Docket No. 10-1479

UNITED STATES COURT OF APPEALS

FOR THE

THIRD CIRCUIT

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

Plaintiffs-Appellees,

- v. -

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

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

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY (NO. 2:08-CV-1652 (PGS))

BRIEF FOR PLAINTIFFS-APPELLEES

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Plaintiffs-Appellees agree that this Court has appellate jurisdiction over the district court's denial of Defendants-Appellants' motions to dismiss on qualified immunity grounds pursuant to 28 U.S.C. § 1291 and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). They disagree that this Court has jurisdiction over the district court's interlocutory denial of Defendants' motions to dismiss on personal jurisdiction grounds.

COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether Plaintiffs sufficiently pled that Defendants had personal involvement in the alleged constitutional violations so as to overcome their assertion of qualified immunity.

2. Whether the narrow boundaries of pendent appellate jurisdiction preclude this Court from reviewing the district court's assertion of personal jurisdiction over Defendants Julie L. Myers and John P. Torres.

3. If pendent appellate jurisdiction is found, whether the district court properly exercised personal jurisdiction over Defendants Myers and Torres based on allegations and evidence that they directed aggressive enforcement activities at New Jersey, resulting in a pattern and practice of unconstitutional home raids there.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Counsel for Plaintiffs are aware of no related cases or proceedings.

STATEMENT OF THE CASE

Plaintiffs brought this action against federal and local law enforcement officials, pursuant to *Bivens v. Six Unkown Agents Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and 42 U.S.C. § 1983. Plaintiffs challenge a statewide

pattern and practice by Immigration and Customs Enforcement ("ICE") of conducting warrantless, nonconsensual raids on immigrants' homes that violated Plaintiffs' clearly established Fourth Amendment rights. That pattern and practice was a predictable consequence of policy decisions undertaken by Defendants Myers and Torres, and implemented by Defendants Bartolome Rodriguez and Scott Weber, pursuant to ICE's "Operation Return to Sender." Defendants Myers and Torres increased, by 800% in one year, the arrest quota for ICE's Fugitive Operations Teams ("FOTs"), which were charged with apprehending any and all aliens they suspected might be unlawfully present. Yet Defendants took no corresponding action to ensure that this aggressive enforcement, representing a departure in scope and purpose from prior practice, would be pursued within constitutional constraints. Across New Jersey and the country, FOTs engaged in widespread, systematic abuses of individuals' constitutional rights, regularly punctuated by violence, intimidation, and other conscience-shocking behavior. Despite being put repeatedly on notice of this pattern of unconstitutional behavior, Defendants not only failed to change course or rectify their subordinates' repetitive misconduct, they in fact implicitly encouraged the violations by touting the success of their program.

On May 7, 2009, the district court denied Defendants' motion to dismiss Plaintiffs' First Amended Complaint, brought on various grounds, and rejected Defendants' claim to qualified immunity and Myers and Torres' claim that the court lacked personal jurisdiction over them. *See Argueta* I, JA-1-45. After Plaintiffs filed their Second Amended Complaint, Defendants moved to dismiss again; this Motion argued that the intervening decision in *Iqbal* entitled Defendants to qualified immunity and urged the same grounds for dismissal as before, including a lack of personal jurisdiction. On January 27, 2010, the district court denied Defendants' Motion. *Argueta II*, JA-46-64A.

Defendants timely appealed the district court's January 27, 2010, denial of qualified immunity, which is properly before this Court; they also appealed the finding of personal jurisdiction over them, which is not properly before this Court. JA-65.

STATEMENT OF FACTS

A. ICE's Fugitive Operations Program

Defendant Myers was at all relevant times the Assistant Secretary for Homeland Security for Immigration and Customs Enforcement, located in Washington, D.C., where she bore responsibility for the administration of the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq*. (1952). JA-534 (Second Am. Compl. ("SAC") ¶19). Defendant Torres was at all relevant times Deputy Assistant Secretary of Operations for ICE and the Director (or Acting Director) of ICE's Office of Detention and Removal Operations ("DRO"), which coordinates the removal of individuals not legally permitted to remain in the country. JA-534-35 (SAC ¶20). Defendant Weber succeeded Defendant Rodriguez (who served from approximately February-May 2007) as the Director of the DRO Field Office in New Jersey. JA-535 (SAC ¶¶21-22).

The Office of Detention and Removal Operations is charged with implementing ICE's National Fugitive Operations Program, which seeks to locate and commence removal proceedings against so-called alien "fugitives," defined by ICE as someone with an outstanding order of removal. JA-537 (SAC ¶28). ICE implements this program through seven-person Fugitive Operations Teams, which are tasked with locating and apprehending such "fugitives." *Id*.

B. Dramatically Increased Warrantless Home Raids Under "Operation Return to Sender"

In 2006, ICE initiated "Operation Return to Sender," which sought to dramatically increase alien apprehensions and removals. JA-537-38 (SAC ¶¶31-32). Specifically, Myers and Torres made a number of policy decisions that escalated and transformed enforcement operations without implementing any corresponding controls to ensure they were taken within constitutional limits, even after learning that their decisions were causing widespread abuses. JA-561-63 (SAC ¶¶144-48). They increased the number of FOTs five-fold, from fifteen in 2005 to seventy-five in 2007; the number in New Jersey doubled from two to four. JA-537 (SAC ¶29). In a January 31, 2006, memorandum to all DRO Field Offices, including to the Newark, New Jersey Field Office ("January 2006 Torres Memo"), Torres ordered each FOT in the country to increase its quota of fugitive apprehensions from 125 to 1000 per year. JA-538 (SAC ¶30); JA-499. Thus, without increasing their size, each seven-member FOT was expected in one year to increase its rate of apprehension by a staggering 800%. *Id.* The January 2006 Torres Memo also superseded a pre-existing requirement that 75% of apprehended fugitives be criminals; thus, as of January 2006, apprehension of any "fugitive" – a person with an outstanding deportation order – would count toward the drastically increased quota. JA-499.

On September 29, 2006, Torres issued another memorandum ("September 2006 Torres Memo"), instructing the Director of the Newark Field Office (as well as other regional field office directors) that they would be permitted to count "collateral apprehensions" – *i.e.* "non-fugitive" apprehensions of persons without outstanding deportation orders encountered by chance during an FOT operation – toward the 1000-apprehension quota for each FOT. JA-501-02. Torres instructed further that such "collateral" apprehensions would have to be approved by DRO

headquarters in Washington, D.C., and that the Newark Field Office must record arrest statistics so DRO headquarters could issue a weekly report on Fugitive Operations activities. JA-502-03.[1]

Despite representations by Myers to Congress in 2007 that ICE needed additional funding in order to remove "primarily criminal aliens," JA-542 (SAC ¶43), the search for "criminal aliens" or "fugitives" operated in New Jersey, as elsewhere, largely as a pretext for sweeping up large numbers of immigrants – including U.S. citizens and lawful permanent residents, such as a number of the Plaintiffs. JA-542 (SAC ¶¶43-44).[2] As revealed by a data set of 600 arrest records from raids undertaken in New Jersey between February 22, 2006, and December 7, 2007, which were produced in connection with a Freedom of Information Act

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[1] The January and September 2006 Torres Memos were originally submitted for the Court's consideration after the filing of the First Amended Complaint. *See* JA-487. The Memos were properly before the District Court on a motion to dismiss because they are matters of public record. *See Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006) (on a motion to dismiss courts may rely on documents outside the pleadings if they (i) are incorporated by reference or integral to the claim, (ii) are items subject to judicial notice, or (iii) are matters of public record); *Anspach ex rel. Anspach v. City of Philadelphia, Dept. of Public Health*, 503 F.3d 256, 273 n.11 (3d Cir. 2007) ("Courts ruling on Rule 12(b)(6) motions may take judicial notice of public records.") (citation omitted); *see also Oran v. Stafford*, 226 F.3d 275, 289 (3d Cir. 2000) (SEC filings are public records for purposes of judicial notice on motion to dismiss); *In re Zyprexa Prods. Liab. Litig.*, 549 F. Supp. 2d 496, 501 (E.D.N.Y. 2008) (same as to documents issued by government agencies).

[2] Of the 2,079 persons arrested in New Jersey in FY 2007, 87% had no criminal history. JA-542 (SAC ¶43); *see also* Nina Bernstein, *Despite Vow, Target of Immigration Raids Shifted*, N.Y. TIMES, Feb. 4, 2009, at A1, *available at* http://www.nytimes.com/2009/02/04/us/04raids.html (under Operation Return to Sender, "nearly three-quarters of the 96,000 people [ICE] apprehended had no criminal convictions").

litigation brought by Seton Hall Law School,[3] only 37% of arrests by New Jersey FOTs involved the actual target of the home raid; the majority (63%), were "collateral" arrests of persons encountered by chance, and without outstanding deportation orders.[4] Nationwide, in the year after the Torres Memos were issued, collateral apprehensions rose to comprise 40% of all FOT arrests, while criminal arrests dropped to nine percent of all apprehensions.[5]

C. Widespread Pattern of Unconstitutional Home Raids

A widespread pattern and practice of unlawful home raids emerged in New Jersey, and nationwide, as a predictable consequence of the Defendants' decisions to dramatically escalate arrest quotas and to encourage FOTs' apprehension of "collaterals," without any precautions against foreseeable misconduct by agents previously accustomed to apprehending "criminal fugitive aliens." Even after Defendants had repeatedly been put on notice of the pattern of abuses, they initiated neither corrective actions nor modifications to ICE policy.[6] The Complaint recounts this pattern in detail, see JA-538-42 (SAC ¶¶33-42), and

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[3] See Stipulation of Partial Settlement and Revised Scheduling Order, *Seton Hall School of Law Center for Social Justice v. DHS*, No. 08 Civ. 0521 (D.N.J. Oct. 29, 2008), ECF No. 21.

[4] In a February 19, 2008, raid in Passaic, an FOT raided thirteen homes in search of only six persons, but returned with twelve arrestees. JA-543 (SAC ¶45); *see also* Peter Markowitz et al., *Constitution on ICE: A Report on Immigration Home Raid Operations*, at 11 (2009), *available at* http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC_ICE-Home-Raid-Report%20Updated.pdf.

[5] Bernstein, *supra* note 2.

[6] *See* Markowitz et al., *supra* note 4 (documenting nationwide pattern of warrantless, nonconsensual raids and abusive FOT conduct); Margaret Mendelson et al., *Collateral Damage: An Examination of ICE's Fugitive Operations Program* (2007), *available at* http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf (same).

reveals what the district court described as the "strikingly similar" way in which each Plaintiff's home raid followed the broader pattern. *Argueta* I, JA-3.

All of the Plaintiffs were pursued as "collateral apprehensions" and could not have been classified as "fugitives" let alone "criminal fugitives." JA-544-58 (SAC ¶¶49-139). In all cases, Plaintiffs were awoken from their sleep in early morning hours by loud banging on their door. *See, e.g.*, JA-544-45 (SAC ¶51) (Plaintiff Argueta awakened at 4:30 a.m. "by very loud banging on the door and windows of her building," which she thought would "break the windows and the door"); *see also* JA-553 (SAC ¶106), JA-555 (SAC ¶120). In most of the raids in this action, ICE agents announced themselves as "police" and in all cases entered without a judicial warrant, either by using deception or force the moment Plaintiffs opened the door. *See, e.g.*, JA-545 (SAC ¶56) (ICE Agents deceived Plaintiff Argueta into believing they needed access to her apartment in search of a criminal); JA-548 (SAC ¶74) (ICE Agents grabbed and pushed Plaintiff Chavez from outside his house through his front door and stated, "If you don't open the door, we're going to make things worse."); *see also* JA-551 (SAC ¶93) (forcing way into Plaintiff Flores' home after he opened door), JA-553 (SAC ¶109) (preventing Plaintiff Ontaneda from closing his door), JA-555 (SAC ¶121) (pushing open door and entering Plaintiff Covias' home). In each case, multiple ICE agents entered the home, searched each room, and roused all persons from their sleep in order to question them about their immigration status. *See e.g.*, JA-552 (SAC ¶97) (rousing Plaintiff Arias from bed); JA-558 (SAC ¶¶135-36) (forcing family members from bed).

In several cases, ICE Agents had guns drawn or pointed at persons in the home, and threatened, humiliated, or demeaned them. JA-549 (SAC ¶79) (pointing guns at mother and child during Chavez family raid); JA-547 (SAC ¶65) (mocking and laughing at Plaintiff Argueta and denying her request to speak to a lawyer);

JA-558 (SAC ¶¶ 137, 139) (yelling at Plaintiff Guzman to "shut up!" and threatening to have her children taken by the state). Others were unlawfully detained. *See* JA-546-47 (SAC ¶¶61-63) (jailing Plaintiff Argueta despite her easily verifiable Temporary Protected Status). Seven of the Plaintiffs were either U.S. citizens or lawful residents at the time of the raids on their homes; in none of the raids did the purported "target" reside in the home raided. *See* JA-544-58 (SAC ¶¶49-139).

D. Defendants' Knowledge of the Pattern of Unconstitutional Conduct

Defendants were repeatedly put on notice that a pattern of unlawful conduct by ICE officers had emerged in New Jersey (and throughout the nation) following the decision to octuple the fugitive and collateral arrest quota. First, as alleged in the Complaint, there were widespread media reports of the abuses in New Jersey and beyond. See JA-559-61 (SAC ¶143) (citing news reports detailing abuses in New Jersey raids and in other regions). Prior to this litigation, Myers and Torres were sued numerous times for their roles in promoting or tolerating nearly identical patterns of unconstitutional and abusive raids in various other jurisdictions. JA-561 (SAC ¶145) (citing, *e.g.*, *Aguilar v. ICE*, No. 07-cv-8224 (S.D.N.Y. Sep. 20, 2007) (suing Myers and Torres); *Flores-Morales v. George*, No. 07-cv-0050 (M.D. Tenn. July 5, 2007) (same); *Arias v. ICE*, No. 07-1959 (D. Minn. April 19, 2007) (same); *Mancha v. ICE*, No. 06-cv-2650 (N.D. Ga. Nov. 1, 2006) (same); *see also Barrera v. Boughton*, No. 07-cv-1436 (D. Conn. Sept. 26, 2007) (alleging identical practices but not suing Myers and Torres); *Reyes v. Alcantar*, No. 07-2271 (N.D. Cal. Apr. 26, 2007) (same)).

Moreover, in June 2007, both members of Congress and the National Immigration Forum lodged complaints directly with the Department of Homeland Security about widespread "misconduct" during the ICE home raids. JA-559

(SAC ¶141); JA-562 (SAC ¶146); JA-313. Responding to the National Immigration Forum complaint, Myers acknowledged that only five of the twenty-nine persons arrested were actually fugitives but argued that ICE "cannot turn a blind eye to illegal aliens once encountered." JA-314. She also conceded that ICE home raids occur without judicial warrants and therefore require knowing and voluntary consent from the resident, but she averred that ICE had ensured such consent by assigning a Spanish-speaking officer to each FOT. *Id*. Torres, too, was specifically warned about unconstitutional conduct by ICE officers under his supervision.[7]

The criticism, some of it directed specifically to Myers, continued in a hearing before the Subcommittee on Homeland Security in February 2008, causing ICE to acknowledge that U.S. citizens had been wrongfully detained and even deported. JA-543 (SAC ¶46). In addition, New Jersey Senator Robert Menendez stated that he met with Myers and DHS Secretary Chertoff to complain about the widespread constitutional violations occurring during raids in New Jersey and that, despite numerous lawsuits filed against them, they denied wrongdoing. JA-441. Even the United Nations publicly criticized ICE's "frequent disregard of due process" and forced home entries. JA-559 (SAC ¶142) (Report of U.N. Special Rapporteur on the Human Rights of Migrants).

In addition, in 2007, the DHS Office of Inspector General (OIG) issued a report that publicly criticized ICE for its incomplete and inaccurate record-keeping, understaffing, and incomplete training. JA-543-44 (SAC ¶47); JA-241.

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[7] The Mayor of New Haven called Torres in June 2007 to inform him of allegations that FOTs "barged into houses without warrants and verbally abused the people and children were manhandled." JA-562 (SAC ¶147). The Mayor specifically put the question to Torres of whether ICE should allow such home raids to continue with these allegations pending. *Id*.

Specifically, OIG noted that the DRO database, from which FOTs identified "fugitive" targets, was inaccurate approximately 50% of the time; criticized ICE for hiring in 2006 (presumably to meet staffing requirements for the increased number of FOTs) lower-level, less experienced officers to conduct fugitive operations; and expressed concerns about the incomplete training of these rookie officers. *Id.*

As the Complaint alleges, not only did Defendants fail to change Fugitive Operations policy or apprehension incentives, conduct meaningful investigations into the widespread unlawful practices, or provide specific guidelines or training to FOTs to ensure that home entries and searches were conducted within constitutional limits, JA-562-63 (SAC ¶¶148) (Myers and Torres); JA-564 (SAC ¶¶150-52) (Weber and Rodriguez), Defendants implicitly encouraged the continuation of such behavior by publicizing the "success" of the dramatically increased home raids, JA-563 (SAC ¶148) (citing Newark Field Office press releases dated May 1, 2007, April 2, 2007, March 1, 2007, Nov. 20, 2006, Oct. 19, 2006). Weber and Rodriguez also frequently commented to the media regarding allegations of misconduct by FOTs, effectively admitting to the asserted wrongdoing. See JA-563-64 (SAC ¶149) (Weber brushed off specific concerns about the patterns of unlawful searches in New Jersey by stating, "I don't see it as storming a home . . . . I see it as trying to locate someone.").

E. The District Court Decisions

On May 7, 2009, the district court denied Defendants' motion to dismiss the First Amended Complaint, except that it dismissed those Plaintiffs who wished to proceed anonymously. *See Argueta I*, JA-19. On the question of the court's personal jurisdiction over Myers and Torres, the district court concluded that they

"certainly had sufficient minimum contacts with New Jersey based upon their specific actions with reference to [Operation Return to Sender]." *Argueta I*, JA-37.

Evaluating Defendants' claim of qualified immunity, the court recognized that a plaintiff is precluded from basing liability on "the theory of *respondeat superior*," but must allege facts that show a defendant's "personal involvement in alleged wrongdoing," – a standard that can be satisfied by allegations of either "personal direction or knowledge and acquiescence." JA-39 (quoting *Evancho v. Fisher*, 432 F.3d 347, 353 (3d Cir. 2005)); *see also Argueta I*, JA-39-42 (articulating various ways to demonstrate knowledge and acquiescence in Third Circuit). Given the preliminary stage of the litigation, when discovery had not yet begun, the court held that "the complaint sufficiently asserts the claim." *Argueta I*, JA-42.

On June 8, 2009, Plaintiffs filed the Second Amended Complaint, which identified one of the previously pseudonymous Plaintiffs as Yesica Guzman, and removed several others who chose not to proceed if they would be publicly identified. JA-529. On June 18, 2009, Defendants filed a Motion to Dismiss the Second Amended Complaint. JA-583. This second motion sought dismissal on grounds identical to the First, except that the Defendants argued that the intervening decision in *Iqbal* eliminated the possibility of asserting supervisory liability on any substantive claim on the basis of "knowledge of acquiescence" and that, therefore, Plaintiffs' allegations against the Defendants were insufficient as a matter of law. *Id.*

In a decision dated January 27, 2010, the district court denied the motion. *Argueta II*, JA-46. The court took special care in addressing – and rejecting – Defendants' characterization of *Iqbal* as eliminating any and all forms of supervisory liability. Acknowledging that a *Bivens* claim for supervisory liability will "vary with the constitutional provision at issue," *Argueta II*, JA-55

(quoting *Iqbal*, 128 S. Ct. at 1941), the district court held that a supervisor's liability can still rest on knowledge and acquiescence where, as here, discriminatory purpose is not necessary to state the claim asserted, *Argueta II*, JA-59-61; *see also Argueta I*, JA-40-43.[8] Thus, the Court concluded that the allegations in the Second Amended Complaint, like the identical allegations in the First Amended Complaint, "plausibly" stated a claim for violation of Plaintiffs' clearly established Fourth Amendment rights. *Argueta II*, JA-59-61.

SUMMARY OF ARGUMENT

The only issue properly before this Court is whether Defendants are entitled to qualified immunity. In arguing that the Complaint fails sufficiently to plead Defendants' personal involvement in the violation of Plaintiffs' clearly established Fourth Amendment rights, Defendants place far more weight upon *Iqbal* than it can bear. First, contrary to Defendants' characterization, *Iqbal* did not eliminate the possibility of liability based on a supervisor's knowledge of, and acquiescence in, a subordinate's unconstitutional conduct. Defs.' Br. 24. Applying longstanding principles, *Iqbal* recognized that a supervisor's liability must be based on allegations of his or her own misconduct, which could include the supervisor's "own neglect in not properly superintending the discharge of his subordinates' duties." *Iqbal*, 129 S. Ct. at 1948 (internal citations and quotations omitted). The *Iqbal* court stressed that pleading such liability "will vary with the constitutional provision at issue." *Id.* To support his claim of racial or religious discrimination against high-level officials in *Iqbal*, the plaintiff would have had to allege that these officials themselves acted with the requisite discriminatory intent because

[8] The district court did dismiss Plaintiff Ontaneda's Fifth Amendment equal protection claim, which Plaintiffs conceded could not proceed, post-*Iqbal*, based on a knowledge and acquiescence theory. *Argueta II*, JA-58 n. 7.

"mere knowledge" of someone else's unlawful conduct is insufficient to state an equal protection claim. *Id.* at 1949. In contrast, for claims that do not demand a showing of purposeful discrimination – such as the Fourth Amendment claims asserted here – governing Third Circuit law has not changed: a supervisor's personal involvement, and thus liability, may still be premised on his or her "knowledge and acquiescence" in a pattern of unlawful conduct by subordinates, *see Baker v. Monroe Twp.*, 50 F.3d 1186, 1190-91 (3d Cir. 1995), or upon the supervisor's promulgation or maintenance of a policy that produces a "unreasonable risk" of constitutional violations, *see Sample v. Diecks*, 885 F.2d 1099, 1118 (3d Cir. 1989). Numerous post-*Iqbal* cases confirm this basic proposition.

Second, Plaintiffs plead sufficient facts to "state a plausible claim" for relief against the Defendants and thus meet the pleading requirements of Federal Rule of Civil Procedure 8(a). Unlike *Iqbal*, who offered mere "formulaic recitation[s] of the elements of a constitutional discrimination claim" that were thus not entitled to a presumption of truth, *Iqbal*, 129 S. Ct. at 1951 (internal citation and quotations omitted), Plaintiffs here provide specific, concrete factual allegations sufficient to support a "reasonable inference" that the Defendants were personally involved in the violations pled. Specifically, Plaintiffs plead that Defendants promulgated a policy that posed an unreasonable risk of constitutional harm and then acquiesced in a known pattern of constitutional violations by their subordinates. Plaintiffs therefore push their claims far "across the line from conceivable to plausible." *Id.* (internal citation and quotations omitted). Moreover, contrary to Defendants' suggestion, *Iqbal* did not overturn the basic operating system of the Federal Rules of Civil Procedure: *Iqbal* did not usher in a novel regime of heightened pleading under Rule 8(a) requiring particularized allegations; nor does *Iqbal* permit a court to disregard, at the pleading stage, allegations supporting a reasonable inference of

misconduct simply because there exists a competing, plausibly innocent explanation for a defendant's conduct. *See Fowler v. UMPC Shadyside*, 578 F.3d 203, 211-12 (3d Cir. 2009).

This Court does not have jurisdiction to review the district court's finding of personal jurisdiction over Myers and Torres. The Defendants effectively concede this ruling was interlocutory and not immediately appealable under either 28 U.S.C. § 1292 or the limited collateral order doctrine. They maintain instead that this Court can exercise jurisdiction over the personal jurisdiction issue, pendent to the properly appealable qualified immunity ruling, because there is "considerable overlap" between the two. Defs.' Br. 2-3. Analytic or factual overlap, however, is insufficient to overcome the heavy presumption against judicial expansions of the congressionally mandated final judgment rule. Pendent jurisdiction is only appropriate where the two issues are "inextricably intertwined" – *i.e.*, where the issues are "identical" or where deciding the non-appealable issue is logically necessary to resolve the properly appealable issue. *E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F. 3d 187, 203 (3d Cir. 2001). Because this Court can resolve the qualified immunity question without deciding the personal jurisdiction question, the latter is not subject to appellate review.

Even if this Court were to reach out to decide the personal jurisdiction issue, however, the district court had ample basis for exercising jurisdiction over Myers and Torres. Plaintiffs make numerous allegations demonstrating that Myers and Torres purposefully directed their law enforcement activities toward New Jersey, and continued to implement and monitor them there over a period of years. Accordingly, personal jurisdiction is based on far more than the creation of a nationwide policy or a mere failure to act. And, finally, jurisdictional discovery – not dismissal – is the appropriate course if this Court determines that Plaintiffs'

complaint, as currently pled, does not contain sufficient allegations to establish personal jurisdiction.

For these reasons, and others set forth more fully below, the district court's decision should be affirmed.

ARGUMENT

I DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE COMPLAINT PLAUSIBLY STATES A CLAIM THAT THEIR OWN CONDUCT VIOLATED PLAINTIFFS' CLEARLY ESTABLISHED FOURTH AMENDMENT RIGHTS.

Defendants read *Iqbal* to foreclose the possibility of supervisory liability in any context by claiming that "a supervisor's knowledge of, and acquiescence in, a subordinate's wrongful conduct is not sufficient to hold a supervisor liable in a *Bivens* action." Defs.' Br. 24; *see also id.* at 17.[9] The Defendants insist that, in order to defeat qualified immunity, Plaintiffs must allege that the Defendants themselves "searched or seized . . . the plaintiffs or participated in or planned" the unconstitutional home raids of Plaintiffs' homes. *See id.* at 18. Under this extreme view, *Iqbal* worked a complete sea change in *Bivens* and Section 1983 and overruled, *sub silentio*, decades of precedent dating to *Monell v. Dep't. of Social Serv's.*, 436 U.S. 658 (1978). In fact, *Iqbal* did no such thing. *See Dodds v. Richardson*, 614 F.3d 1185 (10th Cir. 2010) (rejecting this categorical reading of

[9] As Defendants note, in *Bayer v. Monroe County Children and Youth Services*, 577 F.3d 186, 191 n. 5 (3d Cir. 2009), this Court considered, but did not decide, whether *Iqbal* might have categorically eliminated "knowledge and acquiescence" as a basis for supervisory liability. As described below, *Iqbal* cannot be read this broadly.

Iqbal); *Al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009) (same), *cert granted in part on other grounds*, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98).[10]

In addition, Defendants take issue with a handful of Plaintiffs' allegations on the grounds that they are insufficiently particularized and with a handful of others on the ground that they are not likely to be true. In so doing, Defendants seek to transform *Iqbal*'s "plausibility" pleading requirement into one that requires "heightened pleading" as well as an allegation of likelihood "akin to probability" – standards that are foreclosed by Rule 8 and *Iqbal* itself. Plaintiffs have stated a plausible claim for relief because the Complaint contains sufficient factual content to permit a "reasonable inference" that the Defendants set the unconstitutional conduct in motion and knew of and acquiesced in their subordinates' wrongdoing.

A. *Iqbal* Did Not Alter the Longstanding Rule That Imposes Liability on Supervisors for Their Knowledge of and Acquiescence in the Unconstitutional Conduct of Subordinates in the Fourth Amendment Context.

Contrary to the Defendants' characterization, *Iqbal* says little of consequence to cases – like this one – that allege misconduct that does not require proof of discriminatory intent. First, *Iqbal* reiterated the longstanding principle that there can be no Bivens or Section 1983 liability based on a theory of *respondeat superior* or vicarious liability – a form of liability-without-fault based exclusively on supervisory position. *See Iqbal*, 129 S. Ct. at 1948. This has been the law for decades, *see, e.g.*, *Monell*, 436 U.S. at 691; *Evancho*, 423 F.3d at 353,

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[10] The Supreme Court granted certiorari in *Al-Kidd* on two questions unrelated to the Ninth Circuit's holding about the standards governing supervisory liability. *See Ashcroft v. Al-Kidd*, Order Granting Certiorari, 79 U.S.L.W. 3062 (U.S. Oct. 18, 2010) (No. 10-98). As such, *Al-Kidd*'s analysis of the requirements for pleading supervisory liability post-*Iqbal*, *see infra* Point I.B., and its holding regarding the absence of pendent appellate jurisdiction, *see infra* Point II, are final.

as has been the corollary, that "each Government official . . . is only liable for his or her own misconduct," *Iqbal*, 129 S. Ct. at 1949; *see also Evancho*, 423 F.3d at 353-54 (describing "personal involvement" requirement to establish supervisory liability).

This corollary principle – that a supervisor is liable for personal conduct that violates a constitutional duty to others – includes a duty of supervision. *See Iqbal*, 129 S. Ct. at 1941 ("[A] federal official's liability 'will only result from his own neglect in not properly superintending the discharge' of his subordinates' duties.") (quoting *Dunlop v. Munroe*, 7 Cranch 242, 269 (1812)); *see also Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 407 (1997) (Section 1983 liability where policymakers "were aware of, and acquiesced in, a pattern of constitutional violations") (internal quotation omitted); *Dodds*, 614 F.3d at 1195 (explaining that a supervisor's "personal involvement is not limited solely to situations where a defendant violates a plaintiff's rights by physically placing hands on him") (internal quotation omitted).[11]

Iqbal also emphasized that, for purposes of ascertaining Bivens liability, the nature of a defendant's duty "will vary with the constitutional provision at issue." *Iqbal*, 129 S. Ct. at 1948.[12] Iqbal sued Attorney General Ashcroft and FBI Director

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[11] Accordingly, when *Iqbal* reflected that "the term 'supervisory liability' is a misnomer," it meant only to underscore the unavailability of claims based exclusively on a "master-servant" relationship or "vicarious liability," while simultaneously reiterating that every government official remains "liable for his or her own misconduct." 129 S. Ct. at 1949; *see also Dodds*, 614 F.3d at 1195 ("*Respondeat superior* liability imposes liability for public policy reasons upon masters though they are not at fault in any way, direct liability imposes liability where the plaintiff has shown the supervisor himself breached a duty to plaintiff which was the proximate cause of the injury.") (internal quotation omitted).

[12] *See also id*. at 1947 ("[W]e begin by taking note of the elements a plaintiff must plead to state a claim"); *id*. at 1950 (viability of a claim against a supervisor is "context-specific"). This, too, is a longstanding rule. In the § 1983 context, the

Mueller for racial discrimination under the Fifth Amendment and religious discrimination under the First Amendment. *Id.* In order to state a claim for racial or religious discrimination, a plaintiff must plead that the relevant decision-maker acted with an invidious purpose or intent. *See Washington v. Davis*, 426 U.S. 229, 239-40 (1976) (race discrimination); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540 (1993) (religious discrimination); *see also Iqbal*, 129 S. Ct. at 1948-49 (explaining discriminatory state-of-mind requirement). The *Iqbal* Court concluded, therefore, that "a supervisor's mere knowledge of his subordinate's discriminatory purpose" does not demonstrate that the supervisor himself acted with unconstitutional animus. *Id.* at 1949.[13]

This principle makes obvious sense. Purposeful discrimination under Supreme Court precedent "requires *more than* 'intent as volition or intent as an *awareness of consequences*.'" *Id.* at 1948 (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)) (emphasis added). It thus follows that "mere knowledge" that someone else – even a subordinate – is acting discriminatorily does not demonstrate that a supervisor himself has the intent to discriminate. *See Iqbal*, 129 S. Ct. at 1949 ("[P]urpose rather than knowledge is required to impose *Bivens* liability . . . for unconstitutional discrimination . . . [on] an official charged with violations arising from his or her superintendent responsibilities."); *Dodds*,

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liability of a supervisor or municipality has always depended upon the nature of the constitutional violation alleged. *See, e.g.*, 1 Sheldon Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983 § 3:2 (2008).

[13] There can be little doubt that the Court's holding was limited to discrimination claims. The Court specifies no less than nine times that it is dealing with the particular elements of a discrimination claim, including the requirement of proof of invidious purpose or intent. *See, e.g.*, *Iqbal*, 129 S. Ct. at 1942, 1944, 1948, 1949, 1951, 1952. Because of this, Plaintiff Ontaneda conceded below that his Equal Protection claim should be dismissed. *Argueta II*, JA-58.

614 F.3d at 1210 ("[I]n a case like *Iqbal*, where the constitutional violation requires discriminatory intent, a supervisor does not *cause* the violation unless he or she actually intended for his or her subordinates to invidiously discriminate."). [14]

Unlike discrimination claims, Fourth Amendment claims have no intent requirement. *See Herring v. U.S.*, 129 S. Ct. 695, 703 (2009) (Fourth Amendment "looks to an officer's knowledge and experience . . . not his subjective intent") (internal citations omitted). Accordingly, *Iqbal* does not foreclose holding supervisors liable for their own "knowledge and acquiescence" in a pattern of Fourth Amendment violations (and thus *personal* misconduct) or for other states of mind correlated with different substantive causes of action.[15] *Compare Lopez v. Beard*, No. 08-3699, 2009 WL 1705674, at *3 n.1 (3d. Cir. June 18, 2009)

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[14] Contrary to Defendants' suggestion, nothing in *Iqbal* requires that Plaintiffs allege that Defendants "participated in or planned" each of the unconstitutional home raids they challenge. Defs.' Br. 18. If the Court had taken such an extraordinary departure from settled law, there would have been no need for the Court even to examine Iqbal's allegations – Iqbal himself never remotely alleged that Ashcroft and Mueller were making ground-level, plaintiff-specific decisions in New York. *See Dodds*, 614 F.3d at 1199, 1195 (rejecting this reading of *Iqbal*). Moreover, courts have long found causation when a supervisor is a "moving force" behind the ultimate violation. *See City of Canton v. Harris*, 489 U.S. 378, 389 (1989)*; see also Bielevicz v. Dubinon*, 915 F.2d 845, 850-51 (3d Cir. 1990) (describing causation requirement).

[15] Put another way, because the touchstone of a Fourth Amendment violation is "objective unreasonableness," *see Graham v. Connor*, 490 U.S. 386, 397 (1989), a supervisor can be held liable for "objectively unreasonable" conduct. *See also* Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability after Iqbal*, 14 LEWIS & CLARK L. REV. 279, 297 (2010) (in light of *Iqbal*'s instruction to tailor liability standards to the appropriate state of mind, supervisory liability is appropriate where a Fourth Amendment violation results from a "supervisor's own objective unreasonableness"). Plaintiffs have alleged enough facts to satisfy a higher standard – knowledge and acquiescence – and thus would also easily satisfy a standard that holds supervisors liable for their objectively unreasonable conduct.

(applying *Iqbal* to analyze claims that supervisors intentionally discriminated based on HIV+ status, but noting different supervisory liability standards relevant to different causes of action), *with Innis v. Wilson*, No. 08-4909, 2009 WL 1608502, at *2-3 (3d. Cir. June 10, 2009) (applying the longstanding "deliberate indifference" standard for supervisory liability claims under Eighth Amendment).[16]

Thus, the law in the Third Circuit regarding a supervisor's liability for a pattern of Fourth Amendment violations remains the same as it was before *Iqbal*. A claim that a supervisor had "personal involvement" can be made through allegations of direct participation in the harm or "knowledge and acquiescence." *Baker*, 50 F.3d at 1194; *accord Robinson v. Pittsburgh*, 120 F.3d 1286, 1294 (3d Cir. 1997) ("[O]ur cases have held that 'actual knowledge and acquiescence' suffices for supervisory liability because it can be equated with 'personal direction'. . . ."); *A.M. v. Luzerne County Juvenile Det. Ctr.*, 372 F.3d 572, 586 (3d Cir. 2004); *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720, 729 (3d Cir.

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[16] Other Circuits have continued to recognize supervisory liability for non-intent based claims, applying their traditional, pre-*Iqbal* precedent. *See Parrish v. Ball*, 594 F.3d 993, 1001 (8th Cir. 2009) ("[S]upervising officer can be liable for an inferior officer's constitutional violation only if he directly participated in the constitutional violation or if his failure to train or supervise the offending actor caused the deprivation.") (internal quotation omitted); *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 49 (1st Cir. 2009) (supervisory liability where official "supervises, trains or hires a subordinate with deliberate indifference toward the possibility that deficient performance of the task eventually may contribute to a civil rights deprivation") (internal quotation omitted); *Sandra v. Grindle*, 599 F.3d 583, 590 (7th Cir. 2010) (deliberate indifference to violations of bodily integrity); *Al-Kidd*, 580 F.3d at 976 (Attorney General's liability established on basis of his "knowing failure to act in the light of even unauthorized abuses"); *Dodds*, 614 F.3d at 1211 ("a supervisor's actual knowledge of his subordinates' behavior will demonstrate the requisite deliberate, intentional act by the supervisor to violate constitutional rights" sufficient to show personal involvement) (internal quotations omitted).

1989). Though the terminology is often mixed,[17] cases in this Circuit reveal that supervisory liability can be shown in at least two ways relevant here.

First, liability attaches where a supervisor implements a policy or practice that carries with it an "unreasonable risk" of constitutional violation by a subordinate, and the supervisor's failure to change policy or employ corrective supervisory practices was a cause of the subordinate's misconduct. *See Brown v. Muhlenberg Twp.*, 269 F.3d 205, 216 (3d Cir. 2001); *Sample*, 885 F.2d at 1117 (individual supervisory liability appropriate where supervisor's policy decisions are "moving force behind" subordinate's constitutional tort); *Bryan County*, 520 U.S. at 409 ("[A] violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations"); *City of Canton*, 489 U.S. at 390 n.10.[18] This standard is consonant with the approach taken by the 10th Circuit in *Dodds*, 614 F.3d at 1199, which held that, post-*Iqbal*, a supervisor may be held liable if he or she "promulgated, created, implemented or possessed responsibility for the continued operation of a policy" that "caused the complained of constitutional harm," as long as a plaintiff also demonstrates that the supervisor acted with the requisite state of

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[17] For example, some cases place both of the following theories of supervisory liability under the "knowledge and acquiescence" classification.

[18] As Judge Greenaway recently explained, supervisory liability *post-Iqbal* may be shown where "the risk of constitutionally cognizable harm was so great and so obvious that the risk and the failure of supervisory officials to respond" contributed to the harm. *Hagan v. Rogers*, No. 06-4491, 2009 WL 1851039, at *5 (D.N.J. June 24, 2009); *accord Hernandez v. Keane*, 341 F.3d 137, 145 (2d Cir. 2003) (a supervisor is liable based on "creation of a policy or custom that sanctioned conduct amounting to constitutional violation, or allowing such a policy or custom to continue"); *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir. 1986) ("An official may also be liable where a policy or custom that he established or utilized results in deliberate indifference to an inmate's constitutional rights").

mind for the underlying constitutional violation – which in the Fourth Amendment context is objective unreasonableness.

Second, supervisory liability may be imposed where "a supervisor tolerated past or ongoing misbehavior." *Baker*, 50 F.3d at 1191 n.3 (citing *Stoneking* 882 F.2d at 724-25); *accord Sample*, 885 F.2d at 1118 ("evidence that such harm has in fact occurred on numerous occasions"); *Carter v. City of Philadelphia*, 181 F.3d 339, 357 (3d Cir. 1999) (same); *Montgomery v. DeSimone*, 159 F.3d 120, 127 (3d Cir. 1998) ("contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents"); *Bielevicz*, 915 F.2d at 851 ("policymakers were aware of similar unlawful conduct in the past, but failed to take precautions against future violations, and . . . this failure, at least in part, led to [plaintiff's] injury").

In sum, supervisors have a duty to prevent an "unreasonable risk" that constitutional violations will arise from their own policies and to take corrective action when they learn of a pattern of subordinates' misconduct. A failure to satisfy these duties violates the Fourth Amendment. *See Robinson*, 120 F.3d at 1294; *see also Bryan County*, 520 U.S. at 407 (policymakers' "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action" to support liability under § 1983).

Significantly, this Circuit broadly construes the duty of supervision in evaluating a supervisor's liability:

> We think the rubric 'supervision' entails, among other things, training, defining expected performance by promulgating rules or otherwise, monitoring adherence to performance standards, and responding to unacceptable performance whether through individualized discipline or further rulemaking.

Sample, 885 F.2d at 1116; *see also Bielevicz*, 915 F.2d at 851 (characterizing broadly the violation of supervisor's duty as "fail[ing] to take precautions against future violations" or a "failure to act once . . . on notice"); *Al-Kidd*, 580 F.3d at 976 ("knowing failure to act" supported liability against Attorney General Ashcroft). Accordingly, liability for inadequate supervision – *i.e.*, acquiescence – can be imposed for failing to modify a policy or "respond appropriately" in the face of an ongoing pattern of constitutional injuries, *see Sample*, 885 F.2d at 1118, or for a "failure to train, discipline, or control," *Montgomery*, 159 F.3d at 127. It is also commonly shown by a failure to implement or enhance police training. *See Bryan County*, 520 U.S. at 407 ("If a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for"); *Carter*, 181 F.3d at 357 ("[I]f the police often violate rights, a need for further training might be obvious").[19]

[19] Ignoring the plethora of case law articulating the knowledge and acquiescence standard in this Circuit, Defendants rely exclusively on *Rode v. Dellarciprete*, 845 F.2d 1195 (1988). In *Rode*, allegations that the Governor of Pennsylvania knew of a low-level state employee's wrongful termination, based on news reports about her immediate supervisor's conduct and grievances she filed with state agencies, were deemed insufficient to meet the "knowledge and acquiescence" standard. *Id*. at 1208. First, unlike the governor of Pennsylvania in *Rode*, the Defendants here were the persons directly responsible for the program challenged and thus it is far more reasonable to infer their knowledge of wrongdoing. *See Argueta II*, JA-59. Second, unlike the long-term *pattern* of misconduct alleged here, Rode attempted to impute knowledge about a single incident. *Compare Bryan County*, 520 U.S. at 408 ("Because the decision necessarily governs a single case, there can be no notice to the municipal decisionmaker based on previous violations of federally protected rights that his approach is inadequate . . . ."). Finally, Plaintiffs here allege that many different sources put the Defendants on notice of widespread constitutional violations. *See infra* Point I.B.

The Defendants state, but do not explain, that a "failure to train claim" is only pertinent to "entity liability" under Section 1983, but not to individual-capacity liability under *Bivens*. Defs.' Br. 30-31. This is incorrect. First, as *Iqbal* itself makes clear, the standards governing liability under *Bivens* and § 1983 are analogous. *Iqbal*, 129 S. Ct. at 1948. *See Chinchello v. Fenton*, 805 F.2d 126, 134 (3d Cir. 1986) (applying Section 1983 cases in evaluating *Bivens* claim for failure to train, supervise, and discipline subordinates). Second, "entity liability" – *i.e.*, municipal liability – is similar to individual supervisory liability under Section 1983. *Baker*, 50 F.3d at 1191; *Sample*, 885 F.2d at 1118. Therefore, individual supervisors can be held liable under Section 1983 – and, accordingly, *Bivens* – for their own failure to supervise or train. *Carter*, 181 F.3d at 358 (policymakers in District Attorney's Office may be held individually liable for failure to train in light of pattern of unconstitutional conduct by police).[20]

Defendants also argue that, because *Iqbal* rejected a theory of liability for supervisors who allegedly enacted an unconstitutional policy, the case for supervisory liability is "even weaker" here because Plaintiffs do not allege that the challenged policies were unconstitutional as written. Defs.' Br. 26. First, Defendants' premise is flawed. *Iqbal* did not hold categorically that supervisors

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[20] Indeed, in *Connick v. Thompson*, No. 09-571, before the Supreme Court this term, the parties – and, implicitly, the Court – agree that a District Attorney can be held individually liable as a supervisor for a failure to train subordinates about their *Brady* obligations where the supervisor knew or should have known of an underlying pattern or practice of *Brady* violations; the only question in contention is whether the risk of harm from a failure to train in that case triggers liability for a single constitutional violation. *See Connick v. Thompson*, 130 S. Ct. 1880 (2010) (granting cert to address question of whether "imposing failure-to-train liability on a district attorney's office for a single *Brady* violation" satisfies *City of Canton* standards); Br. of Ptrs., 2010 WL 2354753, at *21-23 (conceding individual supervisor liability for failure-to-train in face of history of subordinate wrongdoing).

are entitled to qualified immunity even when they devise unconstitutional policies; it held that the plaintiff failed plausibly to allege that the supervisors possessed the required discriminatory intent to render their actions unconstitutional in the first place. More fundamentally, as the foregoing analysis demonstrates, supervisory liability has never required proof that the supervisor enacted *ex ante* a policy that violated the constitution. It is enough, at least in the Fourth Amendment context, that a supervisory defendant promulgates a policy that produces an unreasonable risk of constitutional violations or learns of, and ignores, ongoing and widespread violations by subordinates.[21]

B. Plaintiffs Allege Sufficient Facts To Plausibly State a Claim Against Defendants for Their Knowledge of and Acquiescence in a Pattern of Unconstitutional Conduct.

To evaluate the sufficiency of a complaint at the motion-to-dismiss stage, a court may, first, disregard pure "legal conclusions" or "threadbare recitals of the elements of a cause of action." *Fowler*, 578 F.3d at 210-11 (quoting *Iqbal*, 129 S. Ct. at 1949). Second, the court must determine whether the complaint has "sufficient factual allegations" to state a "plausible claim for relief." *Id.* at 211. *See generally* Adam Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1307-1309 (2010) (explaining *Iqbal*'s two-step approach). Plausibility "is not akin to a probability requirement." *Iqbal*, 129 S. Ct. at 1949. Rather, the court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint," *Fowler*, 578 F.3d at 210 (quoting *Phillips v. County of Allegheny*,

[21] Under the logic of the analogous Section 1983 cases, an otherwise lawful policy can *become* unconstitutional when it is implemented in an unconstitutional manner – liability for the unconstitutional policy or custom is thus attributed to the supervisor where he tolerates its unlawful implementation. *See City of Canton*, 489 U.S. at 387-88.

515 F.3d 224, 233 (3d Cir. 2008)), the court is able to "draw the reasonable inference that the defendant is liable for the misconduct alleged," *id.* (quoting *Iqbal*, 129 S. Ct. at 1948).

Thus, in *Iqbal*, liability against Ashcroft and Mueller depended upon proof that each acted "because of" religious or ethnic animus. *Iqbal*, 129 S. Ct. at 1948. Iqbal did allege that Ashcroft and Mueller adopted a policy of housing 9/11 "high interest" detainees like him in harsh conditions "on account of his religion, race and/or national origin." But the Court disregarded such "naked assertions" of liability – without further factual content substantiating the officials' alleged discriminatory purpose – because they amounted to nothing more than "a 'formulaic recitation of the elements' of a constitutional discrimination claim." *Id.* at 1951 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Iqbal failed to "show, or even *intimate* that petitioners purposefully housed detainees in [harsh conditions] due to their race, religion, or national origin." *Id.* at 1952 (emphasis added); *see also id.* at 1952 (Iqbal's complaint "does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind").[22]

Here, Plaintiffs do not merely assert Defendants' knowledge and acquiescence, nor do they offer a "formulaic recitation" of the standard of a

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[22] Disregarding "threadbare" and "formulaic" legal conclusions, the only well-pled factual allegations remaining in the complaint were that Ashcroft and Mueller, respectively, acted as the "principal architect" and an "instrumental" force in adopting a policy that caused "high interest" detainees following 9/11 to be housed in harsh, segregated conditions while awaiting trial on duly lodged criminal charges. *Id.* As between the "obvious alternative explanation" for the arrests – *i.e.* a nondiscriminatory intent to detain illegally present aliens for valid law enforcement purposes – and the "purposeful, invidious discrimination respondent asks us to infer," the *Iqbal* court concluded that the latter was "not a plausible conclusion." *Id.* at 1951-52.

supervisor's liability for a pattern of Fourth Amendment violations. Rather, they offer sufficient "factual content" to create a plausible inference that the Defendants failed in their constitutional duty under still-governing Third Circuit case law.

First, the Complaint alleges facts that would permit a reasonable inference that the Defendants adopted and maintained a policy that produced an "unreasonable risk" of constitutional violation and was a "moving force" behind Plaintiffs' injuries. Plaintiffs allege:

- Myers and Torres were responsible for devising and implementing relevant portions of Operation Return to Sender, JA-561 (SAC ¶144), and that Weber and Rodriguez were responsible for carrying out that policy in New Jersey, JA-563-64 (SAC ¶149).
- Myers and Torres doubled the number of FOTs operating in New Jersey, JA-537 (SAC ¶29) and ordered each FOT "to arrest 1,000 fugitive aliens per year" – a "quota" that "represented an 800% increase on the previous quota." JA-538 (SAC ¶30); *see also* JA-561 (SAC ¶144) (Myers and Torres failed to provide "the necessary training to prevent ICE agents – faced with these new pressures – from acting abusively and unlawfully").
- Public record documents disclosed after the filing of the initial complaint confirm the plausibility of allegations that Myers' and Torres' policy decisions were a cause of the unconstitutional and abusive searches of Plaintiffs' homes. Specifically, the January 2006 and September 2006 Torres Memos, among other relevant facts, confirm that Myers and Torres increased the FOT annual arrest quotas by 800% and, critically, permitted the arrest of "collaterals" – *i.e.*, non-criminals without outstanding deportation orders that the police encounter incidentally – to count toward this quota.

- Plaintiffs allege that Operation Return to Sender "facilitated the creation of a culture of lawlessness" among FOTs, JA-561 (SAC ¶144), in which raids were treated as a "fun time!" or as "play!!" and where FOTs used deceit, intimidation, and force in pursuit of collateral apprehensions. JA-539-41 (SAC ¶¶36-37).
- Plaintiffs identify common unlawful and abusive features of the statewide raids, JA-538-39 (SAC ¶¶33-35) (unlawful entries); JA-544-58 (SAC ¶¶49-139) (abuse, intimidation, and threats); JA-540-41 (SAC ¶¶38-42) (unlawful seizures).
- Plaintiffs allege they were not the identified targets of a planned raid. Indeed, most were either U.S. citizens or otherwise *lawfully* present when they were raided. JA-544-48 (SAC ¶¶49-139).

In noting that each of the raids followed a "strikingly similar" pattern, *Argueta I*, JA-3, the district court underscored the plausibility of an inference that the violations emanated from a contributing cause: the decisions of the supervisors who constituted a common denominator behind illegal raids in New Jersey and throughout the country. It is thus eminently reasonable to infer in this case that the Fugitive Operations policies Myers and Torres devised, and Weber and Rodriguez implemented, created an unreasonable risk of harm and were otherwise a "moving force" behind the Fourth Amendment violations alleged.

Second, Plaintiffs do not merely allege knowledge in a conclusory manner, but instead make ample allegations to show that Defendants were on notice of the pattern of misconduct and encouraged it. Plaintiffs allege Defendants were put on notice about the pattern because:

- Myers and Torres "have been sued numerous times for their roles in these practices." JA-561 (SAC ¶145) (listing lawsuits naming them

individually); *see also* JA-559 (SAC ¶140) (additional lawsuits putting them on notice).

- "Reports [in the media] of ICE raids – and their often concomitant abuses – have been particularly prevalent in the state of New Jersey." JA-540, 559-61 (SAC ¶¶41, 143) (citing numerous regional and national news reports).[23] Even the Special Rapporteur of the United Nations issued a report critical of the searches and abuses conducted by FOTs. JA-559 (SAC ¶142).
- A June 2007 letter from a Congressional delegation to the Department of Homeland Security criticized New Haven raids in which ICE agents "pushed their way into homes" and "treated both adults and children inappropriately." A contemporaneous letter from the National Immigration Forum expressed similar alarm. JA-559, 562 (SAC ¶¶141,146). Myers responded to the latter, reasoning that, in the face of persistent complaints about nonconsensual home-entries, consent to search was assured merely by the presence of a Spanish-speaking officer. JA-314.
- ICE raids were also criticized at a House subcommittee meeting, prompting a response from ICE. JA-543.
- New Jersey Senator Robert Menendez specifically directed strong criticism of New Jersey raids to Myers who, according to Senator Menendez, disregarded it. JA-441.

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[23] The district court specifically concluded that "based on my government experience and common sense, each [Supervisory Defendant] most likely received and read news clips regularly, including those cited in the Complaint." *Argueta II*, JA-62.

- In 2007, Homeland Security's Office of the Inspector General publicly criticized ICE for its incomplete and inaccurate background information, understaffing, and incomplete training." JA-543-44 (SAC ¶47); *id.* (SAC ¶47(a)-(d)); JA-241.

Allegations regarding Defendants' acquiescence or failure to supervise include:

- Defendants failed to conduct meaningful investigations into the practices or to provide any specific guidelines or training to FOTs to ensure that home entries and searches were conducted within constitutional limits. JA-562-64 (SAC ¶¶148, 152). Nor did Myers and Torres respond to the pressure from media and public officials by either reducing the 1000-FOT arrest quota or altering the incentives to seek collaterals via dragnet raids in order to satisfy that quota.
- Defendants "contributed to such unlawful conduct by continuing to publicize, and laud as 'successful,' their department's dramatic increase in immigration arrests over the past two years, as reflected in boastful press releases touting ICE's accomplishments." JA-562-63 (SAC ¶148) (citing numerous Newark Field Office Press Releases in 2006 and 2007). One such press release described operations during the two-week window when Plaintiff Covias' home was raided.
- Weber and Rodriguez made "frequent reports and comments on the number of arrests made by ICE agents, and [spoke] publicly on behalf of ICE about the implementation of 'Operation Return to Sender'" in New Jersey. JA-563 (SAC ¶149). Weber brushed off specific criticism about home raids in New Jersey, by stating, "I don't see it as storming a home . . . . I see it as trying to locate someone." JA-563-64 (SAC ¶149).

These facts permit a reasonable inference that Defendants acquiesced to a known pattern of Fourth Amendment violations by subordinates. As Judge Becker has explained, "it is logical to assume that continued official tolerance of repeated misconduct facilitates similar unlawful actions in the future." *Bielevicz*, 915 F.2d at 851;[24] *see also Andrews v. City of Philadelphia*, 895 F.2d 1469, 1479 (3d Cir. 1990) (jury could reasonably conclude that frequent allegations of sexual harassment and a "failure to investigate the source of the problem" could "implicitly encourage[] squad members to continue in their abuse of" plaintiff). As such, Plaintiffs pushed their claim far "across the line from conceivable to plausible," *Iqbal*, 129 S. Ct. at 1951, and thus satisfy Rule 8's pleading requirements. *See Fowler*, 578 F.3d at 212 (under "plausibility paradigm" Plaintiffs need only allege specific facts to "give [defendant] notice of the basis for [their] claim").

These allegations surpass those in *Al-Kidd*, 580 F.3d at 976, which the Ninth Circuit found sufficient to plausibly allege Attorney General Ashcroft's supervisory liability for his "knowing failure to act" in the face of abuses of the material witness detention process. There, as here, subordinates' abuses "were highly publicized in the media, congressional testimony and correspondence." *Id.* The Court found that these sources of information "*could* have given Ashcroft sufficient notice to require affirmative acts to supervise and correct the actions of

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[24] Because it is "logical" to assume that acquiescence "facilitates" future unlawful conduct, it is *a fortiori* "plausible" to infer that the Defendants' acquiescence in a known pattern of constitutional violations contributed to the harm to these individual Plaintiffs. The question of "moving force" causation is for the jury and need not be alleged in detail in the pleadings. *See Bielevicz*, 915 F.2d at 851 ("[A]s long as the causal link is not too tenuous, the question whether the municipal policy or custom proximately caused the constitutional infringement should be left to the jury."); *Jett v. Dallas Independent Sch. Dist.*, 491 U.S. 701, 737 (1989) (same).

his subordinates." *Id.* (emphasis added); *see also id*. (finding it "reasonable to believe" that an OIG report that "discussed abuses and improprieties that occurred in a related context" would have put Ashcroft on notice). In contrast, there is no need to infer from the Complaint in this case that the Defendants must or should have known of the violations: Plaintiffs plead facts showing that these Defendants had actual notice of the precise type of constitutional violation – in New Jersey and elsewhere – that Plaintiffs describe in their Complaint.

In addition to quibbling with the sufficiency of isolated allegations in the complaint, *but see Chabal v. Reagan*, 822 F.2d 349, 358 (3d Cir. 1987) (complaint must be read as a whole), Defendants attempt to read into *Iqbal*'s plausibility requirement a transformation of the logic of the Federal Rules of Civil Procedure. First, Defendants demand that particular allegations be supported with additional, specific details. Defs.' Br. 30 (demanding that Plaintiffs "identify the specific training that was warranted" or "identify any discipline or investigation that was required"). The Supreme Court has repeatedly rejected such a "heightened pleading standard" as inconsistent with Rule 8. *Leatherman v. Tarrant County Narcotics Intel. and Coord. Unit*, 507 U.S. 163, 168 (1993) (contrary to the "specificity requirement of Rule 9(b)," the "liberal notice pleading" embraced by Rule 8(a)(2) applies to municipal liability claims); *Erikson v. Pardus*, 551 U.S. 81, 93 (2007) (unanimous opinion) ("Specific facts are not necessary.") (citing *Twombly*, 550 U.S. at 555).

Iqbal decidedly does not require, as Defendants seem to believe, that each *individual allegation* contain specific details that confirm its plausibility; rather, *Iqbal* requires factual allegations that, accepted as true, state a plausible *claim* of misconduct. *Twombly*, 550 U.S. at 570 ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."); *accord Fowler*, 578 F.3d at 211-12 ("Although Fowler's

complaint is not as rich with detail as some might prefer, it need only set forth sufficient facts to support plausible claims."). The Third Circuit has instructed that failure-to-supervise allegations need not be pled with the detail Defendants demand. *See Sample*, 885 F.2d at 1116-17 ("For the purpose of defining the standard for liability of a supervisor under § 1983, the characterization of a particular aspect of supervision is unimportant."); *see Carter*, 181 F.3d at 358 (plaintiff "surmises, reasonably that [police] misconduct reflects inadequate training and supervision. He cannot be expected to know, without discovery, exactly what training policies were in place or how they were adopted").

Second, Defendants appear to disagree with inferences Plaintiffs make from the allegations, Defs.' Br. 34, and suggest that if allegations are simply "consistent with lawful conduct" the complaint is deficient, Defs.' Br. 33. Defendants would thus import into Rule 8 Plaintiffs' ultimate burden to prove liability by a preponderance of the evidence. Yet *Iqbal* expressly instructs that pleading "plausibility" does not require demonstrating a claim is probable. *Iqbal*, 129 S. Ct. at 1949; *Phillips*, 515 F.3d at 234. As such, the "plausibility" standard does not permit a court to choose which of the competing inferences is more likely to be true. *See Fowler*, 578 F.3d at 212 (an "evidentiary standard is not a proper measure of whether a complaint fails to state a claim. . . . [S]tandards of pleading are not the same as standards of proof" (internal citations and quotations omitted)).

Instead, all Plaintiffs must do is "give enough details about the subject matter of the case to present a story that holds together. . . . The court will ask itself *could* these things have happened, not *did* they happen." *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010); *see also id.* (under Rule 8 courts should not "stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences.") (citations omitted); *Fowler*, 578 F.3d at 212 ("[W]ell-pled complaint may proceed

even if it strikes a savvy judge that actual proof of those facts alleged is improbable and that a recovery is very remote and unlikely." (internal quotations omitted)).[25] This is because the logic of the Federal Rules still presumes that establishing a claim as more-likely-than-not requires discovery. *See Twombly*, 550 U.S. at 1959 (complaint must state "enough facts to raise a reasonable expectation that discovery will reveal evidence of" the necessary elements of the claim); *Phillips*, 515 F.3d at 234 (same).

Finally, consistent with their view that *Iqbal* eliminated all possibility of supervisory liability, Defendants argue that Myers should be entitled to the same qualified immunity that Ashcroft received, because of their analogously high positions in the federal bureaucracy. See Defs.' Br. 32 (noting that Myers, like Ashcroft, is subject to Senate confirmation and supervised many employees). This widely misses the point. As already described, Ashcroft was entitled to qualified immunity not by virtue of his high position, but because Iqbal implausibly pled Ashcroft's discriminatory animus. *See Iqbal*, 129 S. Ct. at 1949; *compare Al-Kidd*, 580 F.3d at 977 (allegations against Ashcroft sufficient to state claim for liability under Fourth Amendment). In contrast, Plaintiffs' allegations plausibly show that Myers had the personal involvement necessary to sustain a claim that she violated the Fourth Amendment.

Moreover, Ashcroft and Myers are, in fact, differently situated. Unlike Ashcroft, who was at "the highest level of the federal law enforcement hierarchy," *Iqbal*, 129 S. Ct. at 1943, Myers and Torres directly set and

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[25] Defendants' suggestion that courts must ignore allegations if they are based "upon information and belief," Defs.' Br. 35-36, is also incorrect. *See Arista Records v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) (plausibility standard does not preclude pleading "upon information and belief" where facts are peculiarly within the possession and control of defendant).

maintained, while Weber and Rodriguez implemented, the policy and practices at issue here; they "worked on these issues every day," "had sufficient knowledge of how the searches were being conducted," and "wrote the policy, implemented it and monitored its progress." *Argueta II*, JA-60. Significantly, Plaintiffs did not sue Ashcroft or Homeland Security Director Chertoff because they did not possess comparable evidence of personal involvement.

Nor can the Defendants here rely on a state of emergency to justify their actions and defaults. *Iqbal* stressed that Ashcroft and Mueller were forced to make quick, discretionary policy decisions during "a national and international security emergency unprecedented in the history of the American Republic." *See* 129 S. Ct. at 1945, 1953 (internal quotations omitted); *see also Chao v. Ballista*, 630 F. Supp. 2d 170, 177 (D. Mass. 2009) ("Ever-present in the majority's opinion was the fact that these high-ranking officials faced an unprecedented attack on American soil."). By contrast, Defendants set and maintained their unconstitutional policies over a course of years, with ample time to evaluate and remedy the widespread constitutional violations of which they were aware. This factual distinction affects the scope of a government official's legal obligation. As the Supreme Court has explained, when "unforeseen circumstances demand [an officer's] instant judgment," the courts should be more hesitant to conclude their actions or omissions were unlawful. *County of Sacramento v. Lewis*, 523 U.S. 833, 853-54 (1998). By contrast, where, as here, government officials have "time to make unhurried judgments," and "extended opportunities to do better are teamed with protracted failure even to care, indifference [to the rights of individuals] is truly shocking." *Id*.

To grant the qualified immunity on the broad grounds Defendants propose, especially at the motion-to-dismiss stage, would effectively immunize supervisors' reckless disregard for constitutional rights, no matter how outrageous and

widespread the behavior of their subordinates or how frequently supervisors were put on notice of it. Qualified immunity, while intended to protect government officials from being unduly cautious in carrying out their responsibilities – especially during emergencies, *see Iqbal*, 129 S.Ct. at 1953 – is not designed to permit them to act "wholly free from concern for [their] personal liability." *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985). Indeed, such officials "may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States." *Id.*

II THIS COURT LACKS APPELLATE JURISDICTION TO REVIEW THE DISTRICT COURT'S FINDING OF PERSONAL JURISDICTION.[26]

As Defendants Myers and Torres effectively concede, the interlocutory ruling finding personal jurisdiction over them is not immediately appealable under the limited circumstances set forth in 28 U.S.C. §1292(a). Nor is that ruling part of the "small class" of decisions narrowly classified as "collateral orders" (such as the denial of qualified immunity) that, "although they do not end the litigation, must nonetheless be considered 'final'" and are therefore subject to immediate appellate review. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)); *Iqbal*, 129 S. Ct. at 1945 (2009). By contrast, an interlocutory decision on personal jurisdiction "can be reviewed effectively on appeal from final judgment," and thus is not immediately appealable. *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 756 (2d Cir. 1998); *see also Abi Jaoudi & Azar Trading Corp. v. Cigna*

[26] For a fuller discussion of Plaintiffs' position on this Court's lack of jurisdiction, Plaintiffs respectfully refer the Court to Plaintiff-Appellees' Response to the February 25, 2010, Court Order Regarding Appellate Jurisdiction, March 22, 2010.

Worldwide Ins. Co., Nos. 09-1297, 09-1298, 2010 WL 3279173, at *7 (3d Cir. Aug, 20, 2010) (same).

Myers and Torres instead claim – but do not seriously argue – that this Court may assert appellate jurisdiction pendent to the qualified immunity appeal properly on review pursuant to *Iqbal*. Defs.' Br. 2-3. But the category of judicially created "pendent appellate jurisdiction" is narrow and inflexible, as it undermines Congress's intent to confer on district courts the "first line discretion to allow interlocutory appeals" and usurps the rule-making authority Congress has granted the Supreme Court over federal appellate jurisdiction. *Swint*, 514 U.S. at 47-48.

Accordingly, this Court has held that it will assert pendent appellate jurisdiction only in the circumstances the Supreme Court identified in *Swint, i.e.*, when a nonappealable order is "inextricably intertwined" with an appealable one or when review of a nonappealable order is "necessary to ensure meaningful review" of an appealable one. *Dupont*, 269 F. 3d at 203; *see also Rein*, 162 F.3d at 757-58 (same). These two factors frequently meld into a single inquiry. For example, this Court has found inadequate indicia of "interrelatedness" to support pendent jurisdiction where "the issue of personal jurisdiction does not have to be reviewed to exercise meaningful review of the immediately appealable arbitration issue." *Dupont*, 269 F.3d at 205; *see also Rein*, 162 F.3d at 758 (holding that the two factors amount to "essentially the same thing").

Though Myers and Torres correctly cite the "inextricably intertwined" standard, they effectively concede they fall short by asserting merely that the personal jurisdiction and qualified immunity issues "overlap[] considerably." Defs.' Br. 2-3. Factual or conceptual overlap is insufficient to confer pendent jurisdiction. Rather, the "inextricably intertwined" standard requires that the "basis of the personal jurisdiction decision [be] *identical* to the basis for the immediately appealable order." *Dupont*, 269 F.3d at 203 (emphasis added); *see*

also Rein, 162 F.3d at 760-61 (explaining that subject matter jurisdiction under Foreign Sovereign Immunities Act is "inextricably intertwined" and "essentially identical" to personal jurisdiction because district court could not have found one "without saying everything that was required to answer" the other).[27]

In *Al-Kidd*, the Ninth Circuit faced the same question presented here. After acknowledging analytic overlap between the "personal involvement" prong of the qualified immunity inquiry and the "purposeful[] direct[ion] [of] activities toward the state" prong of the personal jurisdiction analysis, the court held the interrelationship too weak to support pendent appellate jurisdiction. 580 F.3d at 980. Because other elements of personal jurisdiction – including whether the defendant directed his acts at the forum state or knew they were likely to cause harm there – were "irrelevant to any element of . . . qualified immunity," the overlap was not complete enough to render the qualified immunity and personal jurisdiction analyses effectively identical. *Id.* The Ninth Circuit therefore declined to arrogate to itself "the general power to review district courts' exercise of personal jurisdiction before a final judgment." *Id.*[28] Likewise here, pendent jurisdiction is unavailable because the Court can resolve the qualified immunity

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[27] Because interlocutory appeals of temporary injunctions *necessarily* involve resolution of the personal jurisdiction question in the course of assessing the appellant's likelihood of success on the merits, that is a limited circumstance in which pendent appellate jurisdiction is appropriate. *Dupont*, 269 F.3d at 205 n.9.

[28] In *Iqbal v. Hasty*, the Second Circuit asserted pendent appellate jurisdiction over a personal jurisdiction determination when reviewing qualified immunity, based solely on "substantial factual overlap on the issues raised." 490 F.3d 143, 177 (2d Cir. 2007) (internal quotation omitted), *rev'd on other grounds sub nom. Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). This decision is inconsistent with the Supreme Court's decision in *Swint*, 514 U.S. at 51, this Circuit's precedent, *Dupont*, 269 F.3d at 204, and the Second Circuit's own case law, *Rein*, 162 F.3d at 759 (declining pendent jurisdiction of overlapping issue of personal jurisdiction because its consideration was not necessary for review of the appealable issue).

issue without having to decide whether Myers and Torres had sufficient minimum contacts with New Jersey.

The Supreme Court has recently instructed courts of appeals to maintain "a healthy respect for the virtues of the final-judgment rule" because "[p]ermitting piecemeal, prejudgment appeals . . . undermines efficient judicial administration and encroaches upon the prerogatives of district court judges, who play a special role in managing ongoing litigation." *Mohawk Industries, Inc. v. Carpenter*, 130 S.Ct. 599, 605 (2009) (internal quotations omitted). Expanding the category of pendent appellate jurisdiction would improperly "encourage parties to parlay Cohen-type collateral orders into multi-issue interlocutory appeal tickets," *Swint*, 514 U.S. at 49-50, resulting in both considerable cost and uncertainty, *cf. Hertz Corp. v. Friend*, 130 S.Ct. 1181, 1193 (2010) ("[C]ourts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case" as "[s]imple jurisdictional rules promote greater predictability."). Any expansion of the courts of appeals' jurisdiction – and the corresponding balancing of judicial resources – should come from Congress or the duly authorized rulemaking process, not case-by-case adjudication, as the Defendants propose. *Swint*, 514 U.S. at 48.

III THE COURT SHOULD NOT REVERSE THE DISTRICT COURT'S FINDING OF PERSONAL JURISDICTION.

Even if this Court elects to review the district court's interlocutory personal jurisdiction order, it should not reverse it on the merits. First, a plenary review of the allegations and other relevant evidence demonstrates that Plaintiffs have met the minimal burden required for establishing personal jurisdiction over Myers and Torres. Second, if the allegations or other record evidence appears insufficient at this motion-to-dismiss stage, the proper course would be to remand so that

Plaintiffs may pursue jurisdictional discovery, an opportunity denied to them under the district court's May 18, 2010, stay of all discovery. ECF No. 170.

A. Defendants Myers and Torres Had Sufficient Contacts with New Jersey To Justify the Exercise of Personal Jurisdiction over Them.

In evaluating the appropriateness of specific, personal jurisdiction over Defendants, the court considers whether (1) the defendants "purposefully directed [their] activities" at the forum; (2) the litigation "'arise[s] out of or relate[s] to' at least one of those activities;" and (3) the exercise of jurisdiction otherwise "comport[s] with 'fair play and substantial justice.'" *O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 317 (3d Cir. 2007) (internal citations omitted). The test is designed to "ensure[] that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts," *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 323 (1989) (internal citations omitted), but "reasonably anticipate[s] being haled into court there," *World-Wide Volkswagen v. Woodson*, 44 U.S. 286, 297 (1980).[29]

The allegations and documentary evidence in this case show that the policies and activities Plaintiffs challenge were directed specifically at New Jersey. Defendants are therefore wrong to contend that Plaintiffs base jurisdiction on

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[29] Myers and Torres have effectively conceded personal jurisdiction in similar cases brought against them in several other jurisdictions across the country by failing to assert a lack of personal jurisdiction in their motions to dismiss. *See, e.g.*, Memorandum of Law in Support of Motion to Dismiss the Complaint Against Defendants Michael Chertoff, Julie Myers, John Torres, and Marcy Forman, *Aguilar v. ICE*, No. 07 Civ. 8224, Dkt. No. 221 (S.D.N.Y. March 29, 2010) (failing to raise lack of personal jurisdiction as basis for dismissal in case with similar facts); Federal Defendants' Memorandum in Support of Motion to Dismiss or Alternatively for Summary Judgment, *Arias v. ICE*, No. 07-1959, 2009 WL 2628041 (D. Minn. July 17, 2009) (also conceding personal jurisdiction by not raising it).

nothing more than the implementation of a nationwide policy. The Office of Detention and Removal Operations (DRO) first deployed FOTs in 2003, sending eight teams to field offices in seven cities, JA-254, including Newark, New Jersey. From the beginning of 2005 to mid-2006, Myers and Torres doubled the number of FOTs deployed to New Jersey and increased the FOTs' arrest quotas by 800%. JA-537-38, 561 (SAC ¶¶29-30, 144); *see also* JA-499; JA-501-503. Not surprisingly, following the implementation of the increased arrest quotas, the number of individuals arrested by New Jersey FOTs doubled from FY 2006 to FY 2007. JA-538 (SAC ¶32.) The raids at issue in this case occurred during this period of heightened enforcement activity, from August 2006 to April 2008. JA-544-61 (SAC ¶¶49-139, 143).

Plaintiffs have also pled sufficient facts and presented supporting evidence to show that Torres was actively involved in New Jersey operations by: regularly communicating with the Newark Field Office; administering mandates and quotas to that particular office; approving New Jersey operations in advance; and monitoring New Jersey operations. For example, the January 2006 Torres Memo issued to "All Field Office Directors" – including, by definition, the Newark Field Office director – established a quota of 1,000 arrests per FOT per year and informed the directors that DRO Headquarters "will work with Field Office Directors in identifying and implementing initiatives involving fugitive alien cases." JA-499; *see also* JA-538 (SAC ¶30). The September 2006 Torres Memo, also sent to all Field Office Directors, explained that non-fugitive arrests could be counted toward the 1,000-arrest quota so long as the arrests were made during an operation approved by DRO Headquarters. JA-501-04. If, as seems highly likely, the arrests made during the raids at issue in this case were counted toward the quotas, then Torres must have approved each of these raids, since they all included arrests of non-fugitives. The September 2006 Memo further instructed the Newark

Field Office, along with the other field offices, to provide its arrest statistics each week for distribution by Torres' office in a weekly newsletter publicizing FOTs successes. *Id.*[30]

Consistent with these mandates, the Newark Field Office provided statistics and reported directly to both Myers and Torres on New Jersey activities. For example, on April 2, 2007, Defendant Rodriguez, the Acting Field Office Director in Newark, sent Myers a "Detention and Removal Operations (DRO), Newark Field Office: After-Action Report: Operation Return to Sender – New Jersey," which included information on a ten-day fugitive operation in New Jersey that appears to have included one of the raids at issue in this case. JA-444; JA-555 (SAC ¶119). A few days later, on April 5, 2007, the Newark Field Office sent a memo to Myers advising her that on April 9, 2007, the Office would commence a fifteen-day fugitive operation throughout New Jersey, pursuant to Operation Return to Sender, "to target, arrest, prosecute, and remove 75 fugitive aliens residing in the State of New Jersey." See April 5, 2007, Memo from Newark Field Office to Myers, *available* at http://law.shu.edu/ProgramsCenters/PublicIntGov Serv/CSJ/upload/ICE-Memos.pdf.

Armed with the information they obtained from directly communicating with and monitoring the activities of the Newark Field Office, Myers and Torres issued a series of press releases between 2006 and 2007 that lauded as successful

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[30] Before it decided the motions to dismiss, Plaintiffs submitted these memos to the district court as attachments to Scott L. Walker's February 6, 2009, letter. JA-499, 501-03. When personal jurisdiction is challenged, plaintiffs may submit exhibits and affidavits to support their allegations. *See Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1072 (8th Cir. 2004) ("The plaintiff's prima facie showing must be tested, not by the pleadings alone, but by the affidavits and exhibits presented with the motions and in opposition thereto.") (internal quotation omitted); *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 208 (2d Cir. 2001); *Nelson v. Park Indus., Inc.*, 717 F.2d 1120, 1123 (7th Cir. 1983).

the substantial increase in arrests by the FOTs deployed to Newark. *See* JA-562-63 (SAC ¶148 (citing five ICE Press Releases, *available at* http://law.shu.edu/ProgramsCenters/PublicIntGovServ/CSJ/upload/ICE-Press-Releases.pdf, which indicate that arrests were made pursuant to Myers' and Chertoff's nationwide enforcement strategy)).

Plaintiffs do not dispute that an official's high-level policymaking status is insufficient, alone, to confer personal jurisdiction; yet it is equally plain that supervisory officials who purposefully direct the implementation of their policies to a particular forum are subject to personal jurisdiction there, as anyone else would be. *See e.g. Baires v. U.S.*, No. C 09-5171, 2010 WL 3515749, at *6 (N.D. Cal. Sept. 8, 2010) (finding personal jurisdiction over high-level officials, including Defendant Torres, because they "crafted a policy that shapes the behavior of an enormous governmental entity within the state of California"); *Al-Kidd v. Gonzales*, No. CV:05-093, 2006 WL 5429570, at *4 (D. Idaho Sept. 27, 2006) (finding personal jurisdiction over Attorney General Ashcroft, not because of his supervisory position alone, but because he "spear-headed" allegedly unconstitutional practice challenged in forum), *aff'd in part, rev'd in part on other grounds*, 580 F.3d 949 (9th Cir. 2009), *cert. granted in part on other grounds*, No. 10-98, 2010 WL 2812283 (U.S. Oct. 18, 2010).[31]

[31] Accordingly, the cases Myers and Torres cite that reject personal jurisdiction premised exclusively on a D.C. official's supervisory status are inapplicable here. *See, e.g.*, *McCabe v. Basham*, 450 F. Supp. 2d 916 (N.D. Iowa 2006) (no personal jurisdiction over former Secret Service and Homeland Security chiefs where jurisdiction was premised "upon the acts of low-level federal, state and/or local government employees"); *Nwanze v. Philip Morris*, 100 F. Supp. 2d 215 (S.D.N.Y. 2000) (mere supervisory authority over national prison system insufficient basis for personal jurisdiction); *James v. Reno*, 1999 WL 615084, at *1 (D.C. Cir. July 2, 1999) (complained-of acts occurred outside district and no injury alleged to have occurred within district).

Similarly unavailing is Myers and Torres' argument that personal jurisdiction premised solely on a "failure to act" cannot satisfy the "purposefully directed" standard. See Defs.' Br. 45, 49. They rely heavily on *Pettengill v. Curtis*, 584 F. Supp. 2d 348, 357-358 (D. Mass. 2008), to support this proposition, but that decision is easily distinguished. In *Pettengill*, Massachusetts plaintiffs alleged that Boy Scouts leaders had failed to enact nationwide policies preventing child abuse among troop leaders, but made no allegations that these same leaders had any predicate conduct or contacts in Massachusetts. Accordingly, the court found no personal jurisdiction: "a failure to act that was directed nowhere in particular" did not create a "purposeful availment of the laws of one specific state." *Id.* at 358-359.[32] Here, by contrast, Myers and Torres targeted their policy creation, implementation, and monitoring activities at New Jersey, which caused the constitutional violations at issue.

Moreover, contrary to Defendants' claim, a supervisor's knowledge of unconstitutional conduct, coupled with a failure to act, can be sufficient to confer personal jurisdiction if the omissions are directed at the forum. *See McNeal v. Zobrist*, 365 F. Supp.2d 1166, 1172 (D. Kan. 2005) (asserting personal jurisdiction over police supervisors in Missouri based on alleged failure to train and supervise officers charged with using excessive force in Kansas); *Al-Kidd*, 2006 WL 5429570, at *4 (failure to correct constitutional violations in forum).

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[32] The product liability cases Myers and Torres cite are similarly distinguishable because they stand for the unremarkable proposition that a general failure to warn – absent any ties to a specific jurisdiction – is insufficient. *See, e.g., Carty v. Beech Aircraft Corp.*, 679 F.2d 1051, 1061 (3d Cir. 1982); *Clebda v. H.E. Fortna and Brother, Inc.*, 609 F.2d 1022, 1023-24 (1st Cir. 1979); *Nat'l Union Fire Ins. Co. v. Am. Eurocopter Corp.*, No. CV 09-136, 2009 WL 2849130, at *7 (D. Haw. Aug. 26, 2009); *see also Hanson v. Denckla*, 357 U.S. 235, 250-56 (1958) (holding that Florida courts lacked personal jurisdiction over out-of-state defendant trust company that had no office, business, or assets in Florida).

Finally, Myers and Torres do not dispute that Plaintiffs have satisfied the other two requirements for specific jurisdiction. *See O'Connor*, 496 F. 3d at 317. First, as the district court found, "[t]he alleged wrong arises directly out of Defendants' forum-based activities[,]" including their "failure to properly supervise, investigate claims of unlawful home raids, and discipline their New Jersey staff." *Argueta I*, JA-38. Second, considerations of fair play support the exercise of jurisdiction "given the small distance between Washington, D.C. and New Jersey, and the great stake the District of New Jersey has in preventing violations of its residents' constitutional rights." *Id.*

B. Dismissal at the Pleading Stage Is Premature.

Even if the Court were to find that the facts as currently pled do not support a finding of personal jurisdiction, the proper remedy is not dismissal but remand to the district court to permit additional discovery regarding Myers' and Torres' contacts with the forum.

This Court has routinely permitted jurisdictional discovery before considering a motion to dismiss, unless a plaintiff's claims are "clearly frivolous." *Mass. School of Law at Andover, Inc. v. Am. Bar. Ass'n*, 107 F.3d 1026, 1042 (3d Cir. 1997); *Nehemiah v. Athletics Congress of the U.S.A.*, 765 F.2d 42, 48 (3d Cir. 1985). *See also Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. 2003) (jurisdictional discovery, rather than dismissal, preferred where reasonably particular allegations suggest mere possibility of minimum contacts). This permissive discovery rule makes sense in the context of a dispute over personal jurisdiction which, unlike qualified immunity, is a defense to liability and not an immunity from suit. *Compare Robinson v. Hartzell Propeller, Inc.*, 454 F.3d 163, 170-71 (3d Cir. 2006) (personal jurisdiction is a defense to liability), *with*,

Mitchell, 472 U.S. at 526 (qualified immunity provides one protection from burdens of litigation).

Plaintiffs' claims are far from "clearly frivolous." In the limited course of this litigation, new evidence has already come to light supporting Plaintiffs' claims that Myers' and Torres' actions were purposefully directed toward New Jersey. See, e.g., JA-499; JA-501-03; April 5, 2007, Memo from Newark Field Office to Myers, *available at* http://law.shu.edu/ProgramsCenters/PublicIntGovServ/CSJ/upload/ICE-Memos.pdf. If the Court does not find the current record sufficient to establish personal jurisdiction, these memoranda, at the very least, suggest the existence of further evidence that would be sufficient. *See Toys "R" Us*, 318 F.3d at 457 (jurisdictional discovery mandated where "aspects of the record should have [] alerted the District Court to the possible existence of the 'something else' needed to exercise personal jurisdiction"). Jurisdictional discovery is particularly appropriate where, as here, information about the full extent of Myers' and Torres' contacts with New Jersey is exclusively in their and the government's possession. *Id.* (allowing jurisdictional discovery where "information, known only to [the defendant], would speak to an essential element of the personal jurisdiction calculus.").

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

By: /s/ Baher Azmy

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Dated: November 24, 2010

CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

By: /s/ Baher Azmy
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Dated: November 24, 2010

CERTIFICATION OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,955 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman. I further certify that, pursuant to the Court's Local Appellate Rule 31.1(c), the text of the electronic brief is identical to the text in the paper copies filed with the Court.

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Dated: November 24, 2010

CERTIFICATION OF VIRUS SCAN

I hereby certify that I have caused to be scanned for viruses the electronic version of Plaintiffs-Appellees Brief and that no viruses were detected. The virus scan was conduced using Symantic Endpoint Protection version 11.0.5002.333.

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CERTIFICATION OF SERVICE

I hereby certify that on November 24, 2010, the Brief of Plaintiffs-Appellees was served via the Court's ECF system and Federal Express on the following persons:

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In addition, I hereby certify that ten hard copies were sent to the Clerk of the Court by Federal Express.

By: /s/ Baher Azmy
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Dated: November 24, 2010