations clearly had a disparate impact on Latinos, and would not have made sense but for an assumption of racial profiling.

Additionally, the FAC alleges that the ICE Officials affirmatively participated in the decisions not to investigate the complaints of widespread abuse. *See supra* Statement of Facts § III. Such allegations have just been held by the Seventh Circuit to be sufficient to overcome a supervisor's motion for summary judgment, and *a fortiori* are sufficient to state a claim. In *Grindle*, 2010 WL 938047, at *4, the court held that a motion for summary judgment was properly denied as plaintiffs "offered evidence … that [the supervisor] knew about [the] abuse of the girls and deliberately helped cover it up by misleading the girls' parents, the superintendent, and other administrators." The court explained that "[f]rom this evidence, a jury could reasonably infer – though it would not be required to infer – that [the supervisor] also had a purpose of discriminating against the girls based on their gender." *Id.* *See also Massenburg v. Adams*, No. 3:08CV106, 2010 WL 1279087, at *3 (E.D. Va. Mar. 31 2010) (denying motion to dismiss where officials "had the authority and responsibility to intervene and remedy the alleged violation … yet they stood indifferent"); *Valenti v. Massapequa Union Free School Dist.*, No. 09-CV-977 (JFB)(MLO), 2010 WL 475203, at *8 (E.D.N.Y. Feb. 5, 2010) (motion to dismiss gender discrimination suit denied where plaintiff alleged that supervisor was "directly involved in the … decision not to institute investigative and/or disciplinary proceedings … procedures regularly enforced when a female instructor was the subject of such accusations-and that [supervisor] participated in this decision out of gender-based animus").

Furthermore, the blatant inconsistency between ICE's purported goal – the apprehension of specific targets – and ICE's strikingly consistent actual practices on the ground show that the ICE Officials, who personally touted that the purpose of the operations was to seek targets, were

using pretexts. Use of pretexts further supports an inference of discriminatory intent. *See Doe v. Mamaroneck*, 462 F. Supp. 2d 520, 553 (S.D.N.Y. 2006) ("evidence of pretext" can support claim of discriminatory intent by law enforcement officials); *United States v. Andrews* , 05-CR-139, 2005 WL 475403, at *7 (D. Neb. Nov. 1, 2005); *St. Mary's Honor Ctr. v Hicks* , 509 U.S. 502, 511 (1993) ("rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination") (emphasis in original).

Finally, a supervisor's failure to train agents in non-discriminatory methods of identifying individuals amenable to further questioning can support an allegation of intentional discrimination. *Farm Labor Organizing Comm. v. The Ohio State Highway Patrol* , 95 F. Supp. 2d 723, 740-41 (N.D. Ohio 2000) (holding that claims should go to the jury where supervisor "did practically nothing to train [officers] in how to identify illegal immigrants in a race-neutral manner" while "direct[ing] [subordinates] to enforce federal immigration laws more aggressively").[21] Here, even in the face of internal allegations of racial profiling, the ICE Officials failed to provide adequate training to its agents with respect to how and when to question individuals regarding alienage. FAC ¶¶ 12-13.

In sum, this complaint offers far more than the threadbare recitals at issue in *Iqbal*. Plaintiffs allege that these Operations – purportedly designed to apprehend the targets – were in fact a means of corralling Latinos and investigating their status. It is the alternate explanation – that the Operations were appropriate and consensual – that is implausible, particularly given the decisions of several courts to the contrary. The FAC's allegations that the ICE Officials

[21] Additionally, courts consider "[t]he historical background of the decision... particularly if it reveals a series of official actions taken for invidious purposes." *Hayden v. Paterson*, 594 F.3d at 163 (citation omitted). The immigration authorities have a history of discrimination against Latinos, including "Operation Wetback": "It is well known that prejudice against … the Mexicans … emerged as these groups emigrated in substantial numbers; it persisted long after their arrival. *See, e.g.,* … J.R. Garcia, Operation Wetback: The Mass Deportation of Mexican Undocumented Workers in 1954 (1980)." *Mojica v. Reno*, 970 F. Supp. 130, 145 (E.D.N.Y. 1997).

endorsed the use of patently out–of-date and unreliable intelligence, imposed impossible quotas that the supervisors themselves understood could not be attained without including collaterals, and whitewashed governmental inquiries supply more than enough factual context to make Plaintiffs' allegations of intentional discrimination plausible. Thus, the FAC meets Plaintiffs' burden of offering independent factual support for their assertions of discriminatory bias. *Kregler v. City of New York*, No. 09-3840-cv, 2010 WL 1740806, at *1 (2nd Cir. May 3, 2010) (summary order) (reversing district court's dismissal because allegation that defendants "induced contacts … to prevent his appointment as a City Marshal … [wa]s neither a legal conclusion nor assert[ed] a claim that [wa]s implausible on its face" and thus pled sufficient facts under *Iqbal*). *Rouse*, 2010 WL 325569, at *4 ("Unlike what the plaintiff pled in *Iqbal*, Rouse has not merely parroted the legal elements of the claim in his complaint. He has made a factual allegation that provides independent corroboration of his belief that LTC Partners denied his coverage on the basis of his disability, and that allegation is entitled to a presumption of truth.").

CONCLUSION

The allegations in the FAC show that ICE Officials approved, by their own affirmative actions and refusals to act, a pattern of behavior that led to violations of Plaintiffs' Fourth and Fifth Amendment rights. This Court should therefore deny the ICE Officials' motion.

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