No. 12-3991

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ERNESTO GALARZA,
Plaintiff-Appellant,

v.

COUNTY OF LEHIGH,
Defendant-Appellee.

On Appeal From the March 30, 2012 Order and Opinion of the U.S. District Court for the Eastern District of Pennsylvania (Gardner, J.), No. 10-cv-6815, Granting Defendant County of Lehigh's Motion to Dismiss

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BRIEF OF APPELLANT
and VOLUME I of the JOINT APPENDIX (J.A. 1-64)

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JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction over this case pursuant to 28 U.S.C. § 1331. This Court has appellate jurisdiction under 28 U.S.C. § 1291. The district court issued a final order dismissing the case as to all defendants on September 19, 2012. Plaintiff timely filed a notice of appeal on October 16, 2012. This appeal is from a final order that disposes of all parties' claims.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This appeal presents the following issues:

1. Whether the district court erred in dismissing Plaintiff Ernesto Galarza's Fourth Amendment claim against Defendant Lehigh County where, pursuant to the County's policy and practice, County officials imprisoned Plaintiff, a U.S. citizen, for three days solely because he was named on a federal immigration "detainer" form, even though the form did not purport to be supported, and was in fact unsupported, by probable cause. (*Raised in Defendant-Appellee's motion to dismiss, see Dkt. #50-1, Galarza v. Szalczyk et al., No. 10-cv-06815, at 8-12, 14 (E.D. Pa. filed Apr. 25, 2011); objected to in Plaintiff-Appellant's opposition, see Dkt. #58, Galarza v. Szalczyk et al., No. 10-cv-06815, at 12-15 (E.D. Pa. filed May 23, 2011); and ruled upon at Joint Appendix ("JA") 55-58.*)

2. Whether the district court erred in dismissing Plaintiff's Fourteenth Amendment due process claim against Defendant Lehigh County where the County did not notify Plaintiff of the reason for his detention and denied him an opportunity to respond or contest the validity of the detainer. (*Raised in Defendant-Appellee's motion to dismiss, see Dkt. #50-1, Galarza v. Szalczyk et al., No. 10-cv-06815, at 12-14 (E.D. Pa. filed Apr. 25, 2011); objected to in Plaintiff-Appellant's opposition, see Dkt. #58, Galarza v. Szalczyk et al., No. 10-cv-06815, at 16-17 (E.D. Pa. filed May 23, 2011); and ruled upon at JA 55-58.)*

STATEMENT OF RELATED CASES OR PROCEEDINGS

Appellant is not aware of any related case or proceeding that is completed, pending, or about to be presented before this Court or any other court or agency, federal or state.

STATEMENT OF THE CASE

This case arises out of the unconstitutional detention of Plaintiff-Appellant Ernesto Galarza, a U.S. citizen whom Defendant-Appellee Lehigh County imprisoned for three days, without probable cause or due process, on the purported authority of a baseless immigration "detainer."

In November 2008, Mr. Galarza was arrested by the Allentown Police Department—on charges of which he was later acquitted—and booked into Lehigh County Prison. After learning of the arrest, U.S. Immigration and Customs Enforcement ("ICE") agents faxed an immigration "detainer" form to Lehigh County, notifying the County that ICE had begun an investigation into Mr. Galarza's immigration status.

The detainer was not based on probable cause to believe Mr. Galarza was a non-citizen subject to detention and removal; nor did it purport to be. In fact, County officials had ample reason to know Mr. Galarza was *not* a removable non-citizen: He had told County officials during the booking process that he was born in New Jersey, and the County had his Pennsylvania driver's license and Social Security card in its possession. Nevertheless, pursuant to the County's policy and practice of automatically treating all immigration detainers as a basis for imprisonment, County officials detained Mr. Galarza on this basis for three additional days after a magistrate judge had ordered his release on bail, and the bail

had been posted. Mr. Galarza was detained without a warrant, without probable cause to believe he was in violation of any law, and without notice or an opportunity to contest the basis for his detention.

On November 19, 2010, Mr. Galarza filed a civil damages action against Lehigh County, the City of Allentown, and various individual federal and municipal defendants. *See* Complaint, Dkt. #1, *Galarza v. Szalczyk*, No. 10-cv-06815 (E.D. Pa. filed Nov. 19, 2010). After conducting expedited discovery to identify individual defendants named as "John Doe(s)"—including the deposition of Lehigh County's Director of Corrections—Mr. Galarza filed an Amended Complaint on April 6, 2011, naming Lehigh County, the City of Allentown, Allentown Police Detective Christie Correa, ICE Agent Mark Szalczyk, and ICE Agent Gregory Marino as defendants. *See* JA 80-81 at ¶¶ 5-11. With respect to Lehigh County, Mr. Galarza pleaded causes of action under 42 U.S.C. § 1983, alleging that the County's policies or practices caused his detention without probable cause in violation of the Fourth Amendment, and the deprivation of his liberty without due process of law in violation of the Fourteenth Amendment's Due Process Clause. *See* JA 96-98 at ¶¶ 125-34.[1]

[1] In his Amended Complaint, Mr. Galarza also alleged that Lehigh County violated his rights under the Fourteenth Amendment Equal Protection Clause. *See* JA 98 at ¶¶ 135-40. He does not pursue that claim on appeal.

In addition, on August 3, 2011, Mr. Galarza filed a complaint against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b). *See* Complaint, Dkt. #1, *Galarza v. United States*, No. 11-cv-4988 (E.D. Pa. filed Aug. 3, 2011). The district court later consolidated the FTCA action with the individual damages action. *See* Order, Dkt. #70, *Galarza v. Szalczyk et al.*, No. 10-cv-06815 (E.D. Pa. filed Nov. 4, 2011).

All defendants except the United States moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). On March 30, 2012, the district court granted in part and denied in part the motions to dismiss. *See* JA 4. The district court held that the complaint stated claims for relief against ICE Agent Szalczyk and Allentown Detective Correa for violations of the Fourth Amendment and the Equal Protection Clause, and that they were not entitled to qualified immunity. JA 32-47. The district court dismissed the procedural due process claim against Agent Szalczyk, JA 52-54, and it dismissed all claims against ICE Agent Marino and the City of Allentown. JA 28-31, 59-62.

As to Defendant Lehigh County, the district court dismissed all of Mr. Galarza's claims. JA 55-58. The district court reasoned that "[t]he only policy or custom which plaintiff attributes to defendant Lehigh County is the policy of detaining any person being held in Lehigh County Prison who is named in an

immigration detainer," and because it viewed this policy as "consistent with the [federal] regulations," it dismissed Mr. Galarza's claims. JA 55.

Mr. Galarza subsequently settled his claims against the individual defendants, the City of Allentown, and the United States. The district court issued a final order dismissing the case as to all defendants on September 19, 2012. JA 107. This appeal regarding Mr. Galarza's claims against Lehigh County followed.

STATEMENT OF FACTS

Plaintiff Ernesto Galarza is a U.S. citizen who was born in Perth Amboy, New Jersey, in 1974. He is a Hispanic man of Puerto Rican heritage. JA 83 at ¶¶ 24-26.

On Thursday, November 20, 2008, Mr. Galarza was performing construction work on a house in Allentown, Pennsylvania. Unbeknownst to him, a contractor on the construction site sold cocaine to an undercover Allentown police detective, Christie Correa. JA 83-84 at ¶¶ 28-30. Detective Correa arrested not only the contractor, but also Mr. Galarza and two other employees who were working at the site, charging them with conspiracy to deliver cocaine in violation of Pennsylvania law. JA 84 at ¶ 31. All four arrestees were Hispanic. *Id.* at ¶ 32. Two of the arrestees were citizens of the Dominican Republic, the third was a citizen of Honduras, and the fourth, Mr. Galarza, was and is a U.S. citizen. *Id.* at ¶¶ 33-35.

After his arrest, Mr. Galarza was initially detained at the Allentown Police Department. *Id.* at ¶ 36. At some point that evening, Detective Correa made a phone call to U.S. Immigration and Customs Enforcement ("ICE"), informing ICE that she had arrested Mr. Galarza and three other men. She provided ICE with Mr. Galarza's name, date of birth, place of birth, ethnicity, and Social Security number. JA 85-86 at ¶¶ 48-51.

At approximately 8:00 that evening, Mr. Galarza was transported to Lehigh County Prison. JA 85 at ¶ 40. A few hours later, a magistrate judge set his bail at $15,000. *Id.* at ¶ 41. Mr. Galarza went through the prison admissions process in the early morning hours of Friday, November 21. *Id.* at ¶ 42.

During the booking process, Mr. Galarza told Lehigh County prison officials that he was born in New Jersey. *Id.* at ¶ 44. County prison officials therefore were aware that Mr. Galarza is a U.S. citizen. *Id.* at ¶ 45. Prison officials took his fingerprints and confiscated and stored his wallet, which contained his Pennsylvania driver's license, his Social Security card, his debit card, and his health insurance card. JA 84-85 at ¶¶ 39, 46-47.

At some point on Friday, November 21, ICE Agent Mark Szalczyk, acting on the information relayed by Detective Correa, filled out an immigration "detainer" form and faxed it to Lehigh County. The immigration detainer falsely

described Mr. Galarza as a suspected "alien" and citizen of the "Dominican Republic." JA 87 at ¶¶ 59-61. The detainer form also read, in relevant part:

> Investigation has been initiated to determine whether this person is subject to removal/deportation from the United States . . . .
>
> It is requested that you: Please accept this notice as a detainer. This is for notification purposes only . . . . Federal regulations (8 CFR 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays) to provide adequate time for ICE to assume custody of the alien. You may notify ICE by calling (610) 374-0743 during business hours or 802 872-6020 after hours in an emergency.

JA 105. The detainer was not accompanied by a warrant, an affidavit of probable cause, a removal order, or any other evidentiary support. *Id.*

That same day, a surety company posted bail for Mr. Galarza. JA 88 at ¶ 67. A County prison official told Mr. Galarza that his bail had been posted, and that he would be released. *Id.* at ¶ 68. Shortly thereafter, however, the same official told Mr. Galarza that he would not be released because he was the subject of "a detainer." *Id.* at ¶ 69. The prison official did not specify what kind of detainer was preventing Mr. Galarza's release, provide him with a copy, or give him any additional information. Mr. Galarza protested that there should be no detainer preventing his release, but the prison official told him that he would have to wait through the entire weekend and speak with a prison counselor the following Monday. JA 89 at ¶ 70.

Mr. Galarza alleged that his detention was the result of the County's stated policy and practice of effectuating all immigration detainers received from ICE, regardless whether ICE had—or even claimed to have—probable cause to support the request. *See* JA 89, 91-92, 97 at ¶¶ 71, 95, 128, 131. Indeed, notwithstanding the history of "improper detainers" being "frequently . . . issued at Lehigh County Prison," JA 82-83 at ¶ 22, the County maintained a practice of referring all foreign-born arrestees to ICE in order to facilitate the issuance of such detainers. JA 85 at ¶ 43. The County afforded the targets of detainers no notice or opportunity to contest their detention. And in Mr. Galarza's case, County officials, acting pursuant to County policy and practice, "disregarded evidence close at hand . . . [including Mr. Galarza's] Social Security card, Pennsylvania driver's license and statements that he was born in New Jersey . . . which indicated that Plaintiff is a United States citizen." JA 91-92 at ¶ 95.

Mr. Galarza only learned that he was being held pursuant to an *immigration* detainer on the morning of Monday, November 24, when a County prison counselor finally informed him of that fact. JA 89 at ¶¶ 72-73, 75. Mr. Galarza told the counselor that he is a U.S. citizen and asked the counselor to retrieve his wallet containing his driver's license and Social Security card as proof, but the counselor refused to do so. *Id.* at ¶¶ 76-77.

Later on Monday, November 24, two ICE officers appeared at the prison and questioned Mr. Galarza. Mr. Galarza reiterated that he was born in New Jersey, and he gave the ICE officers his Social Security number and date of birth. After leaving for a short time, the ICE officers returned to inform Mr. Galarza that they would cancel the detainer. The detainer was cancelled at 2:05 p.m. The County finally released Mr. Galarza from prison at 8:28 p.m. that day. JA 89-90 at ¶¶ 78-83.

In total, Mr. Galarza was detained for approximately three days after he posted his court-ordered bail on the basis of the immigration detainer. As a result, he lost a part-time job, lost wages from both his full and part-time jobs, and suffered emotional distress and physical problems. Mr. Galarza was later acquitted by a jury of the criminal charge for which he had been arrested. JA 90 at ¶¶ 84-86.

SUMMARY OF ARGUMENT

A U.S. citizen cannot lawfully be detained for any length of time for immigration purposes. Yet Lehigh County held Mr. Galarza, a U.S. citizen since birth, in jail for three days—without a warrant, without probable cause, and without any due process protections—based solely on an unsupported immigration detainer. The district court erred in dismissing Mr. Galarza's Fourth Amendment unlawful seizure and Fourteenth Amendment due process claims against Lehigh

County. Mr. Galarza has stated cognizable claims that the County, acting pursuant to its established policy and practice of treating all immigration detainers received from ICE as a basis for detention, detained him for three days without probable cause and deprived him of his liberty without due process of law.

In the district court, the County's sole argument was that it was just following orders: The County maintained that it could not be held responsible for Mr. Galarza's unlawful detention because the ICE detainer *required* the County to imprison him. *See* Motion to Dismiss, Dkt. #50-1, *Galarza v. Szalczyk et al.*, No. 10-cv-06815, at 8 (E.D. Pa. filed Apr. 25, 2011).

The district court properly ruled that Mr. Galarza had stated a claim that he was unlawfully "seiz[ed]" and detained in County custody without probable cause, *see* JA 35, 40, and noted the County's stated "policy of detaining *any* person . . . named in an immigration detainer" for up to 48 hours, plus weekends and holidays, beyond the time when he or she was entitled to release from County custody. JA 55 (emphasis added). The district court granted the County's motion to dismiss, however, reasoning that the County's "policy is consistent with the regulations promulgated by the United States Department of Homeland Security governing immigration detainers," *id.*, and that "once the immigration detainer is issued, the local . . . agency . . . 'shall' maintain custody." JA 56.

The district court's conclusion is incorrect. No legal authority *required* Lehigh County to detain Mr. Galarza on the basis of the immigration detainer. Therefore, the County cannot escape liability for its actions when those actions violate someone's constitutional rights. Immigration detainers are not, and cannot legally be, mandatory orders. The County chose to adopt a policy of imprisoning any person named in an immigration detainer for an additional two to five days after the person became entitled to release—even where, as here, probable cause was patently lacking, and without providing even minimal due process protections. The County's policy caused Mr. Galarza's detention and the violations of his constitutional rights. For these reasons, the Court should reverse the district court's order granting Lehigh County's motion to dismiss.

STANDARD OF REVIEW

The Court's review of a district court's dismissal of a claim under Fed. R. Civ. P. 12(b)(6) is plenary. *Byers v. Intuit, Inc.*, 600 F.3d 286, 291 (3d Cir. 2010). The Court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Grammer v. John J. Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520, 523 (3d Cir. 2009).

ARGUMENT

I. ICE Detainers—Which Seek Custodial Detention Without Warrant, Probable Cause, Judicial Authorization, or Procedural Protections—Are Anomalous in the Criminal Justice System and Lead Predictably to Constitutional Violations.

The document upon which the County stakes its defense is a pre-printed, fill-in-the-blank form called an "Immigration Detainer—Notice of Action" (Form I-247), which it received by fax from ICE. The form listed Mr. Galarza's name, date of birth, gender, and alleged "[n]ationality: Dominican Republic." JA 105. The form stated that "[i]nvestigation has been initiated to determine whether this person is subject to removal/deportation from the United States," and it "requested" that the County "detain . . . [Mr. Galarza] for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays)" after he would otherwise be released, "to provide adequate time for ICE to assume custody of the alien." *Id.*

As is clear from the face of this form, an immigration detainer "is not a criminal warrant." *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 911 (S.D. Ind. 2011). Immigration detainers differ from warrants in two critical respects.

First, a criminal warrant must be issued by a "neutral and detached magistrate," *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971) (internal quotation marks omitted), based on facts "supported by oath or affirmation." U.S.

Const. amend. IV.[2] This requirement "serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause." *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963) (citation omitted).

Immigration detainers, in contrast, are not judicially approved. They are unsworn documents issued by immigration enforcement officials themselves—the same officials who make arrests. *Compare* 8 C.F.R. § 287.7(b) (listing immigration officials who may issue detainers); *with* 8 C.F.R. § 287.5(c)(1) (listing immigration officials who may make arrests). *Cf. Coolidge*, 403 U.S. at 453 (holding that a search warrant signed by a state Attorney General was not a "warrant" for Fourth Amendment purposes because the attorney general "was the chief investigator and prosecutor in this case, [and] . . . not the neutral and detached magistrate required by the Constitution"). In Mr. Galarza's case, his detainer was signed not by a magistrate judge or an immigration judge, but by ICE

[2] *Accord Connally v. Georgia*, 429 U.S. 245, 251 (1977) (holding that "the issuance of [a] search warrant by the justice of the peace," who was paid a fee for each warrant he issued and thus was not a neutral and detached decision-maker, "effected a violation of the protections afforded [defendant] by the Fourth and Fourteenth Amendments"); *Shadwick v. City of Tampa*, 407 U.S. 345, 350-51 (1972) (holding that municipal court clerks, who were authorized to issue arrest warrants for violations of municipal ordinances, were the equivalent of "neutral and detached" magistrates because they were supervised by municipal court judges and had "no connection with any law enforcement activity or authority which would distort the independent judgment the Fourth Amendment requires").

enforcement agent Mark Szalczyk. JA 105.

Second, a criminal warrant may issue only upon a finding of probable cause to believe that the subject has violated the law. *See* U.S. Const. amend. IV. Mr. Galarza's detainer, in contrast, did not even purport to be based upon probable cause. On its face, the document virtually confesses the absence of probable cause: It asserted only that an "*[i]nvestigation* ha[d] been *initiated*" into whether Mr. Galarza was a non-citizen subject to removal. JA 105 (emphasis added).[3] That is,

[3] At the time of Mr. Galarza's detention, the "initiat[ion]" of an "investigation" was one of four possible bases for the issuance of an immigration detainer, as indicated by the four check-boxes that appear on the form. Alternatively, ICE could issue a detainer if the individual was the subject of an outstanding "Notice to Appear or other charging document," an outstanding "warrant of arrest," or an outstanding removal order by an Immigration Judge. *See* JA 105.

In December 2012—after the district court's decision in this case—ICE released a memorandum stating that "absent extraordinary circumstances, ICE agents and officers should issue a detainer . . . only where . . . they have reason to believe the individual is an alien subject to removal[.]" John Morton, Director of ICE, Civil Immigration Enforcement, Guidance on the Use of Detainers, at 2 (Dec. 21, 2012), *available at* https://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf (last visited March 17, 2013). ICE also amended its detainer form, replacing the phrase "[DHS has] initiated an investigation" with the phrase "[DHS has] [d]etermined that there is reason to believe the individual is an alien subject to removal[.] Form 1-247 (Dec. 2012), *available at* http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf (last visited March 17, 2013). Courts have interpreted the phrase "reason to believe" in related immigration contexts to mean probable cause. *See, e.g., Lee v. INS*, 590 F.2d 497, 499-500 (3d Cir. 1979); *Au Yi Lau v. INS*, 445 F.2d 217, 222 (D.C. Cir. 1971). By amending the detainer form to specifically incorporate the probable cause standard, ICE has effectively acknowledged that previous versions of the form, like that one issued in Mr. Galarza's case, may have been issued without sufficient evidence to meet that standard.

it indicated not that ICE *had* probable cause, but that ICE sought additional time to *acquire* probable cause. At oral argument before the district court, the federal defendants' counsel explained it this way:

> A detainer is basically a stop gap measure that's designed to give ICE time to investigate and determine whether somebody's an alien, and/or subject to removal, before local law enforcement releases that person from custody.

Oral Argument Transcript, Dkt. #79. *See also* 8 C.F.R. § 287.7(a) (stating that an immigration detainer may be issued "at any time"; specifying no evidentiary standard for issuance).

The Supreme Court has long held that the Fourth Amendment forbids arrests based on mere investigative interest. *See Dunaway v. New York*, 442 U.S. 200, 216 (1979) (invalidating "detention for custodial interrogation" based on less than probable cause); *Brown v. Illinois*, 422 U.S. 590, 605 (1975) (invalidating an arrest "for investigation" that was not supported by probable cause; noting that "[t]he impropriety of the arrest was obvious") (internal quotation marks omitted). It is equally well settled that the Fourth Amendment's probable cause requirement applies in the immigration context. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) ("The Fourth Amendment applies to all seizures of the person."); *see also Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973); *Lee v. INS*, 590 F.2d 497, 499-500 (3d Cir. 1979). Indeed, the Supreme Court, relying on Fourth Amendment case-law, recently reiterated in *Arizona v. United States* that

"[d]etaining individuals solely to verify their immigration status would raise constitutional concerns." 132 S. Ct. 2492, 2509 (2012). Yet here, by effectuating the immigration detainer issued by ICE, the County imprisoned Mr. Galarza on precisely this invalid basis—ICE's "investigation" into his immigration status.[4]

In short, immigration detainers are in no way interchangeable with warrants. Nor do they bear any resemblance to *criminal* detainers. A criminal detainer is a formal request that a prisoner who is currently serving a criminal sentence in one jurisdiction be temporarily transferred to another jurisdiction to face pending criminal charges. Critically, criminal detainers may be issued only if criminal charges are *pending* in the requesting jurisdiction. *See United States v. Mauro*, 436 U.S. 340, 343-44 (1978). Immigration detainers lack any comparable protections, and, under the relevant regulations, they may be issued where—as here—no immigration proceedings are pending at all.[5]

Criminal detainers are also subject to multiple procedural safeguards spelled out in the Interstate Agreement on Detainers ("IAD"). *See* 42 Pa. C.S. § 9101 (codifying the IAD in Pennsylvania). Under the IAD, the custodial jurisdiction

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[4] The detention purportedly authorized by an immigration detainer—detention for 48 hours, excluding weekends and holidays—is a full-scale custodial seizure entirely different from a brief stop that may be based on mere reasonable suspicion pursuant to *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

[5] As noted above, *see supra* n.3, there is a space on the detainer form where ICE may indicate whether a "Notice to Appear or other charging document initiating removal/deportation proceedings" has been issued against the subject. JA 105. That box was not checked in Mr. Galarza's case.

agrees to "promptly inform [the individual] . . . of any detainer lodged against him and . . . of his right to make a request" for transfer to the requesting jurisdiction to clear the pending charges against him. 42 Pa. C.S. § 9101, art. III(c); *see also Mauro*, 436 U.S. at 351. Mr. Galarza's immigration detainer came with no such protections. The detainer form itself provided no mechanism for notice or an opportunity to contest the detention.[6] Nor did the County provide Mr. Galarza with any notice or the opportunity to contest the basis for the detainer.

Finally, a criminal detainer does not authorize any additional period of custody beyond that to which the prisoner is already subject under his existing sentence. It serves only to notify the prisoner and the custodial jurisdiction of the pending charges, and to trigger the IAD's procedural protections and timelines. *See United States ex. rel. Esola v. Groomes*, 520 F.2d 830, 838 (3d Cir. 1975) (an IAD detainer is not a "hold order," but rather a "notification" that the subject "is wanted to face pending criminal charges in another jurisdiction") (internal quotation marks omitted); *see also Mauro*, 436 U.S. at 358. Immigration detainers

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[6] Since Mr. Galarza's detention, ICE has amended the detainer form to request that local agencies provide detainees with copies of their detainers, and the form now includes a telephone hotline that U.S. citizens and others subject to erroneous detainers may call. *See* ICE, "ICE Establishes Hotline for Detained Individuals, Issues New Detainer Form" (Dec. 29, 2011), *available at* http://www.ice.gov/news/releases/1112/111229washingtondc.htm (last visited March 17, 2013). The efficacy of these new provisions depends, of course, on local agencies providing detainees with timely notice and access to telephones, among other things. *See infra* Section IV.

like Mr. Galarza's, however, purport to authorize an additional two to five days of detention—48 hours, excluding Saturdays, Sundays, and federal holidays—after the subject would otherwise be released. *See* JA 105; 8 C.F.R. § 287.7(d).

In sum, immigration detainers are unlike anything else in the criminal justice system: They are issued by investigating agents without approval from any neutral authority, and they purport to authorize multiple days of warrantless detention without a showing of probable cause, without any charges pending, and without basic procedural protections.

There is no statutory basis for this exceptional detention power. The only federal statute authorizing immigration detainers, 8 U.S.C. § 1357(d), provides that, "[i]n the case of an alien who is arrested . . . for a violation of any law relating to controlled substances," ICE may issue a detainer and, if "the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien." 8 U.S.C. § 1357(d). The statute says *nothing* about detaining the individual for an additional 48 hours, plus weekends and holidays, *beyond the date on which the individual would otherwise be entitled to his freedom.* Notably, the Supreme Court has described 8 U.S.C. § 1357(d) as an information-sharing mechanism only, not as a basis for detention. *Arizona*, 132 S. Ct. at 2507 ("State officials can . . . assist the Federal Government by responding to *requests for information* about when an alien will be released

from their custody. *See* [8 U.S.C.] § 1357(d).") (emphasis added).[7] Yet ICE's practice at the time of Mr. Galarza's arrest was to issue detainers even before it developed probable cause to believe that the subject is a removable non-citizen, and to ask state and local officials to detain people on that patently insufficient basis. *See* JA 82-83 at ¶¶ 22-23.

Unsurprisingly, given the effectively standardless nature of immigration detainers and the lack of due process protections, numerous U.S. citizens in Pennsylvania and elsewhere around the country have been wrongfully imprisoned on immigration detainers—even though U.S. citizens may not lawfully be detained for immigration purposes.[8] *See, e.g.*, Complaint, Dkt. #1, *Makowski v. Holder et al.*, No. 12-cv-05265, at ¶ 10 (N.D. Ill. filed July 3, 2012) (U.S. citizen subjected to immigration detainer and detained for approximately two additional months); Complaint, Dkt. #1, *Morales v. Chadbourne et al.*, No. 12-cv-00301, at ¶¶ 1-2

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[7] *See* Christopher N. Lasch, *Federal Immigration Detainers After* Arizona v. United States, 46 Loyola of Los Angeles Law Review 1, 84-85 (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178524 (reviewing regulatory history and the *Arizona* decision and concluding that immigration detainers issued under 8 U.S.C. § 1357(d) should be interpreted as "request[s] for notice of impending release, not as . . . command[s] for continued detention").

[8] *See* 8 U.S.C. § 1357(d) (authorizing the issuance of detainers for "alien[s]"); *id.* § 1357(a)(2) (authorizing warrantless arrests of "alien[s]"); *cf. Flores-Torres v. Mukasey*, 548 F.3d 708, 712 (9th Cir. 2008) ("There is no dispute that if Torres is a citizen the government has no authority under the INA to detain him, . . . and that his detention would be unlawful under the Constitution and under the Non-Detention Act.") (citing 18 U.S.C. § 4001(a) ("No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.")).

(D.R.I. filed Apr. 24, 2012) (U.S. citizen subjected to ICE detainers on two separate occasions); Complaint, Dkt. #1, *Wiltshire v. Fitzgerald et al.*, No. 09-cv-4745, at ¶¶ 13-16, 31-36 (E.D. Pa. filed Oct. 16, 2009) (U.S. citizen subjected to ICE detainer and subsequently held for three months in immigration custody).

Mr. Galarza's unconstitutional three-day imprisonment was egregious, but hardly unforeseeable. Because the County chose to seize and imprison the targets of *all* immigration detainers it received—even if unaccompanied by a warrant, affidavit or even allegation of probable cause—and because it failed to offer even minimal due process protections, the County virtually ensured that the rights of detainees like Mr. Galarza would be violated.

II. Lehigh County Cannot Escape Liability for Its Decision To Imprison Mr. Galarza Based on a Constitutionally Deficient Detainer by Mischaracterizing Immigration Detainers as "Orders."

The district court properly held that Mr. Galarza's detention beyond the time when he posted bail was a "seizure" for which probable cause was required. JA 35. It also held that, taking the allegations as true, Mr. Galarza's seizure was unsupported by probable cause—and thus, ICE Agent Szalczyk and Allentown Detective Correa could be held liable for their role in acting to cause his unconstitutional detention. JA 33. Yet the district court erroneously held that Lehigh County was not liable for *detaining* Mr. Galarza in violation of his rights because it viewed the County's policy of detaining all individuals named in

immigration detainers as mandated by the federal government. *See* JA 55-56 (holding that the County's "policy is consistent with the regulations promulgated by the United States Department of Homeland Security governing immigration detainers," which provide that "once the immigration detainer is issued, the local . . . agency . . . 'shall' maintain custody."). This is simply incorrect.

By imprisoning Mr. Galarza without probable cause or due process, Lehigh County violated the Fourth Amendment and the Due Process clause. An order from the federal government could not have authorized Lehigh County to commit these violations. *Cf. Saenz v. Roe*, 526 U.S. 489, 507 (1999) ("Congress may not authorize the States to violate the Fourteenth Amendment."). And even an individual entitled to qualified immunity—which Lehigh County is clearly not under O*wen v. City of Independence*, 445 U.S. 622, 650 (1980)—cannot claim exoneration from liability by reason of superior orders. As courts have regularly observed, "since World War II, the 'just following orders' defense has not occupied a respected position in our jurisprudence, and officers in such cases may be held liable under § 1983 if there is a reason why any of them should question the validity of that order." *Kennedy v. City of Cincinnati*, 595 F.3d 327, 337 (6th Cir. 2010) (quoting *O'Rourke v. Hayes*, 378 F.3d 1201, 1210 n.5 (11th Cir. 2004)) (other internal quotations marks omitted).

But there was in fact no federal order here. The district court's decision was based on a misunderstanding of immigration detainers. Immigration detainers are requests, not orders. The County was not required to comply; rather, it chose to follow a policy of treating all ICE detainers as a basis for imprisonment—even without probable cause or due process—and it imprisoned Mr. Galarza on this basis. The County cannot absolve itself of liability for acceding to unconstitutional requests.

A. The federal regulation and ICE's own statements make clear that ICE detainers are requests.

The district court's error is evident from the plain language of the very regulation on which it relies. The federal detainer regulation specifically provides that an ICE "detainer is a *request*." 8 C.F.R. § 287.7(a) (emphasis added). In relevant part, the regulation states:

> (a) Detainers in general.
> . . . 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 assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.
> . . .
> (d) Temporary detention at Department *request*.
> Upon 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(a), (d) (emphases added). The regulation's repeated use of the word "request" makes clear that ICE detainers are just that.[9]

Despite the fact that Section 287.7(a) defines immigration detainers as "request[s]," the district court erroneously concluded that the regulation required the County to imprison Mr. Galarza because the word "shall" appears in subsection (d) of the regulation. JA 56. Subsection (d), however, is clearly labeled "Temporary detention at Department *request*," 8 C.F.R. § 287.7(d) (emphasis added), and it comes only after the regulation's "general" definition of a detainer as a "request" in subsection (a). *Id.* § 287.7(a). *Cf. Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (noting that "the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute") (internal quotation marks omitted)). Moreover, when read in context, it is evident that the word "shall" in subsection (d) serves not to require detention, but rather to place an outer limit on the length of detention if an agency opts to comply. That is, *if* an agency opts to fulfill a "Department request" to hold the subject of an immigration detainer, the period of custody is "*not to exceed* 48

[9] Nothing in the federal statute governing immigration detainers suggests that such detainers are binding on the recipients. *See* 8 U.S.C. § 1357(d).

hours, excluding Saturdays, Sundays and holidays[.]" 8 C.F.R. § 287.7(d) (emphasis added).

Similarly, the language of Mr. Galarza's detainer confirms that it was a mere request to detain, not an order. The detainer read, in relevant part:

> You are advised that the action noted below has been taken by Immigration and Customs Enforcement, concerning the above-named inmate of your institution:
>
> ☒ Investigation has been initiated to determine whether this person is subject to removal/deportation from the United States. . . .
>
> It is *requested* that you:
>
> Please accept this notice as a detainer. This is for *notification purposes only* and does not limit your discretion in any decision affecting the offender's classification work and quarters assignments, or other treatment which he or she would otherwise receive.
>
> ☒ Federal regulations (8 CFR 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays) to provide adequate time for ICE to assume custody of the alien.

JA 105 (emphases added). The language of the detainer form followed 8 C.F.R. § 287.7(a) and (d), and like the regulation, it used the word "request[]." *Id.* Underneath the general heading "It is requested that you…," the detainer listed certain actions that ICE was asking the County to take, including to "detain" Mr. Galarza. *Id.* The only logical reading of this form is that *if* the County decided to

comply with ICE's request to detain Mr. Galarza beyond his release date, the County was *then* bound by federal regulations which require that the detention be limited to "48 hours (excluding Saturdays, Sundays and Federal holidays)." *Id*.[10]

In addition, ICE's public statements and policy documents confirm that the agency views detainers as requests, not orders.[11] ICE's detainer policy, issued in 2010, describes a detainer as a "*request* that the [law enforcement agency] maintain custody of an alien who would otherwise be released." ICE, Interim Policy Number 10074.1: Detainers, ¶ 2.1 (Aug. 2, 2010) (emphasis added), *available at* http://cironline.org/sites/default/files/legacy/files/ICEdetainerpolicy.PDF (last visited Mar. 17, 2013).[12] This is not a new position. In 1994, the Immigration and

[10] ICE has since revised its detainer form; it no longer uses the word "require." The current version of the form states: "IT IS REQUESTED THAT YOU: Maintain custody of the subject for a period NOT TO EXCEED 48 HOURS, excluding Saturdays, Sundays, and holidays . . . . This request derives from federal regulation 8 C.F.R. § 287.7." Form I-247 (Dec. 2012), *available at* http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf (last visited March 17, 2013) (emphasis in original).

[11] *See Mercy Catholic Medical Center v. Thompson*, 380 F.3d 142, 155 (3d Cir. 2004) (agency policy statements, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance") (quoting *Skidmore v. Swift*, 323 U.S. 134, 140 (1944)).

[12] ICE's 2010 detainer policy remains in effect, as supplemented by ICE's December 2012 memorandum, *see supra* n.3. *See also* ICE, ICE Detainers: Frequently Asked Questions, *at* http://www.ice.gov/news/library/factsheets/detainer-faqs.htm (last visited Mar. 17,

Naturalization Service ("INS")—the predecessor agency to ICE—stated: "A detainer is the mechanism by which the Service *requests* that the detaining agency notify the Service of the date, time, or place of release of an alien[.]" 59 Fed. Reg. 42406, 42407 (Aug. 17, 1994) (emphasis added).

ICE has repeatedly reiterated this view in internal memoranda and communications with congressional staff and local government officials. For example, in response to a local official's letter asking whether "localities are required to hold individuals pursuant to [ICE detainers]," a senior ICE official responded: "ICE views an immigration detainer as a *request* that a law enforcement agency maintain custody of an alien who may otherwise be released[.]" Letter from David Venturella, Secure Communities Assistant Director, ICE, to Miguel Márquez, Santa Clara County Counsel, ¶ 2(a) (Sept. 27, 2010) (emphasis added), *available at* http://www.scribd.com/doc/38550589/ICE-Letter-Responding-to-SCC-Re-S-Comm-9-28-10 (last visited Mar. 17, 2013). And in a 2010 briefing to the Congressional Hispanic Caucus, agency representatives told congressional staff that "local [law enforcement agencies] are not mandated to honor a detainer, and in some jurisdictions they do not." ICE FOIA 2674.020612,

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2013) (an immigration detainer is a "request that the [law enforcement agency] maintain custody of an alien"); DHS Office of Civil Rights and Civil Liberties, Video: "How to Respond to an Immigration Detainer" at 1:53 (2012) *available at* http://www.ice.gov/news/galleries/videos/immigration_detainers.htm (last visited Mar. 17, 2013) (an "immigration detainer is a formal request").

Draft Memorandum to David Venturella, Assistant Director of Secure Communities, ICE, "Secure Communities Briefing (Congressional Hispanic Caucus)" at 3 (Oct. 28, 2010), *available at* http://altopolimigra.com/wp-content/uploads/2011/12/ICE-FOIA-2674.020612.pdf (last visited Mar. 17, 2013).[13]

In reaching its erroneous conclusion, the district court did not rely on any contrary federal authority—there is none—or on any statements of the federal defendants in the case. Plaintiff presented the district court with many of the above-cited statements by ICE officials. *See* Plaintiff's Opposition, Dkt. #58, *Galarza v. Szalczyk*, No. 10-cv-06815, at 8-9 (E.D. Pa. filed May 23, 2011); Motion for Leave to File Supplemental Authority, Dkt. #89, *Galarza v. Szalczyk*, No. 10-cv-06815 (E.D. Pa. filed Mar. 19, 2012). The federal defendants, for their part, never took the position that the detainer imposed a mandatory duty on the County. On the contrary, they consistently referred to Mr. Galarza's detainer as a "request." *See* Brief of ICE Agent Szalczyk, Dkt. #55, *Galarza v. Szalczyk*, No. 10-cv-06815, at 3 (E.D. Pa. filed May 20, 2011) ("Defendant Szalczyk prepared an

[13] This document was released as a result of Freedom of Information Act litigation. *See generally NDLON v. ICE*, No. 10-cv-3488 (S.D.N.Y filed Apr. 27, 2010). *See also* ICE FOIA 2674.017695, E-mail from Deputy Chief of Staff to the Deputy Director of ICE, at 1 (Jan. 26, 2011), *available at* http://altopolimigra.com/wp-content/uploads/2011/12/ICE-FOIA-2674.017695.pdf (last visited Mar. 17, 2013) ("[Question:] Is an ICE detainer a request or a requirement? Answer: It is a request. There is no penalty if they don't comply.").

Immigration Detainer . . . requesting Lehigh County Prison staff to detain Galarza."); *id*. at 11 ("[W]hether the detainer required or requested the local government to hold Galarza . . . makes no difference to Galarza's due process claim against Defendant Szalczyk . . . ."); Brief of ICE Agent Marino, Dkt. #62, *Galarza v. Szalczyk*, No. 10-cv-06815, at 15 (E.D. Pa. filed June 17, 2011) (same). The district court reached its erroneous conclusion based on Lehigh County's arguments, not the federal government's. Its conclusion is contrary to the plain language of the detainer regulation and the repeated public statements of ICE officials.

B. The district court's conclusion that detainers are mandatory is inconsistent with settled constitutional law.

If the detainer regulation and the federal government's own statements left any room for doubt that immigration detainers are requests and not orders, constitutional law conclusively establishes that they must be requests. ICE detainers cannot constitutionally order states and municipalities to imprison targets of federal interest. It has been settled for at least a decade and a half that the federal government cannot under its enumerated powers commandeer local authorities "in their sovereign capacity to regulate their own citizens." *Reno v. Condon*, 528 U.S. 141, 151 (2000).

The Supreme Court firmly established the anti-commandeering principle in *Printz v. United States*, 521 U.S. 898 (1997), where it invalidated a federal statute

that required local law enforcement officials to take actions to assist enforcement of the federal Brady Handgun Violence Prevention Act, proclaiming:

> The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Id. at 935.

Significantly, one precedent upon which *Printz* relied was the federal government's practice, dating from the founding of the Republic, of framing its directions to local authorities to incarcerate federal prisoners as requests, rather than mandates. *See id*. at 909-10 (noting "when Georgia refused to comply with the request . . . Congress's only reaction was a law authorizing the marshal in any State that failed to comply with the Recommendation of September 23, 1789, to rent a temporary jail until provision for a permanent one could be made"). Likewise, the Court noted that a late nineteenth century federal statute involving state assistance in inspecting arriving immigrants "did not . . . *mandate* those duties, but merely empowered the Secretary of the Treasury "to *enter into contracts* with such State . . . officers *as may be designated* for that purpose *by the governor* of any State." *Id.* at 916 (emphases in original; internal quotation marks

omitted). Had the statute *required* states' participation, under the Court's reasoning, it would have been unconstitutional. *See id*.[14]

Printz establishes that an immigration detainer cannot legally be construed as an order to detain. ICE, a subdivision of the executive's Department of Homeland Security, may not require states or localities to detain people suspected of immigration violations to help administer the federal government's immigration enforcement program. It may *request* such assistance, but the Constitution requires that the County remain free to refuse. *See also NFIB v. Sebelius*, 132 S. Ct. 2566, 2602-03 (2012) (invalidating Affordable Care Act's Medicaid expansion because it did not give states a "legitimate choice" whether to comply).

In reaching the conclusion that immigration detainers are orders, the district court entirely failed to consider the mandates of the Constitution. *See* JA 55-58 (analyzing whether immigration detainers are mandatory solely with reference to federal regulations). Not only is its conclusion inconsistent with the plain language of the regulation and the agency's own statements, but it also flies in the face of *Printz* and the Tenth Amendment's prohibition on commandeering.

[14] *See also New Jersey v. United States*, 91 F.3d 463, 466-67 (3d Cir. 1996) (recognizing that the federal government "cannot *require* the states to govern according to its instructions," but holding that "here the federal government has issued no directive to the State of New Jersey" to prosecute immigrants for violations of state criminal law, so the Tenth Amendment was not implicated) (emphasis in original).

C. The district court's decision is in tension with many years of federal court decisions.

The district court's decision in this case was the first judicial decision, to Plaintiff's knowledge, to squarely confront a claim that immigration detainers are mandatory.[15] It is, however, out of step with many years of federal court decisions treating immigration detainers as voluntary requests.

Federal and state court decisions in a variety of contexts—albeit none directly responding to a municipality's argument that immigration detainers are mandatory—have consistently described immigration detainers as requests. This Court has explained, in the habeas context, that

> [f]iling a[n] [immigration] detainer is an informal procedure in which the INS informs prison officials that a person is subject to deportation and *requests* that officials give the INS notice of the person's death, impending release, or transfer to another institution.

Henry v. Chertoff, 317 F. App'x 178, 179 & n.1 (3d Cir. 2009) (emphasis added; internal quotation marks omitted) (citing decisions from other federal courts of appeal). Numerous other courts have described immigration detainers in similar

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[15] Plaintiff is aware of only two other federal court decisions—both recent decisions from the Middle District of Tennessee—concluding that immigration detainers are mandatory. *See Rios-Quiroz v. Williamson County*, No. 11-cv-1168, 2012 WL 3945354, at *4 (M.D. Tenn. Sept. 10, 2012); *Ramirez-Mendoza v. Maury County*, No. 12-cv-00014, 2013 WL 298124, at *7-*8 (M.D. Tenn. Jan. 25, 2013). *Rios-Quiroz*, the first of the decisions, relied heavily on the district court's decision in this case, providing little analysis of its own. *See Rios-Quiroz*, 2012 WL 3945354, at *4 (citing the decision below). *Ramirez-Mendoza*, in turn, relied on *Rios-Quiroz*, again providing little analysis. These decisions are in error for all of the reasons outlined in this brief.

terms. *See, e.g., United States v. Uribe-Rios,* 558 F.3d 347, 350 n.1 (4th Cir. 2009) ("A detainer is a mechanism by which federal immigration authorities may *request* that another law enforcement agency temporarily detain an alien . . . .") (emphasis added); *United States v. Female Juvenile, A.F.S.*, 377 F.3d 27, 35 (1st Cir. 2004) (an immigration detainer "serves as a *request* that another law enforcement agency notify the INS before releasing an alien from detention so that the INS may arrange to assume custody over the alien") (emphasis added); *Orozco v. INS*, 911 F.2d 539, 541 n.2 (11th Cir. 1990) ("The filing of a detainer is an informal process advising prison officials that a prisoner is wanted on other pending charges and *requesting* notification prior to the prisoner's release") (emphasis added); *Buquer*, 797 F. Supp. 2d at 911 ("A detainer is not a criminal warrant, but rather a voluntary *request* . . . .") (emphasis added); *State v. Montes-Mata*, 253 P.3d 354, 370-71 (Kan. 2011) ("The ICE [detainer] in this case is analogous to a call to a sheriff from a law enforcement agency in a neighboring county, expressing interest in one of his or her inmates and *asking* the sheriff for notice when the inmate is to be released. The *request* is for cooperation, not custody.") (emphases added); *People v. Jacinto*, 49 Cal. 4th 263, 273 (Cal. 2010) (compliance with ICE detainers is "a matter of comity"); *State v. Sanchez*, 853 N.E.2d 283, 289 (Ohio 2006) ("[T]he ICE detainer served only to notify the state of Ohio that ICE may seek custody of Sanchez in the future and to *request* that ICE be alerted before her release . . . .")

(emphasis added).

In addition, most courts have held that the issuance of an immigration detainer does not establish ICE custody for purposes of applying the federal habeas statute, 28 U.S.C. § 2241. Instead, a person against whom an immigration detainer has been issued remains legally in the custody of the law enforcement agency receiving the detainer until ICE physically takes him into custody. *See, e.g.*, *Zolicoffer v. U.S. Dept. of Justice*, 315 F.3d 538, 540-41 (5th Cir. 2003); *Campos v. INS*, 62 F.3d 311, 314 (9th Cir. 1995); *Orozco*, 911 F.2d at 541; *Mohammed v. Sullivan*, 866 F.2d 258, 260 (8th Cir. 1989); *see also Henry*, 317 F. App'x at 179.[16] Although habeas law does not itself establish whether or not immigration detainers are mandatory, it is instructive: The fact that the County remained the legal custodian of Mr. Galarza, and not ICE, supports the conclusion that it was the County's choice to detain Mr. Galarza for three additional days.

Finally, courts considering *criminal* detainers have viewed them as requests, not commands, from one jurisdiction to another. *See Moody v. Daggett*, 429 U.S. 78, 80 n.2 (1976) ("When two autonomous jurisdictions are involved, as for example when a federal detainer is placed against an inmate of a state institution, a

[16] Some courts have concluded that the issuance of an immigration detainer may give rise to federal custody for habeas purposes if the detainer is also accompanied by an outstanding removal order. *See, e.g., Amenuvor v. Mazurkiewicl*, 457 F. App'x 92, 93 (3d Cir. 2012); *Morales v. INS*, 26 F. App'x 830, 831 (10th Cir. 2001).

detainer is a matter of comity."); *see also Mauro*, 436 U.S. at 351-52. Although criminal detainers do trigger certain statutory procedures under the IAD, the "[g]overnor of the [custodial] state may disapprove" the requesting state's request for transfer, "either upon his own motion or upon motion of the prisoner." 42 Pa. C.S. § 9101, art. § IV(a). For example, in *United States v. Pleau*, 680 F.3d 1 (1st Cir. 2012) (en banc), the First Circuit noted that "Rhode Island's governor refused the [federal government's] IAD request because of his stated opposition to capital punishment." *Id.* at 3; *see also id.* at 7-8 (holding that, in contrast to the detainer, a federal court's writ of habeas corpus *ad prosequendum* was a mandatory court order that the state had no power to disobey). As discussed above, criminal detainers are subject to numerous procedural protections that do not apply to immigration detainers. It would be strange indeed if immigration detainers were mandatory while criminal detainers are merely requests.

* * *

In sum, the federal detainer regulation, ICE's own statements, well-settled principles of constitutional law, and many years of analogous case-law all point unequivocally in the same direction: Immigration detainers are requests, not orders. The district court's contrary conclusion must be reversed.

III. The Court Should Reverse the Dismissal of Mr. Galarza's Claim Against Lehigh County for the Violation of His Fourth Amendment Rights.

When Mr. Galarza posted his court-ordered bail on November 21, 2008, he was entitled to release from the County's custody. JA 88 at ¶¶ 68-69. At that moment, the County's initial justification for his detention—assuring that he would appear in court to answer the criminal charge against him—dissolved. County officials nevertheless refused to release him and, instead, kept him imprisoned for three additional days solely on the basis of the immigration detainer.

This new period of imprisonment constituted a new seizure, and as such, it requires an independent justification under the Fourth Amendment. *See* JA 35, 40; *see also Illinois v. Caballes*, 543 U.S. 405, 407-08 (2005) (once the initial reason for a seizure is resolved, officers may not prolong the detention without a new, constitutionally adequate justification); *Rogers v. Powell*, 120 F.3d 446, 456 (3d Cir. 1997) ("Continuing to hold an individual in handcuffs" once it has been determined that the initial seizure was in error, without "some additional basis, independent of that claimed to support the initial seizure," to justify the continued detention, "is unlawful within the meaning of the Fourth Amendment"); *Lee v. City of Los Angeles*, 250 F.3d 668, 677-78, 685 (9th Cir. 2001) (plaintiff stated a Fourth Amendment claim against officers who, after arresting him on unrelated charges, prolonged his detention based on an out-of-state warrant without checking whether

he was the individual identified in that warrant); *Anaya v. Crossroads Managed Care Systems, Inc.*, 195 F.3d 584, 592 (10th Cir. 1999) ("A legitimate-though-unrelated criminal arrest does not itself give probable cause to detain the arrestee [for an unrelated civil purpose]."); *Barnes v. Dist. of Columbia*, 242 F.R.D. 113, 118 (D.D.C. 2007) (plaintiffs were "essentially . . . re-seized" for Fourth Amendment purposes when, "despite being entitled to release, they were taken back into custody").[17]

It has long been established that the Fourth Amendment requires all full-scale seizures to be supported by probable cause. *See, e.g., Dunaway*, 442 U.S. at 213; *see also supra* Section I. Mr. Galarza's imprisonment was no exception. And, as the district court correctly held, there was clearly no probable cause for his detention here. JA 40, 44-47 (rejecting Agent Szalczyk's argument regarding probable cause, and denying him qualified immunity on the Fourth Amendment claim).

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[17] *Accord* INS, The Law of Arrest, Search, and Seizure for Immigration Officers at VII-2 (1993), *available at* http://www.scribd.com/doc/21968268/ICE-M-69-Law-of-Arrest-January-1993 (last visited Mar. 17, 2013) ("A detainer placed under [8 C.F.R. § 287.7] is an arrest which must be supported by probable cause."); Congressional Research Service, Immigration Detainers: Legal Issues at 18 (Aug. 31, 2012), *available at* http://www.fas.org/sgp/crs/homesec/R42690.pdf (last visited Mar. 17, 2013) (noting that "holds pursuant to [ICE] detainers would appear to involve seizures of the alien's person," implicating the Fourth Amendment).

Because ICE lacked probable cause to believe that Mr. Galarza was a non-citizen subject to detention and removal, Mr. Galarza's seizure was unconstitutional. *See Berg v. County of Allegheny*, 219 F.3d 261, 271 (3d Cir. 2000) ("Because the government officials who issued the warrant here did not have probable cause to arrest [the plaintiff], the arrest violated the Fourth Amendment."); *Rogers*, 120 F.3d at 453 ("The legality of a seizure based solely on statements issued by fellow officers depends on whether the officers who issued the statements possessed the requisite basis to seize the suspect.") (emphasis omitted); *see also United States v. Hensley*, 469 U.S. 221, 231 (1985); *Whiteley v. Warden*, 401 U.S. 560, 568 (1971).

As the executing agency, Lehigh County bears the responsibility for this unconstitutional seizure. This Court made clear in *Berg* that, where one law enforcement agency requests an arrest and a different agency executes the arrest, *both* agencies may be liable for damages:

> [A] person who, acting under color of state law, directly and intentionally applies the means by which another is seized in violation of the Fourth Amendment can be held liable under § 1983. As a general rule, a government official's liability for causing an arrest is the same as for carrying it out.

Berg, 219 F.3d at 271-72. So, in *Berg*, a constable who executed another county's warrant could be liable where the warrant was erroneously issued, provided he was not entitled to qualified immunity. *Id.* at 272-74. Lehigh County, of course, can

assert no immunity for the constitutional violations caused by its policy of detaining individuals at ICE's request regardless of the absence of a warrant or probable cause. A "municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983." *Owen*, 445 U.S. at 638.

The County's liability for Mr. Galarza's unlawful seizure is clear: The County's agents, acting on the basis of the County's policy of honoring all ICE detainers, seized Mr. Galarza unconstitutionally. *See Berg*, 219 F.3d at 276. As the district court recognized, the amended complaint alleges that the County has a "policy of detaining *any* person being held in Lehigh County Prison who is named in an immigration detainer" for an additional two or more days beyond the time when the person is entitled to release. JA 55 (emphasis added).[18] The complaint further alleges that "Lehigh County Prison officials agreed to imprison Plaintiff on less than probable cause and disregarded evidence close at hand . . . which

[18] At one point later in its decision, the district court stated that "Plaintiff does not allege that it is Lehigh County's policy to detain persons named in immigration detainers without probable cause." JA 56. By this, the district court appears to mean that the complaint does not allege the County had a policy of effectuating *only* those detainers that lacked probable cause. (Reading this statement to mean, instead, that the County's alleged policy was to effectuate detainers only if they *were* supported by probable cause would contradict the court's earlier characterization of the allegations, *see* JA 55, and would be plainly incompatible with the allegations themselves.) Of course, Mr. Galarza need not allege that *every* detainer the County honored under its policy lacked probable cause; he need only allege that the County applied its policy with deliberate indifference to the existence or absence of probable cause in any particular case. The amended complaint alleges precisely that. *See* JA 89, 91-92, 97 at ¶¶ 71, 95, 99, 128, 131, 133.

indicated that Plaintiff is a United States citizen." JA 91-92 at ¶ 95.

The County's policy was to effectuate all detainers *regardless* whether ICE had—or even claimed to have—probable cause to support the request. Indeed, there was a history of "improper detainers" being "frequently issued at Lehigh County Prison," JA 82-83 at ¶ 22, and the County maintained a practice of referring all foreign-born arrestees to ICE in order to facilitate the issuance of such detainers. JA 85 at ¶ 43. Here, as discussed above, *see supra* Section I, the pre-printed language on Mr. Galarza's detainer form asserted only that an "*[i]nvestigation has been initiated* to determine whether this person is subject to removal/deportation." JA 105 (emphasis added). The detainer was not accompanied by a warrant, an order of removal, or an affidavit of probable cause. Yet despite the detainer's facial inadequacy, County officials, following the County's policy or practice, re-imprisoned Mr. Galarza without asking either him or ICE any additional questions. Had it not been for the County's policy, no reasonable official would have imprisoned Mr. Galarza for three days, without a warrant, based solely on ICE's unsupported expression of investigative interest. Indeed, the County's blanket practice applied even though County officials knew Mr. Galarza was born in New Jersey, and his Pennsylvania driver's license and Social Security card were in their possession the entire time. JA 84-85 at ¶¶ 39, 44-45, 47.

The amended complaint therefore alleges that the County maintained a policy or practice of detaining people on the basis of immigration detainers with deliberate indifference to the easily foreseeable risk that such detentions would violate detainees' Fourth Amendment rights, JA 97 at ¶¶ 128, 133, and that this policy is "direct[ly] causal[ly] link[ed]" to his unlawful detention. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989); *see also Bielevicz v. Dubinon*, 915 F.2d 845, 851-53 (3d Cir. 1990). That is sufficient to state a claim against the County at the motion to dismiss stage, and the district court's dismissal of Mr. Galarza's Fourth Amendment claim must be reversed.[19]

[19] All parties below agreed that the Fourth Amendment is the correct framework through which to view Mr. Galarza's seizure and three-day detention. *See Graham v. Connor*, 490 U.S. 386, 395 (1989). The district court therefore did not specifically address Mr. Galarza's alternative substantive due process claim. If the Court concludes that Mr. Galarza's claim should be analyzed as a substantive due process claim rather than a Fourth Amendment claim, however, Mr. Galarza has stated a claim against the County for essentially the same reasons as discussed above.

The constitutional right to substantive due process protects individuals from "arbitrary, wrongful government actions." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (internal quotation marks omitted). Here, the complaint alleges that the County maintained a detainer policy that virtually ensured that arbitrary, unjustified detentions of U.S. citizens like Mr. Galarza would occur. This is sufficient to state a claim. Courts have held that unlawfully detaining an individual after he is entitled to release may constitute a substantive due process violation. *See, e.g.*, *Dodds v. Richardson*, 614 F.3d 1185, 1193 (10th Cir. 2010); *Davis v. Hall*, 375 F.3d 703, 713-14 (8th Cir. 2004); *Cannon v. Macon County*, 1 F.3d 1558, 1562-63 (11th Cir. 1993); *Holder v. Town of Newton*, 638 F. Supp. 2d 150, 153-56 (D.N.H. 2009); *Barnes*, 242 F.R.D. at 117-18.

IV. The Court Should Reverse the Dismissal of Mr. Galarza's Claim Against Lehigh County for the Violation of His Procedural Due Process Rights.

The district court also erred in dismissing Mr. Galarza's claim that the County imprisoned him without due process of law in violation of the Fourteenth Amendment. The amended complaint alleges that, pursuant to the County's policy, Lehigh officials imprisoned Mr. Galarza for three days without providing him with the most basic due process protections: notice of the reason for his detention and a meaningful opportunity to explain that he was a U.S. citizen not subject to detention. JA 89, 97-98 at ¶¶ 70-73, 75-77, 131, 133.

Detention violates the due process clause where, as here, it is imposed without adequate procedural protections. *See, e.g*., *Foucha v. Louisiana*, 504 U.S. 71, 81-82 (1992) (invalidating statute that allowed for commitment without requiring governmental proof or adversarial hearing); *Sample v. Diecks*, 885 F.2d 1099, 1111, 1115-16 (3d Cir. 1989) (holding unconstitutional new term of imprisonment unaccompanied by due process protections). Here, Mr. Galarza inarguably has a protected liberty interest in being free from detention, and the amended complaint alleges that, pursuant to County policy, he was not afforded any process at all before being deprived of his liberty. JA 88-89 at ¶¶ 69-75. County officials, acting pursuant to policy, imprisoned him without providing the most basic notice. Mr. Galarza was not even told *why* he was being detained until

three days later, when a prison counselor finally met with him. JA 89 at ¶ 75. Nor was Mr. Galarza afforded any pre-deprivation opportunity to challenge the detainer's validity or to show proof of his citizenship to County officials or ICE.

Importantly, post-deprivation process and pre-deprivation process are not interchangeable, and the County may not credibly argue that the notice given to Mr. Galarza on the *last* day of his detention provided sufficient process. The Supreme Court has recognized that "the root requirement of the Due Process Clause [is] . . . that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (emphasis in original; internal quotation marks omitted). In *Zinermon v. Burch*, 494 U.S. 113 (1990), the Supreme Court held that a patient who had been civilly committed to a mental health facility, without being offered any pre-deprivation safeguards to ensure he was competent to give informed consent, stated a claim for a violation of his due process rights. *Id*. at 132-39. The Supreme Court explained that pre-deprivation process may be required where the deprivation of the plaintiff's liberty is caused by a standard practice (not a random and unpredictable occurrence), *id*. at 136, where the government is "in a position to provide for predeprivation process," *id*. at 130 (internal quotation marks omitted), and where such "predeprivation procedural

safeguards could address the risk of deprivations" that the plaintiff suffered, *id.* at 132.

Following *Zinermon*, this Court held in *Higgins v. Beyer*, 293 F.3d 683 (3d Cir. 2002), that a prisoner stated a due process claim where he alleged that prison officials deducted funds from his inmate account without providing pre-deprivation notice and a hearing. *Id.* at 694. Because the officials were "acting under the authority of an established state procedure for seizing a prisoner's funds to satisfy court-ordered fines," they were in a position to provide the prisoner with "notice and hearing *before* the[y] . . . deducted money from his account." *Id.* (emphasis added). The availability of *post*-deprivation remedies to retrieve the money was not constitutionally sufficient. *Id.*

And even before *Zinermon*, this Court held in *Sample v. Diecks* that a prisoner was entitled to "predeprivation process" to contest his erroneous detention beyond his scheduled release date. 885 F.2d at 1116.[20] Applying the balancing test set out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the Court reasoned that "[t]he risk of error in calculating a release date . . . is . . . substantial," and the

[20] In *Sample*, the prisoner's over-detention was the result of an unforeseeable mistake by the records officer who calculated his release date, 885 F.2d at 1102-03, not of a request for detention in advance of release, as in Mr. Galarza's case. In practice, therefore, the inmate "could not have asserted his claim prior to" the date on which he should have been released. *Id.* at 1116. The Court emphasized, however, that due process demanded "expeditious[] consider[ation]" of his claim, because "[e]very day" after his release date, the prisoner "faced the prospect of a fresh deprivation of his liberty." *Id.* at 1116.

prison could "reduc[e] the risk" by implementing simple procedures to ensure that inmates can tell their "'side of the story'" when they believe a mistake has been made. *Id.* at 1115-16. Given this balance, and the prisoner's "obviously . . . strong" interest in "avoiding wrongful detention," *id.* at 1115, the Court held that post-deprivation "judicial remedies" were insufficient, and that "to the extent possible the inmate [must] be afforded predeprivation process." *Id.* at 1116.

In the present case, it is clear that some pre-deprivation process was required before Mr. Galarza could be subjected to three days of unwarranted imprisonment. First, Mr. Galarza inarguably has a weighty liberty interest in freedom from confinement. Second, the risk of erroneous detention was high—particularly given ICE's use of a detainer form that on its face purports to be based on nothing but investigative interest, *see* JA 88 at ¶ 66, the history of "improper detainers" being "frequently issued at Lehigh County Prison," JA 82-83 at ¶ 22, and the County's practice of referring all foreign-born arrestees to ICE in order to facilitate the issuance of such detainers. JA 85 at ¶ 43. And third, the County, as Mr. Galarza's jailer, was plainly "in a position" to provide pre-deprivation safeguards, such as informing him of the basis for the detainer and providing him an opportunity to contact ICE and contest the detainer's validity. *Zinermon*, 494 U.S. at 135.

Of course, Plaintiff does not contend that the County should have provided a full-blown pre-deprivation hearing to ascertain his citizenship and immigration

status. *Cf. Arizona*, 132 S. Ct. at 2499 (noting that "governance of immigration and alien status is extensive and complex" and is committed to the federal government). But certainly, once it had decided to effectuate ICE's detainer requests, the County was obligated to implement some due process safeguards to prevent unlawful detentions.

First, the County should have notified Mr. Galarza of the basis for his detention. By withholding that information from him, the County made it impossible for him to contest his imprisonment. This lack of notice "violated the most rudimentary demands of due process." *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). While "[q]uestions [may] . . . arise as to the adequacy of a particular form of notice in a particular case," there can be no question that the absence of *any* notice here was unlawful. *Id.*

Second, at a minimum, upon the provision of notice, the County should have given Mr. Galarza an opportunity to contact the federal government to explain that he was being held erroneously. Because Mr. Galarza was in the County's custody and control, it was the County that was required to give him that opportunity. *See Cooper v. Lockhart*, 489 F.2d 308, 313, 315 (8th Cir. 1973) (holding that "the cooperating custodial state denies the prisoner due process by continuing the effects of a [criminal] detainer placed on him solely on the strength of a request for one made by a sister state," because "[r]ealistically . . . it is the custodial state" that

chose to take action based on the detainer).[21] The County controlled Mr. Galarza's phone access, and County officials held his driver's license, Social Security card, and other identification documents in their possession. *See* JA 84-85 at ¶¶ 39, 47. Thus, unless the County provided the means, Mr. Galarza would have had no way to contest his detention.

These steps would have imposed only a minimal administrative burden on the County, but if offered promptly after the receipt of Mr. Galarza's detainer, they would have enabled Mr. Galarza to avoid three days of unwarranted imprisonment. Yet, in dismissing Mr. Galarza's procedural due process claim against the County, the district court failed to engage in any balancing at all. *See* JA 56. The district court's decision must be reversed. Because the County chose to effectuate all immigration detainers without providing any pre-deprivation procedures to reduce the obvious risk of erroneous detentions, and because County officials detained Mr. Galarza pursuant to this policy, the County caused the violation of Mr. Galarza's due process rights and is liable. *See Bielevicz*, 915 F.2d at 851.

[21] The fact that ICE, too, failed to provide Mr. Galarza with due process protections does not negate the County's liability. *Cf. Honey v. Distelrath*, 195 F.3d 531, 534 (9th Cir. 1999) (holding that both Chief of Police and City Manager were liable for wrongful termination without due process; both "had the authority to effect the very deprivation complained of, and the duty to afford Honey procedural due process").

CONCLUSION

The district court's decision granting Lehigh County's Motion to Dismiss should be reversed because it rests on the legally incorrect conclusion that the County was required to continue Mr. Galarza's detention on the basis of an immigration detainer. The County's policy of imprisoning any person named on an immigration detainer form, regardless of whether the detainer has been issued upon probable cause and without providing any due process protections, violated Mr. Galarza's Fourth and Fourteenth Amendment rights. Mr. Galarza should be permitted to proceed with discovery in support of his claims.

Respectfully submitted,

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CERTIFICATES

Mary Catherine Roper, one of the attorneys for Appellant, hereby certifies that:

1. I caused two true and correct copies of the foregoing Brief of Appellant to be served upon the following counsel of record this 19th day of March, 2013, by First Class Mail to: Thomas M. Caffrey, Esq., 532 Walnut Street, Allentown, PA 18101.

2. The Brief of Appellant was filed with the Court by hand delivery on March 20, 2013, in accordance with Rule 25(a)(2)(B) of the Federal Rules of Appellate Procedure.

3. I am admitted to the bar of the Third Circuit.

4. This Brief complies with the type/volume limitation contained in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and the limitations governing second-step briefs. The brief contains 11,908, excluding the Cover Page, Table of Contents, Table of Authorities, and the Certifications.

5. The printed Brief of Appellant filed with the Court is identical to the text in the electronic version of the Brief filed with the Court.

6. The electronic version of the Brief of Appellant filed with the Court was virus checked using AVG Security Business Edition 2011, version 10.0.132 on March 19, 2013, and was found to have no viruses.

/s/ Mary Catherine Roper
Mary Catherine Roper

No. 12-3991

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ERNESTO GALARZA,
Plaintiff-Appellant,

v.

COUNTY OF LEHIGH,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania (No. 10-cv-06815)

VOLUME I of the JOINT APPENDIX (J.A. 1-63)

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TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ERNESTO GALARZA,	:	
Plaintiff	:	
v.	:	**CIVIL ACTION NO. 10-cv-06815**
MARK SZALCZYK, GREG MARINO, and CHRISTIE CORREA, in their individual capacities, and LEHIGH COUNTY,	:	
Defendants	:	

NOTICE OF APPEAL

Notice is hereby given that Plaintiff in the above-captioned case, Ernesto Galarza, appeals from that portion of the Order and Opinion entered March 30, 2012 by the Hon. James Knoll Gardner, which granted Defendant Lehigh County's Motion to Dismiss the First Amended Complaint. The Order of March 30, 2012 is now appealable as to Lehigh County because Plaintiff has resolved his claims against the remaining defendants, resulting in a final Order dismissing the case under Local Rule 41.1(b), entered on September 19, 2012.

Dated: October 16, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, October 16, 2012, the foregoing NOTICE OF APPEAL was filed electronically and is available for viewing and downloading from the ECF system of the United States District Court for the Eastern District of Pennsylvania.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ERNESTO GALARZA	)	
	)	Civil Action
Plaintiff	)	No. 10-cv-06815
	)	
vs.	)	
	)	
MARK SZALCZYK,	)	
GREG MARINO, and	)	
CHRISTIE CORREA, in their individual capacities, and	)	
CITY OF ALLENTOWN, and	)	
LEHIGH COUNTY,	)	
	)	
Defendants	)	

O R D E R

Now, this 30th day of March, 2012, upon consideration of the following documents:

(1) Defendant Mark Szalczyk's Motion to Dismiss the Amended Complaint, which motion to dismiss was filed May 20, 2011 (Document 55); together with

(A) Memorandum of Law in Support of Defendant Mark Szalczyk's Motion to Dismiss the Amended Complaint, which memorandum of law was filed May 20, 2011 (Document 55);

(B) Plaintiff's Memorandum in Opposition to Defendant Szalczyk's Motion to Dismiss, which memorandum was filed June 20, 2011 (Document 63); and

(C) Defendant Mark Szalczyk's Reply in Support of His Motion to Dismiss the Amended Complaint, which reply was filed on July 1, 2011 (Document 64);

(2) Defendant Gregory Marino's Motion to Dismiss the Amended Complaint, which motion to dismiss was filed June 17, 2011 (Document 62); together with

(A) Memorandum of Law in Support of Defendant Gregory Marino's Motion to Dismiss the Amended Complaint, which memorandum of law was filed June 17, 2011 (Document 62); and

(B) Plaintiff's Memorandum in Opposition to Defendant Marino's Motion to Dismiss, which memorandum was filed July 8, 2011 (Document 67);

(3) Defendants, City of Allentown and Christie Correa's Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Fed.R.Civ.P. 12(b)(6), which motion to dismiss was filed April 25, 2011 (Document 51)("Allentown/Correa Motion"); together with

(A) Memorandum of Law in Support of Defendants, City of Allentown and Christie Correa's Motion to Dismiss Amended Complaint Pursuant to Fed.R.Civ.P. 12(b)(6), which memorandum of law was filed April 25, 2011 (Document 51-1); and

(B) Plaintiff's Memorandum in Opposition to Motion to Dismiss by Defendants City of Allentown and Christie Correa, which memorandum was filed May 23, 2011 (Document 57);

(4) Defendant Lehigh County's Motion to Dismiss the First Amended Complaint Under F.R.C.P. 12(b)(6), which motion to dismiss was filed April 25, 2011 (Document 50); together with

(A) Defendant Lehigh County's Memorandum of Law in Support of Its Motion to Dismiss the First Amended Complaint Under F.R.C.P. 12(b)(6), which memorandum of law was filed April 25, 2011 (Document 50-1); and

(B) Plaintiff's Memorandum in Opposition to Defendant Lehigh County's Motion to Dismiss the First Amended Complaint Under F.R.C.P. 12(b)(6), which memorandum was filed May 23, 2011 (Document 58); and

(5) First Amended Complaint, filed by plaintiff on April 6, 2011 (Document 46); together with

(A) Exhibit A, "Allentown Police Department and Immigration and Custom[s] Enforcement (ICE) Collaboration", undated (Document 46-1);

(B-1) Exhibit B, U.S. ICE Detainer for plaintiff Ernesto Galarza, dated November 21, 2008, and signed by defendant Mark Szalczyk, (Document 46-1); and

(B-2) Exhibit B, cancellation of U.S. ICE Detainer for plaintiff Ernesto Galarza, dated November 24, 2008;

after oral argument held December 15, 2011; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that Defendant Mark Szalczyk's Motion to Dismiss the Amended Complaint is granted in part and denied in part.

IT IS FURTHER ORDERED that plaintiff's procedural due process claim against defendant Mark Szalczyk is dismissed from the First Amended Complaint.

IT IS FURTHER ORDERED that Defendant Mark Szalczyk's Motion to Dismiss the Amended Complaint is denied to the extent that it seeks to dismiss plaintiff's Fourth Amendment and equal protection claims against defendant Mark Szalczyk.

IT IS FURTHER ORDERED that Defendant Gregory Marino's Motion to Dismiss the Amended Complaint is granted.

IT IS FURTHER ORDERED that plaintiff's claims against defendant Gregory Marino are dismissed from the First Amended Complaint.

IT IS FURTHER ORDERED that Defendants, City of Allentown and Christie Correa's Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Fed.R.Civ.P. 12(b)(6) is granted in part and denied in part.

IT IS FURTHER ORDERED that plaintiff's procedural due process claim against defendant Christie Correa is dismissed from the First Amended Complaint.

IT IS FURTHER ORDERED that the Allentown/Correa Motion is denied to the extent that it seeks to dismiss plaintiff's Fourth Amendment and equal protection claims against defendant Christie Correa.

IT IS FURTHER ORDERED that plaintiff's claims against defendant City of Allentown are dismissed from the First Amended Complaint.

IT IS ORDERED that Defendant Lehigh County's Motion to Dismiss the First Amended Complaint Under F.R.C.P. 12(b)(6) is granted.

IT IS FURTHER ORDERED that plaintiff's claims against Lehigh County are dismissed are dismissed from the First Amended Complaint.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ERNESTO GALARZA	)	
	)	Civil Action
Plaintiff	)	No. 10-cv-06815
	)	
vs.	)	
	)	
MARK SZALCZYK,	)	
GREG MARINO, and	)	
CHRISTIE CORREA, in their individual capacities, and	)	
CITY OF ALLENTOWN, and	)	
LEHIGH COUNTY,	)	
	)	
Defendants	)	

* * *

APPEARANCES:

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Christie Correa, and
City of Allentown, and

THOMAS M. CAFFREY, ESQUIRE
On behalf of Defendant
Lehigh County

* * *

O P I N I O N

JAMES KNOLL GARDNER
United States District Judge

This matter is before the court on four motions which seek to dismiss plaintiff's Amended Complaint:

(1) Defendant Mark Szalczyk's Motion to Dismiss the Amended Complaint, which motion was filed May 20, 2011 (Document 55);

(2) Defendant Gregory Marino's Motion to Dismiss the Amended Complaint, which motion was filed June 17, 2011 (Document 62);

(3) Defendants, City of Allentown and Christie Correa's Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Fed.R.Civ.P. 12(b)(6), which motion was filed April 25, 2011 (Document 51); and

(4) Defendant Lehigh County's Motion to Dismiss the First Amended Complaint Under F.R.C.P. 12(b)(6), which motion was filed April 25, 2011 (Document 50).

Plaintiff filed a separate memorandum in opposition to each motion to dismiss. Defendant Szalczyk filed a reply brief in support of his motion. The motions having been fully briefed and oral argument having been held before me on December 15, 2011, the matter is ripe for disposition. Hence this Opinion.

INTRODUCTION

Paragraph 1 of the Amended Complaint filed April 6, 2011 provides the following "Preliminary Statement" of the case:

> Plaintiff Ernesto Galarza is a United States Citizen who was born in New Jersey. Local and federal officials nonetheless collaborated to imprison him at the Lehigh County Prison for three days based on the groundless belief that he might

> be an undocumented and deportable "alien." Plaintiff brings this action under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983 and the authority of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Indeed, Attorney Jonathan H. Feinberg, the first of three counsel for plaintiff to address the court during oral argument on these motions to dismiss, sounded a note similar to the Preliminary Statement when he said:

> I think there is a substantial risk in this case where we have a lot of defendants and a lot of discrete legal issues, of losing the forest for the trees. And the fact is, this case is quite straightforward.
>
> Ernesto Galarza is a United States citizen. As a result of the actions of these defendants, he was held on an immigration detainer.
>
> That is wrong. It violated his constitutional rights. And that's the reason we're here. And we can get lost in these legal issues, and I would suggest to the Court, though, the issue is really quite simple.[1]

Defendants do not dispute that Mr. Galarza is a United States citizen or that a jury subsequently acquitted him of the charge on which he was arrested November 20, 2008,[2] which arrest

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[1] Transcript of Hearing held December 15, 2011 ("N.T."), at pages 27-28.

[2] On Thursday, November 20, 2008, Juan Santilme allegedly sold cocaine to defendant Christie Correa, an Allentown, Pennsylvania police officer who was working in an undercover capacity. On that date, plaintiff Galarza was charged with, and arrested for, conspiring with Santilme and two other arrestees, Joel Cruz and Luis Aponte-Maldonado, to deliver cocaine in violation of Pennsylvania law. On April 26, 2010 a jury acquitted plaintiff Galarza of the crime for which he had been arrested on November 20, 2008. (Amended Complaint at ¶¶ 28-31, 86.)

set the events in motion which led to this federal civil rights action. It is not difficult to contemplate why Mr. Galarza feels aggrieved by the events of November 20 through 24, 2008, or how his subsequent acquittal would have magnified those feelings.

However, the question presently before the court is not whether Mr. Galarza's feelings are reasonable or unreasonable, or whether it is "wrong", in a guttural sense, that a United States citizen was held in a county prison on an immigration detainer after he had posted bail and was otherwise entitled to be released.

The question presently before the court is whether or not plaintiff has plead sufficient facts in his Amended Complaint to establish a plausible entitlement to relief from the claims which he asserts.

SUMMARY OF DECISION

For the following reasons, I grant in part and deny in part the motion to dismiss filed by defendant Mark Szalczyk. Specifically, I grant defendant Szalczyk's motion and dismiss the procedural due process claim against him based upon qualified immunity. However, I deny defendant Szalzcyk's motion to dismiss plaintiff's Fourth Amendment and equal protection claims because plaintiff has sufficiently pled those claims and defendant Szalczyk is not entitled to qualified immunity on those claims based upon the facts alleged in the Amended Complaint.

I grant, in its entirety, the motion to dismiss filed by defendant Greg Marino and dismiss all claims against defendant Marino because he is entitled to qualified immunity based upon the facts alleged in the Amended Complaint.

I grant in part and deny in part the motion to dismiss filed by defendant Christie Correa and defendant City of Allentown. I grant the motion and dismiss all claims against the City because plaintiff has not sufficiently stated a claim based upon an unconstitutional policy or custom, or a failure to train its police officers.

I grant the motion to dismiss to the extent it seeks to dismiss the procedural due process claim against defendant Correa because plaintiff does not oppose dismissal of the due process claim against defendant Correa. I deny the motion to the extent it seeks to dismiss plaintiff's Fourth Amendment and equal protection claims against defendant Christie Correa because plaintiff has sufficiently pled those claims and defendant Correa is not entitled to qualified immunity on those claims based upon the facts alleged in the Amended Complaint.

Finally, I grant, in its entirety, the motion to dismiss filed by defendant Lehigh County and dismiss all claims against Lehigh County because the policy for which plaintiff seeks to hold Lehigh County liable is nondiscriminatory, as well as mandated by federal regulations.

JURISDICTION

Jurisdiction in this case is based upon federal question jurisdiction pursuant to 28 U.S.C. § 1331.

VENUE

Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because the events giving rise to plaintiff's claims allegedly occurred in the Allentown, Lehigh County, Pennsylvania, which is within this judicial district.

PROCEDURAL HISTORY

Plaintiff initiated this civil rights action by filing a Complaint (Document 1) on November 19, 2010. Plaintiff's initial Complaint named Mark Szalczyk, Stephanie Fritzges, "ICE Does 1-5", "Allentown Does 6-10", and "Lehigh County Does 11-15", the City of Allentown, and Lehigh County as defendants.

On January 26, 2011 plaintiff filed a Motion for Leave to Conduct Limited Expedited Doe Discovery (Document 19).

Upon motion by the plaintiff which was granted by my Order dated March 14, 2011 and filed March 15, 2011 (Document 32), Stephanie Fritzges was dismissed as a defendant in this action.

Plaintiff's motion for leave to conduct limited expedited discovery was granted by Order and accompanying Memorandum of United States Magistrate Judge Henry S. Perkin dated March 21, 2011 (Documents 39 and 38, respectively).

On March 21, 2011 plaintiff filed a Motion for Leave to File First Amended Complaint to Add Parties and Allegations Resulting from Doe Discovery (Document 35).

By Order dated April 5 and filed April 6, 2011 (Document 45), I granted as unopposed plaintiff's motion for leave to file an amended complaint and gave plaintiff until April 25, 2011 to do so.

Plaintiff filed his First Amended Complaint on April 6, 2011 (Document 46)("Amended Complaint"). The Amended Complaint named Mark Szalczyk, Greg Marino, and Christie Correa, in their individual capacities, and the City of Allentown, and Lehigh County as defendants. Plaintiff did not name any Doe defendants in his Amended Complaint. Each of the named defendants now seek to dismiss plaintiff's Amended Complaint.

Oral argument was held before me on December 15, 2011 on each of the four defense motions to dismiss. At the conclusion of oral argument I took the matter under advisement. Hence this Opinion.

STANDARD OF REVIEW

A claim may be dismissed under Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). A Rule 12(b)(6) motion requires the court to examine the sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99, 102,

2 L.Ed.2d 80, 84 (1957) (abrogated in other respects by Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

Generally, in ruling on a motion to dismiss, the court relies on the complaint, attached exhibits, and matters of public record, including other judicial proceedings. Sands v. McCormick, 502 F.3d 263, 268 (3d Cir. 2008).

Except as provided in Federal Rule of Civil Procedure 9, a complaint is sufficient if it complies with Rule 8(a)(2), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). Rule 8(a)(2) "[does] not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570, 127 S.Ct. at 1974, 167 L.Ed.2d at 949.[3]

In determining whether a plaintiff's complaint is sufficient, the court must "accept all factual allegations as

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[3] The Opinion of the United States Supreme Court in Ashcroft v. Iqbal, 556 U.S. 662, ___, 129 S.Ct. 1937, 1953, 173 L.Ed.2d 868, 887 (2009), states clearly that the "facial plausibility" pleading standard set forth in Twombly applies to all civil suits in the federal courts. Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009).

This showing of facial plausibility then "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," and that the plaintiff is entitled to relief. Fowler, 578 F.3d at 210 (quoting Iqbal, 556 U.S. at ___, 129 S.Ct. at 1949, 173 L.Ed.2d at 884).

As the Supreme Court explained in Iqbal, "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that the defendant acted unlawfully." Iqbal, 556 U.S. at ___, 129 S.Ct. at 1949, 173 L.Ed.2d at 884.

true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading, the plaintiff may be entitled to relief." Fowler, 578 F.3d at 210 (quoting Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008)).

Although "conclusory or 'bare-bones' allegations will [not] survive a motion to dismiss," Fowler, 578 F.3d at 210, "a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits." Phillips, 515 F.3d at 231. Nonetheless, to survive a 12(b)(6) motion, the complaint must provide "enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element[s]." Id. (quoting Twombly, 550 U.S. at 556, 127 S.Ct. at 1965, 167 L.Ed.2d at 940) (internal quotation omitted).

The court is required to conduct a two-part analysis when considering a Rule 12(b)(6) motion. First, the factual matters averred in the complaint, and any attached exhibits, should be separated from legal conclusions asserted therein. Fowler, 578 F.3d at 210. Any facts pled must be taken as true, and any legal conclusions asserted may be disregarded. Id. at 210-211.

Second, the court must determine whether those factual matters averred are sufficient to show that the plaintiff has a

"plausible claim for relief." Id. at 211 (quoting Iqbal, 556 U.S. at __, 129 S.Ct. at 1950, 178 L.Ed.2d at 884).

Ultimately, this two-part analysis is "context-specific" and requires the court to draw on "its judicial experience and common sense" to determine if the facts pled in the complaint have "nudged [plaintiff's] claims" over the line from "[merely] conceivable [or possible] to plausible." Iqbal, 556 U.S. at __, 129 S.Ct. at 1950-1951, 178 L.Ed.2d at 884-885 (internal quotations omitted).

A well-pleaded complaint may not be dismissed simply because "it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." Twombly, 550 U.S. at 556, 127 S.Ct. at 1965, 167 L.Ed.2d at 940-941.

FACTS

Based upon the averments in plaintiff's Amended Complaint, which I must accept as true under the foregoing standard of review, the pertinent facts are as follows.

Parties

Plaintiff Ernesto Galarza is a 36-year-old male who resides in Allentown, Lehigh County, Pennsylvania and resided here at all times relevant to this action. He was born in Perth

Amboy, New Jersey. Mr. Galarza is Hispanic, specifically of Puerto Rican heritage. He speaks English and Spanish.[4]

At the time of these events, defendant Mark Szalcyzk ("Officer Szalczyk") was a Deportation Officer employed by United States Immigration and Customs Enforcement, United States Department of Homeland Security ("ICE").[5] Defendant Greg Marino ("Officer Marino") was employed by ICE in its Allentown, Pennsylvania office.[6] In this lawsuit, Officers Szalczyk and Marino are both being sued in their individual capacities.[7] At all relevant times, Officers Szalczyk and Marino were acting within the scope of their employment with ICE, a federal executive agency.[8]

Defendant City of Allentown ("City" or "Allentown") is a political subdivision of the Commonwealth of Pennsylvania and operates the Allentown Police Department ("APD").[9] Defendant Christie Correa ("Detective Correa") was at all relevant times a narcotics investigator with APD. She is also being sued in her

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[4] Amended Complaint at ¶¶ 4, 24-27.

[5] Id. at ¶ 5.

[6] Id. at ¶ 6.

[7] Id. at ¶¶ 5-6.

[8] Id. at ¶ 7.

[9] Id. at ¶ 8.

individual capacity.[10] At all relevant times, Detective Correa was acting in the scope of her employment with the APD.[11]

Defendant Lehigh County is a political subdivision of the Commonwealth of Pennsylvania. Lehigh County operates the Lehigh County Prison.

Collaborative Efforts of ICE and the APD

The APD and ICE cooperate to identify and imprison persons suspected of being "aliens" subject to deportation.[12] As part of this cooperation, APD officers actively work with ICE to identify aliens who have committed criminal offenses within the City and take appropriate steps for deportation where warranted.[13]

As part of this collaboration, the APD conducts "periodic operations", which the police also term "round ups", to apprehend undocumented immigrants who have committed crimes. These operations resulted in the apprehension of 120 people in 2006.[14] Detective Correa, and Officers Szalczyk and Marino participated in the collaborative efforts between APD and ICE.[15]

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10 Amended Complaint at ¶ 9.

11 Id. at ¶ 10.

12 Id. at ¶12.

13 Id. at ¶ 13.

14 Id. at ¶ 14.

15 Id. at ¶ 21.

Until March 2007, ICE maintained an office within the APD where an ICE special agent reviewed APD arrest reports and sought to identify arrestees subject to deportation.[16]

In November 2008, when plaintiff was arrested and detained, ICE no longer had an agent posted within the APD. However, ICE and APD employees continued to collaborate from their separate offices in Allentown.[17] APD personnel regularly communicate with ICE personnel regarding arrestees suspected of being aliens subject to deportation.[18]

The City has never provided training to APD officers or arranged for them to receive training regarding (1) how to investigate a person's immigration status; (2) when to provide arrestees' information to ICE; or (3) what arrestee information should be provided to ICE.[19] The City knowingly allowed APD officers to make reports to ICE on the basis of an arrestee's ethnicity.[20]

Many individuals arrested by the APD are jailed at the Lehigh County Prison in Allentown. ICE officials have issued, and then cancelled, "many" immigration detainers against inmates

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16 Amended Complaint at ¶ 15.

17 Id. at ¶ 19.

18 Id. at ¶ 18.

19 Id. at ¶ 19.

20 Id. at ¶ 20.

housed at the Lehigh County Prison and at other nearby county prisons and jails.[21]

On November 6, 2008 James T. Hayes, then-Director of Detention and Removal Operations for ICE, issued a memorandum to ICE Field Office Directors cautioning that ICE officers must have probable cause to believe that a person is an alien subject to removal from the United States before making an arrest of the suspected removable alien.[22]

Arrest and Detention of Mr. Galarza

On Thursday, November 20, 2008, Mr. Galarza was working construction on a house near 6th and Monroe Streets in Allentown. The contractor directing the work, Juan Santilme, was also selling cocaine from the job site. On that date Mr. Santilme sold cocaine to defendant, Allentown Police Detective Christie Correa, who was working under cover.[23]

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[21] Amended Complaint at ¶ 22. Plaintiff does not allege that Detective Correa or the City knew, or was aware, that ICE had issued and then cancelled "many" immigration detainers, or that such cancelled immigration detainers were based upon information provided by APD officers. However, based upon the alleged active cooperation between the APD and ICE -- illustrated by the alleged actions of Detective Correa and Officer Szalczyk -- it is reasonable to infer that APD and the City were aware that ICE had issued and then cancelled many immigration detainers for persons held in the Lehigh County Prison and at other local prison facilities. Accordingly, it is reasonable to infer that the City and the APD were aware that faulty or misleading reports or information provided by APD officers might result in the issuance of an immigration detainer based on that faulty or misleading information.

[22] Id. at ¶ 23.

[23] Id. at ¶¶ 28 and 29.

After Mr. Santilme made the sale to Detective Correa, at approximately 2:30 p.m. on November 20, 2008, police arrived at the job site and arrested Mr. Santilme as well as Juan Cruz, Luis Aponte-Maldonado, and plaintiff Galarza.[24] Plaintiff was charged with conspiring with Mr. Santilme and the other two arrestees to deliver cocaine in violation of Pennsylvania law.[25]

All four arrestees are Hispanic. Mr. Santilme and Mr. Aponte-Maldonado are citizens of the Dominican Republic. Mr. Cruz is a citizen of Honduras.[26] However, at the time of his arrest Mr. Aponte-Maldonado told Detective Correa that he was a United States citizen from Puerto Rico.[27] All four arrestees were taken to the APD where Mr. Galarza was held in a cell separate from the other three arrestees.[28]

A Criminal Complaint against Mr. Galarza was drafted and verified by Detective Correa.[29] The Criminal Complaint which was sworn out by Detective Correa after the arrest accurately listed Mr. Galarza's place of birth (Perth Amboy, New Jersey), his date of birth (September 20, 1974), his ethnicity (Hispanic),

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[24] Amended Complaint at ¶¶ 30 and 31.

[25] Id. at ¶ 31.

[26] Id. at ¶ 35.

[27] Id. at ¶ 34.

[28] Id. at ¶ 36.

[29] Id. at ¶ 37.

and his Social Security Number.[30] At the time of his arrest, Mr. Galarza was carrying his wallet, which contained his Pennsylvania driver's license, his debit card, his health insurance card, and his social security card.[31] Mr. Galarza's United States citizenship could have been verified using this information.[32]

At approximately 8:00 p.m. on Thursday, November 20, 2011, Mr. Galarza was transported from the APD to the Lehigh County Prison. At approximately 10:15 p.m. that evening, Mr. Galarza's bail on the drug charge was set at $15,000.[33]

In the early morning hours of Friday, November 21, 2008, Mr. Galarza underwent the Lehigh County Prison admissions process. During the admission process, Mr. Galarza again gave Perth Amboy, New Jersey as his place of birth. Because he gave a place of birth inside the United States, the prison official conducting the intake did not fill out and forward a form to ICE, as is customary when a prisoner lists a foreign place of birth

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[30] Amended Complaint at ¶ 37.

[31] Id. at ¶ 39.

[32] Id. at ¶ 38. It is reasonable to infer that someone, particularly a police detective or immigration officer, armed with an individual's purported place of birth, date of birth, driver's license, and social security number would be capable of verifying that the individual is who he says he is and was born where he says he was born (which in this case would prove plaintiff's natural-born United States citizenship). However, what is not alleged in the Amended Complaint, and what I cannot infer, is how long it would take for a detective or immigration official to complete such a verification.

[33] Id. at ¶¶ 41-42.

during admission to Lehigh County Prison.[34] Lehigh County Prison officials stored Mr. Galarza's wallet after processing his admission.[35]

Sometime during Thursday evening, November 20, 2008, Detective Correa contacted ICE to convey information regarding her arrest of Mr. Galarza and the other three individuals at the 6th and Monroe Street house earlier that day.[36]

Detective Correa told the ICE officer with whom she spoke -- either ICE Deportation Officer Szalczyk or Officer Marino[37] -- that she had arrested four individuals -- including Mr. Galaraz -- on drug charges earlier that afternoon. She stated to the ICE officer that she believed that all four men had given false information about their identities or were foreign nationals.[38] Detective Correa gave the ICE officer the information contained on each arrestee's booking sheet, including

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[34] Amended Complaint at 43-45.

[35] Id. at ¶ 47.

[36] Id. at ¶ 48.

[37] The Amended Complaint contains alternative allegations regarding who Detective Correa spoke with when she called ICE to provide information concerning the arrests she made. Mr. Galarza avers either: (a) that Detective Correa spoke directly to Officer Szalczyk who then issued the detainer; or (b) that Detective Correa spoke to Officer Marino, that Officer Marino relayed Detective Correa's information to Officer Szalczyk without investigating or verifying that information, and that Officer Szalczyk then issued the immigration detainer. (See Amended Complaint at ¶¶ 48, 51, and 54-56.)

[38] See id. at ¶ 48 and 51

name, date of birth, place of birth, ethnicity, and social security number, if given by the arrestee.[39]

Detective Correa gave Mr. Galarza's identification information to the ICE officer because Mr. Galarza was Hispanic and was arrested in the company of three other Hispanic men who did not appear to be United States citizens.[40] Detective Correa does not report Caucasian individuals to ICE when those individuals are arrested with others suspected of being aliens subject to deportation.[41]

On Friday, November 21, 2008, after receiving the information provided by Detective Correa, Officer Szalczyk prepared an Immigration Detainer-Notice of Action (Form I-274) and faxed the immigration detainer to Lehigh County Prison.[42] Officer Szalczyk did not seek to verify if the social security number provided by Mr. Galarza was valid.[43] The immigration detainer identified Mr. Galarza as an alien and his nationality as "Dominican Republic".[44]

Officer Szalczyk decided to issue the immigration

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[39] See Amended Complaint at ¶¶ 37, 48 and 50-51.

[40] Id. at ¶ 52.

[41] Id. at ¶ 53.

[42] Id. at ¶¶ 59-60. A copy of the immigration detainer is contained in Exhibit B of the Amended Complaint.

[43] Id. at ¶ 58.

[44] Id. at ¶ 62; id., Exhibit B.

detainer for Mr. Galarza either based on the information provided by Detective Correa (directly or through Officer Marino), or because plaintiff had a Hispanic name and was arrested in the company of three other Hispanic men who did not appear to be United States citizens.[45]

If Officer Szalczyk had known or believed that Mr. Galarza was Caucasian, rather than Hispanic, he would not have issued the immigration detainer without first seeking to verify the available identifying information in an effort to confirm that Mr. Galarza was actually an alien subject to deportation and not a United States citizen.[46]

Later on Friday, November 21, 2008, after Officer Szalczyk had issued the immigration detainer regarding Mr. Galarza, a surety company posted Mr. Galarza's bail. A Lehigh County Prison officer told plaintiff Galarza that his bail had been posted and that plaintiff should prepare to leave Lehigh County Prison shortly.[47]

Shortly thereafter, however, the same prison officer told plaintiff that a detainer was preventing his release on bail. Plaintiff protested to the prison officer, but the officer told plaintiff that he would have to wait until Monday,

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[45] Id. at ¶ 58.

[46] Id. at ¶ 63.

[47] Amended Complaint at ¶¶ 67-68.

November 24, 2008 to speak with a Lehigh County Prison counselor about the detainer.[48] Plaintiff was not informed of the basis for the detainer or that it concerned his citizenship or immigration status until Monday, November 24, 2008.[49]

But for the issuance of the immigration detainer lodged against plaintiff, the Lehigh County Prison would have released him on Friday, November 21, 2008 after his bail was posted. Plaintiff was neither interviewed by any ICE officer nor given notice of the immigration detainer before the detainer was issued by Officer Szalczyk.[50]

Plaintiff was detained at Lehigh County Prison over the weekend, and he did not learn that he was being held on an immigration detainer until he was at breakfast in the prison on Monday, November 24, 2008. At that time, he was informed by a prison counselor that the detainer concerned his immigration status. Plaintiff protested the immigration detainer to the counselor and asked the counselor to check the identification information in plaintiff's wallet, which was stored at the prison. The prison counselor declined to do so.[51]

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[48] Amended Complaint at ¶¶ 69-70.

[49] Id. at ¶ 73.

[50] Id. at ¶¶ 71-72.

[51] Id. at ¶¶ 74-77.

Shortly thereafter, two ICE officers met with, and interviewed, Mr. Galarza. Plaintiff was questioned by the ICE officers and again provided his date of birth and social security number. The ICE officers left and when they returned, they informed plaintiff that the detainer was being lifted.[52]

On Monday, November 24, 2008 at 2:05 o'clock p.m. Mr. Galarza's immigration detainer was lifted, and he was released from the Lehigh County Prison at 8:28 o'clock p.m. on that evening.[53]

Because of his imprisonment, Mr. Galarza lost a part-time job, lost wages from both his part-time and full-time job, and suffered both emotional distress and physical problems.[54]

DISCUSSION

Officer Marino

Plaintiff names Officer Marino in each of Counts I through VII of the Amended Complaint. Despite the number of claims asserted against Officer Marino, the factual averments concerning any action actually taken by Officer Marino are sparse.

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[52] Amended Complaint at ¶¶ 78-81. The fact that plaintiff appears to have provided the same information to the ICE officers with whom he spoke on Monday morning as was available to Detective Correa and Officer Szalczyk on the previous Thursday and Friday further supports a reasonable inference that plaintiff's United States citizenship could have been verified either before Mr. Galarza was reported to ICE or before the immigration detainer was issued.

[53] Id. at ¶¶ 82-83.

[54] Id. at ¶ 85.

Indeed, the only factual allegations in the Amended Complaint which concern Officer Marino appear in paragraphs 54 and 55. Because plaintiff is unaware of whether Detective Correa spoke directly to Officer Szalczyk when she called ICE to report plaintiff and his co-arrestees, or whether she spoke to Officer Marino, plaintiff avers in the alternative that

> [Officer] Marino gave [Officer] Szalczyk the information from [Detective] Correa, including the statement...that Plaintiff lied about his identity, [and that] [b]efore [Officer] Marino gave [Officer] Szalczyk this information, [Officer Marino] conducted no investigation of other reasonably available information that would have confirmed Plaintiff's identify and the fact that Plaintiff is a [United States] citizen.[55]

Qualified Immunity -- Officer Marino

Because qualified immunity is not merely a defense to liability but an immunity from suit, it is a proper basis for a motion to dismiss under Rule 12(b)(6). Thomas v. Independence Township, 463 F.3d 285, 291 (3d Cir. 2006). However, "[a] decision as to qualified immunity is premature when there are unresolved disputes of historical facts relevant to the immunity analysis." Phillips v. County of Allegheny, 515 F.3d 224, 242 n.7 (3d Cir. 2008) (citing Curley v. Klem, 499 F.3d 199 (3d Cir. 2007))(internal punctuation omitted).

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[55] Amended Complaint at ¶¶ 54-55.

Here, the Amended Complaint displays an internal dispute of historical fact as to whether Officer Marino passed the message from Detective Correa along to Officer Szalczyk, or whether Detective Correa Spoke directly to Officer Szalczyk. However, regardless of which version of the facts, as pled, is accepted as true, Officer Marino is entitled to qualified immunity because no reasonable officer would have believed Officer Marino's conduct to be unlawful.

If the latter scenario is accurate, then the Amended Complaint avers no actions taken by Officer Marino whatsoever, he thus cannot be liable under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 389, 91 S.Ct. 1999, 2001, 29 L.Ed.2d 619, 622 (1972), and he is properly dismissed from this action. If the former scenario is accurate and Officer Marino did relay the information provided by Detective Correa to Officer Szalczyk, then I conclude that he is entitled to qualified immunity and, thus, is properly dismissed from this action.

To overcome an assertion of qualified immunity, a plaintiff must satisfy a two-prong test. The court must "decide whether the facts [pled], taken in the light most favorable to the plaintiff, demonstrate a constitutional violation" and "whether the constitutional right in question was clearly established." Couden v. Duffy, 446 F.3d 483, 492 (3d Cir. 2006).

Courts are no longer required to decide the first prong of this test before moving on to the second prong. Pearson v. Callahan, 555 U.S. 223, 236, 129 S.Ct. 808, 818, 172 L.Ed.2d 565, 576 (2009).

The test for whether a constitutional right is clearly established is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Couden, 446 F.3d at 492; Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151, 2156 , 150 L. Ed. 2d 272, 282 (2001). If the officer's mistake as to what the law requires is reasonable, the officer is entitled to qualified immunity. Id.

Here, I conclude that it would not have been clear to a reasonable immigration officer that relaying information provided by a city Detective about a group of individuals to an immigration-officer colleague is an unlawful violation of the constitutional rights of one of the individuals about whom the immigration officer relayed information. For that reason, Officer Marino is entitled to qualified immunity if, as alternatively alleged, he relayed information from Detective Correa to Officer Szalczyk. Accordingly, I grant Officer Marino's motion and dismiss all claims against him as a defendant in this action.

Fourth Amendment -- Detective Correa & Officer Szalczyk

An arrest or custodial seizure without probable cause is a Fourth Amendment violation actionable under § 1983 and Bivens. See Walmsley v. Philadelphia, 872 F.2d 546 (3d Cir.1989) (citing cases); Bivens, 403 U.S. at 389, 91 S.Ct. at 2001, 29 L.Ed.2d at 622.

To state a Fourth Amendment claim for false arrest or an unreasonable custodial seizure, a plaintiff must allege that: (1) there was an arrest or custodial seizure; and (2) the arrest or seizure was made without probable cause. Dowling v. City of Philadelphia, 855 F.2d 136, 141 (3d Cir. 1988).

Here, Mr. Galarza was seized by Detective Correa at the time of his arrest and remained in custody from the time of his arrest until the evening of Friday, November 21, 2008. At that time, a surety company posted Mr. Galarza's $15,000 bail and, thus, Mr. Galarza was entitled to be released on that bail. However, because the immigration detainer had been issued and faxed to Lehigh County Prison, Mr. Galarza was not released after his bail was posted. Instead, he was held in prison until Monday, November 24, 2008.

In the Amended Complaint, plaintiff alleges that his detention at Lehigh County Prison pursuant to the immigration detainer was an unreasonable seizure in violation of his rights under the Fourth Amendment because no probable cause existed to

support the detainer.[56] Specifically, plaintiff alleges that the detainer was issued "without probable cause to believe that he was an 'alien' subject to detention and removal."[57]

Means Intentionally Applied

Officer Szalczyk argues that he cannot be liable for any unreasonable seizure of Mr. Galarza because the detainer did not cause Mr. Galarza's detention.[58] Officer Szalczyk cites two district court cases to support his assertion that the immigration detainer issued by him did not cause Mr. Galarza to be seized.[59] Both cases relied on by Officer Scalczyk are significantly distinguishable from this case.

Initially, in Keil v. Spinella, 2011 WL 43491, at *3 (W.D.Mo. January 6, 2011), ICE issued an immigration detainer for Mr. Keil which was served upon the United States Marshal who was then holding Mr. Keil. However, ICE cancelled the detainer when Mr. Keil was released on bond. While in both this case and Keil, ICE never took physical custody of the individual named in the

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[56] The Amended Complaint states that Mr. Galarza was charged with "conspiring...to deliver cocaine in violation of Pennsylvania law" and that on "April 12, 2010, a jury acquitted Plaintiff of the crime for which he had been arrested on November 20, 2008." (Amended Complaint at ¶¶ 31, 86.) Plaintiff does not contend that his November 20, 2008 arrest was unsupported by probable cause. Rather, the essence of his Fourth Amendment claim here is that no probable cause existed to believe that he was an alien subject to removal or deportation from the United States. (Amended Complaint at ¶ 88.)

[57] Id. at ¶¶ 107, 126.

[58] Szalczyk Memorandum at page 6.

[59] Id. at pages 6-7 n.4.

detainer, here, unlike in Keil, Mr. Galarza was not released upon posting bail. Rather, the Amended Complaint alleges -- and Officer Szalczyk acknowledges[60] -- that Mr. Galarza's detention at Lehigh County Prison was extended because of the detainer issued by Officer Szalczyk.

Next, in Nasious v. Two Unknown B.I.C.E. Agents, 657 F.Supp.2d 1218, 1221 (D.Colo. 2009), an immigration detainer was issued against John Nasious on August 3, 2005 (while he was in state custody pending disposition on a five-count indictment). A four-year term of imprisonment was imposed on November 10, 2005 after Mr. Nasious pled guilty to one count of Forgery-Check/Commercial Instrument. ICE lifted the immigration detainer on April 24, 2006, while Mr. Nasious was still in custody pursuant to his November 10, 2005 sentence. 657 F.Supp.2d at 1221, 1224. Like Keil, supra, and unlike Mr. Galarza's case, the confinement of Mr. Nasious was not extended in any way by the issuance of the immigration detainer.

Indeed, the district court in Nasious stated that "[a]lmost all of the circuit courts considering the issue have determined that the logding of an immigration detainer, *without more*, is insufficient to render someone in custody." Nasious, 657 F.Supp.2d at 1229 (citing cases).

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[60] Szalczyk Memorandum at page 7 n.4.

Here, the Amended Complaint alleges something more. The Amended Complaint alleges that Mr. Galarza would have been released on bail three days prior to his actual release but for the immigration detainer issued by defendant Szalczyk. Therefore, the immigration detainer caused a seizure of Mr. Galarza.

Detective Correa contends that she cannot be held liable for an unreasonable seizure of Mr. Galarza because she did not intend for ICE to issue an immigration detainer when she called ICE and reported plaintiff and his co-arrestees.[61] Detective Correa contends that "Plaintiff does not allege that Detective Correa intended a detainer to be issued against him."[62] In her memorandum, Detective Correa contends that she "reported Plaintiff's identity to assist with the identification of three foreign nationals, but ICE assumed that she reported all four as suspected foreign nationals" and therefore, "Plaintiff's detention was an unintended consequence" of Detective Correa's telephone call.[63]

Detective Correa's argument here fails for two reasons. First, her alleged facts conflict with the allegations in paragraph 51 of the Amended Complaint, where plaintiff avers that

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[61] Memorandum of Allentown and Correa at page 7.

[62] Id. at page 8.

[63] Id. at page 8.

Detective Correa gave the ICE officer she spoke to "reason to believe that she suspected *all four arrestees* of being foreign nationals...."[64] Thus, plaintiff alleges that Detective Correa gave the ICE officer reason to believe she suspected Mr. Galarza of being a foreign national. Under the applicable standard of review, discussed above, I must accept plaintiff's alle-gation for the purpose of these motions to dismiss.

Second, Detectice Correa does not dispute that she intentionally telephoned ICE and reported Mr. Galarza, along with his co-arrestees. Indeed, Detective Correa states that she does not dispute that "§ 1983 liability for an unlawful arrest can extend beyond the arresting officer to other officials whose intentional actions set the arresting officer in motion."[65] As plaintiff correctly notes, the United States Court of Appeals for the Third Circuit has held that "§ 1983 anticipates that an individual will be responsible for the natural consequences of his actions." Berg v. County of Allegheny, 219 F.3d 261, 272 (3d Cir. 2000).

Detective Correa relies on a hypothetical example provided by the Third Circuit in Berg, which the court offered as

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[64] Amended Complaint at ¶ 51 (emphasis added).

[65] Memorandum of Allentown and Correa at page 8 (citing Berg, 219 F.3d at 272).

an illustration of means "intentionally applied".[66] The Third Circuit stated that

> [f]or example, if a police officer fires his gun at a fleeing robbery suspect and the bullet inadvertently strikes an innocent bystander, there has been no Fourth Amendment seizure.... If, on the other hand, the officer fires his gun directly at the innocent bystander in the mistaken belief that the bystander is the robber, then a Fourth Amendment seizure has occurred.

Berg, 219 F.3d at 269.

Detective Correa suggests that she is akin to the former officer who intended to shoot the fleeing robbery suspect but inadvertently shot the innocent bystander. Plaintiff contends that Detective Correa is akin to the latter officer who aimed at and shot the innocent bystander based upon the mistaken belief that the bytander was actually the robbery suspect.

Here, taking the facts alleged in the Amended Complaint as true and drawing all reasonable inferences in Mr. Galarza's favor, as I am required to do, he has the better of the arguments. The Amended Complaint alleges that after arresting plaintiff and three others for conspiracy to distribute cocaine, Detective Correa reported each of the four individuals -- including Mr. Galarza -- to the ICE officer with whom she spoke and indicated that she believed all four to be foreign nationals.[67]

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[66] Memorandum of Allentown and Correa at pages 7-8.

[67] Amended Complaint at ¶¶ 48, 51.

Taking those alleged facts as true, a reasonable inference can be drawn that Detective Correa intended to report Mr. Galarza to ICE as someone she believed to be a foreign national and who had been arrested on a narcotics charge. It is also reasonable to infer that the issuance of an immigration detainer against Mr. Galarza would be the natural consequence of Detective Correa's report to ICE, particularly in light of alleged history of collaboration between the Allentown Police Department and ICE.

For these reasons, the arguments by Detective Correa and Officer Szalczyk -- that their intentional action did not cause the immigration detainer, which, in turn, caused Mr. Galarza's detention after his bail was posted and he was entitled to be released -- fail.

Probable Cause

Plaintiff contends that neither Detective Correa nor Officer Szalczyk had probable cause "to believe that Mr. Galarza was an alien subject to removal and detention."[68]

Detective Correa has not directly addressed the issue of whether or not probable cause existed to support the issuance of an immigration detainer against Mr. Galarza.[69]

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[68] N.T. at page 36.

[69] See Memorandum of City of Allentown and Correa at pages 6-12.

Officer Szalczyk asserts that a reasonable officer in his position would have believed that issuing a detainer was lawful under the circumstances. Because Officer Szalczyk has conceded that probable cause is required before a lawful detainer can issue, I take his assertion to mean that a reasonable officer would have believed that there was probable cause to support the issuance of an immigration detainer.

Typically, the existence of probable cause is a question of fact which the jury will decide in a § 1983 or Bivens action. Collins v. Christie, 337 Fed.Appx. 188, 193 (3d Cir. 2009)(citing Montgomery v. De Simone, 159 F.3d 120, 124 (3d Cir. 1998)). However, "a district court may conclude that probable cause exists as a matter of law if the evidence, viewed most favorably to Plaintiff, reasonably would not support a contrary factual finding and enter summary judgment." Id. (quoting Merkle v. Upper Dublin School District, 211 F.3d 782, 788789 (3d Cir. 2000)).

Plaintiff's formulation of the requisite probable cause notwithstanding, the requirements for the issuance of an immigration detainer differ from the requirements for an alien to be deportable.

The statute establishing the various "[c]lasses of deportable aliens" provides, in pertinent part, that

> [a]ny alien who at any time after admission *has been convicted* of a violation of (or a conspiracy

> or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. § 1227(a)(2)(B)(I)(emphasis added).

Although Detective Correa and Officer Szalczyk acted after plaintiff was arrested and charged with conspiracy to violate the laws of the Commonwealth of Pennsylvania regulating controlled substances, nothing in the Amended Complaint suggest that he had been convicted of any such crime. Moreover, none of defendants' motions to dismiss or supporting documentation suggest any reason beyond plaintiff's arrest on November 20, 2008 which would support probable cause to believe that he was deportable.

Based on the facts alleged in the Amended Complaint, and upon the fact that a criminal defendant is presumed innocent until proven guilty, and the fact that a criminal arrest provides no evidence of guilt, I cannot conclude that Detective Correa or Officer Szalczyk had probable cause to believe that Mr. Galarza was deportable, or that any reasonable officer would have believed that probable cause existed to believe that Mr. Galarza was deportable.

While it is clear that facts pled in the Amended Complaint would not provide probable cause to believe that Mr. Galarza was deportable, the question remains whether or not

probable cause existed to support the issuance of an immigration detainer.

The statute establishing the "[p]owers of immigration officers and employees" provides for and regulates the "[d]etainer of aliens for violation of controlled substance laws". 8 U.S.C. § 1357(d). It provides that

> [i]n the case of an *alien* who is *arrested by* a Federal, State, or *local law enforcement official for a violation of any law relating to controlled substances*, if the official (or another official)--
>
> > (1) *has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States*,
> >
> > (2) expeditiously informs an appropriate officer or employee of the Service authorized and designated by the Attorney General of the arrest and of facts concerning the status of the alien, and
> >
> > (3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien,
>
> the officer or employee of the Service shall promptly determine whether or not to issue such a detainer. If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.

8 U.S.C. § 1357(d)(emphasis added).

The phrase "reason to believe" in § 1357(d)(1) has been construed to require probable cause. United States v. Quintana, 623 F.3d 1237, 1239 (8th Cir. 2010)(citing cases).

Therefore, in order to issue a detainer pursuant to § 1357, there must be probable cause to believe that the subject of the detainer is (1) an "alien" who (2) "may not have been lawfully admitted to the United States" or (3) "otherwise is not lawfully present in the United States". 8 U.S.C. § 1357(d)(1) (emphasis added).

Because it is clear that Mr. Galarza was arrested for allegedly violating Pennsylvania's controlled-substance laws, the key inquiry with respect to the assertion of qualified immunity by Detective Correa and Officer Szalczyk is whether the information possessed by Detective Correa and Officer Szalczyk provided probable cause to believe that Mr. Galarza was (1) an "alien" who (2) "may not have been lawfully admitted to the United States" or (3) "otherwise is not lawfully present in the United States", 8 U.S.C. § 1357(d)(1). See Couden, 446 F.3d at 492; 8 U.S.C. § 1357.

The facts and circumstances, as alleged in the Amended Complaint and relevant to the question of probable cause, are as follows. The contractor who was supervising the construction site where Mr. Galarza was working on Thursday, November 28, 2008 was selling cocaine at the site. At approximately 2:30 p.m., the

contractor -- Juan Santilme -- sold cocaine to Detective Correa, who was working under cover. Mr. Santilme, Luis Aponte-Maldonado, Juan Cruz, and plaintiff Ernesto Galarza were arrested for allegedly conspiring to distribute cocaine in violation of Pennsylvania law.[70]

All four arrestees are Hispanic. Mr. Cruz is a citizen of Honduras. Mr. Santilme is a citizen of the Dominican Republic. Mr. Aponte-Maldonado is also a citizen of the Dominican Republic, but after his arrest he told Detective Correa that he was a United States citizen born in Puerto Rico. Plaintiff is a Hispanic man of Puerto Rican heritage who was born in Perth Amboy, New Jersey and is a natural-born United States Citizen. Plaintiff speaks English and Spanish.[71]

The fact that Mr. Galarza is Hispanic and was working at a construction site with three other Hispanic men -- two of whom are citizens of foreign countries and another who claimed to have been born in Puerto Rico but is a citizen of the Dominican Republic -- does not amount to probable cause to believe that Mr. Galarza is an alien not lawfully present in the United States.

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[70] Amended Complaint at ¶¶ 28-31.

[71] Id. at ¶¶ 25-27, 32-36. In his reply brief, Officer Szalczyk treats plaintiff's averment that Detective Correa's "gave the ICE agent to whom she spoke *reason to believe* that she suspected all four arrestees of being foreign nationals" as the equivalent of an admission by plaintiff that Officer Szalczyk had probable cause to support the immigration detainer. (Szalczyk Reply Brief at page 2 (quoting Amended Complaint at ¶ 51).) That interpretation offered by Officer Szalczyk would be both inconsistent with the facts pled and claims asserted by plaintiff, and a legal conclusion, which I am not required to treat as true for purposes of a motion to dismiss.

Moreover, the additional facts available to Detective Correa and Officer Szalczyk provide no further assistance. I recognize that false identity documents can be obtained and that none of the documents in Mr. Galarza's possession alone or together definitively establish United States citizenship.

However, Mr. Galarza's possession of his driver's license, Social Security card, debit card, and health insurance card[72] suggest United States citizenship at least as strongly as they suggest foreign citizenship. Therefore, upon the facts plead in the Amended Complaint, I conclude that Detective Correa and Officer Szalczyk lacked probable cause to support the issuance of an immigration detainer pursuant to 8 U.S.C. § 1357.

Qualified Immunity -- Officer Szalczyk and Detective Correa

Plaintiff contends that Officer Szalczyk is not entitled to qualified immunity because "[n]o reasonable officer would have believed it lawful to cause Mr. Galarza's detention by issuing a detainer without probable cause."[73] Similarly, plaintiff contends that Detective Correa is not entitled to qualified immunity because her alleged conduct violated plaintiff's "clearly established right[] not to be detained without probable cause".[74]

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[72] Amended Complaint at ¶ 39.

[73] Memorandum Opposing Szalczyk at page 22.

[74] Memorandum Opposing Allentown and Correa at page 14.

The United States Supreme Court has "repeatedly told courts...not to define clearly established law at a high level of generality." Ashcroft v. al-Kidd, ___ U.S. ___, ___, 131 S.Ct. 2074, 2084, 179 L.Ed.2d 1149, 1159-1160 (U.S. 2011). The Court specifically noted that "[t]he general proposition, for example, that an unreasonable search and seizure violates the *Fourth Amendment* is of little help in determining whether the violative nature of particular conduct is clearly established." Id. 131 S.Ct. at 2084, 179 L.Ed.2d at 1160 (italics in original).

Here, plaintiff's assertion that detaining Mr. Galarza pursuant to an immigration detainer without probable cause is constitutionally unsound -- which none of the defendants dispute -- provides little more guidance than the proposition used by the United States Supreme Court in the above example.

A precedential decision directly on point is not required for the contours of a right to be "sufficiently clear that *every reasonable official* would have understood that what he [was] doing violat[ed] that right." al-Kidd, ___ U.S. at ___, 131 S.Ct. at 2083, 179 L.Ed.2d at 1159 (quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)(internal quotations omitted))(emphasis added).

Nonetheless, "existing precedent must have placed the statutory or constitutional question beyond doubt." Id. (citing Anderson, supra; Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct.

1092, 89 L. Ed. 2d 271 (1986)). Qualified immunity provides government officials "breathing room to make reasonable but mistaken judgments about open legal questions" and when "properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" al-Kidd, ___ U.S. at ___, 131 S.Ct. at 2083, 179 L.Ed.2d at 1159 (quoting Malley, 475 U.S. at 341, 106 S.Ct. at 1096, 89 L.Ed.2d at 279).

Accordingly, unless "every reasonable official would have understood" that the information possessed by Detective Correa and Officer Szalczyk, viewed in the totality of the circumstances, did not provide probable cause[75] to believe Mr. Galarza was (1) an "alien" who (2) "may not have been lawfully admitted to the United States" or (3) "otherwise is not lawfully present in the United States", 8 U.S.C. § 1357(d)(1), then Detective Correa and Officer Szalczyk are entitled to qualified immunity. See al-Kidd, ___ U.S. at ___, 131 S.Ct. at 2083, 179 L.Ed.2d at 1159.

As noted above, I conclude that the facts plead in the Amended Complaint did not provide probable cause to believe that plaintiff was an alien properly subject to a detainer under

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[75] "Probable cause exists where the facts and circumstances within [an officer's] knowledge and of which [he] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that", Safford Unified School District No. 1 v. Redding, 557 U.S. 364, ___, 129 S.Ct. 2633, 2639, 174 L.Ed.2d 354, 361 (2009) (alterations in original and internal quotations omitted), Mr. Galarza was (1) an "alien" who (2) "may not have been lawfully admitted to the United States" or (3) "otherwise is not lawfully present in the United States". 8 U.S.C. § 1357(d)(1).

§ 1357. Moreover, I cannot conclude based upon these facts that a reasonable officer would have concluded that probable cause existed. Therefore, I deny Detective Correa and Officer Szalczyk's assertion of qualified immunity as grounds for dismissal of plaintiff's Fourth Amendment claims without prejudice for Detective Correa and Officer Szalczyk to raise the defense of qualified immunity after the record is developed during discovery.

Equal Protection -- Detective Correa and Officer Szalczyk

The Amended Complaint alleges that Detective Correa and Officer Szalczyk violated plaintiff's Federal constitutional right to equal protection of law pursuant to the Fifth and Fourteenth Amendments to the United States Constitution.[76]

Racial profiling, or selective enforcement of the law, is a violation of the Equal Protection Clause. Sow v. Fortville Police Deptartment, 636 F.3d 293, 303 (7th Cir. 2011). In order to state an equal protection claim "in the racial profiling context", a plaintiff must allege and provide sufficient factual averments to support a reasonable inference that the challenged conduct or action (1) had a "discriminatory effect", and (2) was motivated by a discriminatory purpose" Carrasca v. Pomeroy, 313 F.3d 828, 834 (3d Cir. 2002)(citing Bradley v. United States, 299 F.3d 197, 205 (3d Cir. 2002)).

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[76] See Amended Complaint, Counts I and V.

To establish discriminatory effect, a plaintiff must allege and provide factual averments supporting a reasonable inference that he is a member of a protected class and "similarly situated" persons in an unprotected class were treated differently. Bradley, 299 F.3d at 206.

The parties do not dispute that Mr. Galarza, who is Hispanic, is a member of a constitutionally protected class. Thus, with respect to the first element of his equal protection claims against Detective Correa and Officer Szalczyk, the key question is whether Mr. Galarza has sufficiently pled that similarly situated persons outside of the protected class were treated differently. See id.

Plaintiff is not required to identify in the Complaint specific instances where others have been treated differently. Phillips v. County of Allegheny, 515 F.3d 224, 245 (3d Cir. 2008). Rather, a general allegation that plaintiff has been treated differently from others similarly situated will suffice. Id. at 244.

Here, plaintiff avers that "[Detective] Correa does not report to ICE about Caucausians arrested with other people whom she believes to be foreign nationals".[77] Moreover, plaintiff avers that "[h]ad [Officer] Szalczyk known or believed [Mr. Galarza] to be Caucasian, [Officer] Szalczyk would not have issued

[77] Amended Complaint at ¶ 53.

the immigration detainer [against Mr. Galarza] without at least checking the available identifying information" to assess Mr. Galarza's citizenship.[78]

In short, taking these factual averments as true, plaintiff's Amended Complaint supports a reasonable inference that Detective Correa and Officer Szalczyk would have treated plaintiff differently if plaintiff were not Hispanic. Therefore, I conclude that the first element of plaintiff's equal protection claim is satisfied as to Detective Correa and Officer Szalczyk.

Next, I must determine whether plaintiff has sufficiently pled that Detective Correa and Officer Szalczyk acted with a discriminatory purpose. See Carrasca, 313 F.3d at 834 (citing Bradley, 299 F.3d at 205).

The United State Supreme Court has stated that a plaintiff asserting an equal protection claim "must plead...that the defendant acted with a discriminatory purpose." Iqbal, 556 U.S. at ___, 129 S.Ct. at 1948, 173 L.Ed.2d at 883. The Supreme Court went on to explain that in order to state an equal protection claim "based upon a violation of a clearly established right", a plaintiff must plead sufficient factual matter to permit a reasonable inference that the government-official defendant acted "for the purpose of discriminating on account of

[78] Amended Complaint at ¶ 63.

race", ethnicity or national origin. Iqbal, 556 U.S. at ___, 129 S.Ct. at 1949, 173 L.Ed.2d at 889.

Here, plaintiff alleges that Detective Correa "knew...that plaintiff was a [United States] citizen"[79] when she called ICE and informed either Officer Szalczyk or Officer Marino that Mr. Galarza was arrested with three other Hispanic men and "gave the ICE agent to whom she spoke reason to believe that she suspected all four arrestees [-- including plaintiff --] of being foreign nationals or of having given false information about their identities."[80]

Plaintiff avers that Detective Correa reported plaintiff to ICE as someone she suspected of being a foreign national "even though she knew...that Plaintiff was a U.S. citizen".[81]

Plaintiff does not go so far as to allege that Officer Szalczyk knew that plaintiff was a United States citizen. Rather, plaintiff avers that Officer Szalczyk had information in his possession (plaintiff's correct name, date and place of birth, ethnicity and social security number) which would have

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79 Amended Complaint at ¶ 38.

80 Id. at ¶ 51.

81 Id. at ¶ 51.

permitted Officer Szalczyk to verify plaintiff's United States citizenship before issuing the immigration detainer.[82]

Plaintiff further avers that Officer Szalczyk made a decision not to utilize this information to verify plaintiff's citizenship because plaintiff has "a Hispanic name" and "was arrested in the company of three other Hispanic men who did not appear to be citizens."[83] In short, plaintiff avers that Officer Szalczyk "took his actions in issuing an immigration detainer...and stating that plaintiff was from the Dominican Republic...and in failing to verify" plaintiff's citizenship because of plaintiff's Hispanic ethnicity.[84]

Based on these averments concerning Detective Correa and Officer Szalczyk, and drawing all reasonable inferences in plaintiff's favor, as I am required to do, I conclude that plaintiff's Amended Complaint supports a reasonable inference that (1) Detective Correa acted with a discriminatory purpose when she telephoned ICE and reported plaintiff to Officer Marino or Officer Szalczyk, and (2) Officer Szalczyk acted with a discriminatory purpose in deciding not to verify plaintiff's citizenship based up the information provided Detective Correa

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82 Amended Complaint at ¶¶ 50, 57-58.

83 Id. at ¶ 58.

84 Id. at ¶ 63.

and issuing an immigration detainer against plaintiff "because of Plaintiff's ethnicity".[85]

Furthermore, to the extent that Detective Correa and Officer Szalczyk seek to dismiss plaintiff's equal protection claims against each of them on the grounds of qualified immunity, I deny those motions because it would be clear to a reasonable officer that such allegedly-intentional racially-discriminatory conduct was unlawful. See Couden, 446 F.3d at 492.

Procedural Due Process -- Officer Szalczyk

Plaintiff's Amended Complaint alleges that Officer Szalczyk violated plaintiff's right to procedural due process.[86] Specifically, Mr. Galarza alleges that by issuing the immigration detainer against him, Officer Szalczyk deprived him of his liberty without constitutionally-sufficient notice and an opportunity to be heard.

The procedural aspect of the Due Process Clause guarantees the availability of certain procedural mechanisms, typically the right to notice and a hearing, before a government actor can deprive an individual of a liberty or property interest. Rogers v. United States, 696 F.Supp.2d 472, 500 (W.D.Pa. 2010). In order to establish a procedural due process violation, a plaintiff must demonstrate that he has been deprived

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[85] Amended Complaint at ¶ 63.

[86] Id., Counts III and VI.

of a constitutionally-protected property or liberty interest. Daniels v. Williams, 474 U.S. 327, 339, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

Here, as discussed above, the Amended Complaint alleges that the immigration detainer issued by Officer Szalczyk prevented plaintiff's release. Thus, the immigration detainer deprived plaintiff of his liberty.

However, I will dismiss plaintiff's procedural due process claim against Officer Szalczyk based upon qualified immunity.

The regulation promulgated by the United States Department of Homeland Security governing the temporary detention of aliens at the Department's request provides as follows:

> Upon 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(d).

Because the Department's regulation expressly provides that an alien subject to an immigration detainer shall be held for "a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays", I conclude that even if the period of detention specified by the regulation were found to be unconstitutional, it would not be clear to every reasonable

officer that the detention for a period expressly provided by federal regulation was unlawful. Therefore, Officer Szalczyk is entitled to qualified immunity from plaintiff's procedural due process claim against him.

Municipal Liability

Because municipalities are not subject to respondeat superior liability, municipal liability "must be founded upon evidence that the government unit itself supported a violation of constitutional rights." Bielevicz v. Dubinon, 915 F.2d 845, 850 (3d Cir. 1990).

Accordingly, in a civil rights action against a municipality pursuant to § 1983, "the municipality can only be liable when the alleged constitutional transgression *implements or executes* a policy, regulation, or decision officially adopted by the governing body or informally adopted by custom." Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996)(citing Monell v. City of New York Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)).

The municipal policy or custom must be the "moving force" behind the constitutional violation such that there is a direct link between the municipal policy or custom and the deprivation of constitutional rights. Sullivan v. Warminster Township, 765 F.Supp.2d 687, 703 (E.D.Pa. 2011)(Surrick,J.) (quoting Board of County Commissioners of Bryan County, Oklahoma

v. Brown, 520 U.S. 397, 404, 117 S.Ct. 1382, 1388, 137 L.Ed.2d 626, 639 (1997). In short, where a municipality's unconstitutional policy or custom is the moving force behind a violation of a plaintiff's rights, the municipality can be held liable for the violation pursuant to § 1983 and Monell.

Here, neither of the policies identified in plaintiff's Amended Complaint is unconstitutional. Indeed, both are consistent with federal statutes and regulations.

Lehigh County

The only policy or custom which plaintiff attributes to defendant Lehigh County is the policy of detaining any person being held in Lehigh County Prison who is named in an immigration detainer.[87] This policy is consistent with the regulations promulgated by the United States Department of Homeland Security governing immigration detainers.

Homeland Security regulations provide:

> (a) Detainers in general. Detainers are issued pursuant to sections 236 and 287 of the Act and this chapter 1. Any 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 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

[87] See Amended Complaint at ¶¶ 71, 90-91; Plaintiff's Memorandum Opposing Motion of Lehigh County at pages 2, 12.

> order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible....
>
> (d) Temporary detention at Department request. Upon 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(a) and (d).

Thus, although an immigration detainer "serves to advise another law enforcement agency that the Department seeks custody" and "is a request" to the federal, state, or local law enforcement agency presently holding the individual named in the detainer that it "advise the Department, prior to release" of that individual, id. § 287.7(a), once the immigration detainer is issued, the local, state, or federal agency then holding the individual "shall" maintain custody. Id. § 287.7(d). Moreover, although the period of time that the agency with custody when the immigration detainer is issued is required to hold the individual is 48 hours, those 48 hours excludes Saturdays, Sundays, and holidays. Therefore, I grant Lehigh County's motion and dismiss plaintiff's procedural due process claim against it.

Plaintiff does not allege that it is Lehigh County's policy to detain persons named in immigration detainers without probable casue. Plaintiff does not allege that it is Lehigh

County's policy to detain only persons of a certain race or ethnicity who are named in an immigration detainer. Plaintiff does not allege that it is Lehigh County's policy to detain persons named in immigration detainers for longer periods of time than permitted by federal DHS regulations. For these reasons, I grant Lehigh County's motion and dismiss plaintiff's Fourth Amendment, equal protection, and procedural due process claims against the County.

In any event, Lehigh County did not maintain custody of plaintiff for more than the 48 hours it was required to do so. Pursuant to the Department of Homeland Security Regulation 287.7(d), quoted above, because ICE isued a detainer for plaintiff, the Lehigh County Prison (a "criminal justice agency") was required to maintain custody of him after he was "not otherwise detained by a criminal justice agency" for a period not to exceed 48 hours, excluding Saturdays and Sundays, in order to permit assumption of his custody by the Department of Homeland Security.

Plaintiff was incarcerated on the state drug charge at approximately 8:00 p.m. on Thursday, November 20, 2008. Bail was set in the amount of $15,000 at 10:15 p.m. on Thursday night. Bail was posted on plaintiff's behalf the next day, Friday, November 21. (The time when bail was posted does not appear in the Amended Complaint.) Plaintiff's immigration detainer was

lifted by ICE at 2:05 p.m. Monday, November 24, and he was released from Lehigh County Prison on Monday at 8:28 p.m.[88]

Plaintiff became a person "not otherwise detained by a criminal justice agency" when his bail was posted. Theoretically, that could have occurred anytime during the 24 hour period from the beginning of Friday at midnight until the beginning of Saturday at midnight. Assuming plaintiff's bail was posted at the earliest moment on Friday (one minute after midnight or 12:01 a.m. Friday), the prison was required to hold him in custody until the end of Monday, November 24 (11:59 p.m. Monday, or one minute before midnight Tuesday. In other words, the prison was required to hold plaintiff for 24 hours Friday plus 24 hours Monday, which equals the 48 hours total (Saturdays and Sundays are excluded) to give ICE the opportunity to take him into their custody.

When ICE lifted its detainer at 2:05 p.m. Monday, 38 hours of the 48 hour period had expired (24 hours on Friday plus 14 hours on Monday) under my example. When plaintiff was actually released from prison at 8:28 p.m. on Monday, 44 ½ hours of the 48 hour period had expired (24 hours on Friday plus 20 ½ hours on Monday). Either way, plaintiff was released before the expiration of the 48 hour period that the prison was required to hold him to give ICE an opportunity to pick him up.

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[88] Amended Complaint at ¶¶ 40-41, 59-60, 67-70 and 82-83.

City of Allentown

Concerning the City of Allentown, plaintiff avers that it is the policy of the City for the Allentown Police Department and its officers to "actively work with ICE to identify criminal aliens who have committed criminal offenses within the City of Allentown and to take appropriate steps for deportation where warranted",[89] and that the City of Allentown's "practice of aggressive pursuit of criminal alien detention...led to Plaintiff's imprisonment on a false immigration detainer."[90]

As the City notes in its memorandum in support of its motion to dismiss, its policy of active cooperation with ICE is authorized by various federal statutory provisions.[91] Most notably, 8 U.S.C § 1103(c) expressly permits cooperative agreements between federal immigration officials and State and local law enforcement agencies "for the purpose of assisting in the enforcement of the immigration laws."

Plaintiff seeks to hold defendant City of Allentown liable for the alleged deprivation of his Fourth Amendment and equal protection rights. However, the policy upon which he seeks to establish municipal liability is not itself discriminatory. Like Lehigh County's policy of enforcing all immigration

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[89] Amended Complaint at ¶ 13, Exhibit .

[90] Id. at ¶ 21.

[91] Memorandum of Allentown and Correa at page 19 (citing 8 U.S.C. §§ 1324(c), 1357(g), 1103(c), and § 1252c).

detainers regardless of the race of the individual named in the detainer, the policy that plaintiff attributes to the City is one of consistent, active cooperation to identify aliens who may be subject to detention and removal.

In other words, the Amended Complaint does not allege that the City's policy of cooperation applies only to suspected aliens who are Hispanic. Moreover, plaintiff does not allege that it is the City's policy for APD officers to fabricate information and report it to ICE in order to cause the issuance of immigration detainers.

Plaintiff also seeks to establish municipal liability against the City based on the City's alleged failure to train its police officers. Specifically, plaintiff avers that despite the "regular collaboration between [APD] officers and ICE, the City of Allentown has never supplied any training or arranged for its officers to receive training from any other source, about investigating immigration status, when to provide information to ICE, or what information to provide."[92]

The United States Court of Appeals for the Third Circuit has stated that "[e]stablishing municipal liability on a failure to train claim under § 1983 is difficult." Reitz v. County of Bucks, 125 F.3d 139, 145 (3d Cir.1997). Generally, deficient training can only amount to the requisite deliberate

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[92] Amended Complaint at ¶ 13.

indifference "where the failure to train has caused a pattern of violations." Berg v. County of Allegheny, 219 F.3d 261, 276 (3d Cir. 2000). Here, plaintiff has not pled facts alleging a pattern of violations, but instead seeks to proceed on a single-violation failure-to-train claim.

Absent a pattern of violaitions, the plaintiff must allege sufficient facts that the case at bar falls within that "narrow range of circumstances" in which "a violation of federal rights may be a *highly predictable* consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations." Montgomery v. De Simone, 159 F.3d 120, 127 (3d Cir. 1998).

Accordingly, plaintiff must demonstrate that in light of the duties assigned to the officers, "the need for more or different training is so obvious, and the inadequacy [of the officers' training is] so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." Sullivan, 765 F.Supp.2d at 703-704 (quoting City of Canton, Ohio v. Harris, 489 U.S. 378, 396, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

Here, the alleged policy pursuant to which APD officers alert ICE to individuals who may be aliens subject to detention and removal so that ICE is aware of the individual and, thus, can

determine whether or not to issue a detainer, does not make the need for more or different training "so obvious" that the policy can be said to constitute the City's deliberate indifference to the Fourth Amendment and equal protection rights of Mr. Galarza. Accordingly, I grant the City's motion and dismiss plaintiff's Fourth Amendment and equal protection claims against the City.

CONCLUSION

For the reasons expressed above, Defendant Mark Szalczyk's Motion to Dismiss the Amended Complaint is granted in part. Plaintiff's procedural due process claim against defendant Mark Szalczyk is dismissed from the First Amended Complaint. However, Defendant Mark Szalczyk's Motion to Dismiss the Amended Complaint is denied to the extent that it seeks to dismiss plaintiff's Fourth Amendment and equal protection claims against defendant Mark Szalczyk.

Additionally, Defendant Gregory Marino's Motion to Dismiss the Amended Complaint is granted, and plaintiff's claims against defendant Gregory Marino are dismissed from the First Amended Complaint.

Next, Defendants, City of Allentown and Christie Correa's Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Fed.R.Civ.P. 12(b)(6) is granted in part. Plaintiff's procedural due process claim against defendant Christie Correa and all claims against defendant City of Allentown are dismissed

from the First Amended Complaint. However, the Allentown/Correa Motion is denied to the extent that it seeks to dismiss plaintiff's Fourth Amendment and equal protection claims against defendant Christie Correa.

Finally, Defendant Lehigh County's Motion to Dismiss the First Amended Complaint Under F.R.C.P. 12(b)(6) is granted, and plaintiff's claims against Lehigh County are dismissed from the First Amended Complaint.