Hon. James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Gustavo VARGAS RAMIREZ, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Case No. 13-cv-02325-JLR **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS UNDER RULE 12(b)(6) AND/OR RULE 56** Noted for Consideration: June 20, 2014 Oral Argument Requested

I. INTRODUCTION

On June 23, 2011, United States Border Patrol ("USBP"), without legal authority and without probable cause, ordered an Anacortes Police Officer to arrest Plaintiff Gustavo Vargas Ramirez ("Mr. Vargas") after a routine traffic stop. In a blatant attempt to cover up the illicit nature of these actions, USBP agents then doctored the record of Mr. Vargas's arrest, falsely reporting 1) that a USBP agent made the initial arrest at the scene of the traffic stop, and 2) the basis for the arrest. Defendant's motion to dismiss does not even acknowledge or address the false report. Instead, Defendant attempts to now insert an independent theory to support the arrest. However, it is clear that the USBP agents violated the law in ordering the police officer to

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arrest Mr. Vargas and take him to the city jail. Moreover, setting aside the issue of who effectuated the arrest, the record also makes clear that USBP agents did not have a legal basis to arrest Mr. Vargas: a police officer's inquiry to USBP based on a Social Security number not appearing in a Washington State Department of Licensing database, coupled with an individual's exercise of his constitutional and statutory rights to not participate in a voluntary investigation, does not provide reasonable suspicion, let alone probable cause, that the individual is in the United States unlawfully. Additionally, Defendant is simply wrong to assert that an "[i]nvestigative detention is permitted for as long as it takes to determine if the alien is in the United States illegally." Def.'s Mot. to Dismiss 6, ECF No. 15.

The facts pleaded and supported in Mr. Vargas's complaint go well beyond what is necessary to state Federal Tort Claims Act claims for false arrest, false imprisonment, negligent infliction of emotional distress, outrage, and abuse of process. Far from demonstrating that Defendant is entitled to judgment as a matter of law, the facts and documents submitted confirm that Defendant's agents acted contrary to their well-established obligations under the Fourth Amendment and their statutory and regulatory authority.

II. STATEMENT OF FACTS

At around 9 p.m. on June 23, 2011, police officer R. Leetz stopped Mr. Vargas for a minor traffic infraction in Anacortes, Washington. Pl.'s Compl. ¶ 9, ECF No. 1. Mr. Vargas provided the officer with his valid Washington driver's license and vehicle documentation, but Officer Leetz contacted USBP to inquire about Mr. Vargas's immigration status when he noticed "no valid Social Security number listed" in his driving record. Compl. Exs. 27, ECF No. 1-1. Washington drivers may obtain a driver's license without providing a Social Security number. Compl. ¶ 13. After running Mr. Vargas's name through its system and finding no records, USBP

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called Officer Leetz back, eventually asking to speak to Mr. Vargas. *Id.* ¶¶ 15-18; Compl. Exs. 27. Mr. Vargas, however, responded clearly and in English that he would not answer any questions without a lawyer. Compl. ¶¶ 20-25.

USBP then "requested that [Officer Leetz] detain [Mr. Vargas] for USBP" and, at around 9:16 p.m., Officer Leetz seized Mr. Vargas "at USBP's request." Compl. Exs. 27, 41. Officer Leetz directed Mr. Vargas to step out of his vehicle; told him he was detained at USBP's request; handcuffed him; patted him down; placed him in the back of his police vehicle; and transferred him to an Anacortes Police Department holding cell, where he was forced to wait over 40 minutes until a USBP agent arrived. Compl. ¶¶ 27-31. From the door of Mr. Vargas's cell, USBP Agent Orr interrogated Mr. Vargas about his immigration status. *Id.* ¶¶ 37-41. "[S]hortly prior" to 10:06 p.m., Agent Orr transferred Mr. Vargas, in handcuffs, to the Bellingham USBP station, where he was fingerprinted, interrogated, and placed in a cell from which USBP agents would periodically pull him in an effort to pressure him to sign some documents. Compl. ¶ 42-44; Compl. Exs. 41. The fingerprinting yielded no immigration or criminal history for Mr. Vargas. *Id.* 37-38. The agents eventually served Mr. Vargas with the arrest record, Form I-213, and the charging document, Form I-862 "Notice to Appear." Mr. Vargas was held overnight and transferred to the Northwest Detention Center, where he was held for about ten weeks; his case was administratively closed in February 2013. Compl. ¶¶ 45-49.

The I-213 form contains numerous false statements. *Id.* ¶¶ 63-77. Notably, the narrative alleged that Agent Orr arrived at the scene of the traffic stop to assist with translation at around 9:20 p.m. and "detained and transported" Mr. Vargas to the Bellingham USBP station based on an alleged admission Mr. Vargas made at the scene of the stop that he was born in Mexico (although the report states he then refused to answer any more questions regarding his status).

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Criminal and immigration record checks on Mr. Vargas generated no results. Compl. Exs. 37. Defendant has admitted that this encounter never occurred. Def.'s Answer ¶ 74, ECF No. 14.

III. DEFENDANT'S MOTION TO DISMISS IS WITHOUT MERIT AND SHOULD BE DENIED

Defendant has alternatively labeled its motion a motion to dismiss and/or a motion for summary judgment. As a threshold matter, Defendant's motion to dismiss is untimely. A 12(b)(6) motion may not be filed after the filing of an answer. Fed. R. Civ. P. 12(b) ("A motion asserting any of these defenses must be made *before* pleading if a responsive pleading is allowed.") (emphasis added).[1] Defendant's 12(b)(6) motion is therefore properly construed as a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). *See, e.g.*, *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 954-55 (9th Cir. 2004).

For purposes of a motion for judgment on the pleadings alleging that a plaintiff has failed to state a claim upon which relief may be granted, the Court must take as true all facts alleged in the complaint and "treat as false those allegations in the answer that contradict [Mr. Vargas's] allegations," *MacDonald v. Grace Church Seattle*, 457 F.3d 1079, 1081 (9th Cir. 2006) (citation omitted); as well as set aside the declarations submitted in support of Defendant's summary judgment motion, *Elvig*, 375 F.3d at 955 n.1 (disregarding "evidence outside the scope of the pleadings"). The facts must be construed in the light most favorable to Mr. Vargas. *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1301 n. 2 (9th Cir. 1992).[2] Mr. Vargas has met his obligations. The complaint contains well-pleaded factual allegations (supported by the law

[1] Defendant filed its Answer on March 10, 2014. Def.'s Answer 15. It filed its Motion to Dismiss on May 29, 2014. Def.'s Mot. 23.

[2] "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The factual content pleaded must "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (noting also that the inference must be "more than a sheer possibility" that the defendant acted unlawfully) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

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enforcement reports) demonstrating that Defendant's agents: (1) ordered Mr. Vargas be arrested by Officer Leetz, in clear violation of the statute and regulations; and (2) ordered his arrest without reasonable suspicion, much less probable cause.

a. Border Patrol lacked the authority to order Officer Leetz to arrest Mr. Vargas.

First and foremost, USBP's very act of ordering Officer Leetz to arrest Mr. Vargas was unlawful, as USBP lacks the power to deputize volunteer local law enforcement agents to perform immigration enforcement actions. Local law enforcement agents are not generally authorized to arrest individuals for suspected immigration violations. *See* 8 C.F.R. §§ 287.8(b)(2) ("If the immigration officer has a reasonable suspicion . . . the immigration officer may briefly detain the person for questioning."), (b)(3) ("Information obtained from [brief detentions for] questioning may provide the basis for a subsequent arrest, which must be effected only by a designated immigration officer."), (c)(1) ("Only designated immigration officers are authorized to make an arrest."); 8 C.F.R. § 287.5(c)(1) (noting who has the power and authority to arrest for immigration violations pursuant to 8 U.S.C. § 1357(a)(2)).

And, indeed, the Supreme Court has recently reaffirmed that where state and local officers "[d]etain[] individuals solely to verify their immigration status," such actions "raise constitutional concerns." *Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012) (citations omitted); *see also Melendres v. Arpaio*, PHX-CV-07-02513-GMS, 2013 WL 2297173, at *61 (D. Ariz. May 24, 2013) ("In the absence, then, of any reasonable suspicion of a possible crime, there is no basis on which the [local law enforcement agency] can make an investigative detention—let alone an arrest—based only on the belief that someone is in the country without

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authorization.") (citation omitted).[3] The Supreme Court has recognized that "[f]ederal law specifies *limited* circumstances in which state officers may perform the functions of an immigration officer." *Arizona*, 132 S. Ct. at 2506 (emphasis added). With few exceptions inapplicable here, state officers may only perform such functions pursuant to a formal agreement with the Attorney General, subject to the Attorney General's "direction and supervision," and contingent on the Attorney General's determination that they are "qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention" of immigrants in the United States and the provision of a "written certification" that such local agents have received special immigration training. *See* 8 U.S.C. §1357(g)(1)-(3); *see also Arizona*, 132 S. Ct. at 2506.[4]

In this case, the Anacortes Police Department was not trained and certified under § 1357(g) to perform immigration enforcement. Defendant itself recognizes this limitation on Officer Leetz's authority, citing USBP Agent Russell Wynn's declaration that local law enforcement officers "are not empowered or able to perform immigration inspections or

[3] It is noteworthy that the Court clarified this would be unlawful even though the state of Arizona had introduced a statutory scheme authorizing state law enforcement officials to participate in immigration enforcement. *Arizona*, 132 S. Ct. at 2509; *see also Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012) ("While the seizures of the named plaintiffs based on traffic violations may have been supported by reasonable suspicion, any extension of their detention must be supported by additional suspicion of criminality. Unlawful presence is not criminal."). It is even clearer that it is unlawful to extend a stop to investigate immigration status in Washington, as there is no statutory framework providing local law enforcement with authority to participate in immigration enforcement. To the contrary, there is no lawful basis to inquire into immigration status (regardless of whether it extends the stop) as it is beyond the scope of any legitimate enforcement action for law enforcement officials in Washington State. *See State v. Acrey*, 64 P.3d 594, 598-99 (Wash. 2003) (once suspicion is addressed then release is warranted); *State v. Williams*, 689 P.2d 1065, 1069 (Wash. 1984) ("Our disagreement with the Court of Appeals is not over the initial interference with petitioner's freedom. … It is the intensity and scope of the intrusion which we find improper.").

[4] Further, 8 U.S.C. § 1357(g)(10) does not authorize USBP's actions, for such cooperation conflicts with the specific guidance provided in the statute and regulations regarding who is authorized to conduct immigration functions. "It is a commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (internal quotation marks, alterations, and citation omitted).

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determine immigration status." Def.'s Mot. 9-10.[5] Yet Officer Leetz was an active participant in the determination of Plaintiff's alleged immigration status as well USBP's performance of its immigration duties. *Id.* The very fact that USBP agents falsified the report, declaring that a USBP agent appeared at the scene of the stop to interpret, and then arrested Mr. Vargas there, demonstrates that Defendant's agents knew that their actions were unlawful. That is why the report failed to acknowledge that Officer Leetz was asked over the phone to arrest Mr. Vargas.

b. Mr. Vargas's arrest by USBP was not an investigative detention, but an arrest.

Mr. Vargas's seizure at USBP's command was an arrest requiring probable cause, despite Defendant's allegations to the contrary. Defendant argues that "[i]nvestigative detention is permitted for as long as it takes to determine if the alien is in the United States illegally." *Id.* at 6 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975)). Defendant cites to *Brignoni-Ponce* to support this astonishing position, even though that case, the statute, and implementing regulations in question all make clear investigative detention can only be for a brief period. In *Brignoni-Ponce* the Supreme Court upheld the stops in question, relying on the "minimal intrusion of a brief stop." 422 U.S. at 881. The Court emphasized that inquiries into immigration status ordinarily last no longer than one minute. *Id.* at 880. It also made clear that, "[t]he officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause." *Id.* at 881-82. Thus, the Supreme Court's holding flatly contradicts the assertion made by Defendant that an investigative detention is permitted for *as long as it takes* to make a determination on citizenship and immigration status.

[5] Nonetheless, Defendant goes on to recognize that Officer Leetz did in fact play a crucial immigration enforcement function when his "suspicions" about Mr. Vargas's alleged immigration status were taken into consideration in USBP's reasonable suspicion analysis. Def.'s Mot. 10; *see also* Section III(c)(1), *infra*.

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Similarly, the controlling regulation provides that where "the immigration officer has a reasonable suspicion, based on specific articulable facts . . . the immigration officer may *briefly* detain the person for questioning." 8 C.F.R. § 287.8(b)(2) (emphasis added). Not only does the authority not support the proposition that "investigative detention is permitted for as long as it takes," it repeatedly confirms that it must be extremely brief and limited in nature.[6]

The Ninth Circuit has clarified that whether an individual has been arrested or merely detained depends on the totality of the circumstances. *United States v. Bravo*, 295 F.3d 1002, 1010 (9th Cir. 2002). The principal inquiry is two-fold: first, courts look to whether the methods used to effectuate the seizure "would cause a reasonable person to feel that he or she will not be free to leave after brief questioning—i.e., that indefinite custodial detention is inevitable"; and, second, "whether the measures used were reasonable in light of the circumstances that prompted the stop or that developed during its course." *United States v. Guzman-Padilla*, 573 F.3d 865, 884-85 (9th Cir. 2009) (citations omitted).

Analyzing Mr. Vargas's seizure through this approach further demonstrates that it was an arrest. First, when USBP ordered Officer Leetz to seize him, Mr. Vargas had *already* been subject to "brief questioning" by a USBP agent over the phone. Compl. ¶¶ 19-25. He did not simply believe he could not leave after this questioning; he was, quite literally, prevented from doing so. Furthermore, he was then handcuffed, placed in the police car, transported to the police station in the back of Officer Leetz's car, and locked up in a holding cell for about 40 minutes until USBP Agent Orr arrived. *Id.* ¶¶ 28-31. Any reasonable person would have understood that he was not free to go.

[6] As previously noted, in *Arizona*, the Supreme Court recently clarified that the Fourth Amendment does not allow state and local police to even prolong a detention solely to verify immigration status. 132 S. Ct. at 2509.

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The seizure, moreover, was characterized by several factors that independently showed that an arrest had occurred: (1) the degree to which "the plaintiff's liberty was restricted," such as by removing Mr. Vargas from his car, *Washington v. Lambert*, 98 F.3d 1181, 1185, 88-89 (9th Cir. 1996) (citation omitted); (2) the use of handcuffs, *id.* at 1188; (3) being placed in the police car; and then (4) being transferred to the police station. Indeed, the fact that Mr. Vargas was transferred to the police station in handcuffs—even for investigative purposes—ends any substantive debate regarding whether he was under arrest. S*ee, e.g.*, *United States v. Parr*, 843 F.2d 1228, 1231 (9th Cir. 1988) ("[A] distinction between investigatory stops and arrests may be drawn at the point of transporting the defendant to the police station.") (citations omitted); *Gonzales v. City of Peoria*, 722 F.2d 468, 477 (9th Cir. 1983) ("[W]here the defendant is transported to the police station and placed in a cell or interrogation room *he has been arrested*, even if the purpose of the seizure is investigatory.") (citations omitted) (emphasis added), *overruled by Hodgers-Durgin v. de la Vina on other grounds*, 199 F.3d 1037 (9th Cir. 1999).

In addition, the duration of a seizure may independently demonstrate an arrest, although determinations are fact-specific. *Lambert*, 98 F.3d at 1189, n.11 (noting case in which 20-minute questioning in police car constituted arrest); *see also Guzman-Padilla*, 573 F.3d at 886. Agent Orr's interrogation of Mr. Vargas while the latter was locked up in the Anacortes Police cell, Compl. ¶¶ 37-41, was more restrictive of his liberty than the "holding [of a] suspect in police car and questioning him for twenty minutes," which the Ninth Circuit has found to be an arrest. *Lambert*, 98 F.3d at 1189 (citing *United States v. Chamberlin*, 644 F.2d 1262, 1267 (9th Cir. 1980)); *see also, United States v. Place*, 462 U.S. 696, 709-10 (1983) (noting that the Court had never approved a stop lasting ninety minutes).

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But this was not the end of Mr. Vargas's ordeal. Agent Orr then transferred him, again in handcuffs, to the Bellingham USBP station, where he was fingerprinted, interrogated, and placed in a cell; USBP agents then repeatedly pressured him to sign some documents. Compl. ¶ 42-44. Incredibly, Defendant argues that this *entire* seizure—from the moment Mr. Vargas was ordered to exit his vehicle by Officer Leetz until USBP served him with the Notice to Appear in the Bellingham station—constituted an investigative detention. Def.'s Mot. 6-7. But this was no "brief and minimally intrusive" stop. *Guzman-Padilla*, 573 F.3d at 883 (describing a *Terry* stop) (internal quotation marks, alterations, and citations omitted). Defendant's emphasis that the seizure was effectuated for investigative purposes and so became an arrest only *after* that investigation was completed, *see* Def.'s Mot. 7, does not make the seizure an "investigative detention" when other factors clearly demonstrate otherwise. *See, e.g.*, *United States v. Zavala*, 541 F.3d 562, 579-80 (5th Cir. 2008) (arrest occurred where the defendant "was handcuffed, placed in a police car, transported to different locations, and was not free to leave … for one hour and thirty minutes until a full-blown drug investigation [was] completed") (citations omitted).

Instead of addressing controlling case law from this Circuit, Defendant is forced to rely heavily on a district court decision from North Dakota in order to support its assertion that Mr. Vargas's arrest was an investigative detention that was reasonably intrusive. Def.'s Mot. 15-16. *See United States v. Diaz-Quintana*, 596 F. Supp. 2d 1273 (D.N.D. 2009) *aff'd sub nom. United States v. Quintana*, 623 F.3d 1237 (8th Cir. 2010). To the extent that case does not conform with controlling case law from this Circuit and the Supreme Court, it must be summarily rejected. Moreover, that case is distinguished by the fact that Diaz-Quintana conceded from the start that he was from Mexico, but alleged he had a valid visa that he had failed to carry with him. Mr. Vargas, by contrast, did not tell Officer Leetz or the USBP agent on the phone anything about

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where he was born or his alleged immigration status (notwithstanding the false information in the USBP report) and yet the USBP agent still instructed Officer Leetz to arrest Mr. Vargas. In addition, Defendant overlooks that, on appeal, the Eighth Circuit, while affirming the legality of Diaz-Quintana's seizure, treated the incident as a warrantless *arrest* under 8 U.S.C. § 1357(a)(2), requiring probable cause. *Quintana*, 623 F.3d at 1241.

c. Plaintiff's arrest was not supported by reasonable suspicion, much less probable cause.

USBP's seizure of Mr. Vargas constituted an arrest, requiring that it be justified by probable cause. 8 U.S.C. § 1357(a)(2). Even assuming, *arguendo*, that the arrest was a brief detention needing only reasonable suspicion, Mr. Vargas has alleged sufficient facts to show that such reasonable suspicion was absent. Defendant repeatedly points to factors that are either inapplicable to the reasonable suspicion analysis or are, at best, marginally relevant. Throughout the motion, instead of citing to case law or other authority to support its agents' use of such factors, Defendant generally cites to its own agent's declaration as authority for such reliance.

The Supreme Court has clarified that reasonable suspicion depends on the totality of the circumstances. *Brignoni-Ponce*, 422 U.S. at 885 n.10. It requires that "the detaining officer [have] a particularized and objective basis for suspecting legal wrongdoing" before approaching a specific individual. *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal quotation marks and citation omitted). This permits 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" but forbids stops premised on "a mere hunch." *Id.* at 273-74 (internal quotation marks and citations omitted). Reliance on an officer's experience, however, does not give that officer "unbridled discretion in making a stop." *United*

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States v. Sigmond-Ballesteros, 285 F.3d 1117, 1126-27 (9th Cir. 2002) (internal quotation marks and citation omitted). Officers may not "rely solely on generalizations that, if accepted, would cast suspicion on large segments of the lawabiding [sic] population." *United States v. Manzo-Jurado*, 457 F.3d 928, 935 (9th Cir. 2006) (citations omitted). An analysis of Defendant's purported reasons underlying a finding of reasonable suspicion demonstrates that USBP acted according to a "mere hunch" instead of reasoned analysis when it had Mr. Vargas arrested.

i. Officer Leetz's "suspicions" about Mr. Vargas's alleged status are inconsequential and irrelevant to the reasonable suspicion calculus.

Defendant purports to assign probative weight to Officer Leetz's "suspicions" as to Mr. Vargas's alleged immigration status, including his evaluation of Mr. Vargas's language abilities, and considering it a contributing factor to USBP's reasonable suspicion determination. Def.'s Mot. 9-10. That USBP agents would accord *any* weight to the suspicions of officers who lack the requisite training to perform immigration enforcement functions is unacceptable. Here, it is particularly alarming that such officers' suspicions "weigh *heavily*" in USBP's assessment. *Id.* at 10 (emphasis added). There is simply no authority to support consideration of this as a factor; Defendant cites as support only its agent's self-serving statement that this may be considered. *Id*.

USBP agents' own ability to arrest individuals and perform related immigration enforcement functions is conditional on their participation in specialized training. *See* 8 C.F.R. § 287.5(c). The record does not indicate that Officer Leetz received immigration enforcement training that would enable him to make an informed determination as to Mr. Vargas's potential immigration status. Such training is necessary, for the Supreme Court itself has recognized that "[t]here are significant complexities involved in enforcing federal immigration law," which have necessitated that any agreement providing for local law enforcement officers to assist the federal

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government in performing immigration functions "must contain written certification that officers have received adequate training to carry out the duties of an immigration officer." *Arizona,* 132 S. Ct. at 2506 (citations omitted). Implicit in this statement is the recognition that these officers are not inherently equipped to do such work. Congress has made the need for training explicit in the law. *See* 8 U.S.C. §1357(g)(1)-(2) (holding that the Attorney General must have "determined" that the non-federal officers it is deputizing to enforce immigration law have received proper training and "are qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens"). In the absence of training, Officer Leetz's "suspicions" were, at best, mere hunches and, at worst, conclusions based on impermissible stereotypes and assumptions. That his suspicions were given such weighty consideration by the USBP agents involved is cause for concern and evidence that Mr. Vargas's arrest was not supported by reasonable suspicion.

ii. Mr. Vargas's refusal to cooperate with USBP is not a legitimate factor to consider in reasonable suspicion analysis.

Defendant argues that Mr. Vargas's inability or unwillingness to cooperate in USBP's investigation is another factor supporting reasonable suspicion. Def.'s Mot. 11-12, 21. But again, there is no authority to support this assertion, so instead Defendant cites to its agent's self-serving statement that this is permissible. *Id.* at 11-12.

Case law shows that such refusal to cooperate is irrelevant to the reasonable suspicion analysis. The Supreme Court has held that in a consensual encounter where the person being questioned "refuses to answer and the police take additional steps … to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure." *INS v. Delgado*, 466 U.S. 210, 216-17 (1984) (citations omitted).

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Accordingly, Mr. Vargas's refusal to cooperate with USBP does not itself supply the necessary justification for a detention or a seizure. *Id.*; *see also*, *e.g.*, *Florida v. Bostick*, 501 U.S. 429, 437 (1991); *Martinez v. Nygaard*, 831 F.2d 822, 827 (9th Cir. 1987) ("where a worker merely refuses to answer but does not attempt to flee or evade the agents, any additional steps taken by the agents must be supported [by other objective justification]") (internal quotation marks and citation omitted); *Pearl Meadows Mushroom Farm, Inc. v. Nelson*, 723 F. Supp. 432, 448 (N.D. Cal. 1989) (finding that someone's refusal to answer an immigration agent's question regarding immigration status was "neither unlawful nor probable cause for an arrest"). Even when accompanied by other factors that allegedly contributed to an officer's reasonable suspicion, refusal to cooperate with law enforcement holds no probative value in that calculus, for an "'individual has a right to ignore the [officer] and go about his business.'" *Hall v. Dodge*, 6:12-CV-1808-MC, 2013 WL 4782208, at *4-5 (D. Or. Sept. 5, 2013) (citing, *inter alia*, *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000)) (holding that Plaintiff's refusal to answer questions, presence in a crime-ridden locale, style of dress, lawful display of a weapon, and somewhat "'furtive' movement and … quickening pace" were insufficient to justify reasonable suspicion). "[T]he Fourth Amendment itself cannot require a suspect to answer questions." *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cnty.*, 542 U.S. 177, 187 (2004). USBP's attempts to penalize Mr. Vargas for exercising his rights and cast his behavior as worthy of suspicion are improper.[7]

[7] Defendant also asserts that Mr. Vargas's failure to produce any valid immigration documents and the fact that no records appeared under his name are additional factors USBP agents may consider in the reasonable suspicion analysis. *See* Def.'s Mot. 11-12. However, U.S. citizens are not required to carry citizenship papers on them; and USBP had no reasonable suspicion to believe that Mr. Vargas was an immigrant who needed to carry registration documents. Similarly, the absence of entry records is only a relevant consideration in the case of someone who is foreign-born, for such a factor is highly suggestive of unlawful entry. Again, there was no reasonable suspicion for USBP to make this assumption about Mr. Vargas, and so its agents' reliance on this factor is inappropriate.

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iii. Defendant misstates the probative value of Mr. Vargas's proximity to the border.

Defendant asserts that the fact that Mr. Vargas "was encountered … in an area with a maritime border, a functioning port of entry, a non-functioning Border Patrol checkpoint, and a large illegal immigrant population" "contributed" to USBP's reasonable suspicion. Def.'s Mot. 8-9. But Defendant's argument fails for a number of reasons. First and foremost, there was *never* any suspicion that Mr. Vargas was coming from the border. Mr. Vargas had a valid Washington driver's license when he was apprehended, as well as proof of automobile registration and insurance for his car. Compl. ¶ 11. These factors do not support a finding that he was a recent border crosser—the only reason being close to the border serves any probative value in the reasonable suspicion analysis. As the Fifth Circuit has explained, under the *Brignoni-Ponce* test, "'reason to believe that the vehicle had come from the border' is a vital element." *United States v. Pallares–Pallares*, 784 F.2d 1231, 1233 (5th Cir. 1986). If there is no reason to believe that the vehicle has come from the border, the remaining factors must be examined "charily." *Id.* at 1234. Indeed, Defendant itself recognizes that proximity to the border is relevant to the analysis *because* of the need to apprehend recent border crossers who take advantage of the "porous border," which "allows for people to be dropped off illegally in boats or by plane and then enter the rest of the United States by ferry." Def.'s Mot. 8.[8]

Moreover, proximity to the border is relevant where the record shows that "a particular location or route is used predominantly for illegal purposes—including illegal immigration." *Manzo-Jurado*, 457 F.3d at 936 (citations omitted); *see also United States v. Matson*, 345 F. App'x 303, 304 (9th Cir. 2009) (finding it significant that USBP agents had found Defendant in a

[8] Defendant inflates the importance of the proximity to the border by arguing that Anacortes serves as functioning port of entry, with an unchecked ferry. Def.'s Mot. 8. This is simply another fact thrown at the wall to distract the Court, as there is no allegation that agents believed Mr. Vargas had recently entered through the maritime border.

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"small, isolated town close to the Canadian border, which… had become a hot spot for illicit smuggling activity" in the evening at a location already under suspicion). However, "a location or route frequented by illegal immigrants, but also by many legal residents, is not significantly probative to an assessment of reasonable suspicion" even when in a location that is close to the border. *Manzo-Jurado*, 457 F.3d at 936 (citing *Sigmond–Ballesteros*, 285 F.3d at 1124). Here, beyond Defendant's unsubstantiated argument that Anacortes has a large undocumented population, there is no evidence that that is the case because the city is a hotbed of illicit border crossing activity, or that undocumented immigrants trying to get into the country typically drive through the area where Mr. Vargas was apprehended.

An indicator of recent illicit border crossing or other unlawful activity is necessary for this factor to be afforded any significant weight; otherwise it consists of a "broad profile" that could apply to lawful as well as unlawful immigrants and residents of border areas. *Id.* at 940. What is more, any connection to the *Canadian* border is especially attenuated given that the agent suspected Mr. Vargas of coming from Mexico. *Cf. United States v. Martinez-Fuerte*, 428 U.S. 543, 564 n. 17 (1976) ("Different considerations would arise if, for example, reliance were put on apparent Mexican ancestry at a checkpoint operated near the Canadian border.").

iv. Mr. Vargas's accented English did not provide reasonable suspicion.

Defendant argues that Mr. Vargas's English was hard to understand, as noted by Officer Leetz. Def.'s Mot. 9. In in *Manzo-Jurado*, for instance, the Ninth Circuit found that USBP lacked reasonable suspicion to stop a group of men in Montana based on the "individuals' appearance as a Hispanic work crew, inability to speak English, proximity to the border, and unsuspicious behavior." *Manzo-Jurado*, 457 F.3d at 932.While an individual's inability to speak English "may support an officer's reasonable suspicion that the individual is in this country

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illegally," it is not by itself dispositive, requiring the existence of "other factors [that] suggest that the individuals stopped are present in this country illegally." *Id.* at 937 (citing, *inter alia, United States v. Contreras-Diaz*, 575 F.2d 740, 745 (9th Cir. 1978)).

The cases cited by Defendant do not support a finding of reasonable suspicion in this case. In *Contreras-Diaz,* for instance, inability to speak English was but one of numerous factors taken into account by an officer in detaining individuals to check their status with USBP—among the other factors were a lack of valid identification, "resemblance to illegal aliens with whom [that officer] had previously come into contact," the fact that the car they were in had been speeding, and the completely different stories told by the driver of the vehicle and one of its occupants as to their destination. 575 F.2d at 745. There was considerably more information warranting reasonable suspicion than in this case, where USBP's information was simply that, according to the police officer, an individual in a border city spoke accented English and had a valid driver's license that did not list a number it was not required to list.

What is more, not being able to speak English fluently or at all is not necessarily and automatically indicative of foreign birth. United States Census statistics show that, in 2011, 10.6% of all native-born U.S. citizens age five and over grew up speaking a language other than English at home. Of those who grew up speaking Spanish at home, nearly 20% "[s]poke English less than 'very well'"; the figure was 15.2% for those who grew up speaking another language.[9] This data clearly demonstrates that conflating inability to speak English well with being foreign-

[9] U.S. CENSUS BUREAU: AMERICAN COMMUNITY SURVEY REPORTS, "Language Use in the United States: 2011," Aug. 2013, Tbl 3, *available at* http://www.census.gov/prod/2013pubs/acs-22.pdf (last accessed June 11, 2014).

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born is an inaccurate assumption to make, affirming the former factor's limited probative value in reasonable suspicion analysis.[10]

v. Mr. Vargas's lack of a listed Social Security number in the Washington State Driver's License database did not provide reasonable suspicion.

Defendant also argues that the "the fact that Plaintiff did not have a valid Social Security number is another factor that contributed to Border Patrol's reasonable suspicion" that Plaintiff was an undocumented immigrant since, in "Border Patrol's experience," not having such a number meant that individual is foreign-born or not lawfully admitted. Def.'s Mot. 10-11. Defendant's allegations fail. First, Officer Leetz only noted that Mr. Vargas's driver's license did not have a Social Security number "listed," not that he did not have a Social Security number. Compl. Exs. 27. Washington State does not require that a driver provide a Social Security number to obtain his license so long as adequate proof of state residency is provided. *See, e.g.*, Wash. Rev. Code Ann. 46.20.091; Wash. Admin. Code 308-104-014(4). Thus, that a driver does not have a Social Security number affiliated with his driver's license does not mean he does not possess such a number.

Second, not having a Social Security number is not necessarily indicative of unlawful status in this country. Not all non-citizens lawfully present are eligible to obtain a Social Security number. *See* 20 C.F.R. § 422.104(a)(2)-(3) (clarifying that a lawfully present non-citizen who is unauthorized to work cannot obtain a Social Security number absent one of two specified "valid

[10] Moreover, language is often used as a proxy for race. *See, e.g., Hernandez v. New York*, 500 U.S. 352, 371 (1991) ("It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.") (citations omitted); *Diomampo v. State*, 185 P.3d 1031, 1037-38 (Nev. 2008) (holding that explanation that potential juror was disqualified due to an inability to speak English was a pretext for his race and ethnicity). The Ninth Circuit has now repeatedly cautioned regarding the use of race as a factor in reasonable suspicion analysis. *See, e.g., United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) ("Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required."); *Melendres*, 2013 WL 2297173, at *64 ("Under Ninth Circuit law, the race of an individual cannot be considered when determining whether an officer has or had reasonable suspicion in connection with a *Terry* stop, including for immigration investigation.") (citation omitted).

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nonwork reason[s]"). Moreover, U.S. citizens are not required to have a Social Security number, and some choose not to have them. *See id.* (showing that U.S. citizens are eligible for a Social Security number but not listing any requirement that they obtain one); *see also Kocker v. C.I.R.*, 80 T.C. Memo 2000-238, at *1-2 (implicitly recognizing that parents have the option whether to register their U.S. citizen children for a Social Security number).

Thus, USBP's assertion that not having a Social Security number associated with a Washington driver's license supports reasonable suspicion that the holder of that license is an undocumented immigrant is a generalization "based on broad profiles which cast suspicion on entire categories of people without any individualized suspicion of the particular person to be stopped." *Sigmond-Ballesteros*, 285 F.3d at 1121 (internal quotation marks and citations omitted); *see also Manzo-Jurado*, 457 F.3d at 935. In *Manzo-Jurado*, the court found that the allegation that being part of a Hispanic work crew was relevant to developing reasonable suspicion of undocumented status was not a particularly weighty consideration; an agent's assertion that local USBP had "encountered numerous [Hispanic] work crews which contained illegal immigrants" was "too conclusory to support substantially that the stop was based on reasonable inferences rather than subjective impressions" and did not warrant deference to that agent's alleged expertise. *Manzo-Jurado*, 457 F.3d at 938 n.10 (citation omitted). As in *Manzo-Jurado*, without more "particularized information," USBP's assumption here is overly broad, "marginally relevant," and "insufficient by itself to satisfy the reasonable suspicion standard." *Id.* at 937-38 (internal quotation marks and citation omitted).

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vi. The falsified Form I-213 further demonstrates the lack of reasonable suspicion at the time of Mr. Vargas's arrest by USBP.

Even putting aside the fact that the USBP agents in this case used impermissible factors in their reasonable suspicion calculus, the factors that they *could* and did use are of such low probative value that, taken together, they failed to furnish enough information to warrant a finding of reasonable suspicion of Mr. Vargas's alleged unlawful status. The factors proffered lack particularity, casting suspicion on too many people, both here lawfully and not.

The USBP agents involved knew this, which is why they fabricated an encounter between Mr. Vargas and Agent Orr that would have provided them with grounds to claim they had reasonable suspicion. Compl. ¶¶ 63-77 (claiming that Agent Orr met Mr. Vargas on the scene of the stop and that Mr. Vargas admitted to being from Mexico and having been in the United States for about 10 years). *See* Def.'s Answer ¶ 74 (recognizing that this encounter never happened). Agent Orr did not meet with Mr. Vargas until *after* the latter had already been unlawfully arrested on USBP's orders, and any information he may or may not have discovered is irrelevant to this analysis.[11]

Reasonable suspicion analysis is not an exercise designed to yield to a USBP agent's "unbridled discretion in making a stop." *Sigmond-Ballesteros*, 285 F.3d at 1126-27. Quite the contrary, it is a constitutional requirement that courts scrutinize carefully. Mr. Vargas's case is greatly instructed by the Court's decision in *Manzo Jurado* as the factors used to justify his arrest are all of similarly low probative value as the ones enunciated in *Manzo-Jurado*: proximity to the

[11] Defendant recognizes that any suspicion it had about Mr. Vargas's alleged unlawful status "ripened … into probable cause" as a result of Agent Orr's interrogation. Def.'s Mot. 13-14. However, any concessions Mr. Vargas may have made at that point may not be used to support a finding of reasonable suspicion or probable cause because they were the direct product of his unlawful arrest. *See, e.g.*, *United States v. Crawford*, 372 F.3d 1048, 1055 (9th Cir. 2004) (describing three cases in which individuals were "arrested without probable cause in the hope that something [incriminating] would turn up… [and] the [Supreme] Court excluded the defendants' confessions as fruits of the illegal seizures") (internal quotation marks, alterations, and citations omitted).

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border unconnected to suspicions of a recent border crossing; difficulty with English fluency; and allegedly suspicious behavior that was actually only superficially so. 457 F.3d at 932. The court in that case found that this painted too broad a profile that did not distinguish lawful from unlawful immigrants. *Id.* at 939.

Defendant's reliance on *Tejeda-Mata* and *Soto-Cervantes* is misplaced. The two cases differ significantly because in both the alleged non-citizens conceded alienage in the process of their interaction with the relevant authorities. *See Tejeda-Mata v. INS*, 626 F.2d 721, 723-725 (9th Cir. 1980) (noting that Petitioner told the immigration officer "that he came from Mexico" prior to the officer's arrest); *United States v. Soto-Cervantes*, 138 F.3d 1319, 1321, 1323-24 (10th Cir. 1998) (defendant produced an alien registration card before even being turned over to immigration authorities). In *Tejeda-Mata*, moreover, the petitioner's presence in a car with another individual with a known immigration record was a key consideration warranting the officer's reasonable suspicion to question him. 626 F.2d at 723-24. In contrast, Mr. Vargas never conceded alienage, nor were there any other significant factors at play.

Mr. Vargas's complaint states a claim for relief, for it contains sufficient factual allegations that, if accepted as true, state "a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (citation omitted). Defendant's agents lacked reasonable suspicion, much less probable cause, to arrest Mr. Vargas.[12] Accordingly, Defendant's motion for judgment on the pleadings should be dismissed.

[12] In addition, the intrusiveness of the detention was not reasonably related to the situation and greatly extended beyond the scope of a permissible investigative detention. *See generally* Section III.b. Defendant's reliance on *United States v. Garcia-Aguilar*, 2010 WL 3636274 (D. Neb. Aug. 12, 2010) *report and recommendation adopted*, 2010 WL 3636266 (D. Neb. Sept. 9, 2010) and *United States v. Nunez-Betancourt*, 766 F. Supp. 2d 651 (E.D.N.C. 2011), is misplaced. In *Garcia-Aguilar*, immigration enforcement agents approached and seized the defendant to verify his immigration status pursuant to a tip about his status and *after* they knew he was using a Social Security number that appeared to be used by multiple people. 2010 WL 3636274 at *1. The defendant, moreover, was openly hostile to the agents and resisted arrest. *Id.* at *2. In *Nunez-Betancourt,* the immigration agent

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IV. DEFENDANT HAS NOT ESTABLISHED ITS RIGHT TO JUDGMENT AS A MATTER OF LAW AND ITS MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED

Summary judgment is appropriate where the moving party "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). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982) (citation omitted). Defendant is not entitled to summary judgment.

Defendant's sole defense to Mr. Vargas's claims is the alleged existence of reasonable suspicion to justify the arrest. A determination of disputed facts is needed to support Defendant's assertion that there is a complete defense to Mr. Vargas's claims of false arrest and imprisonment. *See Hanson*, 852 P.2d at 301.[13] But, as demonstrated in Section III, *supra*, Defendant ordered Plaintiff's arrest without any legal authority for doing so. This lack of lawful authority does not warrant a grant of summary judgment to Defendant.

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was contacted after the defendant admitted to local law enforcement that he was in the United States unlawfully. 766 F. Supp. 2d at 654. In both cases, the agents had considerably more to go on than the agents in this case to warrant a prolonged seizure to investigate the individuals' potential immigration status. Additionally, Defendant's argument that USBP had reasonably believed that Mr. Vargas was likely to escape before they could obtain a warrant for his arrest is similarly without merit. Def.'s Mot. 20-22. Mr. Vargas had clear ties to Washington, evidenced by his valid state driver's license and vehicle documentation. Moreover, his driver's license contained his address, which USBP could easily obtain from Officer Leetz. Additionally, at no point in the encounter with Officer Leetz did Mr. Vargas attempt to flee or act in a way that suggested he was contemplating it.

[13] The existence of probable cause or reasonable suspicion is also relevant to Mr. Vargas's abuse of process claim because that claim is contingent on the lack of a lawful basis to arrest Mr. Vargas: USBP agents misused the legal processes available to them to cover up their unlawful conduct in ordering Mr. Vargas's arrest without lawful justification. Compl. ¶¶ 114-123. Defendant mistakenly argues, however, that the existence of probable cause is a complete defense to an abuse of process claim generally. *See* Def.'s Mot. 7. *But see Fite v. Lee*, 521 P.2d 964, 968 (Wash. App. 1974) ("[A]n action for abuse of legal process will lie even though there was probable cause for issuance of the process.") (citation omitted). The cases cited by Defendant refer to malicious prosecution claims, not abuse of process. *See Hanson*, 852 P.2d at 299, 301; *Bender v. City of Seattle*, 664 P.2d 492, 500 (1983).

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Moreover, the declarations submitted by Defendant support the merits of Mr. Vargas's action and undermine the claim that reasonable suspicion existed by showing the low probative value of the factors allegedly taken into consideration in USBP's analysis. They also raise matters of fact relevant to the reasonable suspicion and probable cause analyses that Mr. Vargas must verify through the discovery to which he is entitled, such as, for example, what proportion of USBP apprehensions in Anacortes result from recent border crossing and how large the undocumented population of Anacortes is. However, such declarations fail to establish that there are no material facts in dispute and that Defendant is entitled to judgment as a matter of law. Indeed, they highlight disputed facts by presenting information contrary to the USBP agents' initial report. Thus, they demonstrate that Defendant must introduce new facts in order to support its motion for summary judgment.

Further, genuine issues of material fact exist in order to properly adjudicate Mr. Vargas's abuse of process claim. Plaintiff has sufficiently shown that Border Patrol agents misused the legal procedures available to them for the ulterior purpose of justifying their unlawful conduct. Compl. ¶¶ 114-123. Mr. Vargas has identified at least several instances in which USBP agents acted in improper ways motivated by this desire, including, but not limited to, USBP's falsification of Mr. Vargas's arrest record. *Id.* ¶¶ 117-120. Defendant has conceded that a significant part of the information included in Mr. Vargas's arrest record is false. Def.'s Answer ¶¶ 71-74. The forged I-213 is a crucial factor in Mr. Vargas's abuse of process claim, for it clearly demonstrates the use of a legal process designed to ensure transparency and accountability in arrests to cover up Mr. Vargas's unlawful detention. Finally, Defendant's motion does not even address Mr. Vargas's remaining claims for negligent infliction of

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emotional distress, outrage, and abuse of process. Defendant is thus not entitled to summary judgment on Mr. Vargas's claims.

V. CONCLUSION

Mr. Vargas's Complaint alleges facts necessary to defeat Defendant's motions on the pleadings and for summary judgment. Accordingly, this Court should deny Defendant's motions.

DATED this 16th of June, 2014.

Respectfully submitted,

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