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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARIA ARGUETA, et al.,	)	Hon. Peter G. Sheridan
	)	
Plaintiffs,	)	Civil Action No. 08-1652-PGS-ES
	)	
v.	)	**Memorandum of Law In Support**
	)	**of Motion to Dismiss for**
UNITED STATES IMMIGRATION	)	**Individual Federal Defendants**
AND CUSTOMS ENFORCEMENT,	)	**Myers, Torres, Weber and**
et al.,	)	**Rodriguez**
	)	
Defendants.	)	
	)	

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I. INTRODUCTION

This action arises from efforts of the United States Immigration and Customs Enforcement (ICE) to remove illegal aliens from the United States, in particular, aliens who have committed crimes and those who have disregarded formal orders of removal. Under national enforcement initiatives developed by ICE headquarters, ICE law enforcement offices in Newark planned and executed operations to apprehend targeted aliens. Under the Immigration and Nationality Act (INA), ICE agents may arrest without a warrant any person whom they have reason to believe is in the country illegally, regardless of whether that person is the target of an enforcement operation or someone they encounter while carrying out the enforcement operation.

The plaintiffs contend that in nine incidents arising from this enforcement initiative, ICE agents entered and searched their residences without consent or other legal justification, in violation of the Fourth Amendment. In addition, some of the plaintiffs alleged that they were seized and excessive force was used in violation of the Fourth Amendment. Finally, some of the plaintiffs allege violations of their Fifth Amendment substantiative due process, procedural due process, and equal protection rights. The First Amended Complaint (FAC) seeks individual capacity damages against four individual federal defendants including the two highest federal officials at ICE, Assistant Secretary of Homeland Security, ICE, Julie L. Myers, and the Acting Deputy Assistant Secretary for Operations of Homeland Security, ICE, John P. Torres. Also

named in their individual capacity are the two supervisors of the ICE Newark Field Office, Field Office Director, Scott A. Weber and Deputy Field Office Director Bartolome Rodriguez. Finally, the FAC names DOE ICE agents, supervisors and local police.[1]

This Court should dismiss the plaintiffs' claims against individual federal defendants Myers, Torres, Weber and Rodriguez for the following reasons:

1. The Court lacks personal jurisdiction over the two Washington, D.C. based defendants, Myers and Torres, because they lack the required minimum contacts with New Jersey.

2. The Court lacks jurisdiction over the Roe plaintiffs because they failed to apply to proceed anonymously.

3. The INA, specifically, 8 U.S.C. §§ 1252(b)(9) and 1252(g), divests this Court of jurisdiction to hear constitutional tort claims relating to ICE law enforcement actions taken for the purposes of removing illegal aliens, from any alien plaintiffs who may be subject to removal.

4. Special factors, including the INA and the plenary power of the political branches over immigration and national security matters, preclude plaintiffs who were believed to be unlawful aliens from seeking damages directly under the Constitution.

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[1] Any unnamed federal defendants are not parties or represented herein. In addition, there are claims for injunctive relief against ICE that have been addressed by the United States in a separate pleading.

5. Qualified immunity should be granted to the individual federal defendants because the plaintiffs have failed to provide anything but conclusory assertions that those defendants were personally involved in the alleged violations of the plaintiffs' constitutional rights.

II. FACTUAL AND PROCEDURAL BACKGROUND[2]

A. Fugitive Operations Teams

ICE was formed pursuant to the Homeland Security Act of 2002 and is charged by Congress with enforcing the nation's customs and immigration laws. Part of this mission requires ICE to arrest immigration law violators found within the United States. FAC, Exhibit D, p. 1. Fugitive Operations Teams (FOTs) are an integral part of this mission. Id.

FOTs use leads and other intelligence to find, arrest and place into removal proceedings aliens who have been previously ordered to leave the country, but failed to comply. Id. ICE defines these fugitives as "an alien who has failed to depart the United States pursuant to a final order of removal, deportation or exclusion; or who has failed to report to a Detention and Removal Office after receiving notice to do so." Id.[3]

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[2] The "facts" in this section are taken from the FAC and the exhibits attached to that complaint and are assumed to be true only for the purposes of this motion. See Kanter v. Barella, 489 F.3d 170, 177 (3d Cir. 2007).

[3] As of 2006 there were an estimated 12 million illegal aliens living in the United States of which more than 600,000 were fugitive aliens. FAC, Exhibit C, p. 3.

FOTs focus their efforts on specific fugitive aliens at specific locations. Id. at 2. During ICE operations targeting these fugitives, FOTs often encounter other aliens who are in the United States illegally. Id. If a person is deemed to be such an alien, they may be arrested, without a warrant, and processed accordingly for removal. Id.

B. Statutory Powers of ICE Agents

1. Powers to Detain and Arrest Without a Warrant

Section 287 of the INA, 8 U.S.C. § 1357, authorizes certain categories of ICE officers and employees to undertake specified enforcement-related actions without a warrant. Section 1357(a)(1) allows authorized ICE agents to "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." 8 U.S.C. § 1357(a)(1). Section 1357(a)(2) empowers any authorized agent, without a warrant, "to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation [relating to the admission, exclusion, expulsion, or removal of aliens] and is likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. § 1357(a)(2).

Federal regulations permit certain employees, including deportation officers, special agents, and immigration enforcement agents, to make the warrantless arrests authorized in section 1357(a)(2), provided that they "have successfully completed basic immigration law enforcement training." See 8 C.F.R. § 287.5(c)(1).[4] These employees

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[4] The Homeland Security Act provided that references "relating to" the INS in "statutes, regulations, directives, or delegations of authority shall be

are also authorized by statute and regulation to carry firearms and to employ deadly and non-deadly force in conducting enforcement activities. See 8 C.F.R. §§ 287.8(a)(1), (a)(2); 8 U.S.C. § 1357(a) (authorizing DHS officers to carry firearms pursuant to regulations issued by the Attorney General); 8 C.F.R. § 287.9(b) (permitting immigration officers, as defined in 8 C.F.R. § 103.1(b) to carry firearms approved by DHS).

An alien arrested without a warrant under section 1357(a)(2) must be examined by an immigration officer to determine whether "there is prima facie evidence that the arrested alien was entering, attempting to enter, or is present in the United States in violation of the immigration laws." 8 C.F.R. §§ 287.3(a) and (b). If such evidence exists, the examining officer refers the case to an immigration judge by issuing a "Notice to Appear," which charges the alien with being in the United States in violation of the INA. See 8 C.F.R. §§ 239.1, 1003.15. The filing of a Notice to Appear (or other charging document) with the Immigration Court vests that Court with jurisdiction and initiates removal proceedings against the alien. See 8 C.F.R. § 1003.14.

2. Powers to Execute Administrative Warrants

Once an alien is subject to a final removal order, certain ICE officials authorized by regulation may issue a warrant of removal. See 8 C.F.R. § 241.2(a). A warrant of

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deemed to refer to the appropriate official" of DHS. 68 Fed. Reg. 35273, 2003 WL 21358855 (June 13, 2003) (final rule conforming text of Title 8 of Code of Federal Regulations to governmental structures established in Homeland Security Act and DHS reorganization plan).

removal may be executed by certain employees, including special agents and deportation officers, provided that they have successfully completed basic immigration law enforcement training. See 8 C.F.R. §§ 241.2(b) and 287.5(e)(3).

C. Operation Return to Sender

Operation Return to Sender, begun in May of 2006, is a nationwide enforcement initiative to arrest ICE fugitive aliens found within the United States. FAC, Exhibit D, p.1. The Operation combines ICE's National Fugitive Operations program resources with those of other federal, state and local law enforcement entities "to eliminate the backlog of ICE fugitive cases." Id. ICE policy indicates that FOTs may only enter dwellings during this operation after obtaining consent from a person authorized to give consent. Id. at 2. To ensure that the occupant was able to understand the request for consent, each team has at least one Spanish-speaking officer. Id. If consent to enter is granted, the FOT may, if necessary for officer safety, search the immediate area and the occupant may be asked if there are other people in the house. Id. If others are present, they are asked to come into a common area. Id.

The FOT then tries to determine if the fugitive target of the operation is present. If, in the course of searching for targeted fugitives, ICE officers encounter other aliens whom they have reason to believe are in the United States illegally, they can arrest those aliens without a warrant and transport them to an examining immigration officer under the authority of 8 U.S.C. § 1357(a)(1). Id. These policies were in place

between August 2006 and April 2008, the applicable time period of the FAC allegations.

D. The Plaintiffs' Allegations

The plaintiffs complain that more stringent immigration enforcement policies and tactics resulted in "unconstitutional home raid practices" that violated their constitutional rights. FAC, ¶ 2. The plaintiffs allege that "federal agents" gained unlawful entry into their homes and detained some of the occupants without legal justification. Id. Some of the plaintiffs allege "physical or verbal abuse." Id. at 3. In the nine ICE enforcement operations outlined in the FAC, which allegedly occurred between August 2006 and April 2008, the plaintiffs complain as follows:

1. Maria Argueta claims to have had "Temporary Protection Status" when unknown ICE agents entered her home looking for a "male criminal." Id., ¶ 59. She claims that this target was a ruse, and therefore the consent she gave to enter the home was invalid. Id., ¶¶ 58-60. She further states that the ICE agents searched the apartment and asked her about her immigration status. Id., ¶¶ 63 and 65. Argueta claims that she told the agents that she was waiting to receive her "TSP card in the mail," and provided the agents with documentation of her status. Id., ¶¶ 65 and 66. Argueta claims that she was the arrested and detained for almost 36 hours. Id., ¶¶ 69 and 75.

2. Walter Chavez and Ana Galindo claim to be lawful permanent residents, and

their nine-year-old son a United States citizen. They claim that unknown ICE agents' threats caused Chavez to open his door, and the agents asked for the location of Galindo's sisters. Id., ¶¶ 80 and 83. The plaintiffs claim that one of the unknown ICE agents pointed his gun at Galindo and her child. Id., ¶ 85. There is no allegation that anyone was arrested or detained during this operation.

3. Arturo Flores and his stepdaughter Bybyana Arias claim to be United States citizens. Id., ¶ 95. The plaintiffs allege that unknown ICE agents forced open the door, searched their residence and arrested and detained Flores' wife and brother. Id., ¶¶ 99, 102 and 108.

4. Juan Ontaneda alleges unknown ICE agents knocked on his door looking for a man named "Elias." Id., ¶ 114. After Ontaneda denied knowing the target, the ICE agents allegedly arrested and transported him to the detention center in Elizabeth, New Jersey. Id., ¶¶ 122 and 124.

5. Veronica Covias claims to have been a lawful permanent resident when unknown ICE agents allegedly pushed her door open and searched her residence without consent. Id., ¶¶ 125, 127 and 129. The agents then allegedly arrested Covias' son, who was later removed from the United States. Id. at ¶¶ 131 and 132.

6. Carla Roe 1 claims that unknown ICE agents came to her door claiming to be looking for a "person who sold drugs" and then entered without consent. Id., ¶¶ 136 and 137. After telling the agents she did not have identification, Carla Roe 1 was

arrested and later removed. Id., ¶¶ 140, 144 and 145.

7. Carlos and Carla Roe 2 claim that unknown ICE agents forced their way into their residence with guns drawn. Id., ¶ 148. Carlos Roe 2 was then arrested and questioned about gang-related activity. Id., ¶¶ 159 and 160. Bond was set by an Immigration Law Judge, and Carlos Roe 2 was detained for two months. Id., ¶ 161.

8. Carla Roe 3 claims that unknown ICE agents and members of the Penns Grove Police Department knocked on her door and asked for the location of her brother. Id., ¶¶ 164 and 166. The FAC alleges that the law enforcement officers then entered and searched the home with their guns drawn and without consent. Id., ¶¶ 166 and 170. The agents allegedly arrested Carla Roe 3's husband and two other occupants of the house who were subsequently removed, and told Carla Roe 3 that she had to report to "the Office." Id., ¶ 174.

9. Carlos Roe 4 alleges that unknown ICE agents forced their way into his residence without consent and claimed to be looking for a "Jose Morales." Id., ¶¶ 178 and 179. Carlos Roe 4 alleges that a friend who was staying with him was subsequently arrested and has been detained in an immigration detention facility. Id., ¶ 186.

III. ARGUMENT

A. The Roe Plaintiffs Should be Dismissed Because They Have Not Properly Applied to Proceed Anonymously

Fed. R. Civ. P. 10(a) states that "[t]he title of the complaint must name all the parties." This rule embodies the presumption of openness in judicial proceedings. See Gannett Co. v. DePasquale, 443 U.S. 368, 386 n.15 (1979). "A plaintiff should be permitted to proceed anonymously only in those exceptional circumstances involving matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity." M.M. v. Zavaras, 139 F.3d 798, 803 (10th Cir. 1998) (emphasis added) quoting Doe v. Frank, 951 F.2d 320, 324 (11th Cir. 1992). To proceed anonymously, the plaintiffs must petition the Court for permission. W.N.J. v. Yocom, 257 F.3d 1171, 1172 (10th Cir. 2001). "Where no permission is granted, 'the federal courts lack jurisdiction over the unnamed parties, as a case has not been commenced with respect to them.'" Id., quoting Nat'l Commodity & Barter Ass'n, 886 F.2d 1240, 1245 (10th Cir. 1989); see also Marcano v. Lombardi, No. 02-2666, 2005 WL 3500063, at *4 (D.N.J. Dec. 20, 2005) (Unpublished) (Case dismissed because the plaintiff never petitioned to proceed under an alias); Estate of Rodriguez v. Drummond Co., 256 F. Supp. 2d 1250, 1255-56 (N.D. Ala. 2003) (held the court lacked jurisdiction over the unnamed parties). Since the Roe plaintiffs have failed to move to proceed anonymously, this Court does not have jurisdiction over these

plaintiffs and they should be dismissed.

Even if the Roe plaintiffs had moved to proceed anonymously, such a request should be denied because the importance of having open courts and the individual federal defendants need for information to defend themselves greatly outweighs any baseless retaliation concern derived from an unrelated, outdated, news article. The Third Circuit has not specifically addressed the circumstances under which a plaintiff may proceed anonymously. Doe v. C.A.R.S. Protection Plus, Inc., —F.3d —, Nos. 06-3625 and 06-4508 2008 WL 22226890, at *11 n.2 (3d Cir. May 30, 2008). However, the New Jersey Federal District Court has addressed the balancing test used in other jurisdictions to determine if a plaintiff - in that case one with psychiatric disabilities - could proceed anonymously. Doe v. Hartford Life and Acc. Ins. Co., 237 F.R.D. 545, 549 (D.N.J. 2006). Factors weighing in favor of anonymity include:

> (1) the extent to which the identity of the litigant has been kept confidential; (2) the bases upon which disclosure is feared or sought to be avoided, and the substantiality of these bases; (3) the magnitude of the public interest in maintaining the confidentiality of the litigant's identity; (4) whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigant's identities; (5) the undesirability of an outcome adverse to the pseudonymous party and attributable to his refusal to pursue the case at the price of being publicly identified; and (6) whether the party seeking to sue pseudonymously has illegitimate ulterior motives.

Id. citing Doe v. Provident Life and Accident Ins. Co., 176 F.R.D. 464, 467-68 (E.D. Pa. 1997). Factors weighing against anonymity included:

> (1) the universal level of public interest in access to the identities of litigants; (2) whether, because of the subject matter of the litigation, the status of the litigant as a public figure, or otherwise, there is a particularly strong interest in knowing the litigant's identities, beyond the public's interest which is normally obtained; and (3) whether the opposition to pseudonym by counsel, the public, or the press is illegitimately motivated.

Hartford Life, 237 F.R.D. at 550, citing Provident Life, 176 F.R.D. at 468. The second factor against anonymity, a strong interest in knowing the plaintiffs' identities, has been described by other courts as "the risk of unfairness to the opposing party." James v. Jacobson, 6 F.3d 233, 238 (4th Cir. 1993).

This is a particularly important consideration for the individual federal defendants in this case, because without the names of the Roe plaintiffs they cannot be sure which specific law enforcement action is the subject of the Roe plaintiffs' allegations and therefore cannot adequately defend themselves. This raises serious due process concerns as to the individual federal defendants. The FAC, moreover, provides no justification for proceeding anonymously. Attached is the unrelated article, cited but not provided by the plaintiffs, which claims that unidentified ICE agents in Miami targeted a family of four illegal aliens for removal in 2006 because their daughter was an immigration activist. Defense Exhibit (DEX) 1.[5] The article,

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[5] It is the individual federal defendants' position that such unauthenticated documents are inadmissable as well as irrelevant. See McCabe v. Basham, 450 F. Supp. 2d 916, 925 (N.D. Iowa 2006) (in considering similar articles the court indicated it "seriously questions the admissibility of these unauthenticated exhibits.") However, a copy of this article is provided by the individual federal

published almost two years after the alleged incident, provides no support for this claim other than the unsworn and unsubstantiated conjecture of the activist herself who, according to the article, did not report the alleged threats for almost two years. Id. Based on this inadmissible evidence, which is of no probative value, the Roe plaintiffs claim that "ICE has been known to retaliate against immigrants who have spoken out against immigration laws and policy." FAC, ¶ 22. This overly broad, conclusory allegation has nothing to do with the individual federal defendants here and provides no support for anonymous plaintiff participation in this case. This is clearly not an exceptional circumstance that outweighs the presumption that court proceedings will be open.

To the contrary, the risk of unfairness to the individual federal defendants of not knowing the particular circumstances over which they are being sued is serious indeed. Since Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court has provided individual federal defendants the ability to defend themselves not only from liability, but from the hardships of litigation including discovery through qualified immunity. Siegert v. Gilley, 500 U.S. 226, 231 (1991), citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Crawford-El v. Britton, 523 U.S. 574, 598 (1998). However, to do so the defendants must know the particular circumstances surrounding the allegations. See

defendants to demonstrate its irrelevance.

id. ("the court may insist that the plaintiff put forward specific, nonconclusory factual allegations.") They cannot do this without knowing who the plaintiff is so they can determine what law enforcement operations the Roe plaintiffs allege violated their rights. Therefore, this Court should either dismiss the Roe plaintiffs for lack of jurisdiction, or require them to be identified immediately.

B. This Court Has No Subject Matter Jurisdiction Over Claims That Could Have Been Brought During Removal Proceedings By Alien Plaintiffs Who May Be Subject To Removal

The INA prohibits the alien plaintiffs who may be subject to removal, Juan Ontaneda, Carla Roe 1, Carlos Roe 2, and Carla Roe 3, from challenging in district court the alleged actions of the individual federal defendants leading up to their immigration arrests, detentions and removal processing.[6] The INA limits judicial review of immigration proceedings in two ways material to this case. First, the INA consolidates in the courts of appeals all legal and factual questions arising from actions taken to remove an alien. See 8 U.S.C. § 1252(b)(9). Second, the Act precludes challenges to the Government's decisions and actions "to commence removal proceedings, adjudicate cases, or execute removal orders." See 8 U.S.C. § 1252(g).

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[6] The FAC does not indicate that any of these four plaintiffs, Ontaneda, Carla Roe 1, Carlos Roe 2, or Carla Roe 3 were lawfully present. FAC, ¶¶ 15, 17, 19, and 20. In addition, the FAC states that Ontaneda and Carlos Roe 2 were arrested and transported to a detention facility, Carla Roe 1 was removed, and Carla Roe 3 ordered to go to the ICE Office. FAC, ¶¶ 124, 146, 161 and 174.

As the Supreme Court noted, "the theme of the [INA's]" jurisdiction-stripping provisions is to "protect[] the Executive's discretion from the courts." Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 486 (1999) ("AADC"). Likewise, as the Second Circuit explained, a "primary effect" of the amendments to the INA is "to 'limit all aliens to one bite of the apple . . . [and thereby] streamline what the Congress saw as uncertain and piecemeal review of orders of removal.'" Xiao Ji Chen v. DOJ, 471 F.3d 315, 324 n.3 (2d Cir. 2006), quoting Bonhometre v. Gonzales, 414 F.3d 442, 446 (3d Cir. 2005). Applied to this case, the INA divests this Court of jurisdiction to hear Bivens claims of the alien plaintiffs who may be subject to removal relating to ICE law enforcement actions taken for the purposes of removing illegal aliens.[7] Therefore, the Court should dismiss the immigration arrest or processing related claims of Juan Ontaneda, Carla Roe 1, Carlos Roe 2, and Carla Roe 3 for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

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[7] Cf. Aquilar v. U.S.I.C.E., 510 F.3d 1, 9 (1st Cir. 2007) (the "breathtaking" expanse of 8 U.S.C. § 1252(b)(9) applies to alleged constitutional violations that arise from actions taken to remove aliens); Humphries v. Various Federal USINS Employees, 164 F.3d 936, 942, 945 (5th Cir. 1999) (dismissing First Amendment claim based on § 1252(g)); Foster v. Townsley, 243 F.3d 210 (5th Cir. 2001) (dismissing excessive force, due process, equal protection, and First Amendment claims); Van Dinh v. Reno, 197 F.3d 427 (10th Cir. 1999) (dismissing Bivens class action suit regarding the Government's decision to transfer aliens between detention facilities).

1. There is No Subject Matter Jurisdiction In This Court for Any Action Taken to Remove an Alien

The INA's central avenue for judicial review is its provision requiring all legal and factual questions arising from actions taken to remove an alien to be reviewed only by the courts of appeals. See 8 U.S.C. § 1252(b)(9). The Supreme Court has described this provision as "the unmistakable 'zipper' clause" because it consolidates all judicial review in a single place, the courts of appeals. AADC, 525 U.S. at 483. Specifically, this section states:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter [8 U.S.C. §§ 1151, et seq.] shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus . . . or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

8 U.S.C. § 1252(b)(9) (emphasis added). Under this clause, judicial review is thus limited to the courts of appeals, see 8 U.S.C. § 1252(a), and "other challenges" may no longer be "brought pursuant to a federal court's federal question . . . jurisdiction under 28 U.S.C. § 1331." Calcano-Martinez v. INS, 232 F.3d 328, 340 (2d Cir. 2000), aff'd, 533 U.S. 348 (2001).

The "zipper clause" provision dovetails with the INA's exhaustion requirement. Before an alien can present a claim to the court of appeals, the alien must first "exhaust[] all administrative remedies available to the alien as of right," 8 U.S.C. §

1252(d)(1), which includes raising his claims before an Immigration Judge and the Board of Immigration Appeals. An alien's failure to do so deprives the courts of jurisdiction to hear his claims. See 8 U.S.C. § 1252(d)(1); see also McCarthy v. Madigan, 503 U.S. 140, 144 (1992), superseded on other grounds, 42 U.S.C. § 1997(e); United States v. Copeland, 376 F.3d 61, 69 (2d Cir. 2004). Together, the "zipper clause" and the exhaustion requirement map out the exclusive path that all challenges to removal actions must follow.

In the instant case, the plaintiffs are asserting Bivens claims for damages arising from alleged Fourth Amendment violations, including unreasonable entries, searches, seizures and excessive force, and alleged Fifth Amendment violations, including equal protection, substantive and procedural due process violations. However, 8 U.S.C. § 1252 (b)(9) operates to bar the claims of Juan Ontaneda, Carla Roe 1, Carlos Roe 2, and Carla Roe 3 because they directly "aris[e] from an[] action taken . . . to remove an alien from the United States." It is clear that every law enforcement action cited by the plaintiffs was taken for the purposes of removing an alien from the United States. In addition, the "Plaintiffs' claims are common in removal proceedings and could directly impact Plaintiffs' immigration status." Arias v. U.S. I.C.E., No. 07-1959, 2008 WL 1827604 at *6 (D. Minn. April 23, 2008) (8 U.S.C. § 1252 (b)(9) barred subject matter jurisdiction over immigration enforcement operation related Bivens allegations). "Ultimately, allowing aliens to ignore the channeling provisions of

section 1252(b)(9) and bring [these]claims directly in the district court would result in precisely the type of fragmented litigation that Congress sought to forbid." Aquilar, 510 F.3d at 13-14.

The allegations in Arias are very similar to the case at bar. That case also involved an ICE enforcement operation in which the alien plaintiffs alleged nonconsensual home entries and searches as well as due process and equal protection violations. Arias, 2008 WL 1827604 at *4. The district court held that 8 U.S.C. § 1252 (b)(9) divested the Court of subject matter jurisdiction for the plaintiffs "who are parties to removal proceedings" because their claims arose directly from actions taken to remove them from the United States. Id. at 5. Likewise, in the case being considered, statutory language indicating that "[j]udicial review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien" shall only be reviewable by the court of appeals, clearly applies to bar the claims of Juan Ontaneda, Carla Roe 1, Carlos Roe 2, and Carla Roe 3. 8 U.S.C. § 1252 (b)(9) (emphasis added).

2. Pursuant to 8 U.S.C. § 1252(g) This Court Lacks Subject Matter Jurisdiction Over the Claims of Juan Ontaneda, Carla Roe 1, Carlos Roe 2, and Carla Roe 3

In addition to consolidating review through the "zipper clause," Congress has also precluded district courts from entering claims arising from actions to commence removal proceedings, adjudicate cases, or execute a removal order. 8 U.S.C. 1252(g) provides that, "notwithstanding any other provision of law, . . . no court shall have

jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."[8] Although the Supreme Court, in Reno v. American-Arab Anti Discrimination Committee, 525 U.S. 471 (1999), concluded that Section 1252(g) should be read narrowly, the Court expressly held that Section 1252(g) applies to "three discrete actions that the Attorney General may take: [the Attorney General's] 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'" Id. at 482 (emphasis in original). Importantly, the Supreme Court in AADC did not suggest that, when a lawsuit involves these three categories of actions, federal court jurisdiction turns on the nature of the arguments raised by the alien to challenge the Attorney General's action. Rather, when a challenge "arise[s] from" the Attorney General's "decision or action" to "commence proceedings, adjudicate cases, or execute removal orders," federal district courts lack jurisdiction to review these decisions. 8 U.S.C. 1252(g).

The claims of the alien plaintiffs who may be subject to removal against the individual federal defendants are focused exclusively on their allegedly wrongful actions leading up to their attempt to locate, arrest and detain illegal aliens, which by

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[8] The statute, as originally promulgated in 1996, discussed the decisions and actions of the Attorney General. 8 U.S.C. § 1252(g). The Homeland Security Act of 2002, transferred the detention and removal functions of the abolished Immigration and Naturalization Service (INS) to the DHS, specifically, the Undersecretary of Border and Transportation Security. 6 U.S.C. § 251.

their very terms serve to initiate removal proceedings. See 8 U.S.C. § 1229. These plaintiffs clearly state that unknown ICE agents were searching for specific illegal aliens for the purposes of commencing removal proceedings during the alleged law enforcement operations. FAC, ¶¶ 55-186. While some of the plaintiffs suggest that the stated search for particular individuals might have been a pre-text, they do not suggest that the ICE agents had any motive other than the removal of illegal aliens.

The alien plaintiffs who may be subject to removal cannot evade the jurisdictional bar by couching their cause of action as Fourth or Fifth Amendment violations. Unknown ICE agents arrived at their residences solely to commence removal proceedings against illegal aliens. Where the statute in question is jurisdictional, it "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." Cheng Fan Kwok v. INS, 392 U.S. 206, 212 (1968); see also Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 433 (1989) ("We start from the settled proposition that the subject-matter jurisdiction of the lower federal courts is determined by Congress 'in the exact degrees and character which to Congress may seem proper for the public good.'") (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845)). Here, the plain language of Section 1252(g), is controlling. It expressly bars any claim "on behalf of any alien arising from the decision or action by the Attorney General to . . . commence removal proceedings . . . against any alien under this chapter." (emphasis added). See Sissoko

v. Rocha, 509 F.3d 947, 949 (9th Cir. 2007) (8 U.S.C. § 1252(g)'s jurisdiction-stripping language, "commence" removal proceedings, applied to the alien's Fourth Amendment-based damages claim for false arrest).[9]

C. Plaintiffs Maria Argueta, Juan Ontaneda, Carla Roe 1, Carlos Roe 2, and Carla Roe 3 May Not Pursue a Bivens Remedy In Light of the Special Factors Present By the INA and the Federal Government's Exercise of Its Plenary Immigration Authority

This Court should not recognize a damages remedy against the individual federal defendants for claims arising from the arrest of, or attempt to arrest, individuals believed to be unlawful aliens.[10] To the extent these plaintiffs have alleged constitutional violations, such claims are actionable - if at all - under Bivens, 403 U.S. at 397. In Bivens, the Supreme Court asserted its general remedial powers to imply a private cause of action for damages, directly under the Constitution, against federal officers in their individual capacities. Id. at 396. Nonetheless, Bivens and subsequent decisions have made clear that federal courts have no freewheeling authority to imply a damages remedy any time a plaintiff can show a violation of the

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[9] See also Khorrami v. Rolince, 493 F. Supp. 2d 1061, 1067 (N.D. Ill. 2007), appeal argued, No. 07-2755 (7th Cir. May 6, 2008) (8 U.S.C. 1252(g) bars subject matter jurisdiction over Fourth Amendment claims because the "arrest/detention arose from the decision to commence proceedings"); Van Dinh v. Reno, 197 F.3d 427 (10th Cir. 1999) (8 U.S.C. 1252(g) bars subject matter jurisdiction over decision to transfer and detain the plaintiff).

[10] In addition to the four alien plaintiffs who may be subject to removal, discussed in the previous sections, it is clear from the FAC that Argueta was arrested based on a belief that she was an unlawful alien. FAC, ¶¶ 65-66.

Constitution by a federal officer. See, e.g., Correctional Servs. Corp. v. Malesko, 534 U.S. 61 (2001). In fact, for over twenty-five years the Supreme Court has "consistently refused to extend Bivens liability to any new context or new category of defendants." Malesko, 534 U.S. at 68; see also Schweiker v. Chilicky, 487 U.S. 412, 421-25 (1988) ("[o]ur more recent decisions have responded cautiously to suggestions that Bivens remedies be extended into new contexts").

The Supreme Court in Wilkie v. Robbins, 127 S. Ct. 2588, 2597 (2007), recently rejected another attempt to create a new Bivens remedy, reiterating that a damages remedy "is not an automatic entitlement . . . and in most instances we have found a Bivens remedy unjustified." The Supreme Court explained that a Bivens remedy should only be inferred if (1) there is no alternative, existing process for protecting a constitutional interest, and (2) if there are no special factors counseling hesitation against a judicially created remedy. Id. In this case, the INA addresses the very substance of the plaintiffs' complaints, and it provides an alternative, existing process to protect constitutional interests. See Arar v. Ashcroft, —F.3d—, No. 06-4216, 2008 WL 2574470 at *20 (2d Cir. June 30, 2008) (holding that "a Bivens remedy is unavailable" for claims arising from any action taken to remove an alien under the authority conferred by the INA). In addition, Congress and the Executive's plenary power over immigration is another special factor counseling hesitation. Taken together, these mutually reinforcing special factors preclude a Bivens remedy for

plaintiffs who were believed to be unlawful aliens for claims relating to law enforcement actions in enforcing immigration law under the INA.

1. The Comprehensive Statutory Scheme Of The INA Is A Special Factor That Precludes A Bivens Remedy

The presence of a deliberately crafted statutory system is a "special factor" that precludes a Bivens remedy because it demonstrates that Congress has not intended to supplement the scheme it created by allowing a private right of action for damages. Schweiker, 487 U.S. at 421-25. In this case, the immigration enforcement actions that led to the arrest, detention and ultimately the removal of some of the plaintiffs were governed by the INA, which the Supreme Court itself has characterized as "the comprehensive federal statutory scheme for regulation of immigration and naturalization." De Canas v. Bica, 424 U.S. 351, 353 (1976). The focus in a special factors analysis "is not on the nature of the constitutional violation . . . but whether it is appropriate to create a damages action to remedy the wrong in light of what Congress has done." Shreiber v. Mastrogiovanni, 214 F.3d 148, 154 (3d Cir. 2000). In the INA, Congress has broadly provided that all aliens are subject to arrest and detention during their removal proceedings. See 8 U.S.C. §1226(a). Congress has also delineated the types of remedies available to aliens, taking into account their status in the United States and the likelihood and imminence of their removal. See, e.g., 8 U.S.C. § 1225, 8 U.S.C. § 1229, 8 U.S.C. § 1229a, and 8 U.S.C. § 1229b. The INA also details specific procedures for detention as well as the requirements for relief

from detention. See, e.g., 8 U.S.C. § 1222, 8 U.S.C. § 1225(b)(1)(B)(iii)(IV), 8 U.S.C. § 1226 and 8 U.S.C. § 1231.

In addition to regulating the arrest, detention and removal of aliens, the INA and its implementing regulations encompass a host of safeguards to protect an alien's constitutional rights, including, the right to seek review of an initial bond determination, see 8 C.F.R. § 1236.1(d); the right to challenge that determination in an adversarial evidentiary proceeding before an immigration judge with the ability to present evidence and to be represented by counsel, see 8 C.F.R. § 1003.19(d) and 8 C.F.R. § 1003.16; and the right to seek review of the Immigration Judge's bond decision by the Board of Immigration Appeals, see 8 C.F.R. § 1003.1(b)(7).

The aforementioned protections demonstrate that in the INA, "Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." Schweiker, 487 U.S. at 423. Where such a comprehensive program exists, it is the plaintiff's burden to show that Congress has "plainly expressed an intention that the courts preserve Bivens remedies" alongside the program. Spagnola v. Mathis, 859 F.2d 223, 228 (D.C. Cir. 1988). Unless this burden is met, courts must not create additional Bivens remedies. See id.; accord Schweiker, 487 U.S. at 423; Dotson v. Griesa, 398 F.3d 156, 166-67 (2d Cir. 2005).

The five plaintiffs who were believed to be unlawful aliens cannot meet their

burden of demonstrating that Congress expressed an intention to preserve Bivens remedies in this context. To the contrary, Congress cut off judicial review of immigration decisions except for those expressly provided in the INA, and these judicial review provisions have repeatedly been strengthened over the years. See, e.g., REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a)(1)(A)(iii), 119 Stat. 23, 310 (2005) (codified at 8 U.S.C. § 1252(a)(2)(D)). As discussed in the previous section, the INA provides a "sole and exclusive" means for judicial review of removal orders: a petition filed in the appropriate court of appeals. 8 U.S.C. § 1252(a)(5). See also id. 8 U.S.C. § 1252(g), 8 U.S.C. § 1252(a)(2)(B)(ii), and 8 U.S.C. § 1226(e). The extension of Bivens remedies cannot be squared with that legislative judgment.

At a minimum, the INA's provisions limiting judicial review show "that Congress expected the Judiciary to stay its Bivens hand." Wilkie, 127 S. Ct. at 2600. Congress made clear that discretionary detention decisions would be reviewed under the administrative procedures authorized in the INA, rather than through actions in the federal courts. In analogous circumstances, the Third Circuit explained in regard to the federal tax code, "Congress chose to provide certain remedies, and not others, as part of the complex statutory scheme which regulates the relationship between the IRS and taxpayers. We will not create a remedy where Congress has chosen not to." Shreiber, 214 F.3d at 152-53; See also Dotson, 398 F.3d at 160 (finding that the Civil Service Relief Act is a comprehensive scheme precluding a Bivens remedy). Here, the

INA's the same sort of comprehensive scheme that this Circuit and the Supreme Court have found to be a special factor counseling hesitation. This Court should thus not infer an additional remedy under Bivens.

2. Congress's Plenary Power Over Immigration Is a Special Factor That Precludes a Bivens Remedy

In Wilkie, the Supreme Court stated that in addition to considering whether a statutory scheme exists to regulate the area, courts need to be mindful that "a Bivens remedy is a subject of judgment: 'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.'" 127 S. Ct. at 2598, quoting Bush v. Lucas, 462 U.S. 367, 378 (1983). One special factor that precludes a Bivens remedy is when Congress has plenary power over the subject matter for which a Bivens remedy is sought. See Chappell v. Wallace, 462 U.S. 296, 298 (1983) (citing Congress's plenary power over military matters as a basis to deny a Bivens remedy for claims arising in the context of military affairs); accord Sanchez-Espinoza v. Reagan, 770 F.2d 202, 209 (D.C. Cir. 1985) (rejecting creation of Bivens remedy because of the "foreign affairs implications" of the suit). Because Congress has plenary power over immigration matters, its legislative judgments carry almost conclusive weight. See Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952). The Executive, in turn, is charged with implementing that power. In Shaughnessy, the Supreme Court held that immigration

"matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Id. Accordingly, federal courts must afford substantial deference to the Executive Branch entities that have been granted authority by Congress to enforce and implement its laws. See INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (deference on immigration matters "is especially appropriate" because "officials 'exercise especially sensitive political functions that implicate questions of foreign relations'"), quoting INS v. Abudu, 485 U.S. 94, 110 (1988). Thus, just as in Chappell, where Congress failed to provide a damages remedy when it legislated in military matters, "[a]ny action to provide a judicial response by way of such a remedy would be plainly inconsistent with Congress' authority in this field." 462 U.S. at 304.

To permit Bivens suits in the immigration field would also unnecessarily enmesh the courts in difficult foreign affairs and public policy issues, as well as matters of national security. See Wilkie, 127 S. Ct. at 2602-04 & n.11 (holding that even where there is no comprehensive scheme, courts should consider the "difficulty" in defining and implementing the proposed Bivens remedy). As the Supreme Court has explained, "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." Demore v. Kim, 538 U.S. 510, 522 (2003) (internal quotations and citations omitted). This case in particular

would require this Court to invade the realm of federal immigration policy normally reserved for the political branches. To resolve the central question posed in the plaintiffs' FAC - the review of legal and factual questions arising from ICE's actions taken to remove aliens who are identified as being illegally present in the United States - this Court will need to interpret and apply immigration law and regulations, as well as determine whether federal immigration officers acted properly in areas in which Congress has given them discretion. Even if these issues do not trigger the jurisdictional bar of the INA, they illustrate why staying "its Bivens hand" makes sense. Wilkie, 127 S. Ct. at 2600. One of the reasons Congress consolidates challenges under a statutory scheme is to avoid a patchwork body of interpretation produced by different courts during different types of proceedings. See Bush, 462 U.S. at 378. There are a host of reasons to not apply a right of action in this case to the potentially removable plaintiffs, including the INA's comprehensive scheme, the plenary power of the political branches in immigration and foreign policy, and national security concerns inherent in the immigration arena. See eg. Chappell, 462 U.S. 304 (numerous factors "[t]aken together" "constitute[d] 'special factors'"). Consequently, any damages remedy for immigration-related claims should come through legislation, not judicial intervention. See Wilkie, 127 S. Ct. at 2604-05. Therefore, this Court should not create a new Bivens remedy, and the claims of Argueta, Ontaneda, Carla Roe 1, Carlos Roe 2, and Carla Roe 3 should be dismissed.

D. Defendants Myers and Torres Should be Dismissed for Lack of Personal Jurisdiction

The plaintiffs bear "the burden of establishing personal jurisdiction." O'Connor v. Sandy Lane Hotel Co., Ltd., 496 F.3d 312, 316 (3d Cir. 2007). Defendants Myers and Torres are not residents or domiciliaries of New Jersey, and they do not consent to the jurisdiction of this Court. Accordingly, pursuant to Rule 12(b)(2), these senior federal officials should be dismissed from this action because they lack the contacts with New Jersey that must exist in order for this Court to assert jurisdiction over them.

"A federal district court may assert personal jurisdiction over a nonresident of the state in which the court sits to the extent authorized by the law of the state." Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n, 819 F.2d 434, 436 (3d Cir. 1987); see also Fed. R. Civ. P. 4(k). "The New Jersey long-arm rule extends to the limits of the Fourteenth Amendment Due Process protection." Carteret Sav. Bank, FA v. Shushan, 954 F.2d 141, 145 (3d Cir. 1992); N.J.Civ.R. 4:4-4(b)(1). For due process to be satisfied, a defendant, if not present in the forum, must have "certain minimum contacts" with the forum state such that the assertion of jurisdiction "does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). A plaintiff may establish minimum contacts if the defendant has purposefully taken "actions . . . himself that create a 'substantial connection' with the forum State." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (citation omitted). "'[R]andom,' 'fortuitous,' or 'attenuated contacts'" will

not suffice, nor may "the 'unilateral activity of another party or a third person'" subject a defendant to jurisdiction. Id. (citations omitted). Minimum contacts cannot be based on generalized foreseeability that the defendant's conduct may cause injury in the forum state. Id. at 474. "[T]he foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

Applying the "minimum contacts" analysis, a court may obtain either general or specific jurisdiction over a defendant. Marten v. Godwin, 499 F.3d 290, 296 (3d Cir. 2007). The Third Circuit has held "that the plaintiff must show significantly more than mere minimum contacts to establish general jurisdiction. The nonresident's contacts to the forum must be continuous and substantial." Provident Nat'l Bank, 819 F.2d at 437. See also Schwarzenegger v. Fred Martin Motor Car, 374 F.3d 797, 801 (9th Cir. 2004) ("This is an exacting standard, as it should be, because a finding of general jurisdiction permits a defendant to be haled into court in the forum state to answer for any of its activities anywhere in the world.") The FAC does not indicate any contacts between either Myers or Torres and New Jersey. As none of the allegations in the FAC come close to satisfying the high threshold necessary to establish general jurisdiction, the plaintiffs presumably are seeking the exercise of "specific jurisdiction" over Myers and Torres.

"Specific jurisdiction" is available when the following "three-prong test" is satisfied: (1) The nonresident defendant must purposefully direct his activities at the forum; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice. O'Conner, 496 F.3d at 317 (internal citations omitted). The plaintiffs have alleged no facts that Myers or Torres purposefully directed any activities at New Jersey that gave rise to their claim. Nor have they alleged that these two Washington, D.C. defendants ever entered New Jersey, or purposefully directed any phone call, e-mail, or other communication into New Jersey related to the plaintiffs' claim. In fact, the FAC does not even allege that Myers or Torres had any contact with New Jersey at all or were aware of the specific law enforcement actions that make up the plaintiffs' allegations.

Instead, the plaintiffs claim that these senior Washington, D.C. officials in charge of ICE oversaw an increase in the number of FOTs between 2005 and 2007, and make conclusory allegations that they increased nation-wide arrest "quotas" and failed to provide ICE agents with necessary training.[11] FAC, ¶ 191. In addition, the plaintiffs mention that these two defendants have been sued in states other than New Jersey, and that they both responded to inquiries concerning ICE practices in

[11] Although the FAC, Exhibit C, pp. 5, 8-9, mention "goals" for FOTs the FAC mischaracterizes this information by repeatedly calling these "goals" quotas.

Connecticut. FAC, ¶¶ 192, 193 and 194. The FAC alleges that these defendants failed to conduct "meaningful investigations" of ICE agent misconduct, presumably nation-wide, but the FAC failed to provide specific information tying those investigations to New Jersey or anywhere else related to this case. FAC, ¶ 195. Finally, the plaintiffs allege that ICE provided press releases concerning the success of "the nationwide interior immigration enforcement strategy." Id.

"At the threshold, the defendant must have 'purposefully avail[ed] itself of the privilege of conducting activities within the forum.'" O'Connor, 496 F.3d at 317 quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958). "[W]hat is necessary is a deliberate targeting of the forum." Id. The FAC does not allege any targeting of New Jersey, and therefore this court may not exercise personal jurisdiction over Myers and Torres.[12] In fact, the FAC allegation of a national policy undercuts the showing that the plaintiffs must make, because such a wide-ranging policy, by definition, could not be expressly targeted at New Jersey.

The mere fact that Myers and Torres, while working in Washington, D.C., had general supervisory authority over subordinates who may have been in New Jersey,

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[12] The same argument applies to the "effects test" derived from Calder v. Jones, 465 U.S. 783 (1984). This test requires that the "defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity." Marten, 499 F.3d at 297; see also Zieper v. Reno, 111 F. Supp. 2d 484, 492 (D.N.J. 2000) (the fact that a plaintiff feels the effects of the defendants' conduct in the forum because the plaintiff is located there is insufficient to satisfy Calder.)

and allegedly oversaw more stringent immigration enforcement policies cannot subject them to jurisdiction in this forum. Numerous courts have held that allegations which seek to assert personal jurisdiction against high-level federal officials employed outside the forum state based on the adoption of a national policy are insufficient to satisfy personal jurisdiction with a particular state.[13] As one court observed, "'[i]f a federal agency head could be sued personally in any district within his or her official authority merely for supervising acts of subordinates . . . , the minimum contacts requirement would be rendered meaningless.'" McCabe, 450 F. Supp. 2d at 926

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[13] See Doe v. American Nat'l Red Cross, 112 F.3d 1048, 1050-51 (9th Cir. 1997) (dismissing FDA official sued on constitutional claim due to lack of contacts with forum, as there was no reason for "a government employee working and living in the Washington, D.C. area" to believe his actions "would expose him to the power of the courts in Arizona"); Gilbert v. DaGrossa , 756 F.2d 1455, 1459 (9th Cir. 1985) (Bivens defendants from New York and New Jersey dismissed due to insufficient contacts with Washington state); Hill v. Pugh, 75 Fed. Appx. 715, 719, (10th Cir. 2003) (Unpublished) ("It is not reasonable to suggest that federal prison officials may be hauled into court simply because they have regional and national supervisory responsibilities over facilities within a forum state."); James v. Reno, No. 99-5081, 1999 WL 615084, at *1 (D.C. Cir. July 2, 1999) (Unpublished); McCabe, 450 F. Supp. 2d 924-26 ("is not permissible" to "premis[e] jurisdiction [of] . . . , two senior-level federal government officials, upon the acts of low-level federal, state and/or local government employees") (footnote omitted)); Vu v. Meese, 755 F. Supp. 1375, 1378 (E.D. La. 1991) ("[T]he fact that federal government officials enforce federal laws and policies on a nationwide basis is not sufficient in and of itself to maintain personal jurisdiction in a lawsuit which seeks money damages against those same governmental officials in their individual capacities."). See also Moss v. United States Secret Service, No. 06-3045, 2007 WL 2915608, at *18-19 (D. Or. Oct. 7, 2007); Mahmud v. Oberman, 508 F. Supp. 2d 1294, 1301-02 (N.D. Ga. 2007), aff'd sub nom. Mahmud v. DHS, 262 Fed. Appx. 935 (11th Cir. 2008); Rank v. Hamm, No. 204-0997, 2007 WL 894565, at *11-13 (S.D. W.Va. March 21, 2007).

(quoting Wag-Aero, Inc. v. United States, 837 F. Supp. 1479, 1486 (E.D. Wis. 1993), aff'd, No.93-4028, 1994 WL 485810 (7th Cir., Sept. 1994)). Because the plaintiffs cannot establish that Myers and Torres had sufficient contacts with the state of New Jersey, they must be dismissed pursuant to Rule 12(b)(2).

E. The Individual Federal Defendants are Entitled to Qualified Immunity

1. The Doctrine of Qualified Immunity

The plaintiffs seek damages from the personal resources of four supervisory federal government officials: the Assistant Secretary of Homeland Security, ICE, the former Director, Detention and Removal Operations[14], the Field Office Director and the Deputy Field Office Director for ICE/DRO in Newark. The qualified immunity doctrine enunciated in Harlow v. Fitzgerald, 457 U.S. 800 (1982), was formulated precisely to allow government officials, such as these, the necessary latitude to vigorously exercise their authority without the chill and distraction of damages suits, by ensuring that only personal conduct that unquestionably violates the Constitution will subject an official to individual liability. Qualified immunity is intended to shield government officials sued in their individual capacities from the entirety of the litigation process where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818.

[14] As of March 5, 2008, John Torres became the Acting Deputy Assistant Secretary for Operations of Homeland Security, ICE.

For purposes of a motion to dismiss under Rule 12(b)(6), a court will consider whether the plaintiffs have alleged facts sufficient to support a claim which would entitle them to relief. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007). (Plaintiffs' "grounds" for relief must entail "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"). The requirement to allege facts which support a claim against each individual defendant is particularly important in qualified immunity cases, where personal participation is a prerequisite to liability. See Evancho v. Fisher, 423 F.3d 347, 353 (3d Cir. 2005) (allegations that plaintiff's unlawful transfer was carried out by a supervisor or his immediate underlings did not suffice to demonstrate personal involvement in the challenged decision). To overcome qualified immunity, a plaintiff must allege more than that the officials sued were in positions of authority; rather the plaintiff must allege facts that show that an individual defendant had "'personal involvement in the alleged wrongdoing; liability cannot be predicated solely on the operation of *respondeat superior*. Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiesce.'" Id. quoting Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988). This is because the purpose of a Bivens remedy, "deter[ing] individual federal officers from committing constitutional violations" is served only when the plaintiffs recover against those directly responsible for violating their rights. Malesko, 534 U.S. at 70-71.

Although the Court is required to take all well-plead factual allegations in the complaint as true, Kanter v. Barella, 489 F.3d 170, 177 (3d Cir. 2007), the Court need not accept inferences drawn by the plaintiff if they are unsupported by the facts as set forth in the complaint. See California Pub. Employees' Ret. Sys. v. The Chubb Corp., 394 F.3d 126, 143 (3d Cir. 2004). Nor must the court accept legal conclusions set forth as factual allegations. Papasan v. Allain, 478 U.S. 265, 286 (1986). "Factual allegations must be enough to raise a right to relief above the speculative level." Twombly, 127 S. Ct. at 1965.

2. The Plaintiffs Have Failed to Allege that the Individual Federal Defendants were Personally Involved in the Alleged Violation of Their Constitutional Rights

In this case, the plaintiffs' FAC fails to satisfy the threshold personal involvement requirement of alleging a claim against the senior federal officials sufficient to overcome their qualified immunity defense. Although plaintiffs contend that liability for the allegedly unconstitutional actions of the line ICE officers should attach to the four individual federal defendants, they have asserted no facts explaining how or why these defendants were personally involved in the alleged violations.[15]

The plaintiffs do not allege that Meyers or Torres were in New Jersey at the

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[15] There is no mention of Myers, Torres, Weber or Rodriguez in the section of the FAC that contains the allegations of the plaintiffs' specific encounters with unknown immigration officers. FAC, ¶¶ 55-186. Instead, the sole allegations against the four individual federal defendants are included in a separate section entitled "Defendants' Supervisory Responsibility." FAC, ¶¶ 191-199.

time of the events in question, or were aware of the specific operations, agents involved, fugitive targets, or operational locations or timing.[16] Instead they make conclusory assertions that increasing the number of FOTs nationwide left ICE agents inadequately trained and unaccountable, and therefore Myers and Torres should be liable for the alleged unconstitutional actions of members of these particular teams. FAC, ¶191. The plaintiffs conclude that Myers and Torres were placed on notice of the unconstitutional activities of ICE agents because of a number of lawsuits, media reports and other sources. Id. at ¶¶ 192, 194-5. However, the plaintiffs do not allege that any of these complaints involved the FOTs allegedly involved in the plaintiffs' claims. Mere allegations, none of which have been proven to be true, against different FOTs in different states are not determinative of allegations against agents in New Jersey.[17] It should also be noted that no constitutional violations have been found in the cases cited by the plaintiffs.

The plaintiffs point to a 2007 letter that was sent to Meyers, and a phone call made to Torres concerning the conduct of ICE agents in Connecticut. Id. at ¶ 193.

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[16] Myers and Torres are the two highest level federal officials at ICE, an organization that "has more than 15,000 employees working in offices nationally and around the world, and its fiscal year (FY) 2006 budget was $3.1 billion." FAC, Exhibit C, p. 2.

[17] Likewise, in a case in which the plaintiffs actually provided similar articles as exhibits, unlike the FAC which merely cites the articles, the judge indicated "[t]he court seriously questions the admissibility of these unauthenticated exhibits." McCabe, 450 F. Supp. 2d at 925.

Again, these allegations have nothing to do with operations in New Jersey and provide no indication of these defendants' personal participation in the particular operations. Indeed, the response letter from Myers indicates that ICE operations are designed to protect the rights of those concerned by ensuring that consent is voluntarily obtained before entering a dwelling. Id. at Exhibit D, p. 2.

The plaintiffs have alleged no personal direction or actual knowledge and acquiescence required by the Third Circuit for personal involvement. See Evancho, 423 F.3d at 353. Instead, the plaintiffs allege that under Myers' and Torres' direction ICE has increased its emphasis on arresting illegal aliens which has resulted in a number of complaints. As part of this increased emphasis, ICE has implemented policies that requires FOTs to obtain consent prior to entering a home. FAC, Exhibit D, p. 2. This policy is clearly constitutional, therefore the plaintiffs' only argument appears to be that Meyers and Torres, supervisors of a worldwide organization of more than 15,000 employees, failed to adequately respond to a number of unsubstantiated complaints. Even if this were a logical conclusion, which it is not, it does not demonstrate that either of these defendants had actual knowledge and acquiesced to the FAC's alleged unconstitutional conduct including allegations that contrary to policy consent was not obtained and some excessive force was used. See Evancho, 423 F.3d at 354 (allegations that supervisor or his underlings carried out illegal behavior "is simply a 'bald assertion,' which a court is not required to credit in

deciding a motion to dismiss.") Permitting this litigation to proceed against high-ranking Executive Branch officials like Myers and Torres - given the complete absence of factual allegations linking their actions to the plaintiffs' claims - would contravene the settled rule precluding *respondeat superior* liability in Bivens cases and undermine the policies that the qualified-immunity doctrine is meant to serve. See Crawford-El, 523 U.S. at 590. Accordingly, the Court should dismiss the individual capacity claims against Myers and Torres pursuant to Rule 12(b)(6) on the grounds of qualified immunity.

Plaintiffs make even fewer and more conclusory allegations regarding Rodriguez and Weber, merely stating that they "were each directly responsible for overseeing fugitive operations and the execution of 'Operation Return to Sender' in New Jersey." FAC, ¶ 196. However, the plaintiffs do not allege, or provide any facts, indicating that Rodriguez and Weber were present for or directed any of the alleged behavior. Instead, plaintiffs allege, without elaboration, that comments to the media by these defendants "regarding allegations of inappropriate action by their fugitive operations personnel, including unconstitutional home raids, suggest that defendants Rodriguez and Weber at best acquiesced in, and at worst encouraged such behavior." Id. at ¶ 196. Such a speculative hypothesis of personal knowledge in depriving the plaintiffs of their civil rights is plainly insufficient. Evancho, 432 F.3d at 354. See also Twombly, 127 S. Ct. at 1965 ("Factual allegations must be enough to raise a right

to relief above the speculative level.") The only specific example plaintiffs provide of supposed acquiescence in unconstitutional conduct is a one line quote from Weber in an article that is taken completely out of context. DEX 2. There is no indication that the article had anything to do with the law enforcement operations that involved the plaintiffs. Moreover, it is clear from this article that Weber does not believe that ICE agents working for FOTs under his supervision are violating the Constitution. This article, and plaintiffs' conclusory allegations that Rodriguez and Weber knew about nonconsensual searches in New Jersey and failed to train the agents they supervised, do not provide any indication that Weber or Rodriguez had contemporaneous, personal knowledge of the alleged violations and acquiesced in them.[18] See Brown v. Muhlenberg Township, 269 F.3d 205, 216 (3d Cir. 2001) (Plaintiff's allegations that supervisor is liable for failing to adequately train his subordinates are conclusory and insufficient to allege liability under 42 U.S.C. § 1983.)

IV. CONCLUSION

For the forgoing reasons the plaintiffs' allegations against the individual federal defendants should be dismissed.

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[18] Other than the cite to the apparently unrelated newspaper article (FAC, ¶ 196), the remaining three paragraphs alleging supervisory responsibility on the part of Weber and Rodriguez claim to be based "[u]pon information and belief." FAC, ¶¶ 197-199. However, the FAC does not provide any "information" that supports these conclusory "beliefs." See Twombly, 127 S. Ct. at 1965 (Plaintiffs' "grounds" for relief must entail "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do").

DATE: July 8, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 8, 2008, I electronically filed the foregoing document, along with a Notice of Motion and Proposed Order with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing

/s/ Edward Martin
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SERVICE LIST ARGUETA, et al. v. U.S. ICE, et al.
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