NO. 15-_____

In the Supreme Court of the United States

RICHARD RYNEARSON,

Petitioner,

v.

AGENT LANDS, BORDER PATROL AGENT, INDIVIDUALLY, AND RAUL PEREZ, BORDER PATROL AGENT, INDIVIDUALLY.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Ruthanne M. Deutsch
Washington, DC

J. Carl Cecere
Counsel of Record
CECERE PC
6035 McCommas Blvd.
Dallas, TX 75206
(469) 600-9455
ccecere@cecerepc.com

QUESTION PRESENTED

In *United States v. Martinez-Fuerte*, this Court held that the Fourth Amendment permits the United States Border Patrol to maintain fixed checkpoints along roadways within 100 miles from the national border, where all travelers are seized even without individualized suspicion that they entered the country illegally or are otherwise engaged in criminal activity. 428 U.S. 543 (1976). Such blanket intrusion on travelers' liberty, this Court emphasized, is justified only by the stringent "limitations on the scope" of the permissible inquiry, allowing no more than "a brief question or two" regarding the traveler's citizenship "and possibly the production of a document evidencing a right to be in the United States." *Id*. at 558, 567.

Petitioner was detained at an internal immigration checkpoint for 23 minutes after he affirmed his citizenship and offered two valid U.S. passports, during which time the agents spent nearly 15 minutes on multiple phone calls reporting the encounter to his employer. The Fifth Circuit held that this extended detention was permissible without any reasonable suspicion that Petitioner was involved in criminal activity.

The question presented is:

Whether border patrol agents have fair warning that, in the absence of reasonable suspicion of criminal activity, the Fourth Amendment prohibits unrelated inquiries that measurably extend the duration of an internal immigration checkpoint detention beyond the few minutes a reasonably diligent agent would need for an immigration inquiry.

TABLE OF CONTENTS

QUESTION PRESENTED i
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 2
A. Factual Background 4
B. Procedural History 7
REASONS FOR GRANTING CERTIORARI 11
I. THE COURT SHOULD REVIEW THE FIFTH CIRCUIT'S RULE THAT A REASONABLE OFFICER COULD BELIEVE THE CONSTITUTION ALLOWS EXTENSION OF AN IMMIGRATION DETENTION FOR UNRELATED INVESTIGATION WITHOUT SUSPICION OF CRIMINAL WRONGDOING. 14
A. The Fifth Circuit's Decision Disregards Fundamental Limitations Imposed By This Court That Are Applicable To Immigration Checkpoint Detentions. 14
B. The Fifth Circuit's Rule Permitting Extended Detentions To Pursue Unrelated Inquiries If A Detainee's Behavior Is "Unorthodox" Creates A Multi-Layered Circuit Conflict. 21
1. *The Fifth Circuit rule permitting extended detentions for unrelated inquiries without individualized*

suspicion diverges from Ninth and Tenth Circuit law. 21

2. *The Fifth Circuit split from other circuits by holding that no clearly established law prohibits officers from prolonging a detention based on detainee conduct that did not contribute to the complained-of delay.* 27

C. The Proper Scope Of An Immigration Checkpoint Seizure Is An Exceptionally Important Question. 31

II. AT A MINIMUM, THIS CASE SHOULD BE REMANDED FOR FURTHER CONSIDERATION IN LIGHT OF LAST TERM'S DECISION IN *RODRIGUEZ*. 35

CONCLUSION 39

APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit (February 26, 2015) 1a

Opinion and Order of the United States District Court for the Western District of Texas (September 30, 2013)............................ 19a

Report and Recommendation of the Magistrate Judge for the United States District Court for the Western District of Texas (June 27, 2013) 50a

Order of the United States Court of Appeals for the Fifth Circuit Denying Petition for Rehearing En Banc (May 4, 2015).................. 90a

Plaintiff's Fact Appendix (Excerpt) (October 15, 2012) 92a

TABLE OF AUTHORITIES

<u>CASES</u>:

Arizona v. Johnson,
555 U.S. 323 (2009) 17

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,
403 U.S. 388 (1971) 7

City of Indianapolis v. Edmond,
531 U.S. 32 (2000) ....*passim*

Florida v. Royer,
460 U.S. 491 (1983) 16

Illinois v. Caballes,
543 U.S. 405 (2005) 16, 17

Illinois v. Lidster,
540 U.S. 419 (2004) 15

Karnes v. Skrutski,
62 F.3d 485 (3d Cir. 1995) 29, 30

Lawrence v. Chater,
516 U.S. 163 (1996) (per curiam).................. 36, 37

Liberal v. Estrada,
632 F.3d 1064 (9th Cir. 2011) 28, 29

Mich. Dep't of State Police v. Sitz,
496 U.S. 444 (1990) 15

Muehler v. Mena,
544 U.S. 93 (2005) 17

New York v. White,
796 N.Y.S.2d 902 (N.Y. Sup. Ct. 2005)................ 32

Pearson v. Callahan,
555 U.S. 223 (2009) 8

Rodriguez v. United States,
135 S. Ct. 1609 (2015) ....*passim*

Scott v. Harris,
550 U.S. 372 (2007) 4

Seymour v. City of Des Moines,
519 F.3d 790 (8th Cir. 2008) 30

Terry v. Ohio,
392 U.S. 1 (1968) 3, 16

Tolan v. Cotton,
134 S. Ct. 1861 (2014) (per curiam)..................... 15

United States v. Brignoni-Ponce,
422 U.S. 873 (1975) 3, 16

United States v. Ellis,
330 F.3d 677 (5th Cir. 2003) 37

United States v. Jennings,
468 F.2d 111 (9th Cir. 1972) 29

United States v. Machuca-Barrera,
261 F.3d 425 (5th Cir. 2001) 18, 22, 24

United States v. Martinez-Fuerte,
428 U.S. 543 (1976) ....*passim*

United States v. Massie,
65 F.3d 843 (10th Cir. 1995) 22, 23, 25

United States v. Portillo-Aguirre,
311 F.3d 647 (5th Cir. 2002) 18, 25

United States v. Sharpe,
470 U.S. 675 (1985) 19

United States v. Taylor,
934 F.2d 218 (9th Cir. 1991) 22, 23, 25

Wilson v. Lane,
526 U.S. 603 (1999) 30

CONSTITUTION AND STATUTES:

U.S. CONST., Amend. IV .... *passim*

28 U.S.C.
§ 1254(1) 2

RULES:

Fed. R. App. P. 28(j)... 36

OTHER AUTHORITIES:

Am. Civil Liberties Union of Ariz., Complaint
and Request for Investigation (Jan. 15,
2014) 33

Am. Civil Liberties Union of N.M., Guilty Until Proven Innocent: Living In New Mexico's 100-Mile Zone (May 2015) 33

Gov't Accountability Office, Report No. 05-435 (July 2005) 2, 32

Gov't Accountability Office, Report No. 09-824 (Aug. 2009) 32, 33

In the
Supreme Court of the United States

NO. 15-_____

RICHARD RYNEARSON,
Petitioner,

v.

AGENT LANDS, BORDER PATROL AGENT, INDIVIDUALLY, AND RAUL PEREZ, BORDER PATROL AGENT, INDIVIDUALLY.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Rynearson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-18a) is unpublished, but reported at 601 F. App'x 302. The district court's opinion (App. 19a-49a) and magistrate judge's opinion (App. 50a-89a) are unpublished.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on February 26, 2015. Petitioner timely filed a petition for rehearing en banc, which was denied on May 4, 2015.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

In addition to checkpoints located at official ports of entry into the United States, the United States Border Patrol operates a network of fixed traffic checkpoints in the nation's interior along major roads up to 100 miles from the border. *United States v. Martinez-Fuerte*, 428 U.S. 543, 553 (1976); *See* Gov't Accountability Office, Report No. 05-435, at 1-2 (July 2005). At these checkpoints, Border Patrol agents stop, seize, and interrogate each traveler, without individualized suspicion that any traveler entered the country illegally or is otherwise involved in criminal activity. *See Martinez-Fuerte*, 428 U.S. at 545-47, 549-50.

The Fourth Amendment's protection from "unreasonable searches and seizures," U.S. Const., Amend. 4, normally makes any such "seizure *** unreasonable" in the "absence of individualized suspicion of wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). In *Martinez-Fuerte*, this Court nevertheless upheld this system of internal immigration checkpoints because of the unique problem of "[i]nterdicting the flow of illegal entrants," 428 U.S. at 552, emphasizing that this blanket intrusion on all travelers' liberty is justified only because the "intrusion on Fourth Amendment interests" is "quite limited," *id*. at 557. Because the "sole purpose" of the detention is for "conducting a routine and limited inquiry into residence status," *id*. at 560, the detention should "usually consume[] no more than a minute," *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975) (describing identical parameters for roving stops), or perhaps up to five minutes for travelers referred to a secondary inspection area, *Martinez-Fuerte*, 428 U.S. at 547. The seizure should extend long enough only for a "brief question or two and possibly the production of a document evidencing a right to be in the United States." *Id*. at 558.

These "appropriate limitations on the scope" of immigration checkpoint detentions are crucial for their constitutionality. *Id*. at 567. Detentions short of arrest must not "exceed[] the time needed to handle the matter for which the stop was made." *Rodriguez v. United States*, 135 S. Ct. 1609, 1612 (2015). This principle, derived from *Terry v. Ohio*, 392 U.S. 1 (1968), applies to all non-arrest detentions, but is even more vital in the context of

immigration checkpoint detentions, already an intrusive exception to the foundational Fourth Amendment rule that government officials may not detain people that are not suspected of having committed any crime. *Edmond*, 531 U.S. at 37.

Border patrol agents have thus known for decades that these strict confines on the scope of suspicionless immigration detentions are the constitutional bedrock upon which the entire system of interior checkpoints is built. Yet the Fifth Circuit jettisoned those limits in this case, creating fundamental conflicts among the courts of appeals. First, the Fifth Circuit, unlike other circuits, allows agents to extend the duration of the detention beyond the few minutes necessary for the immigration inquiry to permit investigation of unrelated matters. Second, the Fifth Circuit's justification for permitting that extended detention—conduct of the detainee that did not contribute to the relevant delay—has been rejected under clearly established law in other circuits. This Court's review is needed to harmonize the law governing these suspicionless detentions, and to ensure that vital Fourth Amendment rights are respected during these routine intrusions on all travelers' liberty.

A. Factual Background

Because the district court dismissed Rynearson's claim on summary judgment prior to Respondents' answer or any discovery, what follows is "the plaintiff's version of the facts." *Scott v. Harris*, 550 U.S. 372, 378 (2007).

1. Petitioner Richard Rynearson is an officer in the United States Air Force who was once stationed

at Laughlin Air Force Base, near Del Rio, Texas. App. 2a, 93a. In March 2010, while traveling between Del Rio and San Antonio—a route that crosses no international border—Rynearson was detained for 34 minutes at the Border Patrol's interior checkpoint near Uvalde, Texas. *Id.* at 2a, 4a.

2. When Rynearson first arrived at the checkpoint, Agent Lands asked him whether he owned the car he was driving, but asked nothing about his citizenship. *Id.* at 95a-96a. Lands then referred Rynearson to a secondary inspection area. Once there, as Agent Lands admitted in his declaration, the agent then requested—but "did not direct"—that Rynearson exit his car, and when Rynearson declined to do so, Agent Lands decided to complete the remainder of the investigation with Rynearson in his vehicle, R. 274. A second agent who would later appear on the scene, Agent Perez, never requested that Rynearson exit his vehicle. App. 103a-104a.

When Lands then asked Rynearson to display his identification, Rynearson placed his driver's license and military identification in the window where they could be read from outside the vehicle. *Id.* at 3a. Agent Lands never asked to physically inspect these documents. *Id.* at 97a. Once Rynearson had displayed the documents, he and Agent Lands engaged in a discussion during which Rynearson questioned Agent Land's authority to detain him for an extended period, but nonetheless answered every question posed to him, including questions about his military status and assigned base. *Id.* at 3a, 96a-103a. Although the car window

was rolled up or partially rolled up through much (but not all) of the detention, both Rynearson and Agent Lands could hear one another. *Id.*

3. It was several minutes into this sometimes heated discussion, and 11 minutes into the detention, before Lands informed Rynearson that the identification documents he had displayed "don't mean anything." *Id.* at 11a (Elrod, J., dissenting). That complaint caused Rynearson to offer, unprompted, his official and private passports for inspection. *Id.* at 12a.

Agent Lands ignored this offer, and instead, for the first time during the detention, asked Rynearson whether he was a U.S. citizen, to which Rynearson responded that he was. *Id.* But Rynearson was not permitted to leave, and Agent Lands still did not ask to see his passports. *Id.*

4. Almost 18 minutes into the detention, Agent Perez finally asked for Rynearson's passports, and Rynearson immediately surrendered them. *Id.* at 3a; *id.* at 12a (Elrod, J., dissenting). Agent Perez stated that he would review Rynearson's passports and Rynearson would be on his way. *Id.* at 104a. Instead of inspecting the passports, however, Agent Perez asked Rynearson several additional questions about his military assignment. Rynearson answered all of them but one: he declined to identify his commanding officer. *Id.* at 3a; *id.* at 12a (Elrod, J., dissenting). After considering Rynearson's objection, Agent Perez agreed that Rynearson did not have to answer that question and left with Rynearson's passports. *Id.* at 106a.

The parties dispute the precise sequence of events at this point, but viewed in the light most favorable to Rynearson, Agent Perez then examined the passports and determined that Rynearson was an American citizen. *Id.* at 106a; R. 266 (Perez declaration). Agent Perez then returned a few minutes later and asked Rynearson to again confirm his assigned base, which he did. App. 106a. Agent Perez then informed Rynearson that he planned to call Rynearson's assigned base and again left. *Id.* Agent Perez subsequently spent up to 15 minutes making calls to Laughlin Air Force Base, including a call to Rynearson's commander. *Id.* at 12a (Elrod, J., dissenting); R. 279, 358. Agent Perez made the calls to discuss Rynearson's military identity and to "inform[]" Rynearson's superiors of "the encounter." R. 279 (Perez declaration). After completing the phone calls—some 23 minutes after Rynearson offered his passports to Agent Lands—Agent Perez finally instructed Agent Lands to release Rynearson. App. 12a-13a (Elrod, J., dissenting).[1]

B. Procedural History

1. Rynearson brought Fourth Amendment claims against the agents under *Bivens v. Six Unknown Named Agents of Federal Bureau of*

---

[1] Rynearson recorded a video of the entire encounter, which is available in four parts at:

https://www.youtube.com/watch?v=4BId1f8WG2s;
https://www.youtube.com/watch?v=NqU9M9RyeZA;
https://www.youtube.com/watch?v=o8GDNFleCI8; and
https://www.youtube.com/watch?v=mZbCCBH7YM4.

Narcotics, 403 U.S. 388 (1971). The agents moved for summary judgment on their qualified immunity defense. Qualified immunity is not available if two conditions are met: "the facts *** alleged *** make out a violation of a constitutional right," and "the right at issue was 'clearly established' at the time of [the] alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Courts have discretion to decide the order in which to engage these questions. *Id.* at 236.

2. The district court granted the agents' summary judgment motion, determining that they enjoyed qualified immunity because Rynearson had not established a constitutional violation. App. 35a. With respect to the first part of the detention, the district court concluded that "Rynearson's own actions, and not the lack of diligence on the part of Agent Lands, was the sole reason for any delay in determining immigration status." *Id.* at 38a.

The district court separately addressed the nearly 15 minutes that Agent Perez expended with calls to the Air Force, during which Rynearson had no interaction with the agents. *Id.* at 40a-41a. It held that even this period did not unreasonably extend the detention, on the basis of its factual conclusion, *see supra* at 7, that Agent Perez made the phone calls before verifying Rynearson's citizenship from his passports, App. 41a. Following Fifth Circuit precedent, the district court held that a suspicionless immigration checkpoint detention can only be "impermissibly lengthen[ed]" by "continued questioning *after* the confirmation of citizenship" not questioning that occurred *before*. *Id.* (emphasis in

original) (citing *United States v. Valdez*, 267 F.3d 395, 398-99 (5th Cir. 2001)).

As an alternative basis for affirming the reasonableness of the detention, the district court determined that the agents developed "reasonable suspicion" justifying a *Terry* stop that Rynearson was involved in drug trafficking as a result of what it called Rynearson's "combative behavior." App. 38a-39a.

3. On appeal, the government disclaimed reasonable suspicion as justification for the detention, and the members of the Fifth Circuit panel unanimously agreed that the detention was not based on reasonable suspicion. *Id*. at 7a (noting that Agents Perez and Lands were exercising "a grant of authority" that was "readily distinguishable from the authority granted by *Terry*"); *see also id.* at 16a n.7 (Elrod, J., dissenting) (describing and accepting the government's concession at oral argument). A majority of the divided panel nevertheless affirmed.

a. The majority rejected Rynearson's arguments that the agents had detained him for an unreasonable time by "intentionally extending the duration of his detainment" and "calling his military base to inquire into his military status." *Id.* at 7a. The majority held that the detention's length was reasonable, because "the agents had difficulty determining how to respond to his unorthodox tactics," including his assertion of "his right against unlawful searches and seizures." *Id.* at 8a. The majority concluded that the agents "at worst, made reasonable but mistaken judgments when presented with an unusually uncooperative person." *Id*.

The majority also affirmed the district court's conclusion that even the second portion of the detention after Rynearson provided his passports—during which Agent Lands refused to consider them, Agent Perez made phone calls to Rynearson's base unrelated to citizenship, and Rynearson had little to no interaction with the agents—was similarly justified. *Id.* at 7a.[2]

b. Judge Elrod dissented. She noted that Rynearson "asserted his rights while also providing the documentation needed to prove his citizenship status," and stressed that he had produced identifying documents as early as two minutes into the detention. *Id.* at 10a-11a (Elrod, J., dissenting). Judge Elrod determined that, for their part, Agents Lands and Perez "did not expeditiously investigate Rynearson's citizenship status." *Id.* at 11a. "Agent Lands refused to examine [Rynearson's] passports, and Agent Perez, rather than simply scrutinizing the passports, asked Rynearson to identify his commanding officer and then made Rynearson wait while he placed phone calls to Rynearson's employer." *Id.* at 10a.

"Putting aside the dilatory nature of the stop as a whole," Judge Elrod concluded that "at a bare minimum, once Rynearson offered his passports to Agent Lands, any further detention other than the

---

[2] Because the majority recognized that the Border Patrol may not continue a detention after completing the citizenship inquiry, App. 6a, the majority (like the district court, *supra* at 8) also necessarily concluded that Perez made the phone calls to the Air Force before he examined Rynearson's passports.

couple of minutes required to authenticate the passports was unnecessary." *Id.* at 15a. Yet Rynearson was detained an additional 23 minutes while Agent Perez "wasted ten to fifteen minutes placing unnecessary phone calls." *Id.*

Responding to the majority's assertion that this added time was warranted by Rynearson's "unorthodox" tactics, Judge Elrod noted that "while he provided the information needed to prove his citizenship, Rynearson explained several times that he would not indulge the officers' commands when he thought that they exceeded the limited scope of the immigration checkpoint inquiry," and that "[s]tanding on one's rights is not an 'unorthodox tactic[].' It is a venerable American tradition." *Id.* at 11a (second alteration in original).

Finally, Judge Elrod noted that while evidence of the agents' "subjective intentions is not relevant to the qualified immunity defense," she could not "escape the impression that Agent Lands's refusal to look at the passports and Agent Perez's irrelevant phone calls to Rynearson's employer operated as retribution against Rynearson for asserting his rights." *Id.* at 15a & n.6.

c. The Fifth Circuit denied rehearing en banc.

REASONS FOR GRANTING CERTIORARI

The Fifth Circuit's decision upholds an immigration checkpoint detention lasting 34 minutes, which included more than 20 minutes after Rynearson offered two valid U.S. passports. It held this prolonged detention was justified because of Rynearson's "unorthodox tactics," including his

assertion of "his right against unlawful searches and seizures," App. 8a, regardless of whether that behavior contributed to the added time.

This petition challenges only this second, 23-minute, phase of the detention, which alone far exceeded the time needed for a question or two or the production of an immigration document, and was unrelated to any so-called "unorthodox tactics" by Rynearson.

The Fifth Circuit's decision that even this period was reasonable condones suspicionless immigration checkpoint detentions that are clearly prohibited by the Constitution and this Court's precedent. As this Court has made clear for decades, the Fourth Amendment permits a suspicionless seizure at an interior immigration checkpoint only if: the detention is "brief," *Martinez-Fuerte*, 428 U.S. at 558; the scope of the detention is "carefully tailored to its underlying justification" and not prolonged by "unrelated investigations," *Rodriguez,* 135 S. Ct. at 1614 (internal quotation marks omitted); and the agents pursue the detention's purpose diligently, *id.* at 1616.

The Fifth Circuit's law conflicts with all three of these mandates. It permits protracted detentions in lieu of the very brief inquiry this Court's cases permit, even when the additional time was spent on unrelated inquiries, and in the absence of any suspicion of criminal activity. Further, it excuses these excesses on the basis of the detainee's "unorthodox tactics" even though it is uncontroverted that Rynearson had nothing to do with the additional 23-minute delay.

In departing from this Court's clearly established law, the Fifth Circuit also dispenses with clear protections hewed to in the other circuits. The Ninth and Tenth Circuits demand that routine checkpoint detentions confine their scope to inquiries relevant to the agents' duties—*i.e.*, to investigate whether travelers are lawfully present in the country—and require *some* suspicion of criminal activity before permitting any extension of the detention. By permitting detentions to be extended without *any* suspicion of criminal wrongdoing—at least if the extension comes before the completion of the immigration inquiry—the Fifth Circuit departed from even these limited protections for checkpoint detainees.

The Fifth Circuit's justification for this extended detention for non-immigration inquiries opened yet another divide in circuit authority. By excusing the agents' obligation of reasonable diligence on the basis of the detainee's conduct, the Fifth Circuit created a conflict with three other circuits. Those courts hold that even if a detainee's conduct causes some part of the length of a detention, it is clearly established that further detention unrelated to the detainee's actions is unreasonable unless the officers demonstrate that the delay happened in spite of their reasonable diligence.

The appropriate scope of internal immigration checkpoint detentions presents a question of exceptional importance to the more than 100 million motorists facing increasingly intrusive inquiries at these checkpoints every year. This Court should grant certiorari to review the Fifth Circuit's

misguided rejection of fundamental principles regarding the scope of a permissible suspicionless detention, and to protect vital Fourth Amendment liberties.

At the least, this Court should grant, vacate, and remand this case for further consideration of *Rodriguez*, which reiterated long-standing limitations on seizures short of arrest, including that conducting an unrelated inquiry cannot "prolong[]—*i.e.*, add[] time to—the stop," regardless of whether it occurs "before or after" the completion of the purpose justifying the stop. *Id.* at 1616 (internal quotation marks omitted).

I. THE COURT SHOULD REVIEW THE FIFTH CIRCUIT'S RULE THAT A REASONABLE OFFICER COULD BELIEVE THE CONSTITUTION ALLOWS EXTENSION OF AN IMMIGRATION DETENTION FOR UNRELATED INVESTIGATION WITHOUT SUSPICION OF CRIMINAL WRONGDOING.

A. The Fifth Circuit's Decision Disregards Fundamental Limitations Imposed By This Court That Are Applicable To Immigration Checkpoint Detentions.

One may "rather doubt that the Framers of the Fourth Amendment would have considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing," *Edmond*, 531 U.S. at 56 (Thomas, J., dissenting). Even so, this Court has upheld such blanket suspicionless seizures in a small number of special circumstances, serving

acute and particular law enforcement needs, when those seizures operate within certain well-established "limitations on the scope of the stop" necessary to protect Fourth Amendment liberties. *Martinez-Fuerte*, 428 U.S. at 567. The Fifth Circuit breaks with this Court's precedent by disregarding three such limitations on the permissible scope of suspicionless detentions: brevity, purpose, and reasonable diligence.

First, this Court has approved suspicionless seizures only when they are strikingly brief. It approved the system of fixed immigration checkpoints at issue here only in light of the Border Patrol's assurance that the stops took no longer than 5 minutes. *Id.* In all other contexts in which the Court has approved suspicionless checkpoint seizures, the stops lasted mere seconds. *See Illinois v. Lidster*, 540 U.S. 419, 422 (2004) (10 to 15 seconds for checkpoints seeking witnesses to an earlier event); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 448 (1990) (25 seconds for sobriety checkpoints). This Court has thus instructed that permissible intrusions be measured objectively in seconds, or, at the outside, mere minutes, giving border patrol agents "fair warning" of these severely circumscribed time limits. *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curiam) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). The Fifth Circuit disregarded entirely the requirement to consider the overall brevity—or lack thereof—of the detention. Locating the precise limit of a "brief" detention may be hard, but it is clear that an already lengthy detention that is further extended by more than 20 minutes falls far wide of that mark.

Second, this Court has firmly tethered the permissible duration of all non-arrest detentions to their justifying purposes, limiting them to "the time needed to handle the matter for which the stop was made." *Rodriguez*, 135 S. Ct. at 1612. This principle, derived from *Terry*'s holding that a seizure based on less than probable cause must be "reasonably related in scope to the circumstances which justified the interference in the first place," 392 U.S. at 20, has been invoked in countless cases since, involving every kind of seizure short of arrest. *See, e.g.*, *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (seizure may not be "prolonged beyond the time reasonably required to complete [its] mission") (traffic stop); *Florida v. Royer*, 460 U.S. 491, 500 (1983) ("The scope of the detention must be carefully tailored to its underlying justification.") (investigative stop); *Brignoni-Ponce*, 422 U.S. at 881 ("As in *Terry*, the stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'") (quoting *Terry*, 392 U.S. at 29) (roving immigration stop). It applies with equal or greater force to immigration checkpoint detentions, because they can be conducted without any suspicion at all, and thus must be limited to, and conducted within, some more restricted "programmatic purpose" than a "general interest in crime control." *Edmond*, 531 U.S. at 42, 46; *see also Martinez-Fuerte*, 428 U.S. at 567 (citing *Terry* and *Brignoni-Ponce* for the "appropriate limitations on the scope of the stop") (immigration checkpoint stop).

Accordingly, anything beyond the time for a "brief question or two and possibly the production of a document evidencing a right to be in the United States," which the Court anticipated would take a

maximum of 5 minutes, is unreasonable. *Martinez-Fuerte*, 428 U.S. at 547, 558.

A corollary of this requirement is that any seizure short of arrest—but especially a suspicionless seizure—becomes unlawful if lengthened beyond this permissible purpose-based timeframe by "unrelated investigations" without additional justification. *Rodriguez*, 135 S. Ct. at 1614; *see also Arizona v. Johnson*, 555 U.S. 323, 333 (2009) (An "officer's inquiries into matters unrelated to the justification for the traffic stop" "convert the encounter into something other than a lawful seizure" if "those inquiries *** measurably extend the duration of the stop."); *Caballes*, 543 U.S. at 407; *see also, e.g.*, *Muehler v. Mena*, 544 U.S. 93, 101 (2005) (holding, in suit under 42 U.S.C. § 1983, that suspicionless seizure of individual on premises during execution of search warrant would be invalid if "the detention was prolonged by [unrelated] questioning"). It does not matter whether the unrelated inquiry occurs before or after the mission of the stop is completed—it only matters whether it "adds time" to the stop beyond the "'time reasonably required to complete [the stop's] mission.'" *Rodriguez*, 135 S. Ct. at 1616 (quoting *Caballes*, 543 U.S. at 407; alteration in original).

The Fifth Circuit's decision upholding Rynearson's detention disregards these well-established purpose-based limits on the scope of an immigration checkpoint detention.[3] It is undisputed

[3] The Fifth Circuit might have been thought to recognize these limits when it stated that agents "may ask questions outside the scope of the stop only so long as such questions do

that the extra 15 minutes Agent Perez spent with calls to the Air Force and Rynearson's commander *alone* added time to the detention beyond that necessary to complete the immigration inquiry. This time-frame is well beyond the 5 minutes anticipated in *Martinez-Fuerte*, 428 U.S. at 547, or the "couple of minutes" Agent Lands admitted it would take to verify Rynearson's passports after they were offered, App. 13a (Elrod, J., dissenting). To make matters worse, Agent Perez admitted that he completed the tasks relevant to the mission—here, reviewing Rynearson's passports—separate and apart from, not during, the phone calls, which further exacerbated the delay.

The purpose of these calls was also avowedly unrelated to immigration. Perez admitted that he made the calls to inquire about Rynearson's military status and to "inform[]" Rynearson's superiors of "the encounter"—not to verify whether Rynearson was a citizen, which he did through a records check and the review of Rynearson's passport. *See* R. 266; R. 279.

---

not extend the duration of the stop." *United States v. Machuca-Barrera*, 261 F.3d 425, 432 (5th Cir. 2001). But, as the district court held, the Fifth Circuit applies that rule only to questions that "extend the duration of the stop" because they are asked *after* the inquiry into citizenship is complete. *See supra* at 8; App. 41a; *United States v. Portillo-Aguirre*, 311 F.3d 647, 654 (5th Cir. 2002) ("Conversely, when officers detain travelers after the legitimate justification for a stop has ended, the continued detention is unreasonable."). This interpretation of Fifth Circuit law was cemented as correct when it was affirmed by the panel's decision in this case and left undisturbed by the en banc court.

Finally, it has been clear for over a decade that, in conducting any kind of detention short of arrest—but *especially* where suspicionless immigration detentions are concerned—"an officer always has to be reasonably diligent" in his investigation, *Rodriguez,* 135 S. Ct. at 1616 (internal quotation marks omitted), and must "diligently pursue[] a means of investigation that [is] likely to confirm or dispel [his] suspicions quickly." *United States v. Sharpe*, 470 U.S. 675, 686 (1985). As this Court held in *Sharpe*, this universal obligation of diligence persists even if a detainee's actions contribute to the length of the detention. *Sharpe* concerned the reasonableness of a 20-minute *Terry* stop in which the "delay" in completing the stop "was attributable almost entirely" to the suspect's actions attempting to evade the officers. *Id*. at 687-88. The Court held that the duration of a stop will not be considered "unreasonable when the police have acted diligently *and* a suspect's actions contribute to the added delay." *Id*. at 688 (emphasis added). This dual requirement makes plain that when an officer does not act diligently, delays not attributable to the detainee will render the detention unreasonable.

The Fifth Circuit, in contrast, disregarded this rule and exempted the agents from *any* duty of diligence based on its finding that Rynearson engaged in "unorthodox tactics" and was "unusually uncooperative." App. 8a. These findings are certainly debatable—the majority labeled him "uncooperative" simply because he did not exit the car (even when he was not ordered to do so); kept the window rolled up during part of the detention (although he was able to freely converse with the

agents); and "asserted his right against unlawful searches and seizures" (which was his constitutional prerogative). *Id.* at 2a-3a, 8a. Throughout the encounter, Rynearson promptly provided the agents with all of the information they needed to perform the "programmatic purpose" of the detention—to verify his immigration status. *Edmond*, 531 U.S. at 46.

More importantly, however, as Judge Elrod pointed out on dissent, *none* of this alleged "uncooperative" or "unorthodox" behavior can justify the 23-minute extension of the detention *after* Rynearson affirmed his citizenship (when first asked) and offered his passports. Nor can it excuse the final 17 minutes after Agent Perez finally took Rynearson's passports. App. 16a (Elrod, J., dissenting). By either of these points, the agents had all of the information they needed to verify his U.S. citizenship. No action by Rynearson can be said to have contributed anything to this portion of the detention; the delay was instead due to the agents' dilatory actions, including Agent Perez's unrelated calls to Rynearson's employer.

The Fifth Circuit's holding that Rynearson's conduct excused an excessive delay that he had no part in causing violates *Sharpe's* command that officers must remain diligent even when faced with conduct of a detainee that causes delay.

Because the Fifth Circuit's decision transgresses each of three fundamental limitations upon the scope of suspicionless seizures—brevity, purpose, and reasonable diligence—review is warranted to bring

the Fifth Circuit's law in line with this Court's precedents.

B. The Fifth Circuit's Rule Permitting Extended Detentions To Pursue Unrelated Inquiries If A Detainee's Behavior Is "Unorthodox" Creates A Multi-Layered Circuit Conflict.

Besides transgressing this Court's precedent, the Fifth Circuit's decision reveals an intractable, multi-layered conflict between its law and the clearly established law of other circuits. First, the Fifth Circuit departed from the Ninth and Tenth Circuits—the other two circuits in which the majority of fixed border patrol checkpoints operate—with its holding that agents may pursue inquiries unrelated to immigration status during an immigration checkpoint detention, absent *any* suspicion of criminal wrongdoing. It compounded the conflict by making the sequence of events determinative of the permissibility of these unrelated pursuits. And the Fifth Circuit opened up another divide of authority by using a detainee's conduct to justify an extended detention that the detainee himself played no role in causing.

1. ***The Fifth Circuit rule permitting extended detentions for unrelated inquiries without individualized suspicion diverges from Ninth and Tenth Circuit law.***

The Fifth, Ninth, and Tenth circuits agree that once an interior immigration checkpoint detention exceeds the permissible immigration inquiry,

continued detention can only be justified if the agents have developed *at least* a reasonable suspicion of criminal activity. *See, e.g.*, *Machuca-Barrera*, 261 F.3d at 434 ("[I]f the initial, routine questioning generates reasonable suspicion of other criminal activity, the stop may be lengthened to accommodate its new justification."); *United States v. Massie*, 65 F.3d 843, 848 (10th Cir. 1995) ("Further detention of an individual beyond the scope of a routine checkpoint stop must be based upon reasonable suspicion, consent, or probable cause."); *United States v. Taylor*, 934 F.2d 218, 220 (9th Cir. 1991). This apparent agreement masks irreconcilable differences among the circuits on the rules for determining *when* a detention exceeds its permissible immigration purpose.

a. The circuits divide first on whether agents may prolong an immigration detention to investigate matters outside a traveler's immigration status without any individualized suspicion.

Both the Ninth and Tenth Circuits logically recognize that it is not possible to ensure that an immigration checkpoint detention is properly limited to the "time needed to handle the matter for which the stop was made," *Rodriguez*, 135 S. Ct. at 1612, and is not impermissibly lengthened by "unrelated investigations," *id.* at 1614, without policing the scope of the investigation that agents can undertake during these suspicionless detentions.

The Tenth Circuit permits agents to "briefly question individuals" only on certain limited matters: "'vehicle ownership, cargo, destination, and travel plans.'" *Massie*, 65 F.3d at 848 (quoting *United States*

v. Rascon–Ortiz, 994 F.2d 749, 752 (10th Cir. 1993)). Even then, questioning on these matters is permitted only "as long as such questions are 'reasonably related to the agent's duty to prevent the unauthorized entry of individuals into this country and to prevent the smuggling of contraband.'" *Id.*

In the Ninth Circuit, the inquiry during an immigration checkpoint detention is even more confined. Such a detention is only reasonable if "the scope of the detention remains confined to a few brief questions, the possible production of a document indicating the detainee's lawful presence in the United States, and a visual inspection of the vehicle *** limited to what can be seen without a search." *Taylor*, 934 F.2d at 220 (internal quotation marks omitted; ellipsis in original).

Beyond these strict limits, both circuits permit further investigation only when the initial investigation reveals information that gives the agents some minimal suspicion that the traveler is engaged in criminal activity. *See Massie*, 65 F.3d at 848 ("[I]f an agent observes 'suspicious circumstances' during initial questioning, he 'may briefly question the motorist concerning those suspicions and ask the motorist to explain.'") (quoting *Rascon-Ortiz*, 994 F.2d at 753); *Taylor*, 934 F.2d at 221 ("[W]e hold that the brief further detention conducted by the government in this case must be predicated on an articulable suspicion or 'a minimal showing of suspicion' of criminal activity.") (citation omitted).

The Fifth Circuit, in contrast, permits agents to undertake inquiries that are plainly *not* related to

any special duties of the Border Patrol with respect to immigration, including calling an employer to report an encounter. The Fifth Circuit held that the agents' actions were not clearly unreasonable even when the detention was measurably lengthened for an investigation that ranged far afield from any inquiry into authorization to be in the country. App. 7a. Further, the Government conceded, and the panel unanimously held, that this wide-ranging investigation was conducted in the absence of any reasonable suspicion that Rynearson had committed a crime. *Id.* (majority opinion); *id.* at 16a n.7 (Elrod, J., dissenting). The majority's approval of this extended investigative frolic is based on the circuit's hands-off approach to evaluating agents' immigration investigations. Because Fifth Circuit precedent deems it necessary for officers to "have leeway in formulating questions to determine citizenship status," courts in the circuit are not permitted to "scrutinize the particular questions a Border Patrol agent chooses to ask." *Machuca-Barrera*, 261 F.3d at 433. This hands-off approach ultimately means that, unlike in the Ninth and Tenth Circuits, there are no enforceable limits on the investigation that can be undertaken prior to the completion of an immigration checkpoint detention.

b. These divergent approaches to policing the scope of an immigration checkpoint detention yield an additional conflict: whether the sequence of events in a detention is determinative of its reasonableness.

In the Fifth Circuit, sequencing is critical. Under its precedent, a detention cannot be continued

after an agent eventually completes the immigration inquiry, *Portillo-Aguirre*, 311 F.3d at 654, meaning that an agent may not prolong the detention by asking questions outside the scope of the stop once the traveler's immigration status has been verified. But the Fifth Circuit's deferential approach to review of agents' investigative choices outlined in *Machuca-Barrera*, *see supra* at 24, leaves agents free to pursue even unrelated inquiries that appreciably lengthen the detention, so long as those inquiries occur *before* the agent determines citizenship. As the district court recognized, App. 41a, the practical import of the Fifth Circuit's rule is that suspicionless immigration checkpoint detentions can only be "impermissibly lengthen[ed]" by "continued questioning *after* the confirmation of citizenship" *not* questioning that occurs *before*, *id.*, creating perverse incentives for agents to delay the one inquiry permitted under this Court's precedent.

The Ninth and Tenth Circuits, on the other hand, have long held that sequencing is immaterial; only overall duration is critical. Those courts of appeals permit detentions to continue for certain routine inquiries even after citizenship is confirmed. *See, e.g.*, *Massie*, 65 F.3d at 845 (permitting further detention after an agent "verif[ied] Defendants were United States citizens"); *Taylor*, 934 F.2d at 219 (permitting further detention after an agent's "immigration inspection was completed"). Yet these circuits, unlike the Fifth Circuit, require that the *overall* duration of the detention, regardless of sequence of events during the detention, be markedly, and objectively, brief.

c. These conflicts result in widely different limits upon routine checkpoint seizures from one State to the next. This cannot continue. Uniformity is critical for all travelers, who should not have their Fourth Amendment rights depend upon the vagaries of circuit boundaries. Uniformity will also benefit the Border Patrol, because subjecting the entire system of interior border checkpoints to a single set of rules will make administration simpler, and therefore more effective, than the current constitutional patchwork.

This difference in law of the circuits is also outcome determinative of this case. One may question whether the Ninth and Tenth Circuit's doctrine—permitting an additional investigation once the immigration inquiry described in *Martinez-Fuerte* is completed, on some minimal suspicion less than reasonable suspicion—comports with the clearly established law of this Court. But at least in these circuits, unlike the Fifth Circuit, the scope of the suspicionless inquiry is cabined to ensure that it is not unduly prolonged by unrelated questioning. Moreover, the Ninth and Tenth Circuits would demand *some* level of suspicion before Agents Lands and Perez would have been permitted to pursue wholly unrelated inquiries, while the Fifth Circuit demands only that they withheld the determination of citizenship until their unrelated phone calls were complete. Even these modest improvements would have prohibited the agents' unrestrained investigative romp in this case. Review is thus warranted to resolve the fundamental divergence between the law of the Fifth Circuit and that of the

Ninth and Tenth Circuits on the permissible scope and duration of a suspicionless immigration inquiry.

2. *The Fifth Circuit split from other circuits by holding that no clearly established law prohibits officers from prolonging a detention based on detainee conduct that did not contribute to the complained-of delay.*

In justifying its holding that Agents Lands and Perez could permissibly prolong the detention for unrelated inquiries, the Fifth Circuit held that Rynearson's "unorthodox tactics" and assertion of "his right against unlawful searches and seizures" caused the detention—even in its final 23 minutes—to not violate clearly established law.

By announcing that justification, the Fifth Circuit broke from a consistent line of cases reinforcing *Sharpe*'s holding that an officer's duty of diligence cannot be excused by an uncooperative detainee. The Third and Ninth Circuits have recognized as clearly established that even if a detainee's conduct contributes to the length of a detention short of arrest, further detention that was neither caused by the detainee's actions nor the result of a reasonably diligent investigation would be prohibited. A third court of appeals, the Eighth Circuit, has held that such an extended detention violates the Constitution, although it held that this rule was not clearly established in 2002. The Fifth Circuit's unorthodox-conduct-excuses-all rule is in diametric opposition to the law in these courts of appeals.

In direct conflict with the Fifth Circuit's decision here, the Ninth Circuit has held that even if a detainee is initially uncooperative or evasive, it is clearly established that detentions of unreasonable duration are not excused when the extended detention is not caused by any action of the detainee. In *Liberal v. Estrada*, 632 F.3d 1064 (9th Cir. 2011), the Ninth Circuit affirmed the denial of qualified immunity in a case challenging a traffic stop that lasted for 45 minutes. In that case, an individual who was stopped for unlawfully tinted windows failed to pull over on the road, and instead engaged in "evasive action" by "pulling over into a darkened parking lot behind a building and turning off his car's lights." *Id.* at 1081. The detainee was also "verbally confrontational," and contended that he had been stopped for no reason and was being unlawfully detained. *Id.* at 1068-69.

The Ninth Circuit held that the detainee's behavior in pulling into the darkened parking lot "certainly played a part in prolonging his detention." *Id.* at 1081. "But even taking into account the inevitable investigatory delay caused by that behavior, the length of Plaintiff's detention was still unreasonable," because after the first five minutes of the detention, the officers "were not diligently pursuing a means of investigation that was likely to confirm or dispel their suspicions quickly," as required by *Sharpe*. *Id.* at 1081. The Ninth Circuit held that the "prolonged detention was not for a valid investigatory purpose" because, after the first five to ten minutes of the stop, the officers "were not waiting for investigatory checks to be run or asking Plaintiff questions that would confirm or dispel their

suspicions quickly (or at all)." *Id.* Rather, they were prolonging the "detention merely to engage in an exaggerated display[] of authority," which is "unreasonable and unconstitutional." *Id.* (internal quotation marks omitted; alteration in original).[4]

In *Karnes v. Skrutski*, 62 F.3d 485 (3d Cir. 1995), the Third Circuit likewise held that clearly established law prohibits officers from prolonging a detention beyond any delay that was actually caused by a detainee's conduct. In *Karnes*, the Third Circuit reversed a district court's grant of qualified immunity in a case challenging the duration of an investigatory automobile stop. *Id.* at 495-97. The court rejected the government's argument that the length of the detention was reasonable because it "was due to [the detainee's] argumentative questioning of their procedures." *Id.* at 489. The Third Circuit held that the mere fact that the suspect became "argumentative and difficult," and refused to consent to searches of his luggage and car, could not make the duration of his detention reasonable, given that the delay was "the result primarily of the [officers'] dilatory pursuit of their investigation," including their repeated attempts to "cajole [the detainee] into granting them consent" to search his

[4] Similarly, the Ninth Circuit overturned the conviction of a suspect who initially evaded arrest because the "prolonged and subsequent detention at the Sheriff's office which followed" could not be justified. *United States v. Jennings*, 468 F.2d 111, 115 (9th Cir. 1972). The suspect "identified himself satisfactorily, answered questions about himself and his activities *** [and] allowed himself to be patted down." *Id.*

vehicle, and was not actually based on the plaintiff's questioning. *Id.* at 496-97.

Finally, in *Seymour v. City of Des Moines*, 519 F.3d 790 (8th Cir. 2008), the Eighth Circuit held that a detention was unreasonable when a father was held during the investigation into the death of his infant son until an investigating officer could arrive on the scene. *Id.* at 792. The Court rejected the government's argument that the duration of the detention was reasonable when "*some* of the detention's duration is attributable to [the father] himself" because he "spent some time deciding who should care for his children" before departing for the hospital to meet the investigating officer. *Id.* at 797 n.5 (emphasis added). The Court contrasted the case to the facts of *Sharpe*, saying that, unlike the delay in *Sharpe*, which "'was attributable almost entirely to' one of the defendants," the father's "indecision regarding who would stay behind appears to have been brief." *Id.* The Eighth Circuit nevertheless held that this law was not clearly established in 2002, *id.* at 798, when the detention took place. In any event, it certainly became clearly established upon the 2008 release of the *Seymour* opinion, two years before Rynearson's detention.[5]

These teachings are clear. A detainee's conduct during detention cannot serve to excuse

---

[5] A rule can be clearly established for qualified immunity purposes even if there is no "case[] of controlling authority in the[] jurisdiction," when there is a "consensus of cases of persuasive authority." *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

unreasonable delays, *i.e.*, delays that are not caused by the detainee's behavior or that are based on unrelated inquiries outside the permissible scope of the stop. And even if a detainee contributes to some part of a prolonged detention, courts must separately scrutinize whether any subsequent portion of the detention that cannot be laid at the detainee's feet is justified by reasonably diligent investigation of the stop's purpose. These cases stood for years as clearly established law since this Court's decision in *Sharpe*, until the Fifth Circuit's decision in this case created a conflict.

Like the Fifth Circuit's departure from the limits imposed on suspicionless checkpoints in the Ninth and Tenth Circuits, this conflict is outcome determinative. Had Rynearson's case arisen in the Third, Eighth, or Ninth circuits, the court would have been forced to consider, at a minimum, whether the 23 minutes of Rynearson's detention *after* he offered his passports was actually caused by Rynearson as opposed to the agents' lack of diligence. This question can only be answered in Rynearson's favor. In any event, the Fifth Circuit departed from its sister circuits in rejecting the clearly established rule that delays a detainee had no part in creating are not rendered reasonable simply because the detainee asserted his rights or was "uncooperative" in some earlier part of the detention.

C. The Proper Scope Of An Immigration Checkpoint Seizure Is An Exceptionally Important Question.

The "principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations

on the scope of the stop," *Martinez-Fuerte*, 428 U.S. at 566-567. The question presented here concerns those limitations and is of exceptional importance to the more than one hundred million travelers who are seized without any individual suspicion at internal border patrol checkpoints each year.

1. The Border Patrol operates more than 70 fixed checkpoints across California, Arizona, New Mexico, and Texas alone. *See* Gov't Accountability Office, Report No. 09-824, at 8, 10 (Aug. 2009) (reporting that in fiscal year 2008, the Border Patrol operated 32 permanent checkpoints in the Southwest on a near-continuous basis plus an additional 39 tactical checkpoints). At just six of those checkpoints, including the two busiest, the Border Patrol stops about 111.2 million vehicles a year. Gov't Accountability Office, Report No. 05-435, at 35-37, 66, 68, 73, 80 (reporting daily traffic in 2004 at six of the Border Patrol's permanent checkpoints in the Southwest). Nor are the Border Patrol's internal checkpoints limited to the Southwest; fixed checkpoints also operate in states along the Canadian border. *See, e.g.*, *New York v. White*, 796 N.Y.S.2d 902 (N.Y. Sup. Ct. 2005) (suppressing evidence where defendant was detained at a Border Patrol interior checkpoint in New York for 50 minutes).

Travelers are increasingly encountering checkpoint detentions that exceed the brief, limited questioning envisioned in *Martinez-Fuerte*. *See, e.g.*, Am. Civil Liberties Union of Ariz., Complaint and Request for Investigation, at 2 (Jan. 15, 2014) (noting that "border residents regularly experience extended

interrogation and detention not related to establishing citizenship" and reporting incidents in which "most of the individuals described *** were never asked about their citizenship");[6] Am. Civil Liberties Union of N.M., Guilty Until Proven Innocent: Living In New Mexico's 100-Mile Zone, at 7 (May 2015) (reporting complaints received from motorists subjected to "prolonged detentions at interior checkpoints" involving "aggressive and unnecessary questioning not pertaining to citizenship status").[7] The Fifth Circuit's decision—approving of suspicionless detentions exceeding 20 minutes after valid passports were offered, and featuring unrelated phone calls to a detainee's employer—will only exacerbate these problems for the tens of millions of motorists seized each year at the Border Patrol's interior checkpoints in Texas, which contained more than half of the Border Patrol's permanent checkpoints in 2009. *See* Gov't Accountability Office, Report No. 09-824, at 9 (displaying locations of permanent checkpoints).

The importance of this question is underscored by Judge Elrod's sharp and impassioned dissent. Her careful opinion not only fatally undermines the panel majority's logic, but also demonstrates that this is far

---

[6] *Available at* http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Checkpoints%20%202014%2001%2015_0.pdf.

[7] *Available at* https://www.aclu-nm.org/wp-content/uploads/2015/05/ACLU-NM-GuiltyUntilProvenInnocentFinal5-15-2015-21.pdf.

from a routine application of settled law, despite what its per curiam label might suggest.

2. The Fifth Circuit's approach leaves vital Fourth Amendment liberties unprotected for the millions who are seized at immigration checkpoints in Texas. The Fifth Circuit permits wide-ranging questioning on virtually any topic, for periods of time far exceeding the few minutes reasonably necessary to determine a traveler's authorization to be present within the United States. It allows this questioning and investigation to continue so long as the traveler's immigration status has not actually been verified, and condones an agent's stalling in asking the only question that justifies the detention. It thus undermines in practice the strict limits that provide the only justification for the Border Patrol's program of fixed immigration checkpoints, making them in reality no different than suspicionless detentions conducted to serve a "general interest in crime control" that this Court has repeatedly rejected. *Edmond*, 531 U.S. at 40.

Furthermore, the Fifth Circuit's decision makes a detention's reasonableness turn on the happenstance of the sequence of events during the detention—or worse—provides a perverse incentive to Border Patrol agents to delay the immigration determination until they have pursued any other flight of investigative fancy. Agents who wish to engage in further investigation—whether to troll for potential criminal activity, or as a pretext to harass a traveler who exercises his rights—will be able to extend the scope of their investigation by *prolonging* rather than *expediting* the completion of the

immigration inquiry. This encourages delay where the Constitution requires diligence, and thus undermines, rather than protects, essential Fourth Amendment rights.

Finally, the Fifth Circuit's view that agents are effectively unlimited in the scope and duration of the detention so long as they can point to some "unorthodox tactic" by the detainee upends the Fourth Amendment's protections in a dizzying array of potential law enforcement encounters, even those outside of immigration checkpoints. Rather than focus on the officers' diligence, the Fifth Circuit makes the *detainee*'s response the *sine qua non* of reasonableness—even if that response has *no bearing* on delays caused by dilatory action by the officers. That gets the Fourth Amendment inquiry exactly backwards. The free pass the Fifth Circuit awards agents to conduct extended detentions even when detainee conduct has no effect on the agents' ability to diligently investigate citizenship status leaves the Fourth Amendment rights of checkpoint travelers effectively unprotected. This holding is erroneous and should be reversed.

II. AT A MINIMUM, THIS CASE SHOULD BE REMANDED FOR FURTHER CONSIDERATION IN LIGHT OF LAST TERM'S DECISION IN *RODRIGUEZ*.

As discussed above, the Fifth Circuit's departure from this Court's precedents and the law of other circuits warrants plenary review. At the least, however, this Court should grant, vacate, and remand this case for further consideration in light of *Rodriguez*, which was decided in April 2015, after the

Fifth Circuit panel decision issued in February 2015, and after the request for en banc rehearing was filed. That decision is an "intervening development[], or recent development[] that [there is] reason to believe the court below did not fully consider," and it reveals a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) (discussing considerations for granting, vacating, and remanding a case for further consideration).[8]

In *Rodriguez*, this Court considered a traffic stop that had been lengthened by seven to ten minutes by the officers' decision to conduct a dog sniff after completing the traffic citation. *Id.* at 1612. This Court reversed the Eighth Circuit's holding that adding seven to ten minutes to the stop was a "*de minimis* intrusion on [the detainee's] personal liberty." *Id.* at 1614 (internal quotation marks omitted). Instead, this Court reiterated, authority for a "seizure *** ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Id.*

Most critically here, *Rodriguez* also reinforced that the sequence of an investigation is irrelevant; the only test is whether "unrelated checks" "add[] time to" the stop. *Id.* at 1615-16. This ruling reveals

[8] Petitioner submitted a copy of *Rodriguez* during the pendency of the en banc petition under FED. R. APP. P. 28(j), but rehearing was denied just two working days later, suggesting that the supplemental authority was not "fully considered."

the fundamental fallacy of the Fifth Circuit's (and district court's) premise that only unrelated inquiries pursued *after* the citizenship inquiry was conducted should be considered when evaluating whether a detention was unlawfully prolonged. There is strong reason to believe the Fifth Circuit would reach a different result upon full consideration of *Rodriguez*.

Although *Rodriguez* was decided after the seizure in question, it is still potentially determinative here, *see Lawrence*, 516 U.S. at 167, because it merely "reiterate[d]" what this Court "said in *Caballes*" regarding the permissible scope of a seizure based on less than probable cause, 135 S. Ct. at 1616, and *Caballes* was decided years before Rynearson's detention and thus reflected the clearly established law at that time. Moreover, it is plain under both this Court's precedent and the Fifth Circuit's that analysis of the permissible scope of a stop in *Terry* and traffic cases applies with equal or greater force in internal immigration checkpoint cases. *See Martinez-Fuerte*, 428 U.S. at 567 (citing *Terry* as the source for "appropriate limitations on the scope of the stop"); *United States v. Ellis*, 330 F.3d 677, 679 (5th Cir. 2003) (noting the Fifth Circuit has "delineated the bounds of immigration stops by applying *** jurisprudence regarding stops based on reasonable suspicion").[9]

---

[9] The majority rejected the relevance of *Terry* stop cases, but only on the question whether an individual could be compelled to answer questions or produce identification at an immigration checkpoint. App. 6a-7a. That part of the Fifth Circuit's holding is not before the Court because the question presented

In sum, there is a reasonable probability that the decision below rests on a premise that the lower court would reject if asked to fully consider *Rodriguez*, and a grant, vacate, and remand order is appropriate.

* * * * *

The net effect of the Fifth Circuit's decision is quite remarkable. It permits the Border Patrol to conduct suspicionless seizures free of the constraints that obtain even for suspicion-based seizures—to hold someone more than 30 minutes for purportedly brief questioning, while spending most of the time pursuing unrelated inquiries and calling an individual's employer. Most troublingly, the Fifth Circuit allows agents to unreasonably extend a detention because an individual asserted his rights—all without even the barest minimum of individual suspicion at any time during the encounter. Review is warranted to bring the Fifth Circuit's law governing immigration checkpoint seizures in line with the precedent of other courts of appeals and of this Court.

---

addresses only the last 23 minutes of the detention. *See supra* at i, 11.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ruthanne M. Deutsch
Washington, DC

J. Carl Cecere
Counsel of Record
CECERE PC
6035 McCommas Blvd.
Dallas, TX 75206
(469) 600-9455
ccecere@ceceerepc.com

Counsel for Petitioner

August 3, 2015

APPENDIX

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

TABLE OF CONTENTS

Opinion of the United States Court of Appeals for the Fifth Circuit (February 26, 2015) 1a

Opinion and Order of the United States District Court for the Western District of Texas (September 30, 2013).. 19a

Report and Recommendation of the Magistrate Judge for the United States District Court for the Western District of Texas (June 27, 2013)....... 50a

Order of the United States Court of Appeals for the Fifth Circuit Denying Petition for Rehearing En Banc (May 4, 2015) 90a

Plaintiff's Fact Appendix (Excerpt) (October 15, 2012).. 92a

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13-51114

RICHARD RYNEARSON,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA; AGENT LANDS, Border Patrol Agent, Individually; RAUL PEREZ, Border Patrol Agent, Individually,

Defendants – Appellees

Appeal from the United States District Court for the Western District of Texas
USDC No. 2-12-CV-24

Before REAVLEY, ELROD, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent

Richard Rynearson brought this *Bivens* action against two border patrol agents in their individual capacities. He alleged they violated his Fourth Amendment rights by unlawfully detaining him. The district court granted summary judgment for the agents after concluding that they were entitled to qualified immunity. We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

Rynearson, a major in the United States Air Force, was stopped at a fixed interior immigration checkpoint in Uvalde County, Texas approximately 67 miles from the United States-Mexico border in March 2010. He alleges that he has had several unpleasant experiences in prior stops at the checkpoint. Consequently, he was prepared with numerous cameras in his vehicle to record this stop. The following facts come from the pleadings and a video Rynearson recorded during the stop and posted on at least two websites. The defendants included the video as an exhibit in their Motion to Dismiss.

When Rynearson entered the checkpoint he was asked if he owned his vehicle. Upon saying he did, he was asked to move to the secondary inspection area. He was not asked about his citizenship at any point during the initial stop. Rynearson kept his window almost completely closed throughout all communications with the officers despite being repeatedly asked to open it further or step out of the vehicle. Rynearson was held in his vehicle in the

---

except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

secondary inspection area for a little over a minute before he was asked to display his identification. Inside the car, he stuck his driver's license and military identification between the window glass and the door's weather stripping, where they could be read from the outside of the vehicle.

Upon seeing Rynearson's military identification, Agent Lands asked him where he was stationed. The agent then asked him to step out of the car. Rynearson refused and demanded to be told why he was being detained. Agent Lands explained that he needed to determine Rynearson's citizenship and that he would be free to go afterwards, but Rynearson still refused to step out of the car or roll down his window. Rynearson insisted that he would not get out unless Lands explained his reasonable suspicions for detaining him. This discussion continued for about eight minutes before Agent Lands said he was going to find a supervisor. Rynearson then added his passports to the display of documents on his window.

After Rynearson had waited 18 minutes at the checkpoint, Supervisory Border Patrol Agent Perez arrived. Rynearson explained to Agent Perez that the agents had not allowed him to leave despite the fact that he had offered his identification and told them that he was a citizen. Rynearson still refused to roll down his window or exit the vehicle. Agent Perez asked for Rynearson's passports and for the name of Rynearson's commanding officer. Rynearson refused to give the name and complained that Agent Perez was trying to interfere with his employment. Agent Perez then took Rynearson's passports into the checkpoint station and returned 13 minutes later to

inform Rynearson that he was free to go. He explained that if Rynearson would be more cooperative in the future by rolling down his window to help agents hear over the traffic and by physically producing immigration documents for validation, the checkpoint procedure would be quicker. Rynearson's total time at the checkpoint was approximately 34 minutes.

Rynearson submitted an administrative claim to United States Customs and Border Protection pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq., seeking $500,000 in damages as a result of the stop. His claim was denied. He then filed this suit in the United States District Court for the Western District of Texas. His FTCA claims were based on negligence, false arrest and imprisonment, intentional infliction of emotional distress, and violation of rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments. His complaint also included *Bivens* claims against Agents Lands and Perez for violation of his Fourth Amendment rights. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Only the *Bivens* Fourth Amendment claims are before this court. All others were dismissed and no appeal was taken.

The district court concluded that Agents Lands and Perez were entitled to qualified immunity because Rynearson failed to demonstrate a violation of his Fourth Amendment rights in either the manner of conduct at the stop or the duration of the stop. The court also found that the agents had reasonable suspicion to detain Rynearson. Finally,

the district court denied Rynearson's motion to stay summary judgment pending discovery.

DISCUSSION

We review *de novo* a district court's grant of summary judgment on the basis of qualified immunity. *Freeman v. Gore*, 483 F.3d 404, 410 (5th Cir. 2007). "The doctrine of qualified immunity protects governmental officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The plaintiff has the burden of refuting a properly raised qualified immunity defense "by establishing that the official's allegedly wrongful conduct violated clearly established law." *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008) (quotations and citation omitted). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments and protects all but the plainly incompetent or those who knowingly violate the law." *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (quotations and citations omitted).

We conduct a two-step analysis to determine whether an agent is entitled to qualified immunity. *See Saucier v. Katz*, 533 U.S. 194 (2001). The usual approach is to determine, first, "whether, viewing the summary judgment evidence in the light most favorable to the plaintiff, the defendant violated the plaintiff's constitutional rights." *Freeman*, 438 F.3d at 410. If such a violation occurred, we then "consider whether the defendant's actions were objectively unreasonable in light of clearly

established law at the time of the conduct in question." *Id.* at 411. For a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011). Although the existence of the right is often considered first, it is permissible to begin with the determination of whether the claimed right was clearly established: "the judges of the district courts and the courts of appeals are in the best position to determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each case." *Pearson*, 555 U.S. at 242.

A routine interior immigration checkpoint stop conducted without reasonable suspicion does not violate the Fourth Amendment. *United States v. Martinez-Fuerte*, 428 U.S. 543, 561-62 (1976). Border patrol agents at interior checkpoints may stop a vehicle, refer it to a secondary inspection area, request production of documents from the vehicle's occupants, and question the occupants about their citizenship. *Id.* at 562-63. The purpose of the stop is limited to ascertaining the occupants' citizenship status. *United States v. Machuca-Barrera*, 261 F.3d 425, 433 (5th Cir. 2001). "The permissible duration of an immigrant checkpoint stop is therefore the time reasonably necessary to determine the citizenship status of the persons stopped." *Id.* "Conversely, when officers detain travelers after the legitimate justification for a stop has ended, the continued detention is unreasonable." *United States v. Portillo-Aguirre*, 311 F.3d 647, 654 (5th Cir. 2002).

Rynearson argues the agents violated his Fourth Amendment rights by being "intentionally dilatory"

in waiting too long to ask about his citizenship, intentionally extending the duration of his detainment, and calling his military base to inquire into his military status. He argues that he had a right to refuse to cooperate because the Fourth Amendment "does not impose obligations on the citizen" to cooperate. *See Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 187 (2004).

Rynearson relies on precedent discussing the Supreme Court's analysis in *Terry v. Ohio*, 392 U.S. 1 (1968). *Terry* allows a law enforcement officer to detain a person for a brief investigation if the officer can identify specific and articulable facts leading to a reasonable suspicion that the person is committing or about to commit a crime. *United States v. Hill*, 752 F.3d 1029, 1033 (5th Cir. 2014). In contrast, the Supreme Court has granted agents at immigration checkpoints the right to stop and question a vehicle's occupants regarding their citizenship without reasonable suspicion of any wrongdoing. *Machuca-Barrera*, 261 F.3d at 433. That grant of authority is readily distinguishable from the authority granted by *Terry*.

There is no dispute that the initial stop was constitutional. Neither Rynearson nor his car was searched. Because the Supreme Court has granted agents the authority to stop, question, and inspect documents at interior checkpoints, the government argues there must also be a requirement that the individual cooperate with the agents. The Supreme Court has concluded that "all that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States."

United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975) (quotations and citation omitted).

The facts indicate that Rynearson generally asserted his right against unlawful searches and seizures while the agents had difficulty determining how to respond to his unorthodox tactics. We have not discovered nor been shown any authority supporting Rynearson's claim that the constitutional rights he chose to stand on were clearly established. Accordingly, we conclude that these governmental officials, at worst, made reasonable but mistaken judgments when presented with an unusually uncooperative person, unusual at least in the facts described in any of the caselaw.

Because we hold that no constitutional right of which all reasonable officers would have known was violated, we need not consider whether Rynearson actually had some limited Fourth Amendment right to refuse to cooperate. *See Pearson*, 555 U.S. at 242.

We close by examining Rynearson's argument that the district court erred by denying his motion to stay summary judgment pending limited discovery. "We review a decision to stay discovery pending resolution of a dispositive motion for an abuse of discretion." *Brazos Valley Coal. for Life, Inc. v. City of Bryan, Tex.*, 421 F.3d 314, 327 (5th Cir. 2005). We find no basis to disturb the district court's exercise of discretion. Qualified immunity "is intended to give government officials a right not merely to avoid standing trial, but also to avoid the burdens of such pretrial matters as discovery . . . ." *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (citation and internal quotations omitted). To stay summary judgment in order to allow discovery, the

court must determine "that the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity." *Wicks v. Miss. State Emp't Servs.*, 41 F.3d 991, 994 (5th Cir. 1995). Then, if the court remains "unable to rule on the immunity defense without further clarification of the facts," it may issue a discovery order "narrowly tailored to uncover only those facts needed to rule on the immunity claim . . . ." *Lion Boulos v. Wilson*, 834 F.2d 504, 507-08 (5th Cir. 1987). We have already discussed why the officers were entitled to qualified immunity in the absence of any clearly established constitutional right. Discovery was unnecessary.

AFFIRMED.

JENNIFER WALKER ELROD, Circuit Judge, dissenting:

At a fixed interior immigration checkpoint approximately sixty-seven miles from the United States–Mexico border, United States Air Force officer Richard Rynearson presented four forms of government-issued identification—including official and personal U.S. passports—to show that he is a United States citizen. Yet Agent Lands refused to examine the passports and Agent Perez, rather than simply scrutinizing the passports, asked Rynearson to identify his commanding officer and then made Rynearson wait while he placed phone calls to Rynearson's employer. Because the law is clearly established that immigration officials violate the Fourth Amendment when they continue to detain a traveler beyond the time reasonably necessary to investigate his citizenship status, I respectfully dissent.

I.

The majority opinion accurately recites many of the facts that gave rise to this controversy, but I write to emphasize a couple of points. First, for the duration of the stop, Rynearson asserted his rights while also providing the documentation needed to prove his citizenship status. The majority opinion labels these actions "tactics" and calls them "unorthodox" and "unusually uncooperative." However, as the majority opinion recognizes—and a review of the record and the video confirms[1]—

---

[1] As the majority opinion observes, Rynearson posted a video of the incident on the internet, and the defendants

Rynearson began cooperating as early as two minutes into the stop by producing identification documents.[2] Moreover, while he provided the information needed to prove his citizenship, Rynearson explained several times that he would not indulge the officers' commands when he thought that they exceeded the limited scope of the immigration checkpoint inquiry. Standing on one's rights is not an "unorthodox tactic[]." It is a venerable American tradition.

Second, the record also shows that Agents Lands and Perez did not expeditiously investigate Rynearson's citizenship status. Approximately two minutes into the stop, Rynearson displayed his military identification and driver's license for Agent Lands, but Agent Lands waited until approximately eleven minutes into the detention to inform Rynearson that those identification cards "don't mean anything." At that point, Rynearson

---

attached it as an exhibit to their motion to dismiss. The video, which is divided into four parts and entitled "Full Video – Border Patrol Incident," appears at the following links:

Part One: https://www.youtube.com/watch?v=4BId1f8WG2s

Part Two: https://www.youtube.com/watch?v=NqU9M9RyeZA

Part Three: https://www.youtube.com/watch?v=o8GDNFleCI8

Part Four: https://www.youtube.com/watch?v=mZbCCBH7YM4

[2] Because the parties agree that Rynearson's video is accurate, we must "view[] the facts in the light depicted by the videotape." *Scott v. Harris*, 550 U.S. 372, 380–81 (2007).

immediately offered to show Agent Lands his official and personal U.S. passports. Agent Lands ignored the offer and, for the first time, finally asked Rynearson whether he was a United States citizen. Rynearson responded affirmatively, but he was not then permitted to leave, and Agent Lands never asked to see Rynearson's passports.

Almost eighteen minutes into the detention, Agent Perez arrived and asked for Rynearson's passports. Rynearson instantly surrendered them. Rather than simply examine the passports, however, Agent Perez asked Rynearson to identify his commanding officer and attempted to call the Provost Marshal[3] and CID.[4] Agent Perez spent ten to fifteen minutes on these phone calls, and Agent Lands did not inform Rynearson that he was free to leave until more than fifteen minutes after Agent Perez took his passports.[5] In total, approximately twenty-three minutes transpired between the time that Rynearson offered his passports to Agent Lands and the time

---

[3] The Provost Marshal is the officer in charge of the military police.

[4] "CID" refers to the U.S. Army Criminal Investigation Command.

[5] The majority opinion incorrectly asserts that Agent Perez was the one who returned the passports to Rynearson and informed him that he was free to leave. In fact, Agent Lands (not Agent Perez) was the officer who returned the passports; in his declaration, Agent Perez averred that he "informed [Agent Lands] to release Mr. Rynearson and to return Rynearson's passports and send him on his way." ROA. 266. In addition, the agents' voices are clearly distinguishable on the videotape, and Agent Lands is the one speaking when Rynearson receives his passports and is informed that he may leave.

that the detention ended, for a total detention time of approximately thirty-four minutes. Although Agent Perez did scrutinize Rynearson's passports at some point during the final portion of the detention, Agent Lands stated in a declaration that such records checks generally take a "couple of minutes."

II.

Agents Lands and Perez argue that, on summary judgment, they can invoke qualified immunity to defeat Rynearson's *Bivens* action against them. The test for qualified immunity is a familiar one. "First, a court must decide whether the facts . . . alleged . . . make out a violation of a constitutional right." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). "Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was 'clearly established' at the time of [the] alleged misconduct." *Id*. This second prong of the qualified immunity analysis asks whether "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates [the] right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Stated another way, "in the light of pre-existing law the unlawfulness must be apparent." *Id*. Qualified immunity applies unless both prongs are satisfied. *Pearson*, 555 U.S. at 232.

The Supreme Court has made clear that while the Fourth Amendment permits routine, suspicionless stops at fixed checkpoints near the border, the scope of such stops is "quite limited." *United States v. Martinez–Fuerte*, 428 U.S. 543, 557, 562 (1976). "[A]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a

right to be in the United States." *Id.* at 558 (internal quotation marks omitted). Moreover, this court has held that "[t]he scope of an immigration checkpoint stop is limited to the justifying, programmatic purpose of the stop: determining the citizenship status of persons passing through the checkpoint." *United States v. Machuca–Barrera*, 261 F.3d 425, 433 (5th Cir. 2001). "It follows that the permissible duration of an immigration stop is the 'time reasonably necessary to determine the citizenship status of the persons stopped.'" *United States v. Portillo–Aguirre*, 311 F.3d 647, 653 (5th Cir. 2002) (quoting *Machuca–Barrera*, 261 F.3d at 433).

"An officer may ask questions outside the scope of the stop, but only so long as such questions do not extend the duration of the stop." *Machuca–Barrera*, 261 F.3d at 432. "Conversely, when officers detain travelers after the legitimate justification for a stop has ended, the continued detention is unreasonable." *Portillo–Aguirre*, 311 F.3d at 654. "[A]ny further detention beyond a brief question or two or a request for documents evidencing a right to be in the United States must be based on consent or probable cause," *Portillo–Aguirre*, 311 F.3d at 652, or upon reasonable suspicion, *Machuca–Barrera*, 261 F.3d at 434. Even a three-minute extension beyond a detention's permissible duration is cognizable as a Fourth Amendment violation. *See Portillo–Aguirre*, 311 F.3d at 654.

By making Rynearson wait for thirty-four minutes, ignoring a verbal affirmation of U.S. citizenship, and rejecting multiple forms of identification, Agents Lands and Perez far exceeded the scope of the immigration-checkpoint inquiry as

the Supreme Court defined it in *Martinez–Fuerte*. Putting aside the dilatory nature of the stop as a whole, at a bare minimum, once Rynearson offered his passports to Agent Lands, any further detention other than the couple of minutes required to authenticate the passports was unnecessary. The State Department may issue passports only to United States citizens and non-citizen nationals. 22 U.S.C. § 212. As detailed above, Agent Lands refused to even look at the passports, and Agent Perez did not simply verify the passports' authenticity—he asked for the identity of Rynearson's commanding officer and wasted ten to fifteen minutes placing unnecessary phone calls to military law enforcement.

One cannot escape the impression that Agent Lands's refusal to look at the passports and Agent Perez's irrelevant phone calls to Rynearson's employer operated as retribution against Rynearson for asserting his rights; about three minutes into the stop, a fellow officer even pointed out the cameras in Rynearson's car. But putting that to one side,[6] after Rynearson offered his passports, Agents Lands and Perez needed only to examine them to determine whether Rynearson was a United States citizen. Therefore, Agents Lands and Perez detained Rynearson longer than "reasonably necessary to determine the citizenship status of the person[]

---

[6] Evidence of a defendant's subjective intentions is not relevant to the qualified-immunity defense. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817–19 (1982); *Crawford–El v. Britton*, 523 U.S. 574, 588 (1998).

stopped."[7] *Machuca–Barrera*, 261 F.3d at 433.

In addition, I would hold that at the very least, Agents Lands and Perez failed to demonstrate entitlement to qualified immunity with respect to the twenty-three minutes of detention that followed Rynearson's offer to show Agent Lands his passports. In light of *Martinez–Fuerte, Machuca–Barrera*, and *Portillo–Aguirre*, and on the record as it currently stands in this case, no reasonable officer would believe that he could lawfully detain a traveler for twenty-three minutes after the traveler presents a valid U.S. passport—better evidence of United States citizenship than the state-issued forms of identification that highway travelers most frequently carry on their person. Far more than simply ask Rynearson to give the limited information that the Supreme Court allows officers to demand at fixed border checkpoints—"a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States," *Martinez–Fuerte*, 428 U.S. at 558—Agents Lands and Perez were dissatisfied with four forms of government-issued identification and a verbal

---

[7] The length of the detention cannot be justified on the alternative basis of reasonable suspicion. At oral argument, the government correctly conceded that "this is not a *Terry* case." A drug dog did not alert when agents led it behind the car. Later, Rynearson asked Agent Lands several times whether he had reasonable suspicion to detain him; Agent Lands insisted that the detention did not require it. When Rynearson asked whether Agent Lands believed that Rynearson had violated an immigration law, Agent Lands responded, "I didn't say you violated an immigration law." Indeed, Agent Lands insisted that he needed no articulable reason at all to detain Rynearson.

affirmation of United States citizenship. All that remained after Rynearson's offer to surrender his passports was to authenticate them. On the present record, no reasonable officer—in light of *Martinez–Fuerte*, *Machuca–Barrera*, and *Portillo–Aguirre*—would believe that he was entitled to take an additional twenty-three minutes while ignoring the passports and placing phone calls to Rynearson's employer.

III.

Firm assertions of one's rights are far from "unorthodox" in a Republic that insists constitutional rights are worth insisting upon and that tasks the courts with protecting those rights. *See, e.g.*, *Brown v. Texas*, 443 U.S. 47, 52–53 (1979) (holding that without reasonable suspicion, police may not require citizens to stop and identify themselves); *Kolender v. Lawson*, 461 U.S. 352, 353–54 (1983) (invalidating a stop-and-identify statute on vagueness grounds). Government officials, like the defendants in this case, often contend that "[f]ailure to conform is 'insubordination,'" *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629 (1943), but it is the courts that must draw the line "between authority and rights of the individual," *id*. at 630. In drawing this line, we do not rely upon "whether . . . we would think" complying with an official's commands "to be good, bad or merely innocuous." *Id*. at 634. "Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs." *Id*. at 639. Rather, "we act in these matters not by authority of our competence" or by our perception of the plaintiff's actions, "but by force of

our commissions." *Id*. at 640.

Agents Lands and Perez failed to demonstrate their entitlement to qualified immunity because the law is clearly established that immigration officials may not detain travelers longer than reasonably necessary to investigate their citizenship status. For the foregoing reasons, I would reverse the judgment of the district court and remand for further proceedings.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

<table>
<tr><td>MAJOR RICHARD
RYNEARSON
Plaintiff,

v.

UNITED STATES
OF AMERICA;
AGENT LANDS,
Border Patrol Agent,
Individually; and
RAUL PEREZ, Border
Patrol Agent,
Individually,
Defendants.</td><td>§
§
§
§
§
§
§
§
§
§
§
§
§
§
§</td><td>

Civil Action No.
DR-12-CV-24-AM/CW</td></tr>
</table>

ORDER

Pending before the Court is the Report and Recommendation of the Honorable Collis White, United States Magistrate Judge, recommending that this Court grant the Motion to Dismiss All Claims Asserted Against Defendants Border Patrol Agent Justin K. Lands and Supervisory Border Patrol Agent Raul Perez (ECF No. 29), and that it deny the Plaintiff's Motion for Continuance from Summary Judgment to Conduct Discovery (ECF No. 34). Plaintiff Major Richard Rynearson filed objections to the Report on July 25, 2013. (ECF No. 45.) After conducting a de novo review of the relevant filings, this Court **ADOPTS** the Magistrate Judge's Report and Recommendation, **GRANTS** the Defendants' motion to dismiss, **GRANTS** the motion for summary

judgment that was filed jointly with the Defendants' motion to dismiss, and **DENIES** the Plaintiff's motion to continue summary judgment in order to conduct limited discovery for the purposes of qualified immunity.

I. UNDISPUTED FACTS AND PROCEDURAL HISTORY[1]

On March 18, 2010, Plaintiff Richard Rynearson, a Major in the United States Air Force, was traveling east on Highway 90 when he reached a fixed immigration checkpoint located in Uvalde County, Texas, approximately 67 miles from the United States-Mexico border. United States Border Patrol Agent Justin K. Lands approached the vehicle and asked Rynearson if he was the owner. Through the window, which was only slightly cracked, Rynearson answered "yes". Agent Lands then asked Rynearson to lower his window more, if possible, which prompted Rynearson to roll the driver's side window down a little further. In this initial interaction, lasting mere seconds, Agent Lands did not ask any questions about Rynearson's citizenship. Agent Lands proceeded to direct Rynearson to the secondary inspection area, referencing the heavy amount of traffic behind Rynearson in the checkpoint line.

While relocating his car to the secondary inspection area, Rynearson completely closed his

---

[1] These facts come from the pleadings, as well as, a video submitted by the Defendants that Rynearson recorded during the March 18, 2010 stop at the Uvalde County, Texas checkpoint. (ECF No. 38.) The video was posted on Youtube as well as http//www.pickyourbattles.net.

window. Approximately thirty seconds later, Agent Lands again approached Rynearson's vehicle, this time asking Rynearson to exit the vehicle. Rynearson refused and, through the closed window, questioned Agent Lands as to the reason for that request. Agent Lands asked Rynearson to lower his window because the noise from the vehicle traffic on Highway 90 and in the checkpoint area impeded his ability to hear. Despite numerous requests, Rynearson adamantly refused to roll down the window. Instead, he repeatedly asked Agent Lands if he was detaining him and, if so, on what grounds.

When Agents Lands asked Rynearson for his identification, Rynearson placed his license and military identification up against the glass, still refusing to roll down the window; Rynearson continued to do this even when Agent Lands informed him that he would need to physically inspect the documents to ensure that they were valid. Agent Lands stated that he would explain the reasons for Rynearson's detention if he would exit the vehicle, but again Rynearson refused to step out of the car or roll down the window, prompting Agent Lands to state that they would have "to do this the hard way." Nearby, other agents noticed and pointed out the multiple video cameras installed in various locations in Rynearson's car.

Rynearson continued to inquire about his detention through his closed window. When Agent Lands stated that he was experiencing difficulty hearing him, Rynearson retorted that Agent Lands could hear clearly. Agent Lands informed Rynearson that he was not satisfied as to his immigration status at that point because his behavior, such as refusing

to roll down the window, was atypical of a United States citizen, and he further explained that Rynearson's actions were evasive. After Rynearson persisted in challenging Agent Lands's explanations, Agent Lands walked away from the vehicle.

During Agent Lands's absence, Rynearson initiated one of several phone calls, including a call to the San Antonio office of the FBI, claiming that the agents did not have reasonable suspicion to search his vehicle, that he did not know why he was referred to secondary, that he did not want to lower his window, that he felt threatened by the agents, and that he believed they recognized him from previous trips through the checkpoint.

Approximately ten minutes after the initial encounter with Agent Lands, Rynearson lowered his window slightly and informed Agent Lands that, according to the FBI, the agents must have reasonable suspicion before searching the vehicle. A discussion ensued as to the legal standards required by Border Patrol to detain a person at a checkpoint. Rynearson asked Agent Lands if he thought that he was not a United States citizen, and Agent Lands responded, explaining that neither the driver's license nor military identification were appropriate immigration documents. Rynearson asked Agent Lands whether he wanted his passport, but Agent Lands did not acknowledge the offer. At this point, for the first time, Agent Lands asked if Rynearson was a United States citizen, to which he answered "yes". The conversation quickly returned to a discussion about Rynearson's detention. When Rynearson began to challenge Agent Lands's articulable reasons for the detention, Agent Lands

informed him that a supervisor had been summoned and would be arriving to the checkpoint momentarily to discuss the situation with Rynearson. As Agent Lands walked away, Rynearson placed his two passports (official and personal) against the driver's side window, next to his other identification documents.

When Supervisory Border Patrol Agent Raul Perez arrived at the Uvalde checkpoint from an off-site location, he approached the vehicle and asked Rynearson to hand him both passports. When Agent Perez asked Rynearson why he refused to answer questions about his citizenship at primary, Rynearson stated that he was not asked any immigration questions until later and further informed Agent Perez that he had captured the entire encounter on videotape if Agent Perez wished to see what had transpired. Agent Perez next inquired into the identity of Rynearson's commanding officer. Rynearson refused to provide the information and accused Agent Perez of attempting to interfere with his employment. Agent Perez stated that the agents would validate the passports and then left the secondary area.

Again, Rynearson made multiple phone calls, including one to the Border Patrol headquarters in Washington, D.C., expressing concern about his unlawful detention. While Rynearson was still on the phone, Agent Perez returned and stated that he was going to call the Provost Marshal and CID, to which Rynearson responded "okay."

Agent Perez returned the passports to Rynearson approximately thirteen minutes later and informed him that he was free to go. He suggested

that Rynearson cooperate with agents next time and reminded him that the checkpoint was extremely noisy due to its proximity to the highway. Agent Perez also explained that physically handing the documents to the agents would facilitate future inspections because they must verify that they are authentic documents.

The entire stop lasted approximately 34 minutes. Rynearson never exited his vehicle and no searches were conducted.

On September 14, 2010, Rynearson submitted an administrative claim to U.S. Customs and Border Protection pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., seeking $500,000 in damages as a result of the March 18, 2010 immigration stop. (ECF No. 27-2, Exhibit B.) Rynearson's administrative claim was denied on January 7, 2011. (ECF No. 27-4, Exhibit D.) Following the denial of his administrative claim, Rynearson filed suit in this Court on March 16, 2012. (ECF No. 1.) On August 23, 2012, he filed a first amended complaint. (ECF No. 23.)

In his amended complaint, Rynearson alleges the following causes of action: (1) Count One: negligence and/or gross negligence; (2) Count Two: false arrest and imprisonment; (3) Count Three: intentional infliction of emotional distress; (4) Count Four: violation of Rynearson's rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments based on an unreasonable seizure resulting from an extended immigration stop; (5) Count Five: *Bivens* action-false imprisonment/unreasonable search and seizure; (6) Count Six: *Bivens* action-failure to

intervene/supervise; and (7) conspiracy to violate Rynearson's Fourth Amendment rights.

On September 24, 2012, Defendants Lands and Perez filed a combined motion to dismiss and motion for summary judgment as to all claims.[2] (ECF No. 29.) In their motion, they state that Rynearson has failed to state a claim for violations of his Fifth, Sixth, and Fourteenth Amendment rights, thus leaving the Fourth Amendment claim as the only viable constitutional cause of action. Next, the Defendants argue that their actions at the immigration checkpoint were objectively reasonable, and summary judgment is appropriate as to the Fourth Amendment claim because they are therefore entitled to qualified immunity. Finally, the Defendants contend that the remaining claims, conspiracy and supervisory torts, fail because there is no underlying constitutional violation. Alternatively, they argue that even if there is a constitutional violation, the conspiracy and supervisory liability causes of action must be dismissed for failure to state

---

[2] Counts One, Two, and Three have already been resolved as to Agent Lands and Agent Perez. On August 3, 2012, the United States filed a notice of substitution of the United States for the agents for the tort claims pursuant to 28 U.S.C.§ 2679. (ECF No. 17.) The United States certified that both agents were acting in the scope and course of their respective positions as United States Border Patrol Agents during the time period alleged in the complaint. (ECF Nos. 17-1, 17-2.) On August 30, 2012, an order substituting the United States for Agent Lands and Agent Perez was entered as to all claims that would properly fall under the Federal Tort Claims Act, specifically Counts One, Two, and Three of the amended complaint. (ECF No. 25.)

a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Before responding to the motion to dismiss/motion for summary judgment, Rynearson filed a motion for continuance from summary judgment to conduct discovery. Rynearson contemplates a number of areas to he would like to investigate if given the opportunity to engage in discovery; specifically, he plans to (1) depose Agent Lands and Agent Perez in order to investigate their declarations prepared for summary judgment evidence, and (2) request videos and reports from the March 18, 2010 incident. (ECF No. 34.)

On October 15, 2012, Rynearson responded substantively to the Defendants' motion, arguing that (1) the agents are not entitled to qualified immunity because the duration of the stop exceed its constitutional limits; (2) the Defendants' motion for summary judgment is premature because there are genuine issues of material fact and he has not been permitted to conduct discovery; and (3) the claims for supervisory liability and conspiracy are well-pleaded under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). (ECF No. 35.)

After reviewing the motion to dismiss/motion for summary judgment, the motion to continue summary judgment, and other pertinent filings, the Honorable Collis White, United States Magistrate Judge, issued a Report and Recommendation. In his Report, he recommends to this Court that the motion to dismiss/summary judgment be granted in full because (1) the Plaintiff does not state a cause of action for violations under the Fifth, Sixth, or Fourteenth Amendments; (2) the Defendants are

entitled to qualified immunity because their actions, tested under the Fourth Amendment standards, were reasonable; and (3) the Plaintiff's claims for conspiracy, failure to intervene and supervisory liability claims do not survive a Rule 12(b)(6) analysis. The Magistrate Judge also recommends that the motion to continue summary judgment be denied because Rynearson failed to prove that he is entitled to limited discovery at this stage of the proceedings.

Rynearson filed the following objections to the Report: (1) it was error to conclude that Rynearson was uncooperative or that the stop transitioned into a *Terry v. Ohio*, 392 U.S. 1 (1968) stop; (2) the extension of the stop was not justified because there was no reasonable suspicion that Rynearson was involved in criminal misconduct; (3) a 34-minute immigration stop was not permissible on the grounds that Rynearson did not proactively prove his citizenship; (4) the duration of the stop exceeded the time it took to actually verify Rynearson's citizenship; (5) it was error to determine that Rynearson failed to state a claim for conspiracy; and (6) the Report incorrectly concludes that Rynearson is not permitted to conduct limited discovery.[3]

---

[3] Rynearson states that he does not object to the recommendation of dismissal of the alleged causes of action under the Fifth, Sixth, and Fourteenth Amendments or for supervisory liability. He requests leave to amend the complaint to combine Count Four and Count Five into one count to state a *Bivens* claim for a Fourth Amendment violation. These Counts are discussed *infra* at pp. 18-20.

II. Standard of Review

When a party files an objection to any part of a magistrate judge's report and recommendation, the district court must undertake a de novo review of the conclusions to which the party objects. 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."). In performing a de novo review, a district court must conduct its own analysis of the applicable facts and legal standards and is not required to give any deference to the magistrate judge's findings. *See United States v. Raddatz*, 447 U.S. 667, 689 (1980) (Stewart, J., dissenting) ("The phrase 'de novo determination' has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy.").

For findings where there are no objections made, the Court must only determine whether the report and recommendation is clearly erroneous or contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989).

III. Legal Analysis

The Defendants seek dismissal of the pending constitutional claims involving the Fifth, Sixth, and Fourteenth Amendments for an unreasonable search as well as the conspiracy and supervisory liability causes of action. Additionally, they request summary judgment on the Fourth Amendment claim. Because the analysis of the alleged Fourth Amendment

violation may affect other causes of action, this Court will address this part of Count Four first.

A. Count Four: Unreasonable Seizure under the Fourth Amendment

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Topalian v. Ehrman*, 954 F.2d 1125, 1132 (5th Cir. 1992). A genuine dispute about a material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Courts must ordinarily view the facts in the light most favorable to the nonmovant. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). However, conclusory allegations or unsubstantiated claims are not afforded deference during a summary judgment analysis. *See Brown v. City of Houston*, 337 F.3d 539, 541 (5th Cir. 2003). Furthermore, courts do not have to blindly accept the facts presented by the nonmovant as true when they are "blatantly contradicted by the record, so that no reasonable jury could believe it." *Scott v. Harris*, 550 U.S. 372, 381 (2007). In cases where the alleged events are captured by videotape, a court should not view the nonmovant's facts favorably "where the record discredits that description but should instead consider 'facts in the light depicted by the videotape.'" *Carnaby v. City of Houston*, 636 F.3d 186, 187 (5th Cir. 2011) (citing *Scott*, 550 U.S. at 381).

An officer sued under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), may assert qualified immunity as an affirmative defense.

See Wilson v. Layne, 526 U.S. 603, 609 (1999). Qualified immunity protects government officials from "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Wilson*, 526 U.S. at 609 (performing qualified immunity analyses identically for both *Bivens* actions and 42 U.S.C. § 1983 claims). It provides "*immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in the original). Because the protections are lost if a case erroneously proceeds to trial, immunity questions should be resolved by courts at the earliest stage possible. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).

A defendant may invoke qualified immunity if he demonstrates that the alleged conduct occurred while he was "acting 'in his official capacity and within the scope of his discretionary authority.'" *Cronen v. Texas Dept. of Human Services*, 977 F.2d 934, 939 (5th Cir. 1992) (quoting *Garris v. Rowland*, 678 F.2d 1264, 1271 (5th Cir. 1982)). Once the defendant establishes that he acted in his official capacity, courts use a two-prong test to evaluate the qualified immunity claim: (1) has the plaintiff alleged facts that, if true, demonstrate a constitutional violation, and (2) was the constitutional right clearly established at the time of the alleged violation? *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). If the plaintiff cannot satisfy his burden as to both prongs, qualified immunity will attach, protecting officials from unwarranted "harassment, distraction, and liability." *Pearson*, 555 U.S. at 231; *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002)

(shifting the burden to the plaintiff to show qualified immunity is inapplicable after the defendant raises the defense). Using its discretion, a court may begin its analysis with either prong, *Pearson*, 555 U.S. at 236, but if the plaintiff does not prove a constitutional violation, the inquiry immediately ends. *See Mace v. City of Palestine*, 333 F.3d 621, 623 (5th Cir. 2003).

For a constitutional right to be "clearly established," "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Thus, notice is the linchpin of the second prong; and while it is not a prerequisite for the specific act in question to have been previously deemed unlawful, its unlawfulness "in light of pre-existing law . . . must be apparent." *Id*. "The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Mendenhall v. Riser*, 213 F.3d 226, 230 (5th Cir. 2000) (internal quotations omitted).

Discovery is generally not permitted until after completion of the qualified immunity analysis to "spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991); *Mitchell*, 472 U.S. at 526 ("[E]ven such pretrial matters as discovery are to be avoided if possible, as [i]nquires of this kind can be peculiarly disruptive of effective government." (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982))).

However, the plaintiff is entitled to conduct discovery if he "has supported his claim with sufficient precision and factual specificity to raise a genuine issue as to the illegality of [the] defendant's conduct at the time of the alleged acts." *Schultea v. Wood*, 47 F.3d 1427, 1434 (5th Cir. 1995). Defendants are not protected from "all discovery but only from discovery which is either avoidable or overly broad." *Lion Boulos v. Wilson*, 834 F.2d 504, 507 (5th Cir. 1987). If the qualified immunity analysis involves a factual question, narrowly tailored discovery may be permitted. *Id.*

Because the Defendants satisfied their initial burden of showing that the incident occurred while they were acting in their official capacity, this Court must now determine whether Rynearson alleged facts that, if true, establish a violation of his Fourth Amendment right to be free from an unreasonable seizure.

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A seizure occurs when a person is required to stop at an immigration checkpoint. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976). Thus, under the Fourth Amendment, the essential inquiry is whether or not the stop is reasonable. *See Elkins v. United States*, 364 U.S. 206, 222 (1960) ("It must always be remembered that what the Constitution forbids is not all searches and seizures, but *unreasonable* searches and seizures." (emphasis added)). Reasonableness is determined by balancing the public interest against an individual's right to be

free from "arbitrary interference by law officers." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

In *Martinez-Fuerte*, the Supreme Court examined the constitutionality of suspicionless stops of vehicles at fixed immigration checkpoints. 428 U.S. at 555. Weighing the intrusion of a motorist's right to travel without interruption against the established governmental interest of controlling the flow of illegal aliens into the interior of the country, the Court determined that stops can be made "in the absence of any individualized suspicion at reasonably located checkpoints." *Id.* at 562. The public interest in routine stops at fixed checkpoints is considerable because "these checkpoints are located on important highways; in their absence such highways would offer illegal aliens a quick and safe route into the interior." *Id.* at 556-57. The agent's limited questioning will only momentarily interrupt the traveler's passages. *See Brignoni-Ponce*, 422 U.S. at 879 ("[A]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States.").

The mere referral of vehicles to the secondary inspection area of a checkpoint does not impermissibly lengthen the stop, as the intrusion to the traveler remains minimal. *Id.* at 560. "Whether the routine checkpoint stop is conducted at primary, secondary or both is irrelevant to Fourth Amendment concerns." *United States v. Rascon-Ortiz*, 994 F.2d 749, 753 (10th Cir. 1993). Therefore, an officer may refer a motorist to the secondary inspection area for any reason, or for no reason, because it does not

extend the length of the stop. *United States v. Machuca-Barrera*, 261 F.3d 425, 435 n.32 (5th Cir. 2001).

The duration of a stop by law enforcement officials is limited by the purpose for the original stop. *Id*. at 432. ("It is the length of the detention, not the questions asked, that makes a specific stop unreasonable."). Therefore, "[t]he scope of an immigration checkpoint stop is limited to the justifying, programmatic purpose of the stop: determining the citizenship status of persons passing through the checkpoint." *Id.* at 433.

Absent consent, an officer may only permissibly extend the duration of the stop if he develops reasonable suspicion that other criminal activity is afoot. *Id*. at 434; *see also United States v. Arvizu*, 534 U.S. 266, 273 (2002). The reasonableness of the officer's determination to continue the detention of an individual rests on "specific reasonable inferences which he is entitled to draw from facts in light of his experience." *Terry v. Ohio*, 392 U.S. 1, 27 (1968). This reasonableness analysis gives credence to an officer's experience because "common sense and ordinary human experience must govern over rigid criteria." *United States v. Sharpe*, 470 U.S. 675, 685 (1985). When evaluating reasonableness, courts examine "the totality of the circumstances–the whole picture" instead of viewing each action in isolation. *United States v. Scroggins*, 599 F.3d 433, 441 (5th Cir. 2010) (internal quotations omitted). "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative

information available to them that might well elude an untrained person." *Arvizu*, 534 U.S. at 273.

To determine the acceptable length of investigative stops, "it is appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *Sharpe*, 470 U.S. at 686. Courts are cautioned to avoid "second guessing" the officers' chosen methods of investigation and should instead look to see "if the police acted unreasonably in failing to recognize or to pursue [an alternative method]." *Id*.

Viewing the undisputed facts in the light most favorable to the Plaintiff, this Court finds that Rynearson has failed to satisfy his burden under the quality immunity analysis because he cannot show that Agent Lands or Agent Perez subjected him to an unreasonable seizure. The Supreme Court, in *Martinez-Fuerte*, created an exception to the Fourth Amendment to allow agents to conduct brief immigration investigations at permanent immigration checkpoints, like the fixed checkpoint in Uvalde County, Texas where Rynearson was stopped on March 18, 2010.[4] Within ten seconds of his arrival, Rynearson, without being asked any immigration-related questions, was referred to the secondary inspection area. Agents have the discretion to direct travelers to secondary without reasonable suspicion or probable cause. *See United*

---

[4] Rynearson does not challenge the constitutionality of a fixed immigration checkpoint; instead, he challenges the overall duration of his own detention.

States v. Chacon, 330 F.3d 323, 326-27 (5th Cir. 2003). Although an officer does not need to articulate his reasons for directing a vehicle to secondary, Agent Lands explained to Rynearson that traffic was backing up behind him in the primary checkpoint area.

Because the conditions surrounding Rynearson's initial stop and referral to secondary satisfy Fourth Amendment requirements, the analysis next turns on the duration of the stop. The constitutional gravamen of a Fourth Amendment seizure claim is the overall length of the stop in relation to its stated purpose. *Martinez-Fuerte*, 428 U.S. at 568 ("The principal protection of the Fourth Amendment rights at checkpoints lies in the appropriate limitations on the scope of the stop," and not the questions asked.). Although an immigration checkpoint's suspicionless stop is premised on the minimal intrusion into a person's privacy, no court has delineated a bright line rule for the precise time limit for such a stop. The brevity of Agent Lands' initial questions did not wrongfully extend the duration of the stop. *See United States v. Rascon-Ortiz*, 994 F.2d 749, 752 (10th Cir. 1993) (permitting agents to ask brief questions relating to things such as vehicle ownership, destination, and travel plans). Rynearson's accusation that he was sent to secondary so agents could do an illegal search is irrelevant. "The permissible duration of a suspicionless detention . . . [is] determined by objective factors, not by the subjective motivation or state of mind of the specific individual officers conducting the stop and related examination or questioning on the particular occasion at issue." *United States v. Jaime*, 473 F.3d 178, 183 (5th Cir. 2006).

Rynearson contends that it is not standard practice to require an individual to roll down his window or exit his vehicle during an immigration inspection. However, he does not cite to any case law indicating that either request would amount to a violation under the Fourth Amendment. The Supreme Court determined that a minimal intrusion is constitutionally appropriate in light of the great importance of stemming the flow of illegal immigrants into the country. *See Martinez-Fuerte*, 428 U.S. at 557. Brief questioning of the motorists is an acceptable and contemplated minimal invasion. *See Brignoni-Ponce*, 422 U.S. at 880 ("[A]ll that is required of the vehicle's occupants is a response to a brief question or two . . . ."). Therefore, it is consistent with the purpose of the checkpoint to allow an agent to make reasonable requests of an individual in order to facilitate the asking of requisite immigration questions. Agent Lands repeatedly told Rynearson that he could not adequately hear him through the closed window, which impeded his ability to communicate with him and satisfy the intended purpose of the immigration checkpoint. Requiring a motorist to exit the highway and pass through an immigration checkpoint is not an overly invasive request, and it would be improper to hold that requesting a person to lower his window is more intrusive or inappropriate than the initial stop.

An agent's request for a motorist to exit the vehicle does not intrude so strongly on his privacy and personal security that Fourth Amendment concerns would be implicated. *See Pennsylvania v. Mimms*, 434 U.S. 106, 111 (weighing the level of intrusion when ordering a driver to get out of the vehicle). The additional invasion in answering

questions outside of the vehicle instead of inside of the vehicle "can only be described as *de minimis*." *Id*. Whether or not the request to exit the vehicle follows a suspicionless stop or one with probable cause is irrelevant to this analysis. *Id*.

Rynearson centers his unwarranted detention allegation on the fact that Agent Lands did not ask for either his immigration status or his identification until approximately ten minutes into the stop. Looking at the totality of the circumstances, this Court finds that Rynearson's own actions, and not the lack of diligence on the part of Agent Lands, was the sole reason for any delay in determining immigration status. Agent Lands, from his initial interaction with Rynearson, expressed difficulty in hearing him through the window, which was slightly cracked in primary inspection and completely closed for a period of time while he was in secondary. When Agent Lands did have an opportunity to ask for identification, Rynearson refused to hand his license or military identification to him; he instead pressed them up against the glass, preventing Agent Lands from properly determining their authenticity. As the stop continued, Rynearson remained combative, arguing with Agent Lands about the appropriate legal standard for searches and seizures as well as accusing the agent of lying about his inability to hear. Realizing that he could not communicate effectively with Rynearson, Agent Lands summoned a supervisor to take over the stop.

Furthermore, reasonable suspicion developed at the checkpoint as a result of Rynearson's actions (and inactions). An officer must have a "particularized and objective basis for suspecting the particular

person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). Rynearson refused to roll down his window, repeatedly challenged the agents, made multiple phone calls while in secondary, refused to exit the vehicle, and refused to immediately turn over his identification. Agent Lands expressed concern that Rynearson may have tried to avoid rolling down the window because he may have drugs hidden in the door compartment. (*See* Decl. of Agent Lands, ECF No. 29-2 at 6). The refusal of a driver to lower his window combined with other atypical behavior has been found to support the finding of a suspicion that "there was an odor in the car that the driver did not want out." *United States v. Ludlow*, 992 F.2d 260, 264 (10th Cir. 1993). Additionally, Rynearson's combative behavior raised Agent Lands's suspicions to another possibility: that Rynearson might have been attempting to distract the agents at the checkpoint to permit a load of contraband to pass through undetected. *See United States v. Luz Garcia-Marquez*, 141 F.3d 1186, at *3 (10th Cir. 1998) (explaining that one of the purposes of the decoy vehicle is to "arouse agents' suspicions in order to divert attention away from 'load cars' traveling behind."). "[O]fficers are not required to close their eyes to indications of possible wrongdoing that are disclosed at roadblocks." *United States v. Diaz–Albertini,* 772 F.2d 654, 658 (10th Cir. 1985).

In his motion, Rynearson contends that requiring an individual to cooperate with agents at an immigration checkpoint impermissibly reverses the burdens under the Fourth Amendment. An agent must diligently pursue "a means of investigation that [is] likely to confirm or dispel" any suspicions of wrongdoing quickly. *United States v. Macias*, 658

F.3d 509, 522 (5th Cir. 2011). However, delays attributable to the evasive actions of an individual justify the extension of the detention in order to address the challenges outside of the officer's control. *See Sharpe*, 470 U.S. 675, 688 (1985). Rynearson's own actions in refusing to lower his window, refusing to exit the vehicle, challenging the agent's authority, and refusing to hand over identification cards impeded the agent's efforts to complete his investigation.

Rynearson argues that the Fourth Amendment does not require an individual to answer questions from law enforcement officers. *See Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 187 (2004). However, courts have expected individuals to respond to officers stationed at immigration checkpoint when they weigh the personal intrusion against the public interest. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 879 (1975) ("[A]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States."). Furthermore, the issue at hand is not his refusal to answer questions, it is his combative behavior that raised the suspicions of the agents and *prohibited* them from asking questions.

Although Rynearson relies on his military status to argue that the agents should have known that he was a United States citizen, he then tries to argue that it is a constitutional violation to contact a supervisor with knowledge of his military status to confirm his citizenship. (*See* ECF No. 35-1 at para. 19) (accusing Perez of "ignoring [his] military ID card

showing Richard was a military officer and, therefore, a U.S. citizen as all military officers are U.S. citizens."). Although "[c]omputerized license and registration checks are an efficient means to investigate the status of a driver and his auto," they "need not be pursued to the exclusion of, or in particular sequence with, other efficient means." *United States v. Brigham*, 382 F.3d 500, 511 (5th Cir. 2004). According to Rynearson, confirmation of his military status would confirm his citizenship. Furthermore, it is the continued questioning *after* the confirmation of citizenship that impermissibly lengthens a stop. *See United States v. Valadez*, 267 F.3d 398-99 (5th Cir. 2001).

Although the thirty-four minute stop of Rynearson was longer than some stops that occur at checkpoints, the length of the detention did not exceed a constitutionally permissible time. Rynearson's own behavior caused the delays. Agent Lands, as a result of Rynearson's abnormal behavior, developed reasonable suspicion that Rynearson was involved in some criminal activity. The agents acted as quickly as possible to dispel any notions of wrongdoing. After Agent Perez confirmed Rynearson's citizenship, he informed him that he could leave the checkpoint, thus ending the seizure.

Because he cannot establish that the Defendants conducted an unreasonable search and seizure under the Fourth Amendment, Rynearson did not satisfy his burden under a qualified immunity analysis. The Court finds that no rational trier of fact could find for Rynearson. Therefore, summary judgment in favor of the Defendants is appropriate.

B. Remaining Claims

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may file a motion to dismiss a case for failure to state a claim upon which relief can be granted. "Motions to dismiss for failure to state a claim are appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citing Fed. R. Civ. P. 12(b)(6)). A claim sufficient to survive a motion to dismiss "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the conduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). Two principles guide a court's evaluation of the sufficiency of a complaint:

> First, [a court] must accept as true all well pleaded facts in the complaint, and the complaint is to be liberally construed in favor of the plaintiff. Second, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.

Kaiser Aluminum and Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982) (internal citations omitted). The deference afforded to a plaintiff's pleadings is not unfettered. *See Southland Securities Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 361 (5th Cir. 2004) ("We will not strain to find inferences favorable to the plaintiffs. Nor do we accept conclusory allegations, unwarranted deductions, or legal conclusions."

(internal quotations and citations omitted)). Conclusory allegations in the complaint are not accepted as true. *See Iqbal,* 556 U.S. at 679 ("[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.").

1. Count Four: Fifth, Sixth, and Fourteenth Amendment Claims for Unreasonable Search, and Count Six: Supervisory Liability

Rynearson did not object to the recommendation of the Magistrate Judge that his Fifth, Sixth, and Fourteenth Amendment claims, as well as the claim for supervisory liability and failure to intervene, be dismissed for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[5] Accordingly, this Court must only review Judge White's findings for clear error. *See Wilson*, 864 F.2d at 1221. Upon review of the unobjected-to portions of

---

[5] Rynearson does not specifically object to the Magistrate Judge's recommendation that Count Five (A *Bivens* action for false imprisonment and unreasonable search and seizure) be dismissed as duplicative of the allegations in Count Two (false arrest and imprisonment) and Count Four (violation of Fourth Amendment right for wrongful detention). Instead, he seeks leave of the Court to state a singular *Bivens* claim for unreasonable detention under the Fourth Amendment. This Court will not permit Rynearson to amend the complaint, but instead will consider the unreasonable detention claim in conjunction with Count Four. The Court will not reconsider the false imprisonment claim of Count Five. Count Two alleged an identical false imprisonment claim, and has already been dismissed due to lack of subject matter jurisdiction.

the Report, this Court finds that the conclusions are neither erroneous nor contrary to law.

The Magistrate Judge recommends dismissal of the remaining constitutional claims because they are inapplicable to the Plaintiff's unreasonable seizure claim. First, the Fifth Amendment protects individuals from deprivation of life, liberty, or property, without due process of law. U.S. Const. amend. V. Because the Fourth Amendment specifically protects against the action complained of by the Plaintiff—an unreasonable seizure—the claim should be analyzed under the Fourth Amendment, not the Fifth. *See Albright v. Oliver*, 510 U.S. 266, 273 (1994) (providing that the amendment encompassing the "explicit textual source of constitutional protection" should apply, not "the more generalized notion of substantive due process") (internal quotations omitted). The Sixth Amendment is also inapplicable to the Plaintiff's *civil* cause of action because it affords protection for a criminal defendant during *criminal* prosecutions. *See United States v. Balsys*, 524 U.S. 666, 672 (1998). Finally, any claim of a Fourteenth Amendment violation is misplaced because it applies only to state action, whereas only federal action is alleged in the complaint. *See McGuire v. Turnbo*, 137 F.3d 321, 323 (5th Cir. 1998) ("The Fourteenth Amendment, by definition, requires state action.").

In reviewing the supervisory liability claim, the Magistrate Judge concludes that the Plaintiff's cause of action cannot survive a Rule 12(b)(6) analysis. To recover under a theory of supervisory liability, a plaintiff must show that the supervisor overtly participated in the wrongful conduct or that (1) there

is a causal link between failure to train and the violation of the plaintiff's constitutional rights, and (2) the failure to train or supervise rises to the level of deliberate indifference. *See Mesa v. Prejean*, 543 F.3d 264, 274 (5th Cir. 2008) (quoting *Estate of Davis v. City of N. Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005)). Here, Rynearson only alleges that Agent Perez failed to supervise Agent Lands. He does not allege that Agent Perez participated in any acts with Agent Lands or that Agent Perez acted deliberately or with reckless indifference.

To recover under a theory of failure to intervene, the plaintiff must establish that an officer present at the scene and fails to protect an individual from an officer's use of excessive force." *Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995). The Plaintiff does not allege that any excessive force was used. Therefore, dismissal under Rule 12(b)(6) is appropriate.

Accordingly, the Magistrate Judge's recommendations are **ADOPTED**. The motion to dismiss Rynearson's causes of action based on violations of the Fifth, Sixth, and Fourteenth Amendments, as well as his allegation for supervisory liability is **GRANTED**. Therefore, the claim for violations of Rynearson's Fifth, Sixth, and Fourteenth Amendments in Court Four are **DISMISSED**. Count Six of the complaint is also **DISMISSED** for failure to state a claim under Rule 12(b)(6).

2. Count Seven: Conspiracy Claim

To sufficiently state a cause of action for a *Bivens* conspiracy, the plaintiff must "establish the existence of a conspiracy" as well as the violation of a

constitutional right in furtherance of the conspiracy. *Thompson v. Johnson*, 348 F. App'x 914, 920 (5th Cir. 2009) (citing *Hale v. Townley*, 45 F.3d 914, 920 (5th Cir. 1995)). Because a conspiracy claim is not actionable under *Bivens* alone, there must be an underlying constitutional violation. *See Andrafe v. Chojnacki*, 65 F.Supp.2d 431, 462 (W.D. Tex. 1999) (citing *Pfannstiel v. City of Marion*, 918 F.2d 1178 (5th Cir. 1998)).

This Court has determined that Defendants are entitled to qualified immunity for Rynearson's claim that they violated his Fourth Amendment right to be free from an unreasonable seizure. Accordingly, there are no other constitutional violations that have survived either a 12b(6) or summary judgment analysis. Therefore, there is no underlying constitutional violation to accompany the conspiracy claim. *See id*. Summary judgment is thus appropriate for the *Bivens* conspiracy claim.

A plaintiff must support his claim with operative facts. *See Lynch v. Cannatella*, 810 F.2d 1363, 1370 (5th Cir. 1987). "Bald allegations that a conspiracy existed are insufficient." *Id.* "A claim for relief is implausible on its face when 'the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct.'" *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 796 (5th Cir. 2011) (quoting *Iqbal*, 556 U.S. at 662 (2009)). "Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown[n]'—'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)).

Rynearson has not adequately pleaded facts to state a claim that Agent Land and Agent Perez conspired to violate his Fourth Amendment rights. Under the "conspiracy" heading in the complaint, Rynearson states that "at all times defendants were acting in concert and in conspiracy and as agents of the United States." (ECF No. 23 at 13, para. 50). To survive a motion to dismiss, the plaintiff must "allege specific facts to show an agreement." *Priester v. Lowndes County,* 354 F.3d 414, 421 (5th Cir. 2004). Rynearson does not allege that Agent Perez and Agent Lands formed an agreement and does not plead facts that would show the formation of an agreement. Rynearson describes three prior incidents where he believes he was subjected to unconstitutional seizures at the Uvalde checkpoint, but does not factually connect either Defendant to the previous stops at the checkpoint. Blanket allegation, such as stating that Agent Perez knew that Agent Lands had not asked Rynearson about his citizenship and that he knew that Agent Lands was trying to illegally detain Rynearson because he illegally seizes individuals at the checkpoint will not satisfy Rule 12(b)(6). *See Jefferson v. Lead Industries Ass'n, Inc.*, 106 F.3d 1245, 1250 (5th Cir. 1997) ("[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."). Because Rynearson fails to adequately state a claim for conspiracy, the recommendation of the Magistrate Judge is **ADOPTED**. The motion to dismiss as to Count Seven is **GRANTED**.

C. Request for Stay for Purposes of Limited Discovery

Limited discovery is proper only if the plaintiff has raised a genuine issue as to the illegality of the defendant's conduct. *See Schultea v. Wood*, 47 F.3d at 1434. A court may also permit limited discovery and delay a ruling on qualified immunity "if further factual development is necessary to ascertain the availability of that defense." *Backe v. Le Blanc*, 691 F.3d 645, 648 (5th Cir. 2012). The Court finds that limited discovery is not appropriate in this case. Rynearson failed to show that the Defendants violated any of his constitutional rights. Therefore, this Court **ADOPTS** the conclusion of the Magistrate Judge that the motion should be denied.

IV. Conclusion

After a de novo review of the record, the Court **ADOPTS** the Report's conclusion that the motion to dismiss and motion for summary judgment should be granted. Dismissal pursuant to Rule 12(b)(6) is appropriate for the Fifth, Sixth, and Fourteenth Amendment claims under Count Four, as well as for Count Five (false imprisonment), Count Six (failure to intervene/supervisory liability), and Count Seven (conspiracy). The Defendants are entitled to qualified immunity for any Fourth Amendment claims. The Plaintiff is has not established a need for discovery. It is ordered that:

The Plaintiff's motion to continue summary judgment (ECF No. 34) is **DENIED**. The Defendants' motion for summary judgment (ECF No. 29) is **GRANTED.** Therefore, the Fourth Amendment claims under Count Four are

DISMISSED. The Defendants' motion to dismiss (ECF No. 29) is **GRANTED**. Therefore, Fifth, Sixth, and Fourteenth Amendment claims under Count Four are **DISMISSED**. Counts Six and Seven are also **DISMISSED**.

SIGNED this 30th day of September, 2013.

/s/ Alia Moses

ALIA MOSES

UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

MAJOR RICHARD RYNEARSON	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No.**
	§	**2:12-CV-024-AM-CW**
UNITED STATES OF AMERICA; AGENT LANDS, Border Patrol Agent, Individually; and RAUL PEREZ, Border Patrol Agent, Individually,	§	
Defendants.	§	

REPORT AND RECOMMENDATION

Pending before the Court is the Motion to Dismiss All Claims Asserted Against Defendants Border Patrol Agent Justin K. Lands and Supervisory Border Patrol Agent Raul Perez. ECF No. 29. The motion, which is actually a combined motion to dismiss and motion for summary judgment, was referred to the undersigned pursuant to 28 U.S.C. § 636 for a report and recommendation. Plaintiff Rynearson responded to the motion but also filed a motion to continue to conduct discovery before having to respond. ECF No. 34. After reviewing Defendants' motion, Plaintiff's motion, the response, and the reply, the undersigned **RECOMMENDS** that Defendants' motion be **GRANTED** in full. Furthermore, because Rynearson has not made a

sufficient showing for the need for limited discovery, his motion to stay should be **DENIED**.

I. UNDISPUTED FACTS AND PROCEDURAL HISTORY[1]

On March 18, 2010, Plaintiff Major Richard Rynearson approached a fixed immigration checkpoint located on United States Highway 90 in Uvalde County, Texas, approximately 67 miles from the United States-Mexico border. Defendant Justin Lands, a Border Patrol agent on duty at the time, stopped Rynearson's vehicle to conduct an immigration inspection. Rynearson's window was rolled down just a few inches. Lands asked Rynearson if the vehicle was his, and after Rynearson said yes, Lands asked if he could roll down his window some more. Rynearson lowered the window slightly more. Without asking any immigration questions, Lands asked again if the vehicle was his, and after Rynearson said yes, Lands asked Rynearson to move his vehicle to the side. When Rynearson inquired as to why, Lands said that there was traffic behind him, to move to the secondary inspection area ("secondary"), and he would be with him in a moment.

Rynearson drove his vehicle to secondary but rolled up his window completely. Less than a minute later, Lands asked him to step out of his vehicle, but Rynearson refused and also refused to roll down his

---

[1] The undisputed facts come from the pleadings and a video submitted by Defendants that Rynearson recorded while stopped at the immigration checkpoint. *See* ECF No. 38. Rynearson posted the video on his personal blog http//www.pickyourbattles.net and on YouTube.

window, despite Lands stating that he could not hear Rynearson. Rynearson asked through the closed window if Lands was detaining him and why. Lands said he was going to need his identification, so Rynearson placed his license against the window of the vehicle. Lands said that he was going to have to inspect it to see if it was an authentic form of identification, but Rynearson just placed a military identification up against the window next to his license. After Lands acknowledged that Rynearson was in the military, Lands said that he would discuss why Rynearson was being detained if he would step out of the vehicle. Rynearson, however, refused to get out, roll down his window, or hand over the forms of identification. Lands said that this could be done the easy way or the hard way, prompting Rynearson to make a phone call and leave a message with someone about how he was being detained.

Rynearson then asked Lands several times more why he was being detained. Lands again stated that he was having trouble hearing Rynearson, but Rynearson indicated that he could hear Lands just fine and that he did not want to roll down his window. Lands explained through the closed window that the purpose of the immigration checkpoint was to verify citizenship and stated that he was not yet satisfied that Rynearson was a United States citizen. He indicated this was because Rynearson would not roll his window down and was being evasive about answering questions. Instead of rolling down his window, Rynearson continuously asked through the closed window how he was being evasive and argued that he answered every question presented to him. Lands eventually gave up trying to talk to Rynearson and said he would be back.

Meanwhile, Rynearson made a phone call to the FBI in San Antonio and explained to the person who answered that he was referred to secondary for no reason, was not being told anything, and felt threatened. He also indicated he was recording the incident from several different angles from inside the vehicle and posting it on the internet. Apparently, Rynearson had encountered problems at the Uvalde checkpoint in the past and indicated to the person on the phone that he felt like they had been expecting him. Although the details are unclear, they discussed reasonable suspicion and Fourth Amendment rights for a while before ending the call.

After the phone call, Rynearson told Lands that he had called the FBI and said they told him that Border Patrol agents had to have reasonable suspicion to search his vehicle. Rynearson finally rolled his window down a little bit and demanded to know what reasonable suspicion there was. Lands first explained that he was having difficulty hearing Rynearson with the window rolled up. Rynearson responded that he knew Lands could hear him. Lands told Rynearson that a supervisor was coming, then explained to Rynearson that he did not understand the law, and that he did not need reasonable suspicion to place him in secondary.

Rynearson asked if Lands doubted whether or not he was a United States citizen, and Lands indicated that a military ID and a driver's license were not immigration documents and were insufficient to establish citizenship. Rynearson asked if Lands wanted a passport, and Lands finally asked for the first time if Rynearson was a United States citizen. After Rynearson responded yes,

Lands asked why he would not answer earlier, to which Rynearson responded that Lands had never asked. Lands retorted that there was a large truck behind him at the primary inspection area, and that was why he needed Rynearson to roll down his window so he could hear better. Rynearson said he could hear Lands just fine, but Lands noted Rynearson was inside the vehicle and not where he was standing.

Lands then indicated that all this was irrelevant, because Rynearson was being detained for not answering questions. Lands, however, indicated that he did not need reasonable suspicion to secondary anyone for an immigration violation. Rynearson asked if Lands thought he had committed an immigration violation, and Lands indicated that was not what he was saying, and a supervisor was coming. After more pressing, Lands said that all he needed was mere suspicion of an immigration violation, that he had that, but said he did not have to get into it with Rynearson about any articulable facts as to why he was being detained. Lands then said that Rynearson could discuss this with his supervisor and terminated the conversation.

Rynearson placed two passports next to his military ID and license against the closed window at that point but did not summon Lands or any other agent. When the supervisor, Defendant Raul Perez, arrived five to ten minutes later, Rynearson rolled his window down enough to pass Perez both passports–an official one and a personal one. Even with the window rolled down some, Perez also indicated that he was having trouble hearing Rynearson. Instead of rolling down his window,

Rynearson said he would speak up and that he could hear Perez just fine.

Perez asked Rynearson why he would not answer questions about his citizenship at the primary inspection area ("primary"), and Rynearson replied that he was never asked. Perez asked Rynearson if he produced his passport at primary, and Rynearson responded again that no one never asked. Perez then told Rynearson that he would check out his passport. Rynearson said he could prove everything he was saying because it had been videotaped. Perez indicated that wasn't necessary and then asked Rynearson who his commanding officer was in the military. Rynearson refused to tell him and asked why he would interfere with his work. Perez said it was fine for Rynearson not to tell him and that he could get the name of the officer through other means.

While awaiting Perez's return, Rynearson made other calls to unknown sources, complaining of being unlawfully detained. During one of the calls, Perez returned briefly and stated that he was going to call the "Provost Marshal and CID." Rynearson interrupted the call briefly and told Perez okay. After a few minutes, Perez came back and cleared Rynearson. Before sending him off, Perez asked Rynearson to be more cooperative next time, explained to him that there was a lot of traffic and noise, and indicated that rolling down the window and handing over the documents next time would help to verify his citizenship quickly. Perez also stated that viewing identification documents through the window was insufficient to insure that the documents were genuine and not counterfeit. No

search was ever conducted, and after approximately thirty-four minutes total, Rynearson drove away.

Rynearson filed an administrative claim pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq*., with the U.S. Customs and Border Protection, complaining of the stop. *See* ECF No. 27-2, Exhibit B. The claim was denied on January 7, 2011. ECF No. 27-3, Exhibit C.

Rynearson then filed the present suit on March 16, 2012 and filed an amended complaint on August 23, 2012. ECF No. 23. In the amended complaint, Rynearson presents a subjective variation of the facts shown in the video. Although most of the essential facts are the same, Rynearson asserts that Lands asked him questions and moved him to secondary because "he wanted to do an illegal search and seizure of Richard and also his vehicle for contraband unrelated to immigration status without probable cause or reasonable suspicion." Pl.'s Am. Compl. at 4. He also asserts that: (1) he voluntarily provided his military ID and driver's license; (2) Lands could clearly hear him the entire time even with his window rolled up; (3) Lands said he would do things the hard way because Rynearson would not exit his car for an illegal search and seizure; (4) Lands falsely claimed he was being evasive; (5) Lands falsely claimed that he had asked him about immigration status; (6) Perez knew that Lands had not asked him about his citizenship; (7) Perez asked for his commanding officer's name to harass him and get him in trouble with the military for not allowing an illegal search and seizure; (8) Perez was not concerned with immigration status but instead wanted to conduct an illegal search and seizure; (9)

Perez and Lands knew it was common practice to conduct illegal searches and seizures at the checkpoint; and (10) Perez knew Lands was conducting illegal searches and seizures and was trying to do so with him too.

Rynearson also claims that he was never combative, made no threatening gestures, did not resist answering any questions except regarding his commanding officer, and did not act in any manner to cause reasonable suspicion or probable cause that a law had been violated. He furthermore asserts that Lands and Perez ignored his offering of a passport and repeatedly lied that Lands had asked about immigration status. The amended complaint also details that Robert Harris, the Chief Border Patrol Agent, wrote a letter to his military commander a month later, criticizing his acts. Instead of disciplining or retraining Lands and Perez, their actions were praised. Rynearson also indicates that he has been stopped and detained at the same checkpoint longer than necessary at least three times prior, thereby causing him anxiety, fear, and anger when driving through the checkpoint. Although he describes these incidents in detail, none of the present defendants are alleged to have participated in any of these incidents.

Based on his experience that day at the checkpoint, which he describes as unreasonably long, Rynearson alleges the following causes of action: (1) Count One: negligence and/or gross negligence; (2) Count Two: false arrest and imprisonment; (3) Count Three: intentional infliction of emotional distress; (4) Count Four: violations of his rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the

United States Constitution for wrongfully detaining him and his vehicle for an excessive period of time with no reasonable suspicion or probable cause, asking questions unrelated to immigration status; (5) Count Five: a *Bivens* action for false imprisonment and unreasonable search and seizure because he was not free to go; (6) Count Six: a *Bivens* action for failure of Perez to supervise Lands and failure of both Defendants to intervene; and (7) a claim against Lands and Perez for conspiring to violate his Fourth Amendment rights.

Defendants Lands and Perez filed the present motion to dismiss/motion for summary judgment.[2] ECF No. 29. In the combined motion, Lands and Perez argue that Rynearson is unable to state a claim for conspiracy, supervisory liability, or any claims under the Fifth, Sixth, and Fourteenth Amendments of the Constitution. They further argue that they are entitled to dismissal or summary judgment for any remaining Fourth Amendment claims. They assert that the stop was reasonable under the circumstances because of Rynearson's uncooperative and suspicious behavior, and they are therefore entitled to qualified immunity.[3] Rynearson, in

---

[2] Defendant United States of America filed a separate motion to dismiss based on different arguments. This motion is addressed in a separate report and recommendation.

[3] Defendant the United States of America previously certified that Lands and Perez were acting within the course and scope of employment at the time of the alleged acts. Consequently, the tort claims were exclusively covered by the Federal Tort Claims Act, and the United States was the proper defendant. For that reason, the Court issued an order substituting the United States as the party for these claims and

response, asks for the opportunity to conduct depositions before the Court rules on the motion. Alternatively, Rynearson argues that (1) he has adequately stated claims for supervisory liability and conspiracy, and (2) Lands and Perez are not entitled to qualified immunity for any Fourth Amendment claims.

II. LEGAL ANALYSIS

A. Fifth, Sixth, and Fourteenth Amendment Claims in Count Four of the Amended Complaint

Defendants first seek dismissal of the claims of Fifth, Sixth, and Fourteenth Amendment violations pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. They argue that under the facts of this case, none of these amendments are applicable. Rynearson does not respond to this argument.

When considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), the complaint must be viewed in the light most favorable to the plaintiff, and all well-pleaded facts must be accepted as true. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). To state a claim, the plaintiff must plead "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Factual

---

dismissed these claims as to Perez and Lands. ECF No. 25. The tort claims in Counts One, Two, and Three of the Amended Complaint are therefore not presently at issue.

allegations must be enough to raise a right to relief above the speculative level" and must support a "claim to relief that is plausible on its face." *Id.* at 555, 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The undersigned agrees that these claims should be dismissed. The Fifth Amendment provides, among other things, that no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Fifth Amendment's due process clause, however, is not implicated "where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior . . . ." *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (internal quotations omitted). The Fourth Amendment explicitly protects against unreasonable searches and seizures and would therefore be the relevant Amendment to Rynearson's claim, "not the more generalized notion of substantive due process . . . ." *Id.*

The Sixth Amendment, in turn, provides for various rights throughout a domestic criminal prosecution. *See United States v. Balsys*, 524 U.S. 666, 672 (1998). Rynearson has not been criminally prosecuted. Finally, the Fourteenth Amendment only implicates state actions. *See McGuire v. Turnbo*, 137 F.3d 321, 323 (5th Cir. 1998). Both Lands and Perez are being sued because of their acts as federal employees and actors. The undersigned therefore

finds that Rynearson has failed to state a claim for Fifth, Sixth, and Fourteenth Amendment violations.

B. *Bivens* Claims in Count Five

Although not addressed by the parties, the undersigned notes problems with Count Five of the Amended Complaint. Because of the hybrid and repetitive nature of Count Five, the undersigned recommends that this count also be dismissed pursuant to Rule 12(b)(6). In Count Five, Rynearson brings a *Bivens* action for 1. false imprisonment and 2. an unreasonable search and seizure because "he was not free to go until cleared by the defendants." Pl.'s Am. Compl. at 12-13. Count Two, however, is also a false imprisonment claim, but under a common law tort theory. And Count Four alleges a similar unreasonable search and seizure claim for wrongfully detaining him and his vehicle for an excessive period of time with no reasonable suspicion or probable cause.

Rynearson is essentially combining Counts Two and Four to allege another constitutional claim in Count Five for false imprisonment. The Supreme Court, however, has held that general claims of false imprisonment are nothing more than general tort claims. "[F]alse imprisonment does not becomes a violation of the [Fourth Amendment] merely because the defendant is a [federal] official." *Baker v. McCollan*, 443 U.S. 137, 146 (1979); *see also Monroe v. Pape*, 365 U.S. 167, 240 n.68 (1961) ("Most courts have refused to convert what would otherwise be ordinary state-law claims for false imprisonment or malicious prosecution or assault and battery into civil rights cases on the basis of conclusory allegations of constitutional violation."). Here,

Rynearson's conclusory allegation that false imprisonment rises to a constitutional level is insufficient to state a *Bivens* claim, and the claim should therefore be dismissed.[4] [5]

As to Rynearson's second claim of an unlawful search and seizure in Count Five, it is nothing more than a repeat of the claim in Count Four and should also be dismissed or considered in combination with the Fourth Amendment claim in Count Four.

---

[4] Assuming that a false imprisonment claim can be treated as a constitutional claim instead of a simple state law tort claim, which has been done by at least one court, the inquiry has been treated as the same as a Fourth Amendment unreasonable seizure claim. *See, e.g., De La Fuente v. United States*, Civ. Action No. L-08-87, 2010 WL 2487942, at *5 (S.D. Tex. Mar. 31, 2010) ("[T]he inquiry of whether a person has been detained for purposes of false imprisonment is the same as the inquiry for whether there has been [an unreasonable] 'seizure' for Fourth Amendment purposes. In each situation, a detention can be effected by intentional use of any means to terminate a person's freedom of movement, including actual physical restraint, or by explicit or implicit threats of force."). Therefore, even if the Court or the parties disagree with the undersigned, the alternate summary judgment analysis for this claim would be identical to that conducted for the remaining Fourth Amendment claim in the next section. As Section C explains, there was no Fourth Amendment violation.

[5] Since Rynearson already brought a common law tort claim for false imprisonment that was dismissed as to Lands and Perez, there is no sense in construing Count Five as another tort claim.

C. Fourth Amendment Claims in Count Four of the Amended Complaint[6]

Defendants argue that summary judgment is appropriate for Rynearson's Fourth Amendment claim in Count Four of the amended complaint. They assert that the video of the stop indisputably depicts that any delays were a result of Rynearson himself, and they are therefore entitled to qualified immunity, which protects them from both discovery and liability. They also argue that reasonable suspicion developed during the stop, thereby justifying an extended stop. Finally, Defendants assert that even if they violated Rynearson's constitutional rights, these rights were not clearly established at the time, thereby still entitling them to qualified immunity.

Rynearson, in response, argues that various events unreasonably extended the stop, causing his Fourth Amendment rights to be violated. Specifically, he raises issues with the content of the questioning, his referral to secondary, asking him to step out of the vehicle, asking him to roll down the window, failing to promptly ask his immigration

---

[6] Although not designated as such, Rynearson's Fourth Amendment claim in Count Four must be brought pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), the "federal analog to suits brought against state officials under . . . § 1983." *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006). "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson v. Green*, 446 U.S. 14, 18 (1980). Because Rynearson is seeking monetary damages, this claim falls under *Bivens*, even if not properly labeled.

status, failing to explicitly ask for his identification, calling a supervisor who was not onsite when another supervisor was available, using a drug dog, and calling military personnel to confirm his identity.

Rynearson also contends that summary judgment is not appropriate at this stage because of undeveloped facts. He therefore seeks leave of the Court to conduct discovery on various issues before proceeding with the present motion for summary judgment. In support, Rynearson argues that he needs to know: (1) when Perez began his records check and when it was concluded; (2) why Lands summoned an off-site supervisor when an on-site supervisor was present, and whether this was standard policy; (3) the extent of military status matters that Perez investigated; (4) whether communication was actually impeded by wind noise or traffic; (5) whether agents typically ask questions related to car ownership at primary, rather than immigration questions; (6) whether it is standard practice to order someone out of the vehicle when a search is not intended; (7) whether it is standard practice to talk face to face with an agent; (8) what conveyed between Lands and Perez; and (9) whether it was standard practice to bring a drug dog in.

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Whitt v. Stephens Cnty.,* 529 F.3d 278, 282 (5th Cir. 2008). "A genuine issue of material fact exists if the record, taken as a whole, could lead a rational trier of fact to find for the non-moving party." *Tubos de Acero de Mexico, S.A. v. Am. Int'l Inv. Corp.*, 292 F.3d

471, 478 (5th Cir. 2002). Generally, "courts are required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion.'" *Scott v. Harris*, 550 U.S. 372, 378 (2007) (quoting *United States v. Diebold, Inc*. 369 U.S. 654, 655 (1962)). However, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id*. at 380.[7]

Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Essentially, qualified immunity allows for officers to make reasonable mistakes about whether their conduct violates the law and protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *see also Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

---

[7] This standard comes into play here, where a videotape of the incident exists. Similar to *Harris*, "[t]here are no allegations or indications that this videotaped was doctored or altered in any [significant] way, nor any contention that what it depicts differs from what actually happened." 550 U.S. at 378. A court should reject a "plaintiff's description of the facts where the record discredits that description but should instead consider 'the facts in the light depicted by the videotape.'" *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011) (quoting *Scott*, 550 U.S. at 381).

When a defendant properly raises a qualified immunity defense, the plaintiff bears the burden of overcoming the defense. *Bennett v. City of Grand Prairie,* 883 F.2d 400, 408 (5th Cir. 1989).[8] In resolving qualified immunity claims, a court must follow a two-step process, inquiring (1) whether the facts that a plaintiff has alleged or shown make out a constitutional violation; and (2) whether the right at issue was clearly established at the time of the alleged misconduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If the answer to either prong is no, then an officer is entitled to immunity from suit. *Id.* A court is permitted to exercise its "sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson,* 555 U.S. 223, 236 (2009).

"'The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Lytle v. Bexar Cnty.,* 560 F. 3d 404, 410 (5th Cir. 2009) (quoting *Saucier*, 533 U.S. at 202). Although the very action in question does not have to have previously been held unlawful, "in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640; *Manis v. Lawson*, 585

---

[8] To invoke qualified immunity, a government official must show that the conduct occurred while "acting 'in his official capacity and within the scope of his discretionary authority.'" *Cronen v. Tex. Dep't of Human Servs.*, 977 F.2d 934, 939 (5th Cir. 1992) (quoting *Garris v. Rowland*, 678 F.2d 1264, 1271 (5th Cir. 1982)). These specifications have been met.

F.3d 839, 845-46 (5th Cir. 2009) ("If the law at the time of a constitutional violation does not give the officer 'fair notice' that his conduct is unlawful, the officer is immune from suit."). Generally, there must be a Supreme Court or Fifth Circuit decision on point, or in certain circumstances, a "'consensus of cases of persuasive authority.'" *McClendon v. City of Columbia*, 305 F.3d 314, 329 (5th Cir. 2002) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)).

Qualified immunity provides both immunity from suit and immunity from discovery. *See Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012) ("One of the most salient benefits of qualified immunity is protection from pretrial discovery, which is costly, time-consuming, and intrusive."). As such, the Fifth Circuit "has established a careful procedure under which a district court may defer its qualified immunity ruling if further factual development is necessary to ascertain the availability of that defense." *Id.* To permit discovery and delay ruling on a qualified immunity defense, the court must first find "that the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity." *Wicks v. Miss. State Emp't Servs.*, 41 F.3d 991, 994 (5th Cir. 1995). "Thus, a plaintiff seeking to overcome qualified immunity must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity." *Backe,* 691 F. 3d at 648. Only after the Court makes this determination, "if the court remains 'unable to rule on the immunity defense without further clarification of the facts,' it may issue a discovery order 'narrowly tailored to uncover only those facts needed to rule on

the immunity claim.'" *Id.* (quoting *Lion Boulos v. Wilson*, 834 F.2d 504, 507-08 (5th Cir. 1987)).

The undersigned finds that both Lands and Perez are entitled to qualified immunity, and discovery is unwarranted. The Fourth Amendment guarantees individuals the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV. Essentially, "[t]he Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976).

"A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). Checkpoint stops are considered "seizures" within the meaning of the Fourth Amendment. *Martinez-Fuerte*, 428 U.S. at 556. Nonetheless, government agents may constitutionally stop travelers without individualized suspicion for questioning about immigration status." *United States v. Ventura*, 447 F.3d 375, 378 (5th Cir. 2006); *Martinez-Fuerte*, 428 U.S. at 566 ("[S]tops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant.").

Checkpoint stops are not without limits, however. The scope of the stop "is limited to the justifying, programmatic purpose of the stop: determining the citizenship status of persons passing through the checkpoint." *United States v. Machuca-*

Barrera, 261 F.3d 425, 433 (5th Cir. 2001). The permissible duration of the stop is "therefore the time reasonably necessary to determine the citizenship status of the persons stopped," which would include "the time necessary to ascertain the number and identity of the occupants of the vehicle, inquire about citizenship status, request identification or other proof of citizenship, and request consent to extend the detention." *Id.*

Notwithstanding, "if the initial, routine questioning generates reasonable suspicion [or probable cause] of other criminal activity, the stop may be lengthened to accommodate its new justification." *Id.* at 434. "Thus, an agent at an immigration stop may investigate non-immigration matters beyond the permissible length of the immigration stop if and only if the initial, lawful stop creates reasonable suspicion warranting further investigation." *Id.* "Accordingly, illegal drug interdiction may be carried out at immigration checkpoints, though not as the primary purpose of those checkpoints." *Ventura*, 447 F.3d at 378. "Conversely, when officers detain travelers after the legitimate justification for a stop has ended, the continued detention is unreasonable." *United States v. Portillo-Aguirre*, 311 F.3d 647, 654 (5th Cir. 2002).

A prolonged detention at a checkpoint based on reasonable suspicion is considered a *Terry* stop, and "due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which [an agent] is entitled to draw from the facts in light of his experience." *Terry v. Ohio*, 392 U.S. 1, 27 (1968); *United States v. Brigham*, 382 F.3d 500, 506 (5th Cir.

2004) (en banc). The agent must be able to point to "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States v. Cortez*, 449 U.S. 411, 417 (1981). The test is one of reasonableness given the totality of the circumstances and "must be based on commonsense judgments and inferences about human behavior." *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000); *see also United States v. Arvizu*, 534 U.S. 266, 273 (2002) (reiterating that officers must be allowed to "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person") (internal quotations omitted).

The Supreme Court has refused to adopt a "bright line" rule as to whether an investigative detention is unreasonable, or a "hard-and-fast time limit for a permissible *Terry* stop." *United States v. Sharpe*, 470 U.S. 675, 686 (1985). Instead, "common sense and ordinary human experience must govern over rigid criteria." *Id*. at 685. This involves taking into account "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *Id.* at 686. "A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing." *Id.* Even though alternative means may have been available to accomplish objectives of law enforcement, "'less intrusive means' does not, itself, render the search unreasonable." *Id.* at 687 (internal quotations omitted). "The question is not simply

whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." *Id.*

The undersigned finds that Rynearson has failed to demonstrate either prong of the qualified immunity analysis.[9] The issue, essentially, is whether Lands and/or Perez unlawfully extended the

---

[9] Rynearson contends that Defendants failed to even argue that the second prong of the qualified immunity analysis is at issue, and "with good reason," because "[i]t has long been clearly established that a government agent violates the Fourth Amendment when he extends the duration of an immigration checkpoint seizure beyond what is reasonable for a brief inquiry into immigration status . . . when he fails to diligently pursue the purpose justifying the stop . . . and when he extends the stop beyond a permissible duration in order to inquire into matters unrelated to the justification for the seizure . . . ." Pl.'s Resp. at 6-7. This argument is both an oversimplification and misunderstanding of the qualified immunity analysis. In *Anderson v. Creighton*, the Supreme Court clarified in an analogous context:

> For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*.

483 U.S. at 639. Thus, it is certainly well established that law enforcement cannot unjustifiably extend the length of a stop. However, the question is whether existing law made it sufficiently apparent that the particular acts in question were unlawful.

stop beyond its permissible duration. First, the video shows that Rynearson was immediately referred to secondary before the immigration inspection could occur. Noise or no noise, it is well established that drivers can be referred to the secondary inspection area to conduct the initial immigration inspection. Referrals "need not be justified by individualized suspicion and may be based on factors, such as ethnicity, which would generally be deemed impermissible." *Machuca-Barrera*, 261 F.3d at 431 n.6 (citing *Martinez-Fuerte*, 428 U.S. at 563-64). Because the intrusion upon motorists is minimal and an inquiry cannot feasibly be made upon every motorist when traffic is heavy, border patrol agents are allowed wide discretion in selecting the motorists to be diverted for the brief questioning involved. *Martinez-Fuerte*, 428 U.S. at 560. Therefore, "a border patrol agent may refer a car to secondary for any reason (or no reason at all)," as long as "the length of the detention is still limited by the immigration-related justification for the stop." *Machuca-Barrera*, 261 F.3d at 434 n.29 (internal citations omitted).

Second, questions of vehicle ownership are within the scope of a permissible inquiry at an immigration stop. *See, e.g., United States v. Rascon-Ortiz*, 994 F.2d 749, 752 (10th Cir. 1993) ("[A] few brief questions concerning such things as vehicle ownership, cargo, destination, and travel plans may be appropriate if reasonably related to the agent's duty to prevent the unauthorized entry of individuals into this country and to prevent the smuggling of contraband."); *United States v. Ludlow*, 992 F.2d 260, 265 n.4 (10th Cir. 1993) (finding these questions "reasonably related to the agent's duties for

identification purposes and because of the common use of stolen vehicles in smuggling operations").

Notwithstanding, courts "reject any notion that [an agent's] questioning, even on a subject unrelated to the purpose of a routine traffic stop, is itself a Fourth Amendment violation." *United States v. Shabazz*, 993 F.2d at 436; *see also Machuca-Barrera*, 261 F.3d at 434 ("To scrutinize too closely a set of questions asked by a Border Patrol agent would engage judges in an enterprise for which they are ill-equipped and would court inquiry into the subjective purpose of the officer asking the questions."). This is because the Fourth Amendment "is concerned with ensuring that the scope of a given detention," not the subject matter of the questioning, "is reasonable under the totality of the circumstances." *Brigham*, 382 F.3d at 508. The questions about vehicle ownership only took a few seconds and did not impermissibly delay the stop.

It is also well settled that the driver (and even occupants) of a lawfully stopped vehicle can be ordered to step out of the car. *See, e.g., Pennsylvania v. Mimms*, 434 U.S. 106, 111, 123 (1977) (calling it a "*de minimis*" intrusion justified as a precautionary measure to protect the officer); *Maryland v. Wilson*, 519 U.S. 408 (1997) (extending the holding in *Mimms* to passengers); *Mollica v. Volker*, 229 F.3d 366 (2d Cir. 2000) (extending *Mimms* to vehicles stopped at checkpoints). "Establishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements; this, in turn, reduces the likelihood that the officer will be the victim of an assault." *Mimms*, 434 U.S. at 110. Ordering Rynearson out of the

vehicle did not violate his constitutional rights, and any delay caused by Rynearson's refusal to comply was of his own making.[10]

It was more than reasonable for Lands and Perez to ask Rynearson to roll down his window so they could hear him better. Although Rynearson makes conclusory statements that Lands lied about not being able to hear, Lands swore in a declaration, which is competent summary judgment evidence, that the sound of traffic impeded hearing. Furthermore, from an objective standpoint, any person who has driven through the Uvalde checkpoint knows the high level of traffic noise, and it would surely be easier for Rynearson to hear the agents from within his vehicle than it would be for the agents to hear Rynearson. Finally, rolling down the window allows an agent to gather needed documents, quickly assess the credibility of the driver, and also helps to protect the agent by being able to carefully monitor a potentially dangerous situation. The undersigned finds it illogical that an officer can order a person out of his vehicle but

---

[10] Rynearson argues that he could only be ordered out of the vehicle in the case of a suspicion-based stop. Case law indicates that this is not the case; the stop need only be a lawful one such as at a permanent checkpoint. *See Mollica,* 229 F.3d 366; *see also United States v. Ibarra-Sanchez*, 199 F.3d 753, 761 (a vehicle need only be lawfully stopped to order occupants to exit). In any case, even assuming Rynearson is correct, the law is certainly not clearly established, with at least one circuit court finding it permissible to order a driver out of his vehicle at a checkpoint. Furthermore, the request did not delay the stop, as Lands did not persist with his request that Rynearson exit the vehicle.

cannot order him to roll down his window, and there certainly isn't any case law to the contrary. Therefore, any delay caused by Rynearson's refusal to roll down his window again was of his own making.

Also, drug sniffing dogs are often utilized at fixed checkpoints, and their use does not constitute a search or a seizure, so long as the use of the dog does not extend the length of the stop "beyond the time necessary to verify the immigration status of a vehicle's passengers." *United States v. Ventura*, 447 F.3d 375, 378 (5th Cir. 2006). Rynearson does not contend that the use of a drug dog extended the stop in any way.[11]

Rynearson makes much out of the fact that Lands never asked for his identification and did not ask his immigration status until well into the stop. He also claims that he freely offered his identification early on during the stop. The video, however, contradicts these assertions, and Rynearson's version of the facts thus need not be taken as true. *Harris*, 550 U.S. at 380. Lands explicitly told Rynearson that Lands needed Rynearson to give him the forms of identification in order to inspect them to make sure they were valid. Def. Ex. D, part 1, 2:06-10. Rynearson, however, only placed them against the vehicle's window but would not roll down his window to hand anything over. Lands had no way to verify the authenticity of the forms of identification and therefore had no way to verify Rynearson's

---

[11] Whether or not it is standard policy to use a dog at the checkpoint is wholly irrelevant.

citizenship.[12] In addition, because of Rynearson's combative behavior and refusal to get out of the car or roll down his window, Lands had no opportunity to ask Rynearson his immigration status until later in the stop.

The undersigned also finds that reasonable suspicion developed at the inception of the stop, thereby justifying additional detention until that suspicion was dispelled. Lands indicates that his suspicions were raised by Rynearson's combative and evasive behavior, and he thought Rynearson could be acting as a decoy to divert the attention and resources of the agents while others passed through the immigration checkpoint undetected. He also indicates that Rynearson could have been refusing to roll down his window because he was hiding drugs in the door compartment. Lands Decl., ECF No. 29-2 at 5.

The undersigned agrees that Rynearson's conduct rose to the level of reasonable suspicion. In *United States v. Ludlow*, 992 F.2d 260 (10th Cir. 1993), the court found that reasonable suspicion existed where a motorist would not roll the window all the way down at a checkpoint and otherwise acted nervously. Under those facts, the court agreed with the district judge that this behavior would raise the

---

[12] The record also indicates that Lands wrote down information from the forms of identification that were sitting in the window, but the authenticity of the forms of identification still could not be verified. Furthermore, the military ID and the driver's license were inadequate to establish citizenship. Rynearson did not place his passports against the glass until a supervisor had already been summoned.

suspicion that "there was an odor in the car that the driver did not want out." *Id.* at 264. Similarly, Rynearson keeping his window rolled up could have been a way to mask the smell of drugs in the vehicle.

Furthermore, courts have long recognized the use of decoys at checkpoints to divert attention from other drivers.[13] Keeping his window rolled up, refusing to exit his vehicle, constantly making phone calls, typing on his computer, being combative, and refusing to hand over identification more than exceeds the threshold for reasonable suspicion that Rynearson was a decoy, an alien, an alien smuggler, or a drug smuggler. Refusing to answer who his commanding officer was also added doubt that Rynearson was actually in the military. Rynearson's behavior as a whole was simply amiss, and Lands's commonsense judgments and inferences about Rynearson's behavior would have led a reasonable agent to the conclusion that criminal activity was being undertaken.

Citing to *Shabazz*, 993 F.2d 431, and several other cases, Rynearson seems to argue that he was

---

[13] *See, e.g.*, *Brignoni-Ponce*, 422 U.S. 899, 913 (1975) (Burger, J., concurring) (noting the extensive use of decoys); *United States v. Reyes*, 227 F.3d 263, 266 n.1 (5th Cir. 2000) ("A 'scout' vehicle . . . is one which precedes a 'load' vehicle in transit through checkpoints. Load vehicles carry the principal shipment of narcotics, whereas scout vehicles either serve as decoys by distracting border agents with a smaller amount of narcotics, or as lookouts by informing the load vehicles when agents are nearby."); *United States v. Luz Garcia-Marquez*, 141 F.3d 1186, at *3 (10th Cir. 1998) ("Decoy cars, or 'lead cars,' seek to arouse agents' suspicions in order to divert attention away from 'load cars' traveling behind.").

under no obligation to cooperate or answer any questions and should have been cleared to leave immediately. *See* Pl.'s Resp., ECF No. 35. Citing First Amendment law and cases related to refusing to consent to searches, he also seems to argue that his refusal to cooperate is his constitutional right and cannot ever amount to reasonable suspicion to justify extending the stop. *See, e.g.*, *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."); *Machuca-Barrera,* 261 F.3d at 435 n.32 ("The mere fact that a person refuses to consent to search cannot be used as evidence in support of reasonable suspicion.").

The undersigned finds no case law to support these contentions and finds cases cited by Rynearson easily distinguishable. First of all, Rynearson was never asked to consent to a search. Second, reasonable suspicion was based on the totality of the circumstances, not just Rynearson's refusal to cooperate with any single aspect of the stop.

Third, Rynearson did not sufficiently comply with the checkpoint requirements and was not free to leave. In *Shabazz*, the appellants provided conflicting answers to questions posed by officers, thereby creating reasonable suspicion to justify extending the stop. The Fifth Circuit noted that the appellants were under no obligation to answer questions about their recent travels, but law enforcement officers nonetheless were not restricted from asking such questions. As long as the questions were asked before the completion of the investigation

related to the stop, officers could ask any questions they saw fit. In contrast with *Shabazz*, it cannot be disputed that Rynearson could be detained until his identity and citizenship could be ascertained. To hold otherwise would be contrary to *Martinez-Fuerte*, which upheld the validity of checkpoints in order to do just that. Defendants could certainly ask for identification and ask questions related to citizenship and could detain Rynearson until he complied.

Lands was not required to turn a blind eye to Rynearson's suspicious behavior, and the stop could be lengthened to accommodate its new justification, which would mean expanding the reach of the stop to confirm or dispel evidence of drug or alien smuggling. At a standstill with Rynearson, Lands summoned a supervisor, and a mere minutes later, Perez arrived. Again, agents must act diligently, but a court should not indulge in unrealistic second-guessing of the methods utilized to confirm or dispel suspicion. "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." *Sharpe*, 470 U.S. at 687. Rynearson has not pointed to any case law that would indicate calling an offsite supervisor violates clearly established constitutional rights. In fact, courts have upheld far longer delays to summon drug sniffing dogs or additional personnel to aid in confirming or dispelling reasonable suspicion. Importantly, in *Sharpe*, the Supreme Court found it reasonable for law enforcement to detain a suspect pending the arrival of a DEA agent. Even though the DEA agent was unrelated to the case and was simply consulted because of his expertise in drug smuggling, it was deemed reasonable to delay a stop for over ten

minutes to await his arrival.[14] Similar to here, the Court found that the "delay in this case was attributable almost entirely to the evasive actions" of the driver, and the "somewhat longer detention was simply the result of a graduated response to the demands of the particular situation." 470 U.S. at 688 (internal quotations and modifications omitted).[15]

Nor has Rynearson pointed to any case law that indicates calling military personnel to confirm identification violates clearly established rights. This, in fact, appears to be a legitimate means to quickly dispel suspicion of criminal wrongdoing. Because pilots in the Air Force are extensively vetted, ascertaining Rynearson's military status was a reasonable means to confirm his identity and

---

[14] *See also United States v. Franco-Martinez*, 2011 WL 4340857, Crim. No. 11-204 (SRN/LIB) (D. Minn. Aug. 30, 2011) (finding it reasonable for local law enforcement to contact a Spanish-speaking Border Patrol agent when a man failed to produce valid identification during a routine traffic stop).

[15] For examples of amounts of time deemed reasonable to summon a drug dog once reasonable suspicion arises, *see, e.g.*, *United States v. Donnelly,* 475 F.3d 946, 953 (8th Cir. 2007) ("[U]nder the proper circumstances, we have considered delays for dog-sniffs far in excess of 90 minutes reasonable."); *United States v. Glover*, 957 F.2d 1004 (2d Cir. 1992) (20 minutes for narcotics dog to arrive, 30 minutes to detain defendant to conduct brief questioning); *United States v. Mondello*, 927 F.2d 1463 (9th Cir. 1991) (thirty minute detention of defendant and luggage to await narcotics dog reasonable); *United States v. Sullivan*, 903 F.2d 1093, 1097-98 (7th Cir. 1990) (forty-five minute detention of luggage for sniff test held reasonable); *United States v. Knox*, 839 F.2d 285 (6th Cir. 1988) (thirty minute detention of defendants and luggage, followed by a sniff test, held reasonable).

quickly dispel suspicion, thereby focusing limited resources more efficiently elsewhere. *See Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County*, 542 U.S. 177, 186 (2004) ("[K]nowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere."). Although "[c]omputerized license and registration checks are an efficient means to investigate the status of a driver and his auto," they "need not be pursued to the exclusion of, or in particular sequence with, other efficient means." *Brigham*, 382 F.3d at 511.

Rynearson, however, questions the amount of time it took to verify his identification and citizenship and wants to depose Perez essentially to create a strict time line. The Supreme Court has explicitly rejected this approach, holding that there is no constitutional stopwatch for immigration checks. *Sharpe*, 470 U.S. at 686. Approximately ten minutes was not an objectively unreasonable amount of time to both verify the authenticity of the forms of identification plus verify military status. *See United States v. Sanchez*, 417 F.3d 971 (8th Cir. 2005) (finding reasonable a 45-minute stop where the driver was evasive about his identity); *United States v. Tuley*, 161 F.3d 513 (8th Cir. 1998) (holding reasonable a stop that took twenty minutes to verify identification and confirm that a warrant was still outstanding). Again, Perez was clearing Rynearson for potential alien and drug smuggling, not just being in the country illegally. Once Rynearson's identification and citizenship were verified, the

immigration stop was finally completed, and he was immediately free to leave.[16]

Based on an assessment of all the facts, the stop took no longer than reasonably necessary to complete an immigration inspection. It is true that the entire stop took approximately thirty-four minutes, well above the average delay of checkpoint stops. But Rynearson was uncooperative, and in fact combative, during the entire stop, thereby causing his delay. His behavior also created reasonable suspicion that criminal activity was underfoot, justifying an even longer delay.

The undersigned concludes that Rynearson has not met his burden of demonstrating that Defendants are not entitled to qualified immunity for the Fourth Amendment claims. Even assuming any of the methods utilized by Defendants resulted in an unconstitutional seizure, Rynearson has not cited to any case law that clearly establishes this. Because no rational trier of fact could find for Rynearson, summary judgment in favor of Defendants should be granted.[17]

---

[16] Neither agent ever refused any offering of a passport. Placing the passport up against a closed window without allowing physical inspection does not constitute offering a passport. And when Perez approached Rynearson for the first time, Rynearson immediately handed him the passports, which Perez fully accepted.

[17] Although Rynearson argues that some of the facts are in dispute, the undersigned finds that the discrepancies are not material. "The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is

D. Conspiracy, Failure to Intervene, and Supervisory Liability Claims

Defendants next argue that Rynearson's conclusory allegations regarding supervisory liability, conspiracy, and although not explicitly stated, failure to intervene, are unable to pass muster under the Rule 12(b)(6) standard. Rynearson in response argues that these claims are indeed sufficient to meet the Rule 12(b)(6) standards dictated in *Iqbal* and should not be dismissed.

The undersigned finds that these claims should be dismissed for failure to state a claim, or, alternatively, summary judgment should be granted. To establish a claim for failure to intervene, a plaintiff must demonstrate that an officer was present at the scene "and does not take reasonable measures to protect a suspect from another officer's use of excessive force . . . ." *Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995); *see also Gilbert v. French*, 364 F. App'x 76, 83 (5th Cir. 2010).

To establish a *Bivens* conspiracy claim, a plaintiff must establish: "(1) an actual violation of a right protected under [*Bivens*] and (2) actions taken in concert by the defendants with the specific intent to violate the aforementioned right." *Kerr v. Lyford*, 171 F.3d 330, 340 (5th Cir. 1999). "A plaintiff must also 'allege specific facts to show an agreement.'" *Tebo v. Tebo*, 550 F.3d 492, 496 (5th Cir.2008) (quoting *Priester v. Lowndes County*, 354 F.3d 414, 421 (5th Cir. 2004)). Mere conclusory allegations of

---

that there be no *genuine* issue of *material* fact." Harris, 550 U.S. at 380 (internal quotations and citation omitted).

conspiracy, absent reference to material facts, cannot constitute grounds for *Bivens* relief. *Id.*; *Lynch v. Cannatella*, 810 F.2d 1363, 1370 (5th Cir.1987) ("Bald allegations that a conspiracy existed are insufficient.").

Finally, to establish *Bivens* supervisory liability for failure to prevent misconduct, a plaintiff must show that the supervisor is directly responsible for the improper action. *Iqbal,* 556 U.S. at 677. A government official is "only liable for his or her own misconduct," and a plaintiff must show that "each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.* at 676, 677; *see also Mouille v. City of Live Oak*, 977 F.2d 924, 929 (5th Cir. 1992) ("Well settled [Bivens] jurisprudence establishes that supervisory officials cannot be held vicariously liable for their subordinates' actions."). "Supervisors who are simply negligent in failing to detect and prevent subordinate misconduct are not personally involved." *Gossmeyer v. McDonald*, 128 F.3d 481, 495 (7th Cir. 1997). They must act either "*knowingly* or with *deliberate, reckless indifference*." *Id.* (internal quotations omitted).

Simply put, because Rynearson has not shown any clearly established constitutional violation, he is likewise unable to establish a violation of a protected right, a necessary element for a conspiracy claim, a failure to intervene claim, or a failure to supervise claim. *See, e.g.*, *Harper v. Albert*, 400 F.3d 1052, 1064 (7th Cir. 2005) ("In order for there to be a failure to intervene, it logically follows that there must exist an underlying constitutional violation . . . ."). Although Defendants have not moved for

summary judgment on these claims and instead seek dismissal pursuant to Rule 12(b)(6), summary judgment is still an option. A court, after giving notice and a reasonable time to respond, can "consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute." Fed. R. Civ. P. 56(f)(3). This report and recommendation should serve as sufficient notice.

Notwithstanding, the undersigned also finds that the allegations are insufficient to state a claim under Rule 12(b)(6). Although it is true as Rynearson argues that heightened pleading is not required, *see Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993), he must still plead enough facts to state a claim to relief that is plausible on its face. Pleadings that are no more than conclusions are not entitled to the assumption of truth. *Iqbal,* 556 U.S. at 679. "Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Id.* at 687. Nor does Rule 8 "unlock the doors of a discovery for a plaintiff armed with nothing more than conclusions." *Id*. at 678-79.

First, there is no case law suggesting that a failure to intervene claim can arise under any circumstances except when excessive force is used. There are no allegations of excessive force. Second, Rynearson has not alleged any sort of agreement between Lands and Perez or anyone else to establish a conspiracy claim. Nor is there any reference to supporting material facts. Although Rynearson

describes several other checkpoint stops that he contends resulted in illegal searches and seizures, there are no allegations that Defendants participated in those searches and seizures or knew about them.

In fact, the only allegations that could remotely support a conspiracy claim are that: (1) Perez knew that Lands had not asked Rynearson about his citizenship; (2) Perez knew that Lands was doing illegal searches and seizures of vehicles and persons at the checkpoint; (3) Perez knew Lands was trying to do this to him and his vehicle; (4) both Perez and Lands knew that it was common practice to do illegal searches and seizures of persons and vehicles at the checkpoint; and (5) both participated in the illegal searches and seizures. In *Iqbal*, however, the Court considered similar conclusory allegations, where the plaintiff alleged that the defendants "knew of, condoned, and willfully and maliciously agreed" to subject the petitioner to harsh conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." 556 U.S. at 680. The Court found these claims too conclusory in nature to entitle them to any presumption of truth. *Id.* at 681. Similarly, Rynearson's conclusory allegations should not be entitled to any presumption of truth.

Furthermore, Rynearson has not stated a claim for supervisory liability. The only allegation is that Perez was discharging his supervisory duties at the time of his detention but failed to supervise Lands. There are no allegations that Perez was personally involved in any of the acts of Lands or that Perez acted deliberately or with reckless indifference.

Thus, if summary judgment is not granted, any of these claims can be dismissed for failure to state a claim for which relief can be granted.

E. Request for Stay for Purposes of Limited Discovery

The final issue is whether the Court should stay the present motion to allow Rynearson to conduct limited discovery. Again, to permit discovery and delay ruling on a qualified immunity defense, the court must first find"that the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity." *Wicks v. Miss. State Emp't Servs.*, 41 F.3d 991, 994 (5th Cir. 1995). Only after the Court makes this determination, "if the court remains 'unable to rule on the immunity defense without further clarification of the facts,' it may issue a discovery order 'narrowly tailored to uncover only those facts needed to rule on the immunity claim.'" *Id.* (quoting *Lion Boulos v. Wilson*, 834 F.2d 504, 507-08 (5th Cir. 1987)).

The undersigned finds that Rynearson has failed to make the requisite showing. His pleadings do not overcome the defense of qualified immunity because they fail to demonstrate the violation of a clearly established constitutional right. Furthermore, as detailed in full above, Rynearson's sought-after discovery would not aid in defeating such a defense.[18] Because discovery would be futile, Rynearson's motion to stay should be denied.

---

[18] It is important to note that most of the sought-after discovery information involves either policy and procedure, or Defendants' subjective motivations. Border patrol policies are

III. CONCLUSION

For the foregoing reasons, Defendants Lands and Perez's motion to dismiss and motion for summary judgment should be **GRANTED**. Rynearson is unable to state: (1) a claim for violations of the Fifth, Sixth, or Fourteenth Amendments, (2) a constitutional claim for false imprisonment, or (3) claims for conspiracy, failure to intervene, or supervisory liability. Therefore, these claims should be dismissed pursuant to Rule 12(b)(6). Proper summary judgment evidence also establishes that Defendants are entitled to qualified immunity for any Fourth Amendment claims or related claims for conspiracy, failure to intervene, and supervisory liability. Therefore, judgment in favor of Defendants for these claims is also proper.

Finally, the undersigned finds that the Court can adequately rule on the qualified immunity defense without further clarification of the facts. Rynearson's pleadings simply do not draw a reasonable inference that Defendants have violated his constitutional rights. Accordingly, Rynearson's motion to continue and request for discovery should be **DENIED**.

---

not at all at issue under these facts and allegations. In addition, "so long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry." *United States v. Causey*, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc); *see also Whren v. United States*, 517 U.S. 806, 811 (1996) (finding that subjective intent is irrelevant, so long as the initial stop was legitimate).

IV. NOTICE

The United States District Clerk shall serve a copy of this report and recommendation on all parties either by (1) electronic transmittal to all parties represented by an attorney registered as a filing user with the Clerk of Court pursuant to the Court's Procedural Rules for Electronic Filing in Civil and Criminal Cases; or (2) certified mail, return receipt requested, to any party not represented by an attorney registered as a filing user. Pursuant to 28 U.S.C. § 636(b)(1), any party who wishes to object to this report and recommendation may do so within fourteen days after being served with a copy. Failure to file written objections to the findings and recommendations contained in this report shall bar an aggrieved party from receiving a *de novo* review by the District Court of the findings and recommendations contained herein, *see* 28 U.S.C. § 636(b)(1)(c), and shall bar an aggrieved party from appealing "the unobjected-to proposed factual findings and legal conclusions accepted by the District Court" except on grounds of plain error. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996).

SIGNED on June 27, 2013.

/s/ Collis White
COLLIS WHITE
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13-51114

RICHARD RYNEARSON,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA; AGENT LANDS, Border Patrol Agent, Individually; RAUL PEREZ, Border Patrol Agent, Individually,

Defendants-Appellees

Appeal from the United States District Court for the Western District of Texas, Del Rio

---

ON PETITION FOR REHEARING EN BANC

(Opinion 02/26/15, 5 Cir., ______, ______, F.3d ______)

Before REAVLEY, ELROD, and SOUTHWICK, Circuit Judges.

PER CURIAM:

✓ Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Leslie H. Southwick
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

RICHARD RYNEARSON)	
Plaintiff,)	
)	
v.)	**Civil Action No. 2:12-CV-0024-AM-CW**
)	
THE UNITED STATES OF AMERICA, BORDER PATROL AGENT LANDS, Individually, and BORDER PATROL AGENT CAPTAIN RAUL PEREZ, Individually,)	
)	
Defendants.)	

PLAINTIFF'S FACT APPENDIX

This fact appendix is provided pursuant to Local Rule CV-7(d)(1). References are to the exhibits filed with the Response to Defendants' Motion to Dismiss (Pl. Ex.) or to the exhibits filed with Defendants' Motion to Dismiss (Def. Ex.). The following exhibits are filed with the Plaintiff's Response to Defendants' Motion to Dismiss:

Plaintiff Exhibit A	Declaration of Richard Rynearson, October 15, 2012

Plaintiff Exhibit B	Letter from Border Patrol Chief Harris to Lt Col Richard Nesmith
Plaintiff Exhibit C	Excerpt from Border Patrol Policy Manual

A. Background

1. Plaintiff, Mr. Richard Rynearson, is an officer in the United States Air Force. From approximately May, 2007 until July, 2010, he was stationed at Laughlin AFB, near Del Rio, Texas. Throughout the time that he was stationed at Laughlin AFB, Mr. Rynearson maintained a house or apartment in San Antonio, Texas. Most weekends during the time that Mr. Rynearson was stationed at Laughlin, he traveled from Del Rio to San Antonio along Highway 90 in order to spend the weekend in San Antonio. (Pl. Ex. A. ¶ 2).

2. The United States Border Patrol operates an interior checkpoint along Highway 90 between Del Rio and San Antonio, near the town of Uvalde, Texas. Persons traveling toward San Antonio on Highway 90 must stop at the checkpoint. (Def. Ex. A at 2).

B. Plaintiff's Previous Experience With The Uvalde Checkpoint

3. Because Mr. Rynearson traveled to San Antonio almost every weekend that he was stationed at Lauglin AFB, he went through the Uvalde checkpoint on a regular basis, estimated to be more than one hundred (100+) times during the time he was stationed at Laughlin AFB. Mr. Rynearson was aware during this time that the Fourth Amendment allows the border patrol agents to ask questions

unrelated to the purpose of the immigration checkpoint but does not obligate citizens to answer those questions. (Pl. Ex. A ¶ 3).

4. In November 2007, Mr. Rynearson was stopped at the Uvalde Border Patrol checkpoint and refused to tell the agents his intended destination. The agents ordered Mr. Rynearson to secondary, and then ordered him out of his vehicle. Mr. Rynearson complied and a U.S. Border Patrol agent and his drug dog searched the interior of his vehicle, and the agent threw his property, including his laptop computer, onto the pavement. The agents found no contraband, and punitively searched Mr. Rynearson's vehicle because he refused to answer as to his intended destination. (Pl. Ex. A ¶ 4).

5. Following this incident, Mr. Rynearson filed a complaint with the Border Patrol headquarters in Del Rio, Texas. (Pl. Ex. A ¶ 4).

6. On August 14, 2008, Mr. Rynearson was stopped at the Uvalde Border Patrol checkpoint and refused to tell the agents his intended destination. An agent then ordered Mr. Rynearson to open his trunk, and Mr. Rynearson asked the agent if he had reasonable suspicion. The agent then asked the dog handler if he had run the drug dog yet, but the dog handler had not. The agent ordered Mr. Rynearson into secondary. Minutes later, an agent approached the vehicle, said he was just making conversation, and informed Mr. Rynearson that he was the only pilot from the base who refused to answer where he was going. (Pl. Ex. A ¶ 5).

7. In another episode in 2008 or 2009, Mr. Rynearson was stopped at the Uvalde Border Patrol

checkpoint and refused to tell the agent his intended destination. He was ordered to secondary, asked several questions and lectured on not having respect for authority. (Pl. Ex. A ¶ 6).

8. Following these incidents, where Mr. Rynearson's exercise of his right not to answer questions regarding his destination resulted in extended detentions and unlawful searches at the Uvalde Checkpoint, as well as a different incident with unconstitutional law enforcement, Mr. Rynearson decided to install cameras in his vehicle in order to ensure that his encounters with law enforcement were recorded. (Pl. Ex. A ¶ 7).

C. The March 18, 2010 Incident

9. On March 18, 2010, Mr. Rynearson traveled alone from Del Rio to San Antonio driving a two-door car with untainted windows and a military identification sticker on the windshield. Mr. Rynearson wore a T-shirt with a clearly recognizable military symbol, and approached the checkpoint with his window partially rolled down (Pl. Ex. A ¶ 8).

D. The Inspection At Primary; Referral To Secondary (Approx. 35 Seconds)

10. Mr. Rynearson stopped at the checkpoint and said to Agent Lands, "What's going on?" Agent Lands responded, "How's it going today?" and Mr. Rynearson responded, "Good how are you doing?" to which Agent Lands responded, "Doing well. Is this your vehicle, sir?" Mr. Rynearson responded, "It is" and Agents Lands asked, "Can you roll down your window? Is that as far as it'll go?" Mr. Rynearson answered, "No, it can go down more" and rolled his window down further to demonstrate. Agent Lands

asked, "What's that?" and Mr. Rynearson repeated, "It can go down more," Agent Lands said, "You said this is your vehicle?" and Mr. Rynearson confirmed, "It is, yeah." Agent Lands asked no questions related to immigration status. (Def. Ex. D, part 1, 00:22). A K-9 unit was run by the vehicle and did not alert. (Def. Ex. B, at 2).

11. Agent Lands then referred Mr. Rynearson to secondary. Mr. Rynearson began driving slowly toward secondary and asked "Ok, can you tell me why?" and Agent Lands responded, "Yeah, I'll be with you in a moment, there's a bunch of traffic over here. Go ahead and park over here." (Def. Ex. D, part 1, 00:35).

E. Initial Inspection At Secondary By Agent Lands (Approx. 00:35-4:52)

12. Mr. Rynearson parked in secondary and rolled up his window. (Def. Ex. D, part 1, 00:58). Approximately 30 seconds later, Agent Lands walked over and knocked on the window. Agent Lands requested that Mr. Rynearson exit the vehicle, and Mr. Rynearson asked why. Agent Lands also requested that Mr. Rynearson roll down his window, but Mr. Rynearson declined. (Def. Ex. D, part 1, 01:30). Mr. Rynearson understood that a brief immigration related inspection could proceed without any explanation from the agents. (Pl. Ex. A ¶ 11). But, at this time and throughout the encounter, Mr. Rynearson was concerned that the border patrol agents were attempting to remove him from his vehicle so that they could search his car, without any individualized suspicion, as had happened to him in the past. (Pl. Ex. A ¶ 9).

13. Agent Lands then said, "I need to see some identification." Mr. Rynearson responded that he could show Agent Lands identification. Agent Lands then repeated his request for Mr. Rynearson to exit the vehicle, and Mr. Rynearson again refused, asking why he was being detained. (Def. Ex. D, part 1, 01:45). Agent Lands then said, "Well, here's what we can do. You're gonna need to give me your identification." (Def. Ex. D, part 1, 2:06). Mr. Rynearson said, "Ok," and put his driver's license on the window, and said, "There's my ID." (Def. Ex. D, part 1, 2:09). Agent Lands said, "I need to inspect it to make sure it's a valid ID." (Def. Ex. D, part 1, 2:10). Mr. Rynearson said, "Ok" and also put his military ID card on the window. (Def. Ex. D, part 1, 2:16). Another agent standing next to Agent Lands said, "Oh, he's in the military" and Agent Lands asked, "You're in the military?" Mr. Rynearson answered, "I am in the military." (Def. Ex. D, part 1, 2:18). Agent Lands asked, "Ok, where at, here in Del Rio?" Mr. Rynearson answered, "Yep, in Del Rio." Agent Lands said, "Del Rio, ok." (Def. Ex. D, part 1, 2:21). Mr. Rynearson again asked why he was being detained, and Agent Lands responded "Well if you'll get out and I'll be more than happy to explain it to you." Mr. Rynearson declined to exit the vehicle and Agent Lands responded "If you're going to stay there then we'll just do this the hard way." Agent Lands did not renew his request that Mr. Rynearson exit the vehicle thereafter. (Def. Ex. D, part 1, 02:33; Def. Ex. E, at 2).

14. During this exchange, Agent Lands began copying down information from Mr. Rynearson's identification. (Def. Ex. D, part 1, 2:24). Agent Lands did not ask Mr. Rynearson to hand him the

identification or to physically inspect the identification. Agent Lands then ceased conversation. An agent behind the vehicle pointed out the various cameras installed in Mr. Rynearson's vehicle and told another agent, "He's got cameras all over the place." (Def. Ex. D, part 1, 02:57).

15. After Agent Lands ceased conversation and began copying down Mr. Rynearson's identification, Mr. Rynearson began making a phone call to his wife. (Def. Ex. D, part 1, 2:41). Mr. Rynearson attempted to re-engage Agent Lands in conversation approximately 45 seconds after Agent Lands ceased conversation, asking why he was being detained. (Def. Ex. D, part 1, 03:23). Upon receiving no response, Mr. Rynearson left a voicemail for his wife and then again sought to speak with Agent Lands another 45 seconds later. (Def. Ex. D, part 1, 04:06). Agent Lands stated that he could not hear Mr. Rynearson, but continued with the conversation, stating that "This is an immigration checkpoint."

16. During the ensuing conversation, Agent Lands acknowledged that Mr. Rynearson stopped at the checkpoint as required and said, "Yes, but you have to satisfy us that you're a United States citizen." Agent Lands then explained that, "Doing the things you're doing, I don't believe that you're being a United States citizen. You're rolling down your window, you won't roll it down" and claimed Mr. Rynearson was "being evasive about answering [Agent Lands'] questions." (Def. Ex. D, part 1, 4:44). Mr. Rynearson asked, "What question did I not answer? What question did I not answer? You asked if this was my vehicle." Agent Lands responded, "I didn't say you didn't answer, I said you were being

evasive about answering." Mr. Rynearson asked, "How was I being evasive? To which question did I evade?" and Agent Lands responded, "I said you were being evasive, I didn't say you evaded the question. There's a big difference." Mr. Rynearson asked, "Ok, evasive how?" and Agent Lands responded, "If you'll hang tight I'll be right back with you" and then Agent Lands and another agent nearby left the vicinity while other agents remained at Mr. Rynearson's vehicle. (Def. Ex. D, part 1, 5:07).

F. Period Of No Interaction (Approx. From 04:53 To 09:44)

17. For the next approximately five minutes, Mr. Rynearson had no interaction with any border patrol agents. During that time, he first attempted to call his lawyer, but did not reach him. (Def. Ex. D, part 1, 5:11). Mr. Rynearson then called an FBI office in San Antonio to discuss what was required for the Border Patrol to search his vehicle. Mr. Rynearson explained that the Border Patrol was "trying to tell me that I have to roll down my window, which I don't want to do because they won't tell me why they've pulled me into secondary." (Def. Ex. D, part 1, 7:33). Mr. Rynearson asked the FBI agent to confirm his understanding that the Border Patrol agents had to have reasonable suspicion to search his vehicle. The FBI agent confirmed this, stating "exactly." Mr. Rynearson then responded, "but they don't have reasonable suspicion and they won't tell me anything." (Def. Ex. D, part 1, 8:39). Mr. Rynearson did not tell the FBI that he believed the agents needed reasonable suspicion to secondary him. The FBI advised Mr. Rynearson to comply with the border patrol agents.

18. Mr. Rynearson was concerned for his personal safety and thought the agents recognized him and intended to harass him. (Pl. Ex. A ¶ 9). Mr. Rynearson explained to the FBI, "I have my ID up on the glass, and they're telling me to get out of the vehicle which I've refused to do, and they haven't told me anything, I mean absolutely anything, about why they pulled me into secondary and why they want me to exit my vehicle, and I feel threatened, and I don't know why they're doing what they're doing." (Def. Ex. D, part 1, 7:48). Later Mr. Rynearson explained that "they're threatening, I mean they have weapons, and they're not telling me anything and they want me to exit my vehicle as though they expected me to come through here." (Def. Ex. D, part 1, 8:26).

G. Resumed Inspection By Agent Lands (Approx. From 09:45 To 12:52)

19. Following his call with the FBI, Mr. Rynearson asked the agents if he could talk with someone. (Def. Ex. D, part 1, 09:53). Agent Lands returned to the vehicle window from the rear of the vehicle. Mr. Rynearson said, "Hello. I just called the FBI and they said that if you guys have reasonable suspicion, then you can search the vehicle and that's my understanding, as well." When Agent Lands stated that he could not hear Mr. Rynearson, Mr. Rynearson rolled his window partially down. (Def. Ex. D, part 2, 00:15). Mr. Rynearson then asked if Agent Lands could hear him. Agent Lands responded "Yeah," but requested that Mr. Rynearson roll the window down further, stating that "you gotta understand there's a lot of traffic on this highway so if you want to talk, crack it some more so I can hear you." Conversation ensued in which Agent Lands

heard and responded to Mr. Rynearson. When Mr. Rynearson began to ask a question of Agent Lands, Agent Lands stated that a supervisor was coming. (Def. Ex. D, part 2, 00:32).

20. Continuing the conversation, Mr. Rynearson said, "Ok, if you guys have reasonable suspicion and you can tell me what that reasonable suspicion is, then I'll comply with your request to --." (Def. Ex. D, part 2, 00:35). Although Mr. Rynearson was cut off before completing his sentence, he intended to inform Agent Lands that he would comply with what he understood to be the agents' desire to search his vehicle if they could explain the basis for the search. (Pl. Ex. A ¶ 10). Agent Lands then explained that the Border Patrol agents did not need reasonable suspicion to secondary Mr. Rynearson, to which Mr. Rynearson responded that they did need reasonable suspicion to detain him. Mr. Rynearson also explained his understanding that the agents needed reasonable suspicion to search his vehicle, which Agent Lands denied was the case. (Def. Ex. D, part 2, 1:07).

21. Mr. Rynearson then asked whether Agent Lands though that Mr. Rynearson was not an American citizen. (Def. Ex. D, part 2, 01:12). Agent Lands responded, "Well define what that means." Mr. Rynearson responded, "You have a military ID." Agent Lands said, "That doesn't mean anything." Mr. Rynearson pointed to his driver's license and said, "You have this ID." Agent Lands said, "Those aren't immigration documents."

22. Having been informed that the two pieces of identification he had previously provided were meaningless, Mr. Rynearson then asked, "Do you

want a passport?" (Def. Ex. D, part 2, 01:22). Agent Lands did not respond to the offer. Instead, he asked, "Are you a U.S. citizen?" Mr. Rynearson responded, "I am a U.S. citizen." Agent Lands said, "How come you wouldn't answer me earlier?" and Mr. Rynearson responded, "You never asked me if I was a U.S. citizen!" (Def. Ex. D, part 2, 01:53).

23. Agent Lands then stated that he had asked Mr. Rynearson to roll his window down at primary, and explained that he had a difficult time hearing Mr. Rynearson at primary. He then explained, however, that "that's all irrelevant" and told Mr. Rynearson that he was "being secondaried because you weren't answering my questions." (Def. Ex. D, part 2, 01:49). Mr. Rynearson asked what questions he did not answer and stated that he answered all of Agent Lands' questions, at which point Agent Lands stated that "Well, here's the deal, alright, like I said, I don't need reasonable suspicion to secondary you for an immigration violation, that's why you're being secondaried." (Def. Ex. D, part 2, 02:06). When Mr. Rynearson asked whether Agent Lands was saying that he violated an immigration law, Agent Lands responded that he was not accusing Mr. Rynearson of violating an immigration law. When Mr. Rynearson asked why, then, he was being detained, Agent Lands said, "If you'll listen to me, we got a supervisor coming so if you'll just hang tight, he'll be here momentarily and you can do whatever you need to do, you can talk with him about it." (Def. Ex. D, part 2, 02:20).

24. Mr. Rynearson then asked Agent Lands what he had done that justified the detention and the conversation continued. Agent Lands stated that he

had already explained that, at a checkpoint, "all I need is mere suspicion of an immigration violation." (Def. Ex. D, part 2, 02:40). Mr. Rynearson stated that reasonable suspicion was required but Agent Lands reiterated that "mere suspicion" was the standard. Agent Lands declared that he had mere suspicion but was not required to articulate or divulge it. Mr. Rynearson responded "Ok" and Agent Lands continued, "So if you'll just hang tight, when he gets here you can discuss this with him," and Mr. Rynearson said "Ok." Agent Lands then joined other agents at the rear of Mr. Rynearson's vehicle. (Def. Ex. D, part 2, 03:05). Mr. Rynearson placed two passports on the window next to the driver's license and military ID. (Def. Ex. D, part 2, 03:29).

H. Period Of No Interaction (Approx. From 12:53 To 17:23)

25. For approximately five minutes from the time Agent Lands went to the rear of his vehicle to the time that Agent Perez engaged Mr. Rynearson in conversation, Mr. Rynearson waited in the car without interacting with any agents.

I. Initial Conversation With Captain Perez (Approx. From 17:24 To 19:25)

26. Over seventeen minutes into the detention, the border patrol supervisor, Captain Raul Perez, knocked on Mr. Rynearson's window. (Def. Ex. D, part 2, 07:30). Mr. Rynearson responded, "Yes sir?" captain Perez asked, "Can you hear me, sir?" and Mr. Rynearson responded, "Yes sir." Captain Perez asked, "Can you roll your window down so I can get your passport?" Mr. Rynearson responded, "Sure," though the window was already partially down, and

asked, "You want the official one, or you want the personal one?" Captain Perez said, "Both," Mr. Rynearson responded, "Both, ok." Captain Perez said, "I can barely hear you" and Mr. Rynearson responded, "I'll speak up, I can hear you just fine." Captain Perez said, "Ok." Mr. Rynearson gave Captain Perez two passports through the window that was already partially rolled down. (Def. Ex. D, part 2, 07:45).

27. Captain Perez said, "Mr., I'm going to mispronounce it" and Mr. Rynearson said, "Rynearson" and Captain Perez repeated, "Rynearson?" Mr. Rynearson said, "Yes sir." Captain Perez asked, "Ok, Mr. Rynearson, was there any reason you didn't want to tell the agent your citizenship?" Mr. Rynearson responded, "He never asked me my citizenship." Captain Perez stated, "That's what we do right there on primary, sir." Mr. Rynearson repeated, "He never asked me my citizenship." Captain Perez said, "Uh huh" and Mr. Rynearson continued, "He only asked me one question." Captain Perez said, "Uh huh" and Mr. Rynearson continued, "And he asked me was this vehicle mine and I said yes and then he immediately said will you please go to secondary?" Captain Perez said, "Uh huh" and Mr. Rynearson continued, "He never asked me if I was a citizen." Captain Perez asked, "Did you produce your passport there on primary?" and Mr. Rynearson responded, "No, they never asked for it…" Captain Perez said, "Uh huh" and Mr. Rynearson continued, "And they never asked me about my citizenship…" Captain Perez then said, "Just bear with me, let me check out your passport and we'll get you on your way, sir." (Def. Ex. D, part 2, 08:37).

28. Mr. Rynearson explained to Captain Perez that he could prove that he was never asked his citizenship status or for his passport at primary, stating "I have everything videoed right now…" Captain Perez said, "Ok, that's fine…" and Mr. Rynearson mentioned his video was "Sent on the internet." Captain Perez said, "That's fine" and Mr. Rynearson said, "Ok." (Def. Ex. D, part 2, 08:43).

29. Captain Perez then directed the questioning toward Mr. Rynearson's military status, asking, "And where are you currently stationed?" Mr. Rynearson responded, "I'm in, Laughlin Air Force Base." Captain Perez asked, "Laughlin?" and Mr. Rynearson responded, "Yes." Captain Perez then asked, "And who's your CO?" Mr. Rynearson asked, "My commanding officer?" and Captain Perez responded, "Yes." Captain Perez then put Mr. Rynearson's passports in his shirt pocket. (Def. Ex. D, part 2, 08:55).

30. Mr. Rynearson responded that he "prefer[red] not to provide that information." Captain Perez stated, "Well I can go ahead and call anyway and talk to the OIC of the Provost Marshall." Mr. Rynearson said, "Sure. You can." Captain Perez continued, "So, that's why I'm asking you if you're willing to provide that information." Mr. Rynearson asked why Captain Perez "would you need to contact the military" and whether he was "not convinced" that Mr. Rynearson was an American citizen. Captain Perez responded, "No, I'm asking you who your CO is." Mr. Rynearson asked, "Why would you do that?" and Captain Perez responded, "Because it's my job, sir." Mr. Rynearson asked, "It's your job to interfere with my work?" and Captain Perez replied, "I'm not

interfering with your work, sir." Mr. Rynearson asked, "Why would you ask who my commanding officer is?" and Captain Perez said, "That's alright, you don't have to tell me, that's fine, I'll be back with you in just a moment, sir." Mr. Rynearson said, "Ok." (Def. Ex. D, part 2, 09:29).

J. Period Of No Interaction (Approx. From 19:26 To 22:13)

31. Following Captain Perez's questioning regading Mr. Rynearson's military chain of command and duty location, all agents then left the area around Mr. Rynearson's vehicle, and Mr. Rynearson began making phone calls to the Border Patrol Headquarters.

K. Second Conversation With Captain Perez (Approx. From 22:14 To 22:20)

32. Captain Perez returned to Mr. Rynearson's window, knocked on the glass while Mr. Rynearson was on the phone, and asked, "Laughlin Air Force Base?" (Def. Ex. D, part 3, 02:37). Mr. Rynearson replied, "Yep." Captain Perez said, "I'm going to call the Provost Marshall and CID, ok?" Mr. Rynearson said, "Ok." Captain Perez left and Mr. Rynearson continued his phone conversation. (Def. Ex. D, part 3, 02:42).

L. Period Of No Interaction (Approx. From 22:21 To 32:31)

33. Following Captain Perez's second line of questioning regarding Mr. Rynearson's duty location, there was no further interaction between Mr. Rynearson and the border patrol agents for approximately another ten minutes. During this

time, Mr. Rynearson completed his calls to the Border Patrol Headquarters and called the civil rights department of Homeland Security, on the suggestion of an individual at the Border Patrol Headquarters.

M. Release From Detention (Approx. From 32:32 To 33:50)

34. Agent Lands then returned to Mr. Rynearson's vehicle and knocked on the window. (Def. Ex. D, part 4, 03:46). Mr. Rynearson responded, "Yes?" and Agent Lands began the process of releasing Mr. Rynearson. Agent Lands said, "If next time, we appreciate your cooperation, ok, next time, if you'd just be a little more cooperative, ok? Understand, I know you may be able to hear us just fine but we got a lot of traffic out here, ok? There's the highway, like I said, there's the highway noise, there's the traffic behind you. If you could roll down your window, you don't have to, I understand you may not want to roll it all the way down but at least enough that we can communicate. Because we're trying to do this as expedient as possible because we do have a lot of cars, you know what I'm saying? So if you could be just a little more cooperative, roll down your window some and have a little more of a dialogue with us, that may help speed things along. Keep these handy, ok, and if you want to just hand this to us and let us look at it, that would be fine. You know what I'm saying?" Mr. Rynearson replied, "I understand what you're saying." Agent Lands said, "Yeah, because that eliminates a lot of the talking, you understand? You just hand this to me, I can inspect it, but you giving it to me through a window and not letting me look at it,

see what I'm saying? We gotta inspect it to make sure it's not a counterfeit document." Mr. Rynearson replied, "I understand what you're saying." Agent Lands asked, "Ok, we good to go now?" Mr. Rynearson replied, "We're good." Agent Lands then released Mr. Rynearson. Mr. Rynearson replied, "Thank you." (Def. Ex. D, part 4, 04:59).

35. The total length of time that Mr. Rynearson was detained is just shy of thirty-four minutes. (Def. Ex. D, parts 1-4).

36. Agent Lands declares that record checks take a "couple of minutes." (Def. Ex. A, at 4). Captain Perez declares that it took him approximately ten to fifteen minutes to arrive at the checkpoint. (Def. Ex. B, at 2). There was a supervisory border patrol agent already on the scene when Captain Perez arrived. (Def. Ex. B, at 2). Captain Perez further declares that he contacted Laughlin Air Force Base in order to confirm Mr. Rynearson's "military identity," a process which took approximately ten to fifteen minutes. (Def. Ex. F, at 2).

N. Video Recording Of The Incident

37. Mr. Rynearson posted a video recording of this incident on YouTube. The video posted contained footage from two of the five cameras and was edited to combine footage, protect Mr. Rynearson's identity and military affiliation, and to satisfy YouTube's upload requirements. The video uploaded online, a copy of which appears to have been offered as Defense Exhibit D, is an accurate though imperfect account of what transpired during the encounter. (Pl. Ex. A ¶ 12).

O. Letter From Chief Harris

38. 26 days after the incident, Chief Harris sent a letter to Mr. Rynearson's commanding officer, Lt Col Richard Nesmith concerning the 18 March encounter. In the letter, Chief Harris wrote to complain about Mr. Rynearson's conduct and to suggest grounds for disciplinary action (Pl. Ex. B).

* * * * *