The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
OF WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Wilson RODRIGUEZ MACARENO,

Plaintiff,

v.

Joel THOMAS, in his official and individual capacities; Craig GARDNER, in his official and individual capacities; Peter TIEMANN, in his official and individual capacities; Arthur STEPHENSON, in his official and individual capacities; and CITY OF TUKWILA,

Defendants.

No. 18-00421

DEFENDANTS THOMAS, GARDNER, TIEMANN, AND STEPHENSON'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING QUALIFIED IMMUNITY

Note for Motion: ***November 2, 2018***
Without oral argument

I. INTRODUCTION

Plaintiff brings this action alleging City of Tukwila police officers unlawfully detained him and transported him to Immigration and Customs Enforcement ("ICE") officers. Individual Defendants Thomas, Gardner, Tiemann, and Stephenson ("Individual Defendants") are entitled to qualified immunity as it was not – and still is not – clearly established that their actions violated Plaintiff's Fourth Amendment rights. This area of the law is constantly evolving, and even courts within the Ninth Circuit are not clear as to what level of local law enforcement action is permissible or required in relation to immigration law violations. Police officers swear to uphold both state and federal law. Civil liability in this case would place local officers in the untenable position of making judgment calls

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regarding which laws to uphold and which ones to ignore. The Individual Defendants respectfully request the Court grant their motion for qualified immunity and dismiss all claims against them with prejudice as a matter of law.

II. STATEMENT OF FACTS

A. Tukwila Officers Respond to 911 Call.

On or around 5:30 a.m. on February 8, 2018, Plaintiff Wilson Rodriguez Macareno ("Plaintiff") called 911 to report an unknown individual on his property, providing what the 911 call taker believed was the name Wilson Ortega when he called. *Complaint*, *Dkt. 1*, at p. 2:1-3; *Exh. C to Gardner Decl.* (Computer Aided Dispatch log, "CAD"). On the phone, Plaintiff first stated a male was in his house, but later clarified that it was his uncle who actually saw the male, and the male only tried to break into a car, not the house. *Chen Declaration*, at *Exh. A, at 0:00-1:58, 3:35-7:05.* The name for Plaintiff entered into the call by the dispatcher was Wilson Ortega. Tukwila police officers Peter Tiemann and Art Stephenson responded first and located the trespass suspect who was arguing with Plaintiff and his uncle on the lawn outside of the property. *Exh. A to Tiemann Decl.*, at 0:00-0:51. Minutes later, Tukwila police officers Joel Thomas and Craig Gardner also arrived on scene and began questioning everyone on scene to figure out what was happening. *Exh. A to Thomas Decl.*, at 0:00-1:00.

Pursuant to typical practice, Officer Thomas began collecting driver's licenses of all witnesses on scene and reporting names and birthdates back to the 911 agency, Valley Communications Center ("Valley Comm," also known as "Dispatch"), to check everyone for officer safety information and possible warrants. *Id.*, at 1:55-6:16. This is routinely done to make sure the police have a complete record of all witnesses at the scene and for safety purposes to give officers a better understanding of who they are interacting with. *Thomas Decl.*, at ¶ 3 & 5. Through this process, officers learned Plaintiff's correct name, and the name of his uncle.

Officer Stephenson continued to question the suspect as to why he was on the

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property, but ultimately determined they only had probable cause to charge the suspect with trespassing. *Exh. A to Stephenson Decl.*, at 0:00-15:09. Officers asked Plaintiff whether he wanted to press charges against the suspect. *Thomas Decl.*, at ¶ 4. Plaintiff said no, but he did want to have the suspect trespassed from his property. Officer Stephenson informed the suspect he was being trespassed from the property for being there without permission, meaning that if he returned to the property, he would be arrested on the spot. *Exh. A to Stephenson Decl.*, at 10:33-14:01. Officer Stephenson took the suspect's information to fill out the trespass form before releasing him. *Id.*

During this time, Officers Tiemann, Thomas, and Gardner talked with Plaintiff and his companion to determine if the suspect entered the house or took anything from Plaintiff's vehicles. Plaintiff told them he did not take anything. Just as officers were finishing filling out the trespass paperwork, Valley Comm vocalized on the radio with information regarding Plaintiff. *Exh. A to Thomas Decl.*, at 8:26-9:12

B. Valley Comm Notifies Officer Thomas That Plaintiff Has an Outstanding Warrant from ICE.

Valley Comm is the dispatch agency used to relay information that may be important to the officers, including that an individual may have a criminal warrant. *Thomas Decl.*, at ¶ 5; *Gardner Decl.*, at ¶ 3. Valley Comm informed the officers there was a "Bureau of Immigration and Customs Enforcement [warrant] for Macareno." *Exh. A to Thomas Decl.*, at 8:26-9:12. Valley Comm continued to explain the warrant, stating the system showed "alien unlawfully present due to **order of removal** and exclusion from the USA." *Id.* (emphasis added.) Plaintiff immediately volunteered that he knew what Valley Comm was talking about, and stated, "I know they want me. I know what that is about." *Thomas Decl*, ¶ 8. He also stated, "I had three babies and I had to take care [of them]." *Id.*, *Exh. A* at 9:05-9:11. Officer Gardner began to comfort Plaintiff and asked Officer Tiemann to stay with Plaintiff for a second. *Id.*, at 9:05-9:30. Officer Thomas had not heard Valley Comm respond with warrant information like this before. Officer Gardner had not seen an

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immigration warrant like this before. *Gardner Decl*, ¶ 6. Officers Thomas and Gardner decided to go back to their patrol car to further review the report from Valley Comm and to confirm the warrant with LESC. *Id.*, at 9:30-9:48. Officer Thomas muted his camera to talk to fellow officers per standard protocol. *Thomas Decl.*, at ¶ 6.

Once in the vehicle, Officers Thomas and Gardner were able to view the CAD information from Valley Comm on their patrol car computer. The CAD showed Plaintiff had at least one warrant in the National Crime Information Center (NCIC) database. *Thomas Decl.*, at ¶ 7. In relevant part, the CAD showed,

> WARNING REGARDING FOLLOWING RECORD – SUBJECT OF NIC/N940407544 HAS AN OUTSTANDING ADMINISTRATIVE WARRANT OF REMOVAL FROM THE UNITED STATES.

Exhibit B to Thomas Declaration. However, the CAD also showed three lines below,

> "IMMIGRATION VIOLATION – FAILURE TO APPEAR FOR REMOVAL." *Id.*

Finally, a few more lines down, the information appears to show a different warrant:

> ALIEN UNLAWFULLY PRESENT **DUE TO *ORDER* OF REMOVAL OR EXCLUSION** … OUTSTANDING WARRANT OF DEPORTATION – **FAILURE TO APPEAR** CONTACT THE ICE LAW ENFORCEMENT SUPPORT CENTER 1-877-999-5372.

Id. (Emphasis added.) As directed in the CAD, Officer Thomas called the Law Enforcement Support Center (LESC) telephone number. *Thomas Decl.*, at ¶ 9. An LESC agent named Patricia Shannon sent Officer Thomas a picture of Plaintiff from Plaintiff's "NCIC ICE Fugitive Warrant." *Id., Ex. B.* LESC confirmed the warrant and forwarded the information to an LESC agent. This information was entered into NCIC, and this written confirmation based on the photo from a "fugitive warrant" was transmitted to Officer Thomas. *Thomas Decl, Ex. B*.

C. Plaintiff Confesses to Officers He Has Been Illegally Living in the United States Since 2005.

During this entire interaction (from when officers arrive to investigate the alleged

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trespass until Plaintiff is taken to ICE), Plaintiff remained cooperative with officers. *Exh. A to Tiemann Decl.*, *Exhs. A and B to Stephenson Decl., Exh. A to Thomas Decl, Exh. A to Gardner Decl.* Similarly, all Tukwila officers were professional and compassionate with Plaintiff. *Id.* They assured him they just needed to figure out whether they had to do something, and if they didn't, Plaintiff would be free to go. *Exh. A to Tiemann Decl.*, at 27:04-32:02. Plaintiff acknowledged the officers were just doing their job, and he has not alleged officers engaged in any abusive or disrespectful tactics at any point. *Id.*

While Officers Thomas and Gardner talked with the LESC, Officer Tiemann stayed with Plaintiff (re-joined shortly after by Officer Stephenson.) While Officer Tiemann was asking Plaintiff if he wanted to inspect the trespass suspect's bags to make sure the suspect didn't take anything from him, Plaintiff volunteered he was "very nervous" because he was "illegal" and he "had a problem for a long time." *Exh. A to Tiemann Decl.*, 13:30-14:15. Plaintiff then stated, "I heard from the call… They say I have an arrest warrant [from] Immigration. I know, you know?" *Id.* Without prompting, Plaintiff then proceeded to tell Officer Tiemann about his family, his immigration history, and his life back in Honduras. *Id.*, at 14:15-32:02. Officer Tiemann listened to Plaintiff and attempted to comfort him. *Id.* Officer Tiemann also tried to help, asking "does it help that your kids were born here?" *Id.*, at 19:26-19:41. During this interaction, officers let Plaintiff make multiple phone calls, even after he had been handcuffed. *Id.*, at 24:17-32:02.

When Officers Thomas and Gardner returned, the following exchange occurred:

> Gardner: Have you had this warrant for a while? This detainer.
>
> Plaintiff: I don't understand very clearly. What does that mean? Oh, from that?
>
> Gardner: Uh-huh.
>
> Plaintiff: Yes.
>
> Gardner: You've had it for a while?
>
> Plaintiff: For a while. Like, like…

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> Gardner: Have you had a detainer put on you before?
>
> Plaintiff: Yes.
>
> Gardner: Okay.
>
> …
>
> Gardner: Okay well we're seeing… we're calling them and seeing what they want to do.
>
> Plaintiff: They want to catch me.
>
> Gardner: Maybe. We don't know.
>
> Plaintiff: They [*sic*] already looking for me.

Id., at 26:56-27:32. Officers then detained Plaintiff in handcuffs temporarily. *Id.*, at 27:46-29:05. Shortly after, Officers Tiemann and Stephenson left to respond to another burglary call nearby, and Plaintiff was placed in Officer Thomas' vehicle. *Id.*, at 31:05-32:02.

In the meantime, Immigration Officer Mark Bailey contacted Officer Thomas and confirmed ICE wanted Officer Thomas to take Plaintiff into custody on their behalf. *Thomas Decl, Ex. C*. Officer Bailey offered to meet them to transfer Plaintiff into ICE custody. *Id*. However, because the ICE field office was located so close, Officer Gardner offered to transport Plaintiff there. *Id*.

After receiving confirmation there was an "ICE fugitive warrant" for Plaintiff from LESC Agent Patricia Shannon; Officers Thomas and Gardner drove Plaintiff to the ICE facility down the road, where he was turned over to ICE agents. *Id., Ex. B*. Officers Thomas and Gardner waited at the ICE facility and obtained a copy of the detainer (Form I-247A) which states, "DHS has determined that probable cause exists that the subject is a removable alien. This determination is based on … A final order of removal against the alien." *Exh. B to Gardner Decl.*

D. Plaintiff's Immigration History

Plaintiff was personally served a Notice to Appear charging him as removable under the Immigration and Nationality Act (INA) § 212(a)(6)(A)(i). *Exh. B to Chen Decl.*, at p. 2.

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Plaintiff was required to provide INS with his full mailing address and telephone number and update this information if he moved. See, 8 U.S.C. §1229(a)(1).[1] The Notice to Appear also explained the consequences of failure to provide his address and telephone information, which include being ordered removed in absentia if the Service establishes by clear, unequivocal and convincing evidence that the written notice was provided and the alien is removable. *Id*, 8 U.S.C. § 1229(b)(5).

Plaintiff failed to provide his mailing address and telephone number, and then failed to appear for his hearing. *Exh. B to Chen Decl.* During the judicial hearing on or around April 4, 2005, Immigration Judge John D. Carté found there was "clear, unequivocal, and convincing" evidence that Plaintiff was unlawfully present in the United States without having been admitted or paroled after inspection" based on the evidence available to him at the hearing. *Id.* Judge Carté then entered a judicial order removing Plaintiff from the United States to his home country of Honduras. *Id.* Plaintiff went to an attorney in 2005 and learned "he had been deported." Dkt # 61-1, 8:25 – 9:4.

III. STATEMENT OF ISSUES

1. Whether detaining and transporting Plaintiff to ICE agents violated his Fourth Amendment rights where: (1) an "outstanding warrant of deportation" based on a "failure to appear" was entered into NCIC, and (2) the I-247A detainer issued was based on "[a] final order of removal against the alien" which was issued by a federal immigration judge.

2. Whether, if a constitutional violation occurred, it was clearly established the officers' actions in detaining and transporting Plaintiff to ICE agents would violate Plaintiff's Fourth Amendment rights such that no reasonable officer could have believed his or her actions were permissible.

IV. EVIDENCE RELIED UPON

- Declaration of Joel Thomas and attached exhibits.
- Declaration of Craig Gardner and attached exhibits.

[1] Plaintiff has refused to produce a copy of the NTA that was issued to him in response to Defendants' discovery requests, so this is the subject of a pending motion to compel.

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- Declaration of Peter Tiemann and attached exhibits.
- Declaration of Arthur Stephenson and attached exhibits.
- Declaration of Derek Chen and attached exhibits.

V. ARGUMENT AND ANALYSIS

A. Qualified Immunity Standard.

Public officers are entitled to qualified immunity if their conduct does not violate a constitutional right that was clearly established at the time of the alleged violation. *Skoog v. County of Clackamas,* 469 F.3d 1221, 1229 (9th Cir. 2006). In analyzing this, courts look at "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* Even if the answer to this question is "yes," the court may look at "whether the officer could have believed, reasonably but mistakenly … that his or her conduct did not violate a clearly established constitutional right." *Id.* (internal quotations omitted).

The Supreme Court has made it clear that this must be a particularized inquiry based on the circumstances which the official is confronted with. *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3039 (1987).[2] "Generalized allegations of constitutional violations, however, are insufficient to rebut an official's assertion of a qualified immunity defense." *Maraziti v. First Interstate Bank of California*, 953 F.2d 520, 524 (9th Cir. 1992). Therefore, qualified immunity should only be denied where ***no reasonable officer*** could believe the Individual Defendants' actions were permissible. *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1045 (9th Cir. 2002).

[2] *See also Cunningham v. Gates*, 229 F.3d 1271, 1287 (9th Cir. 2000), *as amended* (Oct. 31, 2000) ("[A] district court must decide whether a reasonable public official would know that his or her *specific conduct* violated clearly established rights."); *Groh v. Ramirez*, 540 U.S. 551, 566, 124 S. Ct. 1284, 1295 (2004) ("An officer … is entitled to qualified immunity if 'a reasonable officer could have believed' that the [action] was lawful 'in light of clearly established law and the information the searching officers possessed.' "))

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B. Background Regarding Applicable Federal Immigration Law and Procedures.

Typically, individuals caught after crossing the border into the United States without proper documentation go through a uniform process to determine whether they are in the United States unlawfully. Individuals are examined by an immigration officer to determine if there is *prima facie* evidence that the individual "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 so, the case is referred to an immigration judge for a determination of whether the individual should be removed. *Id.*; 8 U.S.C. § 1229a(a)(1). The individual is issued a Notice to Appear and advised in his or her language of the consequences of failing to appear at the hearing. 8 U.S.C. § 1239.1(a); 8 U.S.C. § 1229a(b)(7). In certain situations, individuals are permitted "voluntary departure" in lieu of being taken into custody. 8 C.F.R. § 287.3(d). If permitted "voluntary departure" until the date of the hearing, the individual still has an obligation to attend the hearing. If the individual fails to appear, the court may proceed with the hearing in his or her absence.

If an individual is ordered removed from the United States,

> [a]ny authorized immigration officer may at any time issue a Form I-247, Immigration Detainer – Notice of Action, to any other Federal, State, or local law enforcement agency. A detainer serves to advise another law enforcement agency that the Department [of Homeland Security] seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.

8 C.F.R. § 287.7. Further,

> [u]pon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.

8 C.F.R. § 287.7. As of at least April of 2017, Immigration and Customs Enforcement now uses Form I-247A. *Roy v. Cty. of Los Angeles*, 2018 WL 914773, at *2 (C.D. Cal. Feb. 7,

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2018)[3]. Form I-247A is a one-page document issued by the Department of Homeland Security that states the specific basis for DHS' determination there is probable cause to remove the individual from the country. *See Exh. A to Gardner Decl.*

C. Immigration Law And Proceedings Applied To Plaintiff.

On April 4, 2005, Plaintiff failed to appear for his hearing before the immigration court. Pursuant to the authority in INA § 240(b)(5)(A), the Honorable Judge John D. Carte´ proceeded *in absentia* and ordered Plaintiff be removed from the United States to Honduras on the charge contained in the Notice to Appear. Plaintiff learned in 2005 from his attorney that he had been deported by the judge.

Nearly 13 years later, on February 2, 2018, Officers Gardner and Thomas received notification from Valley Comm of Mr. Rodriguez Macareno's status. They reviewed the CAD which stated, "CONTACT LESC AT (877) 999-5372 FOR IMMEDIATE HIT CONFIRMATION **AND AVAILABILITY OF BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT DETAINER**." *Exh. B to Thomas Decl.* (Emphasis added.) Officer Thomas called this phone number and DHS confirmed they wanted the individual taken into custody on their behalf. Exh. C to *Thomas Decl.* Plaintiff was detained pursuant to an I-247A detainer that stated, "DHS has determined that probable cause exists that the subject is a removable alien. This determination is based on … A final order of removal against the alien." *Exh. A to Gardner Decl.*

"It is undisputed that federal immigration officers may seize aliens based on an administrative warrant attesting to probable cause of removability." *City of El Cenizo, Texas v. Texas*, 890 F.3d 164, 187 (2018), citing *Abel v. United States*, 362 U.S. 217, 233-34 (1960). "It is also evident that current ICE policy requires the Form I-247A to be

[3] As one federal court in California recognized, "ICE has used five different detainer forms: the December 2011, revision, the December 2012 revision, the June 2015 Form I–247D, the August 2015 Form I–247X, and the April 2017 Form I–247A" since 2011. *Roy*, 2018 WL 914773, at *2. These changes have better identified the source of information used to establish probable cause. *Id.* As identified in *Gomez-Robles*, *Sanchez-Ochoa*, and *Roy* (discussed below), the changes in the language on these forms have often been found sufficient for local law enforcement to rely on the probable cause determination.

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accompanied by one of two such administrative warrants. On the form, an ICE officer certifies that probable cause of removability exists. Thus, an ICE-detainer request evidences probable cause of removability in every instance." *Id*.

"Under the collective-knowledge doctrine, moreover, the ICE officer's knowledge may be imputed to local officials even when those officials are unaware of the specific facts that establish probable cause of removability." *City of El Cenizo, Texas*, 890 F.3d at 187, citing *United States v. Zuniga*, 860 F.3d 276, 283 (5th Cir. 2017). "Compliance with an ICE detainer thus constitutes a paradigmatic instance of the collective-knowledge doctrine, where the detainer request itself provides the required 'communication between the arresting officer and an officer who has knowledge of all the necessary facts.' " *City of El Cenizo, Texas*, 860 F.3d at 187-88, citing *United States v. Ibarra*, 493 F.3d 526, 530 (5th Cir. 2007). The immigration cases that have held local officers may not detain on a suspicion that an individual is a removeable alien all focus on unilateral decisions made by local law enforcement, not actions taken by local law enforcement pursuant to direction by an ICE officer. *City of El Cenizo, Texas*, 860 F.3d at 188.

In *Arizona v. United States*, 567 U.S. 387 (2012), the Supreme Court held a provision of Arizona law that authorized local officers to arrest aliens on the basis of possible removability essentially allowed state officers to make immigration policy without any input from the federal government about whether an arrest of the alien was warranted. This was improper because immigration policy is made by federal, not state, government. Arizona argued 8 U.S.C. § 1357(g)(10)(B) permitted state officers to cooperate with the detention of aliens. However, the Court stated that although there may be some ambiguity as to what constitutes cooperation under the federal law; "no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government." *Arizona*, 567 U.S. at 410.

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This case is distinguishable from *Arizona* in that Defendants had clear instruction from the federal government to detain Mr. Rodriguez Macareno under authority of a final removal order by a judge, and probable cause attested to in the detainer and within the collective knowledge of the ICE officers. Therefore, the brief detention of Plaintiff by Defendants was lawful.

D. Plaintiff's Failure to Depart After a Final Order of Removal Was Entered Against Him May Be a Criminal Violation.

It is undisputed that an immigration judge entered a final order of removal against Plaintiff in 2005 when he failed to appear at his hearing.

> Any alien against whom a final order of removal is outstanding by reason of being a member of any of the classes described in section 1227(a) of this title, who — (A) willfully fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal under administrative processes, or if judicial review is had, then from the date of the final order of the court, … shall be fined under title 18, or imprisoned not more than four years (or 10 years if the alien is a member of any of the classes described in paragraph (1)(E), (2), (3), or (4) of section 1227(a) of this title), or both.

8 U.S.C. § 1253(a). Thus, failure to depart from the U.S. within 90 days of the final order of removal constitutes a criminal immigration violation. Plaintiff either failed to depart from the U.S. within 90 days of the 2005 order of removal, or he departed and re-entered at some point, possibly more than once.[4] While courts may as a very general principle find that local agencies cannot detain individuals simply for being in the United States illegally (often considered a civil matter), Plaintiff's offense might have been criminal in nature and punishable under federal law by up to ten years in prison due to the fact that there was a final order of removal entered against him more than 90 days prior to the night of his detention.

[4] Plaintiff has refused to respond to discovery requests seeking information regarding his immigration case or status, including entry and exit(s) from the United States. This is subject to a pending motion to compel. In the meantime, Plaintiff is unable to dispute he was a member of one of the classes described in Section 1227(a) as he will not provide information regarding his class.

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> The Ninth Circuit has held that local law enforcement officers, therefore, may investigate and enforce "the criminal provisions of the [INA]." Non–287(g) officers may detain those whom they have reasonable suspicion to believe have illegally crossed a border in violation of § 1325, fraudulently filed an immigration application under § 1306, failed to carry documentation of their immigration status under § 1304(e), or committed other criminal immigration violations.

Ortega-Melendres v. Arpaio, 836 F. Supp. 2d 959, 973 (D. Ariz. 2011), *aff'd sub nom. Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012) (local law enforcement officers are permitted to enforce immigration-related laws that are criminal in nature even without section 287(g) authority). It is undisputed the officers learned from Valley Comm, which happened *before* the officers finished their initial stop for the suspected burglary, there was an existing "order of removal or exclusion from the United States" against Plaintiff and Plaintiff had "failed to appear." Mr. Rodriguez Macareno also told the Tukwila officers he was "illegal," he had a detainer issued for him before, he knew ICE was looking for him, and he believed they would want to take him into custody. This provided reasonable suspicion to believe Mr. Rodriguez Macareno had engaged in criminal behavior. This was an independent justification for detaining Plaintiff.

E. It Is Not Clearly Established That Detaining An Individual Pursuant to an Order of Removal or Exclusion or for Failure to Appear Violates Plaintiff's Fourth Amendment Right.

Authority in this area of the law is as clear as mud. While some Ninth Circuit opinions generally address whether local law enforcement agencies can detain aliens pursuant to ICE detainers, they do not provide guidance regarding the specific situation the officers faced here. The district court opinions within the Ninth Circuit, one of which was decided as recently as February of 2018, make it clear even the courts are unsure of how to address these issues. In fact, cases that have examined detainers based on "[a] final order of removal against the alien[,]" as was the situation here, have found there was no Fourth Amendment violation for detaining the individual. Therefore, it does not appear there was any Fourth Amendment violation here. If there was, the right certainly wasn't clearly established at the time of the incident. Dismissal based on qualified immunity is

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appropriate.

1. Reasonable Detentions Based on DHS Determinations of Probable Cause Based on a "Final Order of Removal Against the Alien" Do Not Violate the Fourth Amendment.

District courts within the Ninth Circuit have explicitly affirmed that detention after an individual would have otherwise been released based on an I-247A Detainer citing probable cause due to "[a] final order of removal against the alien" does not violate an individual's constitutional rights absent additional factors such as unreasonable length.

In *United States v. Gomez-Robles*, a criminal defendant filed a "Motion to Suppress Statements and Evidence for Fourth Amendment Violation[,]" seeking to suppress "all evidence obtained as a result of his alleged unlawful detention based on an immigration hold enforced upon his release from the Pima County Jail." 2017 WL 6558595, at *1 (D. Ariz. Nov. 28, 2017), report and recommendation adopted, 2017 WL 6554914 (D. Ariz. Dec. 22, 2017) (Unpublished). Defendant Gomez-Robles was identified by ICE officers as being in custody in Pima County Jail, and that he had a "final order of removal from an immigration judge." *Id.* ICE then sent Pima County a Form I-247A stating "DHS has determined probable cause exists that the subject is a removable alien" based on "[a] final order of removal." *Id.*, at *1-2. After clearing him of all local charges, Pima County detained Gomez-Robles for an additional period pursuant to the I-247A Immigration Detainer to allow ICE to take custody. *Id.*, at *2. In relevant part, Gomez-Robles' main argument was:

> [H]is continued detention at the Pima County Jail based on the Form I-247A Immigration Detainer … violate[d] the Fourth Amendment because neither the detainer nor the warrant were judicially authorized and did not confer probable cause to support his continued detention beyond the termination of the state charges.

Id., at *3. The court held "[t]he Defendant's arguments fail on their merits for the straightforward reason that federal law provides both the authority for DHS to issue immigration detainers and **for law enforcement agencies, like the Pima County Jail, to**

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detain those identified in those detainers." *Id.* (Emphasis added.) The court also held that 8 C.F.R. § 287.7 explicitly permitted Pima County Jail to detain an alien "not otherwise in custody" for up to 48 hours beyond the time he otherwise would have been released. *Id.*

The court in *Gomez-Robles* analyzed two other Fourth Amendment cases based on immigration detainers where the court found the detention was unreasonable, but distinguished those cases based on the same unique facts present in this case. In *Miranda-Olivares v. Clackamas Cty.*, a woman brought suit alleging, among other claims, a § 1983 claim for violation of her Fourth Amendment rights after she was detained in Clackamas County Jail based solely on a federal immigration detainer (Form I-247). 2014 WL 1414305, at *1 (D. Or. Apr. 11, 2014)(Unpublished.) The court held the detainer did result in a "subsequent detention[,]" but specifically held there was a Fourth Amendment violation because her Form I-247:

> stated only that an investigation "has been initiated" to determine whether she was subject to removal from the United States. … The ICE detainer's stated purpose of requesting the Jail to hold Miranda–Olivares custody was "to provide adequate time for [ICE] to assume custody" of her. Therefore, it was not reasonable for the Jail to believe it had probable cause to detain Miranda–Olivares based on the box checked on the ICE detainer.

Id., at *11. Unlike *Gomez-Robles* (and this case), there was not a "final order of removal." *Id.*

Similarly, the court looked at *Ochoa v. Campbell*, where an inmate in the Yakima Department of Corrections also alleged his "continued" or "subsequent" detention violated his Fourth Amendment Rights. 266 F. Supp. 3d 1237, 1242 (E.D. Wash. 2017), appeal dismissed as moot sub nom. *Sanchez Ochoa v. Campbell*, 2018 WL 1548228 (9th Cir. Mar. 30, 2018(Unpublished.) There, DOC had allegedly placed a hold on Ochoa such that even if he paid bail, he would immediately be turned over to ICE upon release. *Id.* The court granted Ochoa's request for a Temporary Restraining Order, finding there was a Fourth Amendment violation. *Id.* However, the court in *Gomez-Robles* emphasized the importance that Ochoa's I-247A was based on "statements made by the alien" (a separate box on Form

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I-247A) rather than a "final order of removal," "which is certainly a more substantial basis than that described in *Sanchez-Ochoa.*" *Gomez-Robles*, 2017 WL 6558595 at *5.

In another opinion issued in February of 2018, a California district court certified a class of individuals who were detained by the Los Angeles Sheriff's Department for up to 48 hours after they otherwise would have been released, and found their continued detention based on immigration detainers violated the individual's Fourth Amendment rights. *Roy*, 2018 WL 914773, at *23. However, this class (certified as the *Gerstein* Equitable relief class) explicitly excluded "inmates who ha[d] a final order of removal or ongoing removal proceedings as indicated on the face of the detainer." *Id.* at *7. In entering its ruling *the day before Rodriguez Macareno was detained*, it was *at least* unclear whether individuals who violated a "final order of removal" due to their "failure to appear,"[5] or any other reason established by a federal immigration judge, had committed a criminal immigration violation. This lack of clarity would work a severe injustice to these officers if qualified immunity was not granted.

2. Even if a Constitutional Right Existed, It Was Not Clearly Established As Applied to These Specific Facts.

Plaintiff alleges the Defendant Officers unlawfully "seized Mr. Rodriguez, preventing him from leaving the scene, placing him in handcuffs, and transporting him in their patrol vehicle to the ICE field office." *Complaint*, at ¶ 77. Plaintiff further alleges "[t]he law was clearly established prior to December 11, 2017, that none of the Defendant Officers, as local police officers, had any lawful authority to seize Mr. Rodriguez or to extend any seizure for purposes of investigating his civil immigration status[,]" and that

> The law was also clearly established prior to December 11, 2017, that, for state and local law enforcement officers, a seizure without probable cause or at least reasonable suspicion of a crime constitutes an unreasonable seizure in violation of the Fourth Amendment to the United States Constitution.

[5] Pursuant to CrR Rule 2.2(b)(4), a warrant may be issued to a defendant for "failure to appear on summons." These "Failure to Appear Arrest Warrants" are often entered into NCIC, (for example, see Ferry County LCrRLJ 2.5) exactly where Officers Thomas and Gardner found Plaintiff's "outstanding warrant" for "failure to appear."

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Id., at ¶¶ 79, 80. Plaintiff argues the Court should accept the broad proposition that continued or subsequent detention by local law enforcement agencies on the basis of ICE warrants or immigration detainers per se violates the Fourth Amendment. However, qualified immunity cannot be denied by such sweeping assertions.

Here, Valley Comm alerted Officer Thomas to a "[warrant] out of Bureau of Immigration and Customs Enforcement for your subject Rodriguez-Macareno, Wilson. A … White male. **Alien unlawfully present due to order of removal or exclusion from the USA. Otherwise valid 2022 out of Bellevue.**" *Exh. A to Thomas Decl.*, at 8:30-9:40. Based on this statement alone, officers had *at least* reasonable suspicion to detain Plaintiff to investigate the warrant further. The information they received from the CAD information on their in-car computers then gave them probable cause to extend the detention.

When Officers Thomas and Gardner returned to their vehicle to figure out whether this was a warrant they had to act on, they viewed information on their in-car computer that said, "CONTACT LESC AT (877) 999-5372 FOR IMMEDIATE HIT CONFIRMATION AND AVAILABILITY OF BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT DETAINER." Officers complied by calling the LESC and were informed ICE did want to take custody of Plaintiff and to hold Plaintiff temporarily while an ICE officer came to take custody of him. Officers Gardner and Thomas offered to take Plaintiff to the ICE facility, which was directly down the street. There, ICE officer Mark Bailey took custody of Plaintiff, and Plaintiff was no longer detained by Tukwila PD.

Ninth Circuit authority is not clear that detaining an individual who is subject to a detainer on the basis of a final order of removal violates that individual's Fourth Amendment right. In fact, district courts in the Ninth Circuit have repeatedly excluded that basis from their analysis when finding Fourth Amendment violations.

Here, Defendants extended the detention for a little over thirty minutes to determine what kind of warrant had been issued, whether there was probable cause to detain Plaintiff,

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and to contact the proper agency to determine whether that agency wanted to take custody of him. Plaintiff makes the blanket assertion this is a purely civil issue because it broadly involves removal. However, this was not a situation where local law enforcement officers detained Plaintiff simply on their own unilateral suspicion that he might be a removable alien. Rather, the facts known to the officers at the time of the incident indicated an order of removal had already been issued, Plaintiff had failed to appear for his removal, Plaintiff committed a criminal immigration violation when he failed to depart from the country within 90 days after being ordered to by an immigration judge, and Defendants were instructed to detain Plaintiff by the federal government. Therefore, based on the particularized facts of this case, the law certainly was not clearly established detaining Plaintiff was a Fourth Amendment violation at the time of the incident. Qualified immunity dismissing all claims against the officers is appropriate.

D. Officers Thomas, Gardner, Tiemann, and Stephenson Should Not Be Named in Their Official Capacities.

Courts in the Ninth Circuit have uniformly held it is not appropriate to name local officers in their official capacity.

> After the *Monell* holding, it is no longer necessary or proper to name as a defendant a particular local government officer acting in official capacity. To do so only leads to a duplication of documents and pleadings, as well as wasted public resources for increased attorneys fees. A plaintiff cannot elect which of the defendant formats to use. If both are named, it is proper upon request for the Court to dismiss the official-capacity officer, leaving the local government entity as the correct defendant.

Luke v. Abbott, 954 F. Supp. 202, 204 (C.D. Cal. 1997). See also *Hafer v. Melo*, 502 U.S. 21, 27, 112 S. Ct. 358, 362, 116 L. Ed. 2d 301 (1991) ("State officers sued for damages in their official capacity are not "persons" for purposes of the suit because they assume the identity of the government that employs them."); *Hyun Ju Park v. City & Cty. of Honolulu*, 292 F. Supp. 3d 1080, 1090 (D. Haw. 2018).

Assuming "individual-capacity" liability is dismissed based on qualified immunity, the result would leave the officers still as named defendants in their official capacity only.

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In that situation, the City of Tukwila is the only proper defendant to sue in its "official capacity." The claims against the individual officers in their "official capacity" should be dismissed as procedurally improper.

E. The Evidence in the Record Does Not Establish Any Plausible Argument for Punitive Damages.

Plaintiff has requested punitive damages, alleging "Defendants' conduct of subjecting Mr. Rodriguez to an unconstitutional seizure was motivated by evil motive or intent, or was recklessly or callously indifferent to his Fourth Amendment rights." *Complaint*, at pp. 14-15.

"Punitive damages may be awarded when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Glosson v. Morales*, 469 F. Supp. 2d 827, 830 (S.D. Cal. 2007). Plaintiff has the burden of pointing to evidence in the record that "establishes the Defendants possessed the requisite mental state to support the award of punitive damages." *Id.* "Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring the plaintiff. Conduct is in reckless disregard of the plaintiff's rights if, under the circumstances, it reflects complete indifference to the plaintiff's safety or rights, or if the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law." Ninth Circuit Pattern Jury Instruction No. 5.5 (2007).

The video evidence from the officers' body cameras captures the officers' interaction with Plaintiff from at least the point where officers learn he has an order of removal. Any evidence or allegations that are clearly discredited by video evidence should not be considered for the purposes of summary judgment. *Scott v. Harris*, 550 U.S. 372, 380–81, 127 S. Ct. 1769, 1776, 167 L. Ed. 2d 686 (2007). Nothing in the video or record supports a finding of punitive damages. The officers consistently treated Plaintiff with respect (and Plaintiff likewise remained compliant) while determining how to handle a

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complex situation. During this time, Officers:

- Tried to assist Plaintiff by looking for ways Plaintiff may be able to stay in the United States legally, including asking if it helps that his children were born in the United States, or if Plaintiff's boss can write him a letter of recommendation. *Exh. A to Tiemann Decl.*, at 14:15-32:02. ("They're looking in the computer right now, and they're going to see if it's something – if we can help you in some way, we will, right?" *Id.*, at 23:19-23:25.)
- Repeatedly tell Plaintiff that they don't have him for any charges and will let him go as long as ICE does not want him. *Id.*
- Tell him some things are taken out of their hands by the law. *Id.*, at 23:45-23:48.
- Allow Plaintiff to make phone calls to his boss and his attorney and otherwise access his phone. *Id.*, *Exh. A to Thomas Decl.*, at 46:30-50:20.
- Repeatedly inform ICE officers that Plaintiff has been extremely cooperative. *Id.*, at 57:55-59:50.

See also Exh. A to Tiemann Decl., *Exhs. A and B to Stephenson Decl., Exh. A to Thomas Decl.* (entire body camera footage). As Plaintiff is being driven to ICE, he even thanks the officers for their patience. *Exh. A to Thomas Decl.*, at 50:15-50:20.

In an effort to resolve this issue without relying on the Court, Defendants' counsel invited Plaintiff's counsel to a meeting at their office at the beginning of the case to ask if they had any facts to support Plaintiff's request for punitive damages. Chen Decl, ¶ 2. They did not. *Id*. Counsel asked if Plaintiff would agree to voluntarily dismiss this claim. They refused. *Id*. Counsel indicated Plaintiff is bringing the claim on the off chance some evidence might show up to support punitive damages. *Id*.

The record clearly shows the officers are doing what they feel required to do to uphold the law, and at no point do they exhibit ill-will, reckless disregard, or "complete indifference." If the Court does not dismiss the officers completely, Defendants respectfully request the Court dismiss Plaintiff's punitive damages claims against them with

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prejudice.

VI. CONCLUSION

New cases are addressing the nuances of this area of law every month, with the Ninth Circuit consistently holding "final orders of removal" are distinct from general suspicion that the individual is in the United States unlawfully. The body camera video of this incident shows officers acted courteously and professionally with Plaintiff while they took reasonable steps to check the warrant. They were told Plaintiff had a final order of removal – which was true. Defendants respectfully request the Court dismiss all claims against them with prejudice.

DATED: October 11, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:

N/A

DATED: October 11, 2018

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