The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
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. 2:18-cv-00421-RAJ

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff's response fails to undertake the mandatory particularized analysis of ***all*** of the facts and circumstances required for qualified immunity questions. Recently in *White v. Pauly*, 137 S. Ct. 548, 552 (2017), the U.S. Supreme Court reiterated "[t]he panel majority misunderstood the 'clearly established' analysis: **It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment."** *Id.,* at 552. In finding the law is clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate… In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law." *Id.*, at 551 (Internal citations and quotations omitted.)

Plaintiff wants this Court to see the single word "administrative" in one portion of the NCIC hit and shut its eyes to everything else the police officers heard on the radio,

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learned from Plaintiff, and saw in the NCIC database – information they indisputably had when they detained Plaintiff. Yet, qualified immunity turns on the totality of the facts, not just one. Plaintiff's opposition in this case lacks any authority clearly establishing "all but the plainly incompetent" would know Defendants' actions violated the law.

A. Plaintiff Cites No Case Where Local Police Officers Were Originally Responding To A Call For Assistance From The Plaintiff Himself.

This case is immediately unique in that Defendants were responding to a call for assistance *from Plaintiff* reporting a trespasser on his property – the call did not begin with Defendants stopping Plaintiff on suspicion of being in the country illegally. Defendants were frankly taken aback when Valley Comm reported Plaintiff had a warrant. They were close to wrapping up the trespass call and leaving when they received this news.

Plaintiff faults the officers for checking his name through dispatch after he provided them with his ID card. However, Plaintiff has provided no authority or evidence this was in any way improper police procedure. In contrast, Defendant Thomas testified this name check is commonly done for officer safety and witness identification purposes. The courts have also found this procedure to be proper.

> We have "held repeatedly that mere police questioning does not constitute a seizure." *Florida v. Bostick,* 501 U.S. 429, 434 (1991); see also *INS v. Delgado,* 466 U.S. 210, 212 (1984). "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage." *Bostick, supra,* at 434–435, (citations omitted).

Muehler v. Mena, 544 U.S. at 101 (2005). Plaintiff was not detained when the officers asked for his identification and ran a check on his name as the officers were still responding to his trespass call.

B. Plaintiff Cites No Case Where Officers Received a Radio Dispatch Indicating An "Order of Removal or Exclusion from the USA"

Next, it is undisputed Valley Comm alerted officers to Plaintiff's Order of removal *prior* to the conclusion of their interaction with Plaintiff regarding the reported trespass. *Exh. A to Exh. 29*, at 8:26-9:57; *Exh. A to Exh. 26*, at 9:30-13:58 (Suspect is released and

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Plaintiff signs trespass card *after* Valley Comm report comes in). Valley Comm identified Plaintiff and stated over the radio, "Alien unlawfully present due to Order of removal or exclusion from the USA..." *Exh. A to Exh. 29*, at 8:26-9:00. As soon as the dispatcher made this announcement over the radio, the officers had reasonable suspicion to detain Plaintiff to investigate whether a criminal offense had occurred.

Reasonable suspicion "exists when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for *particularized* suspicion." *United States v. Montero–Camargo,* 208 F.3d 1122, 1129 (9th Cir.2000) (en banc). Although an officer may not base his reasonable suspicion on a "hunch," *United States v. Sokolow,* 490 U.S. 1, 7 (1989), he may "draw on [his] own experience and specialized training to make inferences from and deductions about the cumulative information available ... that might well elude an untrained person." *United States v. Arvizu,* 534 U.S. 266, 273 (2002)(internal quotation marks omitted). In reviewing whether reasonable suspicion was present, we consider the evidence as a whole, not piece by piece. *United States v. Cortez,* 449 U.S. 411, 417 (1981). The level of suspicion the standard requires is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than is necessary for probable cause. *United States v. Sokolow*, 490 U.S. at 7.

Here, Officers Gardner and Thomas believed the warrant was criminal as it was in the NCIC database, which is a criminal information database, based on their training and experience as officers. *See*, *Garnder Decl, ¶ 3-4; Thomas Decl, ¶ 5*. There was no radio dispatch indicating this was an administrative warrant when they first learned about it.

C. Plaintiff's Admissions Provided Further Reasonable Suspicion To Believe A Crime Had Occurred.

When the dispatcher announced the Order of removal, Plaintiff spontaneously admitted, "I know they want me. I know what that is about." *Exh. A to Exh. 29*, 8:26-9:57. The officers observed this confession in combination with the report he was an illegal alien

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with an Order for removal. Plaintiff was detained to investigate and confirm what the officers believed was a criminal warrant, and to communicate with ICE agents to determine what action ICE wanted to take. Although not enough on its own, Plaintiff's admission of illegal presence may be an indication of illegal entry. *Gonzales v. City of Peoria*, 722 F.2d 468, 476-77 (9th Cir. 1893) (overruled on other grounds).

D. Plaintiff Cites No Case Where Local Law Enforcement Faced an NCIC Hit That Looked Like Or Had The Same Information As The One Here.

Plaintiff next alleges Defendants lacked reasonable suspicion or probable cause to detain Plaintiff when they viewed the NCIC information on their computer containing the term "administrative warrant" in one place. *Dkt. 42*, at p. 9:12-16. Plaintiff's entire case turns on this single mention of an administrative warrant of removal. Meanwhile, it completely ignores the *entirely separate sections* highlighted below:

```
 Message From Terminal/Unit:  ACCESS    Operator:  ACCESS
Requested By:  1T7
Date/Time Sent:  08-FEB-2018 05:46:49
 NCIC PD33VCQE .1L01053Q00RPAPQW
WA017793N

***MESSAGE KEY QW SEARCHES WANTED PERSON FILE FELONY RECORDS REGARDLESS OF
EXTRADITION AND MISDEMEANOR RECORDS INDICATING POSSIBLE INTERSTATE
EXTRADITION FROM THE INQUIRING AGENCY'S LOCATION.  ALL OTHER NCIC PERSONS
FILES ARE SEARCHED WITHOUT LIMITATIONS.
WARNING REGARDING FOLLOWING RECORD - SUBJECT OF NIC/N940407554 HAS AN
OUTSTANDING ADMINISTRATIVE WARRANT OF REMOVAL FROM THE UNITED STATES.
CONTACT LESC AT (877) 999-5372 FOR IMMEDIATE HIT CONFIRMATION AND
AVAILABILITY OF BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT DETAINER.
MKE/IMMIGRATION VIOLATION - FAILURE TO APPEAR FOR REMOVAL
ORI/VTICE0900 NAM/RODRIGUEZ-MACARENO,WILSON A SEX/M RAC/W POB/HD
DOB/19840912 HGT/506 WGT/130 EYE/BRO HAI/BRO FBI/11655BC5
SKN/MED
FPC/WUWUWUWUWUWUWUWUWU MNU/AR-A98683788
OFF/ALIEN UNLAWFULLY PRESENT DUE TO ORDER OF REMOVAL OR EXCLUSION FROM THE USA
OCA/A098683788
VLD/20171209
MIS/OUTSTANDING WARRANT OF DEPORTATION - FAILURE TO APPEAR CONTACT THE ICE LAW
MIS/ENFORCEMENT SUPPORT CENTER 1-877-999-5372
DNA/N
ORI IS BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, LAW ENFORCEMENT SUPPORT
CENTER 877 999-5372
AKA/MACARENO,WILSON ANTONIO
AKA/RODRIGUEZ MACARENO,WILSON A
AKA/RODRIGUEZ-MACAREND,WILSON
AKA/RODRIGUEZ,WILSON ANTONIO
MNU/AR-A098683788
MNU/AR-098683788
MNU/AR-98683788
NIC/N940407554 DTE/20080903 1606 EDT DLU/20171209 0558 EDT
*****  THIS RECORD MAY ONLY BE USED BY CRIMINAL JUSTICE AGENCIES FOR
CRIMINAL JUSTICE PURPOSES.
*****  END OF IMMIGRATION VIOLATOR FILE RESPONSE.  *****
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Even assuming Plaintiff is correct regarding the clarity of the law as it pertains to administrative warrants (which Defendants dispute), Plaintiff has provided no case decisions analyzing an NCIC hit for an "Outstanding Warrant of Deportation – Failure to

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Appear" as a separate entry from notification of an administrative warrant of removal. There are certainly no case decisions holding this type of entry in the NCIC database is insufficient to create reasonable suspicion that a crime of failure to appear has occurred.

Plaintiff's assertion "the *only* information Defendants possessed when they seized Mr. Rodriguez was regarding an administrative warrant" is simply incorrect; and deliberately ignores all of the rest of the information in the database.[1] The remainder of the NCIC information was highly relevant to why officers reasonably suspected this involved a criminal warrant or offense. In Washington, "failure to appear" is generally a criminal violation, and in some cases, officers are permitted to arrest on an order alone without a warrant. *See*, RCW 10.88.370 ("If the prisoner is admitted to bail and fails to appear and surrender himself or herself … the judge, or magistrate by proper order, shall declare the bond forfeited and **order his or her immediate arrest without warrant if he or she be within this state.**" (Emphasis added.) See also RCW 9A.76.170:

> (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state…and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping…
> (3) Bail jumping is: [A felony or a misdemeanor based on the underlying crime.]

RCW 9A.76.170; RCW 2.36.170 ("A person summoned for jury service who intentionally fails to appear as directed shall be guilty of a misdemeanor."). At the very least, the officers had reasonable suspicion Plaintiff had committed a criminal act and were permitted to contact LESC – as instructed in the criminal database – to investigate and receive direction.

E. Plaintiff Cites No Authority Clearly Establishing Defendants Were Not Allowed To Rely On The Collective Knowledge Of ICE Officers.

When the officers called the LESC phone number to investigate the warrant of deportation and failure to appear, LESC Officer Shannon confirmed the warrant and

[1] To this day, Defendants do not have a copy of the actual warrant, or any paperwork indicating what type of warrant(s) were issued or by whom as Plaintiff has refused to produce any of his immigration case file in discovery. The evidence actually suggests Plaintiff **did** commit a criminal immigration violation. *Exh. A to Thomas Decl.*, at 58:05 (ICE Officer Mark Bailey says Plaintiff is a "prior deport" and the two appear to know each other as Plaintiff steps out of the car.)

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provided a photo of Plaintiff from his fugitive warrant to confirm his identity. She further asked them to stand by while ICE officers determined how they wanted to handle the situation and if they wanted to take custody of Mr. Rodriguez Macareno. Defendants Gardner and Thomas were now acting pursuant to a request by another law enforcement agency based on the collective knowledge of that agency that there was probable cause to detain Plaintiff. This is routine in law enforcement.

The collective knowledge doctrine allows courts to impute police officers' collective knowledge to the officer conducting a stop, search, or arrest. It applies "where an officer ... with direct personal knowledge of *all* the facts necessary to give rise to reasonable suspicion... directs or requests that another officer... conduct a stop, search or arrest." *United States v. Ramirez,* 473 F.3d 1026, 1033 (9th Cir.2007). Collective knowledge may be imputed only if there has been some "communication among agents." *Id.* at 1032.

Here, Plaintiff does not dispute ICE officers had sufficient probable cause to detain and arrest him on their warrant. Once the ICE officers directly communicated with the Tukwila officers and asked them to detain him until they could determine if they wanted to take custody, the collective knowledge of the ICE officers is imputed to the Tukwila officers. *See*, *City of El Cenizo, Texas v. Texas*, 890 F.3d 164, 187 (5th Cir.2018), citing *United States v. Zuniga*, 860 F.3d 276, 283 (5th Cir. 2017) (under the collective knowledge doctrine 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). In contrast, the only case decisions where this doctrine was *not* applied involved situations highly distinguishable because there was no actual communication between the ICE officers and local law enforcement. *U.S. v. Villasenor*, 608 F.3d 467, 475 (9th Cir.2010) (record is devoid of any communication between Customs and Board Protection agents and [local officer] regarding the suspect); *Ochoa v. Campbell*, 266 F.Supp.3d 1237, 1257-58 (2017) (nothing in the record suggests ICE requested or in any other way asked that defendants

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arrest or detain Sanchez Ochoa…the record does not indicate the agent interacted with Yakima County officials at all).

F. It Was Not Clearly Established Defendants Could Not Detain Plaintiff At The Request Of ICE Officers.

> The INA contemplates both formal and informal cooperation between federal authorities and state/local authorities on immigration matters. *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1245 (E.D. Wash. 2017). State/local officials may enter into written agreements with ICE to perform certain enforcement functions usually conducted by federal immigration officers with regard to the investigation, apprehension or detention of certain immigrants. 8 U.S.C. § 1357(g)(1)-(9). Such an agreement is not at issue in this case. A formal agreement is not required for local and state officials to (1) communicate with ICE regarding a person's immigration status or (2) cooperate with ICE in the "identification, apprehension, *detention*, or removal of aliens" not lawfully present in the United States. 8 U.S.C. § 1357(g)(10) (emphasis added). Cooperation under this statute must be pursuant to a request, approval or other instruction from the federal government. *Lopez-Lopez v. County of Allegan*,4 321 F.Supp.3d 794, —— 2018 WL 3407695 at *2 (W.D. Mich. July 13, 2018) (citing *Arizona v. United States*, 567 U.S. 387, 410, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012)). When state or local law enforcement officials informally attempt to cooperate with federal immigration agents, they must act on a specific request from ICE agents, and they are limited to actions that do not involve the exercise of their discretion.[5] *Id.* at ——, at *5; *Arizona*, 567 U.S. at 410.

Abriq v. Metro. Gov't of Nashville, No. 3:17-CV-00690, 2018 WL 4561246, at *2–3 (M.D. Tenn. Sept. 17, 2018). In *United States v. Ovando-Garzo*, 752 F.3d 1161, 1164 (8th Cir. 2014), the court held a local official's identification of an alien, communication with ICE concerning that alien, and detaining that alien upon ICE's request until a border patrol agent could take custody were not unilateral actions and did not exceed the scope of his authority. *Abriq*, at *3, Fn. 5.

Courts in the Ninth Circuit have also confirmed, or at the very least heavily supported, local law enforcements' authority to cooperate with ICE under § 1357(g)(10)[2]:

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[2] [2] 8 U.S.C.A. § 1357 (West)

…

(10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State--

(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

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> *Arizona* concerned unilateral arrests by state law enforcement officers – arrests for immigration offenses made without a request, approval, or other instruction from the federal government. *Id.* It did not address the question presented in this case: whether the INA prohibits state officials from detaining an unauthorized immigrant at the request of federal immigration authorities.
>
> In any event, the Court is not persuaded at this stage that § 1357(g) prohibits Defendants from complying with detainers. Defendants' policy does not authorize Sheriff officers to unilaterally investigate, apprehend, or detain persons for immigration violations. Rather, it authorizes the Sheriff to cooperate with a request from ICE to detain a specific inmate already in the Sheriff's custody, whom ICE has independently determined is removable, for a short period to facilitate ICE's apprehension of the individual. This conduct appears to fall within § 1357(g)(10)(B). Plaintiff has not shown a likelihood of success on this claim.

Tenorio-Serrano v. Driscoll, 324 F. Supp. 3d 1053, 1064–65 (D. Ariz. 2018). Further, the same court openly acknowledged the lack of clearly-established law *on this issue*:

> The Court also has a general concern about the parties' arguments. Plaintiff argues that continuing to hold an individual on the basis of an immigration detainer after the state-law justification has expired constitutes a new arrest, and proceeds to address Defendants' actions entirely in the context of arrests. While the Court does not necessarily disagree with Plaintiff's premise – that continued detention is tantamount to an arrest – **the Court sees at least some meaningful difference between a unilateral arrest by a sheriff's officer and continued detention on the basis of a federal warrant. In the former, the officer is acting entirely on his own authority and on the basis of his own judgment and investigation. In the latter, the officer is acting on the probable cause determination of a federal officer empowered and trained to make such determinations.** The extent and significance of this distinction will need to be explored further in this litigation, but it is noteworthy that all of the authorities relied on by Plaintiff address unilateral arrests by state officers. These include the cases cited by Plaintiff, including *Gonzales*, Plaintiff's arguments regarding the need for training and supervision of state officers under § 287(g) agreements, and Plaintiff's arguments regarding 8 U.S.C. § 1252c. Defendants also primarily cite statutes and cases dealing with unilateral arrests. **This focus undoubtedly is due to a *lack of authority addressing the specific issue in this case*, but future briefing should consider and address the differences between unilateral arrests and continued detentions on the basis of federal warrants.**

Id., (emphasis added).

In this case, Defendants told Mr. Rodriguez Macareno they were communicating with ICE and waiting for direction on what the ICE officers wanted to do. They informed Plaintiff if the ICE officers did not want to take him into their custody, the Tukwila officers would let him go. These facts are undisputed and evidenced by the videos of the encounter.

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It is clear Defendants were not exercising their discretion once they contacted LESC; but rather, were acting entirely based upon the direction and decisions of ICE under authority of the federal warrant.

As discussed in the punitive damages section, and pursuant to Plaintiff's argument, the fact that Tukwila officers transported Plaintiff the short distance to ICE versus holding him at the scene until ICE picked him up makes no substantive or legal difference. Plaintiff contests the unlawful detention occurred prior, and has cited no authority that the form of the detention affects the qualified immunity analysis in any way.

G. Plaintiff's Arguments Questioning The Authority Of The Detainer Issued By The ICE Officers Are Not Persuasive.

Plaintiff's arguments regarding the detainer are essentially three-fold: (1) that officers are not allowed to rely on information in the detainer (probable cause based on a judicial Order of removal) because Defendant officers did not have a paper copy of the detainer when they initially detained Plaintiff; (2) the warrant was invalid because it was issued by an ICE officer and not a judge; and (3) the detainer was invalid under ICE policy (Response, 15:16-22). All arguments fail.

Plaintiff's first point ignores the officers clearly had knowledge of the radio announcement from Valley Comm that Plaintiff had an "Order of removal and exclusion from the USA." Plaintiff cites no authority supporting his argument an officer cannot rely on the Order – presumably issued by a judge, which it was – as reasonable suspicion or even probable cause for a detention to investigate a crime. Instead, Plaintiff argues, with no support from any police practices expert, that the officers essentially must carry around paper copies of all warrants and detainers entered into NCIC in order to be able to rely on or take action on them. This simply isn't how policing works, and the physical existence of the warrant at the time officers encounter the subject does nothing to change the underlying authority for the warrant or detainer, or ICE's undisputed authority to execute their own warrant by way of direction to local law enforcement.

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Plaintiff's second contention ignores the fact that the ICE warrant was based on an underlying judicial order. The case cited by Plaintiff involved situations where ICE issued a warrant because it was investigating a suspect – not warrants issued after a final judicial Order of removal had been entered.

Third, Plaintiff points to one portion of an on-line policy claiming the detainer should not have been issued per the policy. Even if this was true, Defendants had no knowledge of the policy provisions. Further, policies are not law and cannot legally invalidate a detainer. Plaintiff cites no case law to suggest otherwise. Finally, Plaintiff only mentioned a portion of the policy, while ignoring the rest of the policy stating nothing precludes a LEA from temporarily detaining a subject while ICE responds to the scene. https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf.

H. Plaintiff Cites No Authority Stating Federal Immigration Judges Are Not Qualified to Issue Orders Or Lack Neutrality.

Plaintiff repeatedly argues a warrant based on an order from an immigration law judge is invalid because it lacks "any review by a neutral judge or magistrate." *Dkt. 42*, at 9:18-10:15. However, Plaintiff cites no actual authority that immigration judges are not neutral, detached magistrates. In fact, Ninth Circuit courts have repeatedly found that they are. See *Khalafala v. Kane*, 836 F. Supp. 2d 944, 955 (D. Ariz. 2011), aff'd (July 11, 2012) (Court faulted a distinct immigration process because "they do not provide for a decision by a neutral arbiter **such as an immigration judge.**") (emphasis added); *Diouf v. Napolitano*, 634 F.3d 1081, 1089 (9th Cir. 2011) (same); *Palomar v. Sessions*, No. 1:17-CV-00638-EPG-HC, 2018 WL 903555, at *4 (E.D. Cal. Feb. 15, 2018) (Unpublished) (Court specifically rejected the petitioner's argument that "no immigration judge can be a neutral decision maker[.]" and held there was no evidence the immigration judge was not neutral.)

I. Plaintiff Failed To Offer Legitimate Evidence To Support A Claim Of Punitive Damages.

Plaintiff identifies four factors in support of a claim for punitive damages against Defendants Gardner and Thomas. However, he offers absolutely no evidence against

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Officers Stephenson or Tiemann whatsoever. The claim against them should be dismissed outright.

Plaintiff claims Gardner and Thomas went out of their way to engage in enforcement action by offering to transport him to the ICE field office. However, he does not deny that ICE officers had already asked Defendants to detain Plaintiff and wait for them to arrive to arrest him. This would mean continuing to wait with Plaintiff either standing outside his house or sitting in the back of a patrol car for all of his neighbors and his wife and children to see, until federal immigration agents arrived to take custody of him in a further display for the whole neighborhood to see. Offering to transport Plaintiff a few blocks to the ICE office to avoid this public embarrassment and reduce the time on the call is not evidence of evil motive or intent. Either way, ICE agents were going to take Plaintiff into custody.

Plaintiff also takes issue with the officers providing identity information for his co-worker and officers "suggesting" they would continue to cooperate with ICE. However, federal law specifically authorizes this type of cooperation – and in fact makes it *illegal* for any state or local agency to prohibit this cooperation. *See*, 8 U.S.C. §§ 1373(a)-(b); 1644.

Finally, generalized comments about illegal aliens obtaining fake identification, and a hope that the courts will settle these issues in the next few years, is evidence of nothing more than the on-going confusion and frustration in this area of the law. Illegal conduct is occurring, yet it is not clearly established how local law enforcement should respond to or enforce the law amidst widely varying situations, humanitarian concerns, and political jockeying. Hence, this motion for qualified immunity for the Defendant officers.

DATED: November 2, 2018

KEATING, BUCKLIN & McCORMACK, INC., P.S.

By: */s/ Shannon M. Ragonesi*
Shannon M. Ragonesi, WSBA #31951

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 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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DATED: November 2, 2018

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