UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADRIANA AGUILAR, *et al.*, Plaintiffs, v. IMMIGRATION AND CUSTOMS ENFORCEMENT DIVISION OF THE DEPARTMENT OF HOMELAND SECURITY, *et al.*, Defendants.	07 Civ. 8224 (KBF) (FM)

REPLY MEMORANDUM OF LAW IN SUPPORT OF FIVE BIVENS DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Defendants ICE 19, ICE 30, ICE 32, ICE 42, and ICE 43 (the "Moving Defendants") respectfully submit this reply memorandum of law in further support of their motion for summary judgment.

Plaintiffs concede that none of the Moving Defendants participated in planning the operations at issue or selecting the targets. They further concede that none of the Moving Defendants arrested them, or searched their homes. And, with respect to all but one Moving Defendant (ICE 32), plaintiffs concede that the Moving Defendants did not enter their homes or participate in the operations in any meaningful way apart from standing around the perimeter of the property and observing from afar. Rather than base their arguments on the personal involvement of the Moving Defendants – which is required to establish *Bivens* liability – plaintiffs argue that the Moving Defendants should remain in the case because they participated in a group "show of authority," because they set foot on the curtilage of plaintiffs' homes, and because they failed to intervene to prevent constitutional violations committed by others. The Court should reject these arguments and grant the Moving Defendants' motion.

A. Plaintiffs Have Presented No Evidence That ICE 19, 30, 42, or 43 Were Personally Involved in the Alleged Constitutional Violations

Plaintiffs concede that ICE 19, 30, 42, and 43[1] did not enter or search their homes, engage in any conversation with them at the doors to their homes, participate in their arrests, or otherwise participate in the operations apart from remaining outside their houses. Specifically, plaintiffs' opposition papers describe the following specific actions of ICE 19, 30, 42, and 43:

ICE 19: Parked his car at the curb outside 710 Jefferson; got out of the car; was present

[1] There is also no material dispute that ICE 32 did not enter any of plaintiffs' homes, as discussed in Point B below. Plaintiffs do not concede that fact, however, thus ICE 32 is not included here.

when other officers approached the house; "could see a good majority of the front door"; heard another agent say the word "police"; and saw Sonia Bonilla's van arrive. *See* Opp. Br.[2] at 4-5.

ICE 30: Stood in the front yard of 22 Dogwood "toward the left side of the house with a view of the rear." Opp. Br. at 7.

ICE 42: Present at 710 Jefferson in either the front or back yard. *See* Opp. Br. at 5.

ICE 43: Paced back and forth in front and side yards of 22 Dogwood. *See* Opp Br. at 7.

At bottom, then, there are no material facts in dispute as to these four defendants: the Moving Defendants and plaintiffs agree that none of these four defendants participated in planning the operations or selecting targets, and that these four defendants did not enter plaintiffs' homes, speak with plaintiffs at the doors to their houses, participate in attempting to obtain consent, search the plaintiffs' homes, or engage in any activity apart from standing outside plaintiffs' homes and monitoring the situation from afar. The parties seek, in effect, a legal determination as to whether the Moving Defendants' mere presence outside a home where constitutional violations are alleged to have been committed at the door or inside the home, by other non-moving defendants, is sufficient to give rise to individual *Bivens* liability.

The Moving Defendants cannot be held individually liable under these circumstances. As explained in the Moving Defendants' opening papers, under *Bivens*, a defendant must have been personally involved in the constitutional violation, and not a mere bystander. *See* Opening Brief at 7-8; *see also Thomas v. Ashcroft*, 470 F.3d 491, 496 (2d Cir. 2006) (*Bivens* plaintiff "must allege that the individual defendant was personally involved in the constitutional violation.").

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[2] References to "Opp. Br." are to Plaintiffs' Memorandum of Law in Opposition to Five *Bivens* Defendants' Motion for Summary Judgment.

Plaintiffs attempt to get around the requirement of personal involvement by arguing that the Moving Defendants can be held individually liable merely because they were members of teams that created a "show of authority." *See* Opp. Br. at 10-13. This ignores the difference between a claim pursuant to the Federal Tort Claims Act (under which the United States could, in theory, be held responsible under a *respondeat superior* theory for the actions of a team of agents) with a *Bivens* claim, which requires that plaintiffs show that each defendant was personally involved in the alleged constitutional violations. In fact, the Second Circuit has recently made clear that undifferentiated allegations that "defendants" as a group committed a constitutional violation are insufficient to pursue a *Bivens* claim if they "fail[] to specify any culpable action taken by any single defendant." *Arar v. Ashcroft*, 585 F.3d 559, 569 (2d Cir. 2009) (*en banc*). Here, to the extent plaintiffs have identified any culpable action, it is by the agents who are alleged to have barged into plaintiffs' homes without first obtaining consent – not the Moving Defendants who are only alleged to have remained on the perimeter at all times, without personal knowledge of the conversation that took place at the door or what happened after other agents entered the homes. Indeed, plaintiffs do not even attempt to argue that the Moving Defendants had personal knowledge of the conversations that took place at the front doors of 22 Dogwood Lane and 710 Jefferson Street; the most they can say is that one Moving Defendant – ICE 19 – heard someone at the door identify himself as "police." Opp. Br. at 4. This is hardly enough to establish that all five Moving Defendants had personal knowledge of – and therefore personal involvement in – a non-consensual home entry.

Plaintiffs also attempt to argue that the Moving Defendants violated the Fourth Amendment simply by standing on their front yards (or, in the case of ICE 42, either the front

yard or the back yard, *see* Opp. Br. at 5). *See* Opp. Br. at 13 (arguing that Fourth Amendment was violated as soon as agents arrived, "long before any agent set foot inside"). Similarly, plaintiffs argue that the Fourth Amendment was violated at the moment the Moving Defendants set foot on the "curtilage" of plaintiffs' homes. Opp Br. at 8; *id.* at 16 (arguing that ICE 42 "personally invaded the curtilage of 710 Jefferson"); *id.* at 17-18 (arguing that ICE 30, 32, and 42 "entered the curtilage" of 22 Dogwood, which "contributed to a show of force and hostility").

Again, plaintiffs misstate the law. The Second Circuit has recently confirmed that a law enforcement officer "may lawfully go to a person's home to interview him" without violating the Fourth Amendment, even when approaching the person's home involves crossing that person's fence, yard, porch, and other areas around the home. *United States v. Titemore*, 437 F.3d 251, 260 (2d Cir. 2006) (quoting *United States v. Daoust*, 916 F.2d 757, 758 (1st Cir. 1990) (Breyer, C.J.)). In *Titemore*, which was a criminal case, the law enforcement officer "walked around [a] split-rail fence, over [a] shallow grass-covered depression, and across Titemore's front lawn" to approach the defendant's "porch and [] sliding-glass door" at the back of the house, on the opposite side of the house from the front door, which had a working doorbell and welcome mat. *Id.* at 254. Moreover, the officer, who was approaching the home at night, purposely avoided the front entrance, because he knew it was equipped with a motion-sensing light, and he did not want the occupant of the home to see him approaching. *Id.* Upon arriving at the sliding glass door, the officer observed Titemore, who was the occupant of the home, sitting on his couch watching television with a rifle within his reach, and Titemore was eventually charged with possession of a firearm by a convicted felon. *Id.* at 254-55. Titemore moved to suppress the evidence on the grounds that the officer had violated the Fourth Amendment because the lawn, porch, and sliding

glass door were "intimately associated with the home itself, [and] they [were therefore] within the protected curtilage." *Id.* at 255.

The Second Circuit rejected this argument, explaining that "[t]he touchstone of [the] inquiry [is] whether [the defendant] had a reasonable expectation of privacy in [the area near the home that he claims to be protected by the Fourth Amendment]." *Id.* at 259 (citation omitted) (fourth and fifth alterations in original). The court held that the porch and sliding glass door did not fall within the curtilage even though they were "connected to the house," because they "constitute[d] part of a principal entranceway," they were "not completely enclosed" or "separated from the public," and "no steps were taken to shield [them] from outside observation." *Id.* This holding aligns with a long string of cases from various circuits, all of which hold that law enforcement officers do not violate the Fourth Amendment by approaching homes through means that are generally accessible to any member of the public. *See, e.g.*, *United States v. Raines*, 243 F.3d 419, 420–21 (8th Cir. 2001) (officer "did not interfere with [the defendant's] privacy interest when he, in good faith, went unimpeded to the back of [the defendant's] home to contact the occupants of the residence" by walking through ten-foot wide opening in wall of debris that acted as make-shift fence around perimeter of property); *United States v. Thomas*, 120 F.3d 564, 571–72 (5th Cir. 1997) (police did not violate Fourth Amendment when they approached front door of apartment by walking through open gate because "the officers could reasonably believe that the gate provided the principal means of access to the apartment"); *United States v. Taylor*, 90 F.3d 903, 908–09 (4th Cir. 1996) (police officers did not violate Fourth Amendment when they looked into window as they approached front door because route "was as open to the law enforcement officers as to any delivery person,

guest, or other member of the public"); *United States v. Garcia*, 997 F.2d 1273, 1279 (9th Cir. 1993) (recognizing "that officers walking up to the front door of a house can look inside through a partially draped open window without conducting a Fourth Amendment search"); *cf. United States v. Reyes*, 283 F.3d 446, 467 (2d Cir. 2002) (no Fourth Amendment violation when police entered driveway because "driveway led to the street and could be viewed in its entirety from the street"); *United States v. Evans*, 27 F.3d 1219, 1228 (7th Cir. 1994) ("[t]he agents' approach to the garage did not implicate a Fourth Amendment interest because Evans did not present any evidence . . . that he had a reasonable expectation of privacy in the driveway").

If there was no violation of the Fourth Amendment in these cases, each of which was a criminal case in which the defendant was sent to prison as a direct result of a law enforcement officer's warrantless entry onto his property, it stands to reason that the Moving Defendants here cannot be personally liable to the plaintiffs for money damages for engaging in essentially the same activity – standing in front or back yards and observing the plaintiffs' homes. It is telling, perhaps, that plaintiffs do not cite a single case where a law enforcement agent has been held personally liable for money damages under *Bivens* merely for setting foot upon the curtilage of a plaintiff's home. The few cases that plaintiffs do cite are (a) criminal, rather than *Bivens*, cases, and (b) easily distinguishable. In *United States v. Maez*, 872 F.2d 1444 (10th Cir. 1989), for example (*see* Opp. Br. at 11-12), the Tenth Circuit found a Fourth Amendment violation where FBI agents and a SWAT team surrounded a trailer, demanded (over loudspeakers) that the criminal defendants exit, never approached the door, handcuffed the defendants' 15-year-old son, and pointed rifles at the trailer. *Id.* at 1446-47. The case differs from this one because the Moving Defendants here approached the plaintiffs' homes with weapons holstered and knocked

on plaintiffs' front door, as opposed to the officers in *Maez*, who pointed rifles at a trailer from afar and used a loudspeaker to order the occupants out.

But, putting that aside, a finding of a Fourth Amendment violation on a criminal suppression motion – where the Government bears the burden of establishing that its actions were lawful – is a different matter altogether from holding individual agents personally liable for money damages in a civil action, where the burdens and quantum of proof necessary to establish liability are entirely different. Here, plaintiffs bear the burden of showing that the law enforcement officers violated clearly established constitutional principles. At a minimum, the abundant case law cited above makes clear both that the Moving Defendants violated no clearly established law, and that the Moving Defendants necessarily enjoy qualified immunity, because it was objectively reasonable for them to believe that it was lawful for them to set foot upon plaintiffs' lawns. *See McClellan v. Smith*, 439 F.3d 137, 147-48 (2d Cir. 2006) (qualified immunity even where "officers of reasonable competence could disagree" on propriety of officers' conduct). Because the qualified immunity standard "gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law," *Hunter v. Bryant*, 502 U.S. 224, 229 (1991), and because ample case law holds that conduct like the Moving Defendants' meets constitutional requirements, *see supra* at 5-6, qualified immunity applies even if the Court were otherwise inclined to adopt plaintiffs' novel theory of liability.

B. There Is No Dispute of Material Fact Regarding the Personal Involvement of ICE 32

As noted above, plaintiffs concede that ICE 19, 30, 42, and 43 did not enter their homes or participate in the operations apart from standing on the perimeter. Plaintiffs do, however, attempt to dispute the level of involvement of ICE 32, arguing that there is sufficient evidence to

infer that ICE 32 entered 22 Dogwood because, according to plaintiffs, another agent, ICE 31, "testified that ICE 32 not only approached the front door, but also assisted in removing two prisoners from inside." Opp Br. at 19, *see also* Plaintiffs' 56.1 Counterstatement ¶¶ 28, 74.

The testimony of ICE 31 that plaintiffs rely upon, which is reproduced below, does not support their argument:

> Q. Other than [ICE 33] and [ICE 27], did you see anyone approach the front door?
>
> A. There were some others there. I believe [ICE 32], but I don't recall if he went in or he took the perimeter on the other side of the house.
>
> Q. So you just recall seeing [ICE 32] at 22 Dogwood, but you don't recall where he went once he got there; is that correct?
>
> A. Correct.

ICE 31 Depo. 94:11-22.[3] Later,

> Q. Can you describe how you led them to your car?
>
> A. I led the first individual just holding his arm, because he was restrained, so I did not want him to trip. And I believe it was [ICE 32] who escorted the second person behind me out to the car.
>
> Q. Who was inside the house when you went in?
>
> A. I recall [ICE 33], [ICE 27], and a Hispanic agent.
>
> Q. Was [ICE 32] inside the house when you went inside?
>
> A. I don't recall his placement, where he was, I just recall offering assistance to take two of the individuals out, and that [ICE 32] assisted me.
>
> Q. Do you recall seeing [ICE 32] in the living room?
>
> A. You know, I don't recall.

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[3] The relevant testimony from the deposition of ICE 31 is attached as Exhibit A to the Declaration of David Bober, which is being filed concurrently with this memorandum.

Id. 110:8-111:3. In other words, plaintiffs' evidence in support of their argument that ICE 32 entered 22 Dogwood is the testimony of one agent who stated that he recalled seeing ICE 32 at the house, but could not recall where he went once he got there, could not recall ICE 32's placement, and could not recall whether he saw ICE 32 in the living room. This evidence is insufficient to create a dispute of material fact even as to whether ICE 32 entered 22 Dogwood; moreover, plaintiffs have adduced literally no evidence that ICE 32 acted under circumstances that could give rise to *Bivens* liability – *i.e.*, by entering plaintiffs' houses with knowledge that no agent had obtained valid consent.

C. The Moving Defendants Cannot Be Held Liable on a Failure-to-Intervene Theory

As explained in the Opening Brief, a *Bivens* defendant can only be held liable under a theory of bystander liability for failure to intervene if the alleged violation took place in the officer's presence, where he had a realistic opportunity to prevent the harm, and he reasonably should have known the plaintiffs' rights were being violated. *See* Opening Brief at 9-10. Plaintiffs argue that the Moving Defendants can be held liable here because they "witnessed the unlawful conduct that took place at the homes." Opp. Br. at 21. But apart from alleging that ICE 19 heard other agents identify themselves as "police," Opp. Br. at 22, plaintiffs point to no evidence establishing that any of the Moving Defendants participated in, heard, or knew of what was said at the front door. Accordingly, there is no evidence that any alleged violation took place in their presence – a requirement for bystander liability – and it was reasonable for them to assume, based on their training and experience, that their fellow agents would not have acted contrary to their training and ICE policy and violated plaintiffs' constitutional rights as alleged. And even as to ICE 19, plaintiffs again overstate the testimony. Although plaintiffs argue that

the fact that ICE 19 heard "police" "raises the inference he heard what else was said at the door," in fact he testified to exactly the opposite:

> Q. Did you hear anyone yelling at any point
>
> A. No. Just, you know, I did hear "police," you know, a couple times from [another agent], you know, identifying themselves. **That was it.**

ICE 19 Depo.146:25-147:6 (Cargo Declaration Exhibit A) (emphasis added).

D. Plaintiffs' Claim That They Have "Never Had a Meaningful Opportunity" to Identify the Defendants Is Incorrect and Inappropriate

Finally, plaintiffs argue that the Moving Defendants' motion should be denied in part because the plaintiffs "have never had a meaningful opportunity to identify the agents who entered the homes." Opp. Br. at 19. This argument is incredible on its face. Putting aside that plaintiffs have taken upwards of 80 depositions, they were given photographs of every *Bivens* defendant a year and a half ago – and they have taken upwards of 20 depositions *after* the photographs were produced. Plaintiffs – or, rather, plaintiffs' counsel – allege that the photographs are not helpful because, in their words, they "appear to be woefully out of date." Opp. Br. at 19. The Court should not accept plaintiffs' counsel's unsworn statement that the photographs that the photographs are "woeful," nor their assertion that they have had insufficient opportunity to identify individual defendants. If plaintiffs were unhappy with the quality of the photographs, they could and should have complained in the 18 months they have had the photographs before this motion was filed. It is too late (and noncompliant with Fed. R. Civ. P. 56(d)) for them to oppose this motion now on this basis.

CONCLUSION

The Court should grant the Moving Defendants' motion for summary judgment.

Dated: New York, New York
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