No. 20-381

In the

SUPREME COURT of the UNITED STATES

HAMILTON COUNTY JOB AND FAMILY SERVICES, Et Al.,
Petitioners

v.

JOSEPH AND MELISSA SIEFERT
Respondents

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

Brief in Opposition to Petition For Writ of Certiorari

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October 23, 2020

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III. STATEMENT OF THE CASE

Plaintiffs, Joseph and Melissa Siefert have five children. (RE 1, at ¶ 19 (Complaint and Jury Demand).) Their oldest, Minor Siefert, was fifteen years old when nearly all events in this dispute took place. *Id*. On about November 2015, the Sieferts learned that Minor Siefert was suffering from depression, anxiety, and suicidal ideations. *Id*. at ¶ 24. Then, on August 11, 2016, Minor Siefert informed Mr. and Mrs. Siefert that she considered herself to be a transgender child. *Id*. at ¶ 25.

On November 13, 2016, based on their pediatrician's recommendation, Mr. and Mrs. Siefert took Minor Siefert to Children's Hospital. *Id*. at ¶ 30. Their purpose was for Children's to conduct a psychological evaluation regarding suicidal ideations. *Id*. For the next week or so, Mr. and Mrs. Siefert, Minor Siefert, and Hamilton County Job and Family Services (HCJFS) consulted regarding Minor Siefert's treatment. *Id*. at ¶ 41. The HCJFS representatives with whom the met face to face included Rachel Butler and Eric Young. *Id*. The HCJFS employees, including Moira Weir, are collectively referred to as the County Defendants.

During this same time period, Mr. and Mrs. Siefert also consulted with Children's staff, including Kimberley Stephens and Lauren Heeney. *Id*. at ¶¶ 43-44. The Children's Hospital Defendants are collectively referred to as Children's Defendants.

During this same initial period, Humana Behavioral Health was providing insurance coverage for Minor Siefert's treatment. *Id*. at ¶ 46.

After about ten days, on November 22, one of the Children's doctors reviewed Minor Siefert's treatment with a board certified psychiatrist from Humana. *Id*. at ¶ 51. As a result of that review, Humana determined that Minor Siefert had "no acute symptoms that require 24 hour care." *Id*. at ¶ 52. Humana determined further that: "She is not a danger to herself or others. She is not aggressive. She is medically stable. She is not manic." *Id*. Humana, accordingly, denied coverage for further treatment by Children's. *Id*.

Based on these circumstances, starting on November 23, the Sieferts made every reasonable effort to have their child returned. (RE 1, ¶¶ 60-96.) Their purpose was to exercise their parental right to custody and association with Minor Siefert. (RE 1, ¶ 60.)

To obtain the release of their child, Mr. Siefert exchanged multiple voicemail messages. (RE 1, ¶¶ 60, 61, 68.) He also sent and received emails. (RE 1, at ¶¶ 78, 81.) He engaged in numerous phone calls. (RE 1, ¶¶ 64, 72-73, 83.) Both Mr. and Mrs. Siefert attended meetings. (RE 1, ¶ 69, 87.) And, they were involved in face-to-face conferences. (RE 1, ¶ 95.) At every step, the Sieferts demanded that Children's and the county return their child. (RE 1, ¶¶ 60-61, 64, 68-69, 72-73, 78, 81, 83, 87, 95.)

Despite the Sieferts' efforts, Children's and the county refused to allow the Sieferts to obtain custody of their child. *Id.* When the Sieferts were at the hospital, they were not allowed to take the child home. (RE 1, ¶¶ 74-75.) When they asked Children's officials how to gain custody, the officials said it was up to HCJFS. (RE 1, ¶ 95.) When they asked county officials how to get their child back, they told the Sieferts that it was up to the Children's doctors. (RE 1, ¶ 90.)

During the entire time that Minor Siefert was at Children's, the county did not make any attempt to obtain a court order for custody – emergency or otherwise. *Id.* at ¶ 59.

Based on all that, Minor Siefert was not allowed to leave Children's Hospital until December 20, 2016. *Id*. at ¶ 96. That was when HCJFS and Sieferts entered into a voluntary "Safety Plan" by which Minor Siefert would stay with her maternal grandparents. *Id*.

IV. SUMMARY OF ARGUMENT

A. '*Individualized Analysis' for Qualified Immunity – Not a Basis for Certiorari*

1. *Defendants Did Not Raise Individualized Analysis*

County Defendants ask this Court to grant certiorari, because the Sixth Circuit did not engage in an "individualized analysis" of their qualified-immunity claims. (Petition at 13-18.) That argument is not well taken, because Defendants did not raise the individualized-analysis issue at the district court or in their appeal briefs. U.S. Sup. Ct. R. 10.

2. *Defendants Have Not Identified a Conflict*

Defendants cite numerous cases in an apparent effort to establish a conflict for the purposes of certiorari. (Petition, at 13-4.) The conflict arguments are not well taken. One reason is because, in the cases that Defendants cite, the issue of individualized analysis issue was raised at the court of appeals. Another reason is because Defendants cite cases with completely different fact patterns, such as impartial-tribunal cases. Another reason is because Defendants do not argue that the Sixth Circuit incorrectly cited qualified-immunity law. They merely object to a perceived "misapplication of a properly stated rule of law." U.S. Sup. Ct. R. 10. Finally, even if Defendants had raised the individualized analysis argument below, the Sieferts' complaint detailed sufficient factual basis to state plausible claims against County Defendants.

B. *Sixth Circuit Did Not Establish 'Affirmative Duty" to Protect Parental Rights*

1. *Defendants Misstate the Sixth Circuit Holding in the Case – No 'Affirmative Duty'*

County Defendants' argue that certiorari is appropriate because the Sixth Circuit created an "affirmative duty" on state actors to protect parental due process rights when a child is hospitalized. (Petition, at 18-22.) This argument is not well taken, because the Sixth Circuit did not create an affirmative duty. The court merely held that "under the circumstances," the Sieferts had stated a plausible claim that County Defendants had violated their due-process rights by blocking the child's release for nearly a month. (Doc. 41-2, Page: 13 (Opinion).)

2. *Defendants Violated 'Clearly Established' Law*

County Defendants argue that certiorari is appropriate because the Sixth Circuit relied on a footnote for its analysis of Sixth Circuit law. This argument also is not well taken, because the Sixth Circuit engaged in a rigorous analysis of parental due-process rights referring to cases from United States Supreme Court, the Sixth Circuit, and other federal courts of appeals. (Doc. 41-2, Page: 12-14 (Opinion).)

C. *Children's Hospital Employees – State Actors*

1. *Sixth Circuit Decision*

Children's argues that the Sixth Circuit incorrectly held that the Sieferts' complaint alleged a plausible claim that Children's officials acted under color of state law.

Children's argument on this point is not well taken, because it just amounts to an argument that the Sixth Circuit misapplied a properly stated rule of law. U.S. Sup. Ct. R. 10. Besides that, the Sixth Circuit cited extensive facts from Sieferts' brief that showed County Defendants and Children's Defendants working in "tandem" to block Minor Siefert's release from the hospital.

In addition, Children's citations that attempt to establish a conflict for the purposes of certiorari are not persuasive, because their cases deal with unrelated fact patterns such as extensive-regulation cases, involuntary-confinement cases, and child-abuse reporting cases.

2. *No State Law Immunity For Federal Due-Process Violations*

Children's makes the implied argument that Ohio immunity statutes are relevant to federal qualified immunity analysis. Children's argument is not well taken, because the U.S. Supreme Court has held that state immunity statutes do not shield defendants from liability on U.S. constitutional violations. *Martinez v. California,* 444 U.S. 277, 283-84, 100 S. Ct. 553, 558 (1989).

V. ARGUMENT

Supreme Court Rule 10 sets out considerations governing review on certiorari. U.S. Sup. Ct. R. 10. One consideration is whether a United States court of appeals has entered a decision in conflict with a decision of another court of appeals on the same important matter. U.S. Sup. Ct. R. 10(a). Rule 10 also states that the Court will consider whether a court of appeals has decided an important federal question "that conflicts with relevant decisions of [the Supreme] Court. U.S. Sup. Ct. R. 10(c). The Court will rarely grant a writ of certiorari when the "asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Sup. Ct. R. 10.

In addition to Rule 10, the Supreme Court has explained except in "unusual circumstances," the Court will not "consider claims neither raised nor decided below." *Clingman v. Beaver,* 544 U.S. 581, 598, 125 S. Ct. 2029, 2041-42 (2005).

A. '*Individualized Analysis' for Qualified Immunity – Not a Basis for Certiorari*

1. *Defendants Did Not Raise 'Individualized Analysis' At The District Court Or On Their Sixth Circuit Appeal*

County Defendants argue that this Court should grant certiorari because the district court and Sixth Circuit did not conduct an "individualized analysis" of their qualified-immunity defense. (Petition at 13-18.)

This Court has explained that it is a court of "final review." *Adarand Constructors, Inc. v. Mineta,* 534 U.S. 103, 110-11, 122 S. Ct. 511, 514-15 (2001). This Court, therefore, does not "decide in the first instance issues not decided below." *Id*. at 513-14, 122 S. Ct. 109.

In this case, when Defendants filed their motion to dismiss at the district court, they raised the qualified-immunity issue based on procedural due process. (RE 12, at 6-10 (County Motion to Dismiss/Stay) (filed under seal).) Defendants did not, however, raise the issue of "individualized analysis" in their motion. *Id.*

Instead, Defendants argued, only generally, that the facts in the complaint demonstrated that the county's compelling governmental interest outweighed the Sieferts' liberty interest in family integrity. *Id*. at 8. Defendants argued, also, that the Sieferts consented to the continued hospitalization of their child. *Id*.

In the district court's opinion, accordingly, the court did not consider the Defendants' individual actions in the case. (RE 35, at PID# 441-49 (Order Lifting

the Stay and Granting County Defendants' Motion to Dismiss).) Instead, the district court analogized the Sieferts' case to the Sixth Circuit case, *Smith v. Williams-Ash,* 520 F.3d 596 (6th Cir. 2008). (RE 35, at 444-446.) Based on *Williams-Ash,* the district court held that it could not conclude that the county defendants have violated a clearly establish procedural due-process right. (RE 35, at 446.)

When the Sieferts filed their appeal, Defendants again raised the same generalized arguments with the Sixth Circuit panel – county's compelling interest and Sieferts' consent. (Doc. 23, at Page: 14-15, 19 (County Defendants' Response Brief).) When it came to the issue of a clearly established right, the Defendants cited the same case on which the district court relied, *Smith v. Williams-Ash*. (RE 23, Page: 22-24.) And, the County Defendants raised the same generalized argument – their conduct did not amount to a clearly-established violation. *Id.* In their appeal brief, just as in their motion to dismiss, Defendants did not ask for an individualized analysis of County Defendants' conduct. *Id.*

The Sixth Circuit, accordingly, responded with the same sort of generalized analysis that the Defendants presented. The Sixth Circuit stated that in "case after case, the Supreme Court has emphasized the parent-child relationship's special place in our society." (Doc. 41-2, Page: 13 (Opinion).) The court then referred to relevant Sixth Circuit and out-of-circuit cases to reinforce that point. *Id*.

Based on the issues that Defendants' raised in their brief and the Sixth Circuit's corresponding analysis, the court properly rejected Defendants' qualified-immunity, clearly-established arguments. (Doc. 41-2, Page: 13-14.)

2. *Defendants Have Not Identified a Conflict for Certiorari*

Defendants, however, seem to implicate the Rule 10 "conflict" consideration for certiorari. (Petition at 15.) They argue that the Sixth Circuit decision is "out of step with well-established Sixth Circuit precedent, out-of-circuit precedent, and the Supreme Court law." (Petition at 15.) In support, Defendants cite more than a dozen cases in which courts have endorsed individualized analysis for multiple defendants on qualified immunity. (Petition, at 14.)

a. *Conflict for Certiorari: Generally*

There is an example of what amounts to a "conflict" for the purposes of certiorari in the recent Supreme Court case, *Clark v. Rameker,* 573 U.S. 122, 134 S. Ct. 2242 (2014). In *Rameker,* the issue was whether "inherited IRAs" were "exemptions" in Chapter 7 bankruptcy proceedings. *Id*. at 127, 134 S. Ct. at 2246.

The Fifth Circuit held that inherited IRAs were exemptions for the purposes of Chapter 7 bankruptcy. *Chilton v. Moser,* 674 F.3d 486 (5th Cir. 2012). A year after the *Clark* case, the Seventh Circuit ruled exactly the opposite – that

inherited IRAs were not exemptions in Chapter 7. *In re: Heffron-Clark,* 714 F.3d 559, 562 (7th Cir. 2013).

The United States Supreme Court then accepted the Seventh Circuit case "to resolve a conflict between the Seventh Circuit's ruling and the Fifth Circuit's decision." *Clark,* 573 U.S. at 126-27, 134 S. Ct. at 2246. The Supreme Court decided that the Seventh Circuit's reasoning was correct. *Id*. at 133, 134 S. Ct. at 2250. The Court held that the inherited IRAs were not retirement fund exemptions for the purpose of Chapter 7 bankruptcy. *Id*. at 133, 134 S. Ct. at 2250.

Using *Clark* as an example, therefore, a "conflict" for the purposes of certiorari would be a circumstance in which two different circuits had decided precisely the same issue and reached exactly opposite results. *Id.* at 126-27, 134 S. Ct. at 2246.

b. *No Intra-Circuit Conflict for Certiorari*

As for a conflict in the *Siefert* case, the first five cases that Defendants cite are from the Sixth Circuit.[1] (Petition at 14.) These cases are irrelevant for the purposes of a conflict analysis, because a conflict within the circuit is not a basis for certiorari. U.S. Sup. Ct. R. 10.

1. *Booker v. LaPaglia,* 617 Fed App'x 520, 524 (6th Cir. 2015); *Binay v. Bettendorf,* 601 F.3d 640, 650 (6th Cir. 2008); *Dorsey v Barber,* 517 F.3d 389, 399 (6th Cir. 2008); *Gandhi v. Police Dep't of Detroit,* 747 F.2d 338, 344 (6th Cir. 1984); and Pollard *v. City of Columbus,* 780 F.3d 395, 402 (6th Cir. 2015).

c. *No Conflict/Different Issues – Other Cases Raised 'Individualized Analysis'*

Turning to cases from out of the Sixth Circuit, for there to be a conflict with the Sixth Circuit *Siefert* case, the other courts would have to have held that, when the defendant defends qualified immunity on a generalized basis and does not raise the issue of "individualized analysis," the court of appeals must *sua sponte* raise that issue.

None of the cases that County Defendants cite from other circuits can be read to conflict with the *Siefert* case. For instance in *Drimal,* a plaintiff sued FBI agents on the grounds that they illegally intercepted some of her phone calls that were unrelated to a criminal investigation. *Drimal v. Tai,* 786 F.3d 219, 226 (2nd Cir. 2015). At the district court, the FBI agents moved to dismiss on qualified-immunity grounds. *Id.* at 223. The district court denied the motions, but did not engage in an individualized analysis. *Id.* On appeal, however, the FBI agents raised individualized analysis in their briefs. (Siefert Appendix A, at 15-16; Siefert Appendix B at 71-72.)

In the *Drimal* case, therefore, there was no reason for the Second Circuit to order courts to *sua sponte* raise the "individualized analysis" issue – the Defendants raised the issue on their own. (Siefert Appendix A, at 15-16; Siefert Appendix B at 71-72.)

In *Grant,* the issue of individualized analysis was raised at both the district court and at the court of appeals. *Grant v. City of Pittsburgh,* 98 F.3d 116, 123

(3d Cir. 1996). At the district court level, the court identified the correct standard for individualized analysis set out in the U.S. Supreme Court cases, *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S. Ct. 2727 (1982); *Anderson v. Creighton,* 483 U.S. 635, 636-37, 107 S. Ct. 3034, 3037 (1987). *Grant,* 98 F.3d at 122. Similarly, the Third Circuit identified the specific issue on appeal: "The question presented in this appeal is whether the district court properly applied the test set forth by the Supreme Court" in *Harlow* and *Anderson. Grant,* 98 F.3d at 118.

In *Grant,* because the issue was identified at the Third Circuit, there would have been no reason for the court to hold that it was necessary to *sua sponte* raise individualized analysis. *Id.*

The facts were much the same in the next case, *Meadours v. Ermel,* 483 F.3d 417, 422 (5th Cir. 2007). The *Meadours* case was based on allegations of excessive force by Texas police officers. *Id*. at 419. The district court denied the officers' motion for summary judgment based on qualified immunity. *Id*.

On appeal, the officers expressly raised the individual analysis argument. *Id*. at 421. The Fifth Circuit, however, determined that there were questions of fact as to whether the officers engaged in excessive force and denied qualified immunity. *Id*. at 423.

In *Bakalis,* the defendants also raised the issue of individualized analysis on appeal. *Bakalis v. Golembeski,* 35 F.3d 318, 322-23 (7th Cir. 1994). The defendants argued that the district court "conducted the qualified-immunity

inquiry at too general a level." *Id*. The court of appeals, however, disagreed, holding that "there is a genuine issue of triable fact with respect to each of the named individual defendants that precludes the defense of qualified immunity." *Id*. at 327.

It was the same in the next case, *Manning v. Cotton,* 862 F.3d 663, 668 (8th Cir. 2017). At the trial court level, the court denied defendants' summary judgment motion based on qualified immunity. *Id.* at 665. On appeal to the Eighth Circuit, the defendants expressly argued that the district court "failed to make the required individualized analysis for qualified immunity." *Id*. at 667. The court of appeals, however, affirmed the district court's denial of qualified immunity. *Id.* at 671.

In all of those cases, because the issue was raised on appeal, none of the courts held that it was necessary to *sua sponte* raise the issue of individualized immunity. *Drimal,* 786 F.3d at 223; *Grant,* 98 F.3d at 122; *Meadours,* 483 F.3d at 419; *Bakalis,* 35 F.3d at 327; *Manning,* 862 F.3d at 668.

For that reason, these cases do not present a conflict for the purposes of certiorari. U.S. Sup. Ct. R. 10(a).

d. *No Conflict: Impartial Tribunal Cases*

In the next two cases that Defendants cite, there also is no conflict with the *Siefert* case. *Stivers v. Pierce,* 71 F.3d 732, 750-51 (9th Cir. 1995); *Hicks v. City of Watonga,* 942 F.2d 737, 747 (10th Cir. 1991). The main reason is that *Stivers*

and *Hicks* were "impartial tribunal" cases, not child-custody cases. *Stivers,* 71 F.3d at 750-51; *Hicks,* 942 F.2d at 750.

In the *Stivers* case, for example, the plaintiff argued that he had been denied procedural due process when he applied to the Nevada State Private Investigators Licensing Board. *Id.* at 741.

In their petition, County Defendants argue that *Stivers* stands for the proposition that "each defendant's entitlement to qualified immunity must be considered separately." (Doc. 23 at Page: 14 (County Defendants' Response Brief).)

According to the Supreme Court Rules, a respondent "has an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." U.S. Sup. Ct. R. 15(2).

In this case, Defendants' characterization of the *Stivers* case is not correct. The *Stivers* case does not hold that each individual defendant's conduct must be analyzed separately. *Id*. at 750-51. Instead, the *Stivers* case holds that when a plaintiff presents evidence that multiple defendants "acted together to deprive" a plaintiff of his due-process right to an impartial tribunal, all of the defendants should be denied qualified immunity. *Id*.

In *Hicks,* the other impartial-tribunal case, a police officer filed a due-process lawsuit related to his termination. *Id*. at 739. In his lawsuit, Hicks sued multiple defendants who had been involved in his disciplinary hearings. *Id*. at

742. The district court granted summary judgment to two of the individuals. *Id*. The court denied summary judgment on the basis of qualified immunity to the six remaining individual defendants. *Id*. at 743.

Those remaining individuals filed an appeal based on the denial of qualified immunity. *Id*.

On appeal, the Tenth Circuit noted that the "Supreme Court held that a person claiming bias on the part of an administrative tribunal 'must overcome a presumption of honesty and integrity in those serving as adjudicators.'" *Id.* at 746. The court held that at summary judgment, Hicks had not presented evidence to overcome the presumption for all but one member of the tribunal. *Id.* at 750-51. For that reason, the court granted qualified immunity to those members about whom Hicks had not presented evidence of bias. *Id.* at 751.

In the *Siefert* case, the parents did not bring an "administrative tribunal" due-process case. (RE 1, ¶¶ 99-106 (Complaint).) And, County Defendants have not pointed to any presumption in parental procedural due-process cases that would be analogous to the administrative-tribunal rule in *Hicks*. (Petition at 13-18.)

In these impartial tribunal cases, therefore, there is no conflict for the purposes of certiorari.

e. *No Conflict: 6th and 11th Circuits Cited Same Qualified Immunity Law*

Finally, Defendants cite *Waldrop v. Evans,* 871 F.2d 1030, 1034 (11th Cir. 1989). Supreme Court Rule 10 states that a petition for certiorari will be "rarely granted when the asserted error consisted of . . . the misapplication of a properly stated rule of law." U.S. Sup. Ct. R. 10.

In *Waldrop,* the parents of a prison inmate brought a due-process claim based on deliberate indifference to the inmate's psychiatric needs. *Waldrop,* 871 F.2d at 1032. At the district court level, the defendants moved for summary judgment on the basis of qualified immunity. *Id.* When the district court considered qualified-immunity, it stated that the standard was whether deliberate indifference to an inmate's psychiatric needs would violate that person's Eighth Amendment rights. *Id.* at 1034.

On appeal, the Eleventh Circuit held that the district court's standard was wrong. *Id.* The correct standard was "whether a reasonable doctor in the same circumstances and possessing the same knowledge . . . could have concluded that his actions were lawful." *Id.*

In the *Siefert* case, the Sixth Circuit explained the qualified-immunity law the same as *Waldrop.* Just as with *Waldrop,* the Sixth Circuit held that a plaintiff can overcome qualified immunity "when every reasonable official would know his conduct was unlawful." (Doc. 41-2, at Page: 12 (Opinion).) And, just like *Waldrop,* the Sixth Circuit held that "it must be clear that Defendants' actions in

this particular circumstance – as alleged in the complaint – violated Sieferts' due process rights." *Id.* at Page: 13.

In the case of *Waldrop,* therefore, Defendants do not point to any conflict between the Sixth Circuit and the Eleventh Circuit. By challenging the Sixth Circuit decision in the *Siefert* case, they identify nothing more than a perceived misapplication of properly stated rule of law. U.S. Sup. Ct. R. 10.

f. *No Conflict: Sixth Circuit En Banc*

The first time that Defendants ever raised the "individualized analysis" was when they filed their Petition for Panel Rehearing or En Banc Determination. (Doc. 45, Page: 6-11.)

The Sixth Circuit has held that Defendants waive issues on appeal that they did not raise in their initial appellee briefs. *Thaddeus-X v. Blater,* 175 F.3d 378, 403, fn.18 (6th Cir. 1999), citing cases.

Defendants in this case, therefore, waived their "individualized analysis" argument for the purposes of their en banc petition. *Id.*

3. *Even if the County had not Waived, the Sieferts Alleged Plausible Claims Against the Individual Defendants*

For an individual defendant to be liable for a 1983 cause of action there must be evidence that he or she was "personally involved" in the constitutional violation. *Burley v. Gagacki,* 729 F.3d 610, 619 (6th Cir. 2013).

Because County Defendants waived the "individualized analysis" argument, their petition for certiorari on that basis really just amounts to a claim

about the Sixth Circuit's perceived "misapplication of a properly stated rule of law." U.S. Sup. Ct. R. 10.

Even that argument fails, because the Sieferts alleged sufficient facts to state a plausible claim against each of the individual County Defendants.

a. *Moira Weir*

In the case of Moira Weir, she is personally involved because she was a final decisionmaker and she ratified the illegal conduct. More specifically, Ms. Weir was the director of HCJFS. (RE 1 at ¶ 6 (Complaint).) The Sieferts alleged that HCJFS actions were authorized because "management officials at the highest level established and ratified the conduct and policy that led to the due-process violations against the Sieferts." (RE 1, ¶ 154.) The Sieferts alleged that Ms Weir was statutorily established as a final policy maker at HCJFS. *Id.* at ¶ 6; Ohio Rev. Code § 5153.02(B). Ms. Weir, herself, was aware of the Siefert situation, because during the time that Minor Siefert was at Children's Hospital, she personally responded to an email from Minor Siefert. (RE 1, at ¶ 33.)

Then, on November 30, when Children's and HCJFS were holding Minor Siefert at the hospital, Mr. and Mrs. Siefert met with Ms. Butler and Mr. Young from HCJFS. *Id.* at ¶ 83. Based on the circumstances, it was apparent that HCJFS had designated Mr. Young and Ms. Butler to speak on behalf of the county and the agency. *Id.* at ¶ 87. At that meeting, Mr. Young explained that HCJFS "had a policy of preventing parents from having custody or association

of their children when Children's doctors and/or HCJFS official do not approve of releasing the child to the parents, even without parent consent or a court order." *Id.* at ¶ 90.

Mr. Young later told the Sieferts that HCJFS "upper management" – which would include Ms. Weir – had approved the framework of the Safety Plan that released Minor Siefert after nearly four weeks at Children's Hospital. (RE 1, at ¶ 97.)

b. *Eric Young*

Mr. Young is liable because he personally prohibited the Sieferts from custody of their child and he ratified the illegal conduct by Ms. Butler.

The Sieferts' complaint establishes that Mr. Young was an HCJFS case-worker supervisor. (RE 1, at 7.) On November 30, the Sieferts were in a meeting with Rachel Butler and Eric Young. (RE 1, at ¶ 87.) During the conference, Mr. Young explained the HCJFS policy of preventing parents from having custody or association of their children when Children's doctors and/or HCJFS officials do not approve of releasing the child to the parents, even without parents' consent or a court order. (RE 1, at ¶ 90.) In Mr. Young's words, the policy amounted to: "we have to go by what the doctors say." *Id.*

Based on the facts of the case, Mr. Young was authorized by Hamilton County to speak on behalf of HCJFS. (RE 1, at ¶¶ 87-88.)

Then, on December 7, 2016, Mr. Young and Ms. Butler told Ms. Stephens that Minor Siefert "could not go home." (RE 1, at ¶ 93.) In the meantime, Mr. Young and Ms. Butler were secretly engaging and telephone calls with Ms. Stephens, in which they told Ms. Stephens that the parents could not take Minor Siefert home. (RE 1, at ¶¶ 63 (Butler) and 93 (Young and Butler).)

c. *Rachel Butler*

Rachel Butler is an HCJFS Children's Service case worker. (RE 1, at ¶ 8.) Her immediate supervisor was Eric Young. *Id.* Ms. Butler told the Sieferts that Children's would not send Minor Siefert home without permission from HCJFS. (RE 1, at ¶ 42.) She said before Minor Siefert could leave Children's, that HCJFS had to make sure that "they" put her in the right place. *Id.*

On November 22, the Sieferts were told to attend a family discharge meeting. *Id.* at ¶ 53. The persons who were to attend included Mr. and Mrs. Siefert, Minor Siefert, Kim Stephens from Children's, and Rachel Butler from HCJFS. *Id.* at ¶ 53. Mr. and Mrs. Siefert attended and Ms. Stephens attended. *Id.* Ms. Butler and Minor Siefert, however, did not show up. *Id.* at ¶ 54. Ms. Stephens told the Sieferts that there was nothing she could do because Ms. Butler was not there. *Id.* at ¶ 55.

Then in a November 23 phone call, Ms. Butler told Ms. Stephens that the "parents could not take [Minor Siefert] back to the home." *Id.* at ¶ 63.

On November 28, when a second scheduled meeting at Children's took place, Ms. Butler called in by telephone. *Id*. at ¶ 69. While Ms. Butler was on the telephone, Mr. Siefert asked what they had to do to have their child discharged. *Id*. at ¶ 71. Ms. Butler's response was: "It does not work that way." *Id*. at ¶ 72. She stated that when you cannot take care of your child, we have to "step in." *Id*. After a bit more back and forth, Ms. Butler hung up the phone with nothing resolved regarding discharge. *Id*. at ¶ 73.

Then, on December 7, Ms. Butler – along with Mr. Young – told Ms. Stephens that Minor Siefert "could not go home." *Id.* at ¶ 93.

Based on all these points, therefore, the county's arguments regarding "individualized analysis" are not sufficient to grant certiorari.

B. *Sixth Circuit Did Not Establish 'Affirmative Duty" to Protect Parental Rights*

Defendants next argue that this Court should grant certiorari because the Sixth Circuit improperly imposed an "affirmative duty to protect parental due-process rights when a child is hospitalized and no child custody proceedings have been initiated." (Petition at i; Petition at 18.)

1. *Defendants Misstate the Sixth Circuit Holding in the Case – No 'Affirmative Duty'*

Defendants' argument is another misstatement, because the Sixth Circuit did not create any such affirmative duty. U.S. Sup. Ct. R. 10.

When this Court imposes a constitutionally mandated "affirmative duty," it refers to some specific act that a person must take in a carefully defined

circumstance. See *e.g., Padilla v. Kentucky,* 559 U.S. 356, 130 S. Ct. 1473 (2010). One such circumstance would be when a criminal defense attorney advises a non-citizen client regarding a plea bargain that may result in deportation. *Id*. If that person is subsequently convicted of a so-called "removable offense," his or her deportation is "practically inevitable." *Id*., at 292-93, 130 S. Ct. at 1480. In the context of an effective assistance of counsel case, the Supreme Court imposed an affirmative duty on the attorney to expressly advise the non-citizen immigrant defendant that if he or she entered into a plea on a criminal charge, that may result in possible deportation. *Id.* at 374-75, 130 S. Ct. at 1486-87.

The *Padilla* case, therefore, shows how far off Defendants are when they argue that the Sixth Circuit imposed an affirmative duty in the *Siefert* case. The court of appeals in *Siefert* did not – as it did in the *Padilla* case – establish an affirmative duty on anybody. Instead, the Sixth Circuit held that "in this particular circumstance," Defendants may have violated the Sieferts' due-process rights. (Doc. 41-2, Page: 13 (Opinion).)

As the Sixth Circuit explained, that was because the Sieferts took the child to the hospital. *Id.* at Page: 2. After about a week, the Sieferts' insurance company had a psychiatrist determine that Minor Siefert was no harm to anyone and was medically stable. *Id*. at Page: 14. The Sieferts did not consent for the child to remain hospitalized. *Id.* at 10. Instead, the Sieferts routinely demanded that Minor Siefert be discharged. *Id*. Over the next four weeks, the

Sieferts "wrangled with the hospital and the county about getting their child back." *Id*. at Page: 2. For their part, Defendants told the Sieferts that their child "could not go home." *Id*. at Page: 11. Defendants did that without obtaining a court order for custody or providing a Sieferts with a hearing. *Id*. at Page: 3. The Defendants ended up holding the child for nearly a month before allowing the child to be released. *Id*. at Page: 5.

In light of that analysis, it is a misstatement for Defendants to twist this Court's holding into an "affirmative duty." U.S. Sup. Ct. R 15(2).

2 Defendants Violated 'Clearly Established' Law

Defendants also misstate the Sixth Circuit's holding regarding clearly-established, qualified-immunity law. *Id.* Defendants' state that the "Sixth Circuit dangerously elected to declare a proposition of law as clearly-established when its only in-circuit appearance is in a footnote." (Petition at 5.) The footnote stated that if parents are not allowed to remove their child from the hospital until defendants allowed, in some circumstances that may interfere with the parents' due-process right to custody of the child. (Doc. 41-2, Page: 12, 13 (Opinion)), citing *Kottmyer v. Maas,* 436 F.3d 684, 691 n.2 (6th Cir. 2006).

The truth is that, rather than just citing a footnote, the Sixth Circuit explained that the Supreme Court has called parents' "care, custody, and control of their children. . . perhaps the oldest of the fundamental liberty interests recognized by this Court." (Doc. 41-2, Page: 9), citing *Troxel v. Granville*,

530 U.S. 57, 65, 120 S. Ct. 2054 (2000). According to the Sixth Circuit, "this right is far more precious than any property right." (Doc. 41-2, Page: 9-10 (internal citations omitted).) The Sixth Circuit held that even "when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." (Doc. 41-2, Page: 9), citing *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388 (1982). Procedural safeguards also apply when the state engages in a "temporary deprivation of physical custody" of a child. *Eidson v. Tennessee Dept. of Children's Services*, 510 F.3d 631, 635 (6th Cir. 2007).

Based on the facts in the complaint, the Sixth Circuit held that the Sieferts had alleged a plausible claim that Defendants interfered with their parental rights and they did not received due process. (Doc. 41-2, Page: 12.)

Having established a plausible due-process violation, the Sixth Circuit then turned to clearly-established analysis. (Doc. 41-2, Page: 12-14.) The court devoted about a page-and-a-half explaining why, based on the facts in the complaint, the Sieferts had alleged a clearly-established procedural due-process violation. *Id.*

When looking at clearly-established law, Sixth Circuit courts "look first to decisions of the Supreme Court, then to decisions of [the Sixth Circuit Court of Appeals] and other courts within [the] circuit, and finally to decisions of other circuits." *Champion v. Outlook Nashville, Inc.,* 380 F.3d 893, 902 (6th Cir. 2004); *Martin v. City of Broadview Heights,* 712 F.3d 951, 961 (6th Cir. 2013).

In this case, the Sixth Circuit started its clearly-established analysis with the Supreme Court case, *Troxel*, 530 U.S. at 66, 120 S. Ct. at 2060. The Sixth Circuit noted that the *Troxel* court cited cases establishing "the parent-child relationship's special place in our society. (Doc. 41-2 Page: 13) The cases cited in *Troxel* include *Meyer v. Nebraska,* 262 U.S. 390, 401, 43 S. Ct. 625 (1923) (parents' right to educate child); *Prince v. Massachusetts,* 321 U.S. 158, 64 S. Ct. 438 (1944) (custody, care, and nurture of child); *Stanley v. Illinois,* 405 U.S. 645, 651, 92 S. Ct. 1208 (1972) (companionship, care, custody, management); *Wisconsin v. Yoder,* 406 U.S. 205, 232, 92 S. Ct. 1526 (1972) (nurture and upbringing); *Quilloin v. Walcott,* 434 U.S. 246, 255, 98 S. Ct. 549 (1978) (parent-child relationship); *Parham v. J.R.,* 442 U.S. 584, 602, 99 S. Ct. 2493 (1979) (broad parental authority over minor children); *Santosky,* 455 U.S. at 753, 102 S. Ct. 1388 (fundamental liberty interest). *Troxel,* 530 U.S. at 65-66, 120 S. Ct. at 2060.

Then, the Sixth Circuit turned to its own cases. Besides the footnote from *Kottmyer,* the Sixth Circuit explained that even "a temporary deprivation of physical custody requires a hearing within a reasonable time." (Doc. 41-2, at Page: 13), citing *Eidson*, 510 F.3d at 635. The Sixth Circuit held that a hearing is necessary when "a child's removal is . . . sustained over the parent's objections." (Doc. 41-2), citing *Young v. Vega*, 574 F. App'x 684, 691 n.6 (6th Cir. 2014). The court also stated that when state officials do not allow parents to remove a child from the hospital until the defendants say so, that can "be construed to

interfere with parental custody of a child." (Doc. 41-2, Page: 13), citing *Kottmyer*, 436 F.3d at 691 n.2 and *Williams-Ash II*, 520 F.3d at 600-01.

Then, the Sixth Circuit turned to out-of-circuit cases to reinforce the point. The court cited the Ninth Circuit case, *Keates v. Koile*, 883 F.3d 1228, 1238-39 (9th Cir. 2018) (Doc. 41-2, at Page: 13). The *Keates* case held that a "parent plausibly pled constitutional violation where a social worker held a parent's daughter at the hospital and did not allow mother to take the child home." (Doc. 41-2, at Page: 13.) The Sixth Circuit also cited the Second Circuit case, *Phifer v. City of New York*, 289 F.3d 49, 61 (2nd Cir. 2002) (Doc.41-2, at Page: 13.) In *Phifer,* the court held that where "a parent voluntarily grants temporary custody to the government or a third party, which then refuses to release the child, 'the State has the duty to initiate a prompt post-deprivation hearing after the child has been removed from the custody of his or her parents.'" (Doc. 41-2, Page: 13), internal citation omitted.

Based on those cases and the facts in Sieferts' complaint, the Sixth Circuit held that the Sieferts established a clearly established procedural due-process violation. (Doc. 41-2, Page: 13-14.)

All of that shows that the Defendants' "dangerously elected" footnote argument is a mischaracterization of the Sixth Circuit's rigorous – and correct – qualified-immunity, clearly-established analysis.

C. *Children's Hospital Employees – State Actors*

Children's Defendants argue that the Sixth Circuit allows a plaintiff to sue a private hospital as a state actor by simply pleading that the hospital's employees "cooperated" with the county for the appropriate treatment of a suicidal minor while the county investigated suspected child abuse.

1. *Sixth Circuit Decision*

Children's Defendants reached that conclusion based on their argument that the Sixth Circuit incorrectly held that the facts in the Siefert's complaint alleged a plausible claim that Children's Hospital officials acted under color of state law. (Petition at 22-28.)

a. *Children's Raises Nothing More Than A Perceived Misapplication Of A Properly Stated Rule Of Law*

On the private behavior/state actor issue, the Sixth Circuit held that the Sieferts presented "specific factual allegations, detailing a deep and symbiotic relationship between children's and the county." (Doc. 41-2, Page: 7 (Opinion).) In support of its holding, the Sixth Circuit cited four Supreme Court cases. *Lugar v. Edmonson Oil,* 457 U.S. 922, 923-24, 102 S. Ct. 2744, 2746 (1982); *NCAA v. Tarkanian,* 488 U.S. 179, 191, 109 S. Ct. 454 (1988); *Brentwood Academy v. Tennessee Secondary School Assn,* 531 U.S. 288, 295, 121 S. Ct. 924 (2001); *Filarsky v. Delia*, 566 U.S. 377, 383, 132 S. Ct. 1657 (2012). The Sixth Circuit also relied on two of its own cases, *Kottmyer,* 436 F.3d at 688; *Ellison v. Garbarino,* 48 F.3d 192, 195-96 (6th Cir. 1995).

The Sixth Circuit relied on those cases to identify the "test" to determine whether private behavior may be treated as state action. (Doc. 41-2 Page: 6.) According to the Sixth Circuit "it all comes down to whether there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." (Doc. 41-2, citations and internal quotations omitted.)

In Defendants' petition, they do not argue that the Sixth Circuit incorrectly stated the law on this private behavior/state actor issue. (Petition at 22-28.)

Instead, Children's argues that the Sieferts' complaint "merely parrots the language of the elements required for establishing that a defendant is acting under color of state law." *Id.* at 27. Based on the Defendants' "parroting" argument, Children's petition for certiorari really is nothing more than a complaint that the Sixth Circuit misapplied the *Twombly/Iqbal* pleading standard. *Id.*

Defendants' argument, therefore, shows that their petition does not meet the considerations identified in Rule 10 – their argument is nothing more than a perceived "misapplication of a properly stated rule of law." U.S. Sup. Ct. R. 10.

Besides that, according to the Supreme Court rules of procedure, the Sieferts have "an obligation to the court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." U.S. Sup. Ct. R. 15(2).

One such misstatement is that Defendants claimed that the Sieferts alleged that Children's officials "should be considered state actors due to their mere cooperation" with Hamilton County's investigation of suspected abuse. (Petition at 32.)

On appeal, the Sixth Circuit considered that argument and thoroughly rejected it. Citing the facts in Sieferts' complaint, the Sixth Circuit explained that "Children's and Hamilton County worked in tandem." (Doc. 41-2, Page: 6.) The court explained, "often collaborating and communicating about Minor Siefert's situation, they depended on each other to block Minor Siefert's release." *Id.*

The Court noted that "Children's admitted it needed the county's permission to send Minor Siefert home." *Id.* To that end, the court explained that "[m]eetings at Children's often included the Sieferts, Children's employees, and county officials together." *Id.* As for Children's blocking the Sieferts, the court noted that "Children's employees told the Sieferts they could not discharge Minor Siefert without talking to Hamilton County employees." *Id.* As for Children's depending on Hamilton County, the court explained that "when the Sieferts demanded that Children's discharge Minor Siefert, Stephens (of Children's) 'told Mr. Siefert that he would have to contact HCJFS to attempt to obtain Minor Siefert's discharge,' because discharge "was being blocked by JFS." *Id.*

County Defendants had, according to the complaint, "told Ms. Stephens that Minor Siefert 'could not go home.'" (Doc. 41-2, Page: 4-5.) As for Children's and the county working in tandem, "Stephens relayed that message to the Sieferts, telling them 'JFS holds the key in determining where [the] patient goes.'" (Doc. 41-2, Page: 6.) To show that Children's itself blocked the Sieferts, Dr. Almeida wrote in his notes "that Children's could not release Minor Siefert because 'JFS gave clear recommendations to not allow patient to be discharged to parents.'" *Id.*

Then showing the nexus between the county and Children's the Sixth Circuit noted that "county employees told the Sieferts they had to 'go by what the doctors say.'" (Doc. 41-2, Page: 6.) And, Children's doctors had said "that Minor Siefert was not to be discharged 'on request of parents." (Doc. 41-2, Page: 7.) But, at the same time, "the county had told the hospital that the "parents could not take [Minor Siefert] home." *Id.*

Between the two, the Sixth Circuit explained that "Children's and the county remained in constant contact, relied on each other for keeping Minor Siefert at the hospital, and at various times gave the Sieferts conflicting statements about who would make the ultimate decision to discharge Minor Siefert." *Id.* According to the Sixth Circuit, in "telling Children's it could not discharge Minor Siefert without its consent, county defendants also gave 'significant encouragement, either overt or covert' to Children's actions." *Id.*

Besides that, the Sixth Circuit noted that "Children's cooperation with Hamilton County shows it was a 'willful participant in joint activity with the State or its agents.'" *Id.*

All of these facts show that Defendants' argument about Children's "mere cooperation" is a misstatement of the record. U.S. Sup. Ct. R. 15(2). Instead, as the Sixth Circuit held, "these facts plausibly establish Children's state-actor status because the conduct was 'fairly attributable to the state.'" (Doc. 41-2, Page: 7 (Opinion).)

b. *No Certiorari Based on Conflict*

Next Children's raises a quasi-conflict argument regarding private healthcare providers and state actors. (Petition at 23-26.)

To be a conflict for the purposes of certiorari, the Sixth Circuit case would have to deal with precisely the same issue as another circuit and reach exactly opposite results. *Clark,* 573 U.S. at 126-27, 134 S. Ct. at 2246.

Based on the standard from *Clark,* for the Sixth Circuit *Siefert* case to conflict with other cases from the U.S. Supreme Court or other courts of appeals, those cases would have to hold that private health care providers can not be considered state actors, even if they worked in tandem with state actors, collaborated and communicated to block a child's release, relied on each other to keep the child from going home, gave significant encouragement to

the county, and acted as willful participants in joint activity with the county agents. (See *supra* at 29-31.)

i. *No Conflict: Extensive-Regulation Cases*

Children's first cites *American Manufacturers Mutual Insurance v. Sullivan*, 526 U.S. 40, 50, 119 S. Ct. 977, 985 (1999). The issue in *American Manufacturers* was whether "private insurers providing workers' compensation coverage under state laws" were state actors. *Id.* at 50, 119 S. Ct. at 984-85. Stated more specifically, the issue was whether the private insurers were subject to due-process requirements when they made decisions to withhold payments for disputed medical treatment. *Id.* at 52, 119 S. Ct. at 986.

The next case is *Blum v. Yaretsky,* 457 U.S. 991, 1002, 102 S. Ct. 2777, 2785 (1982). In *Blum,* the issue was whether extensive Medicaid regulations imposed state-actor status on private nursing homes. *Id.* at 1003-04, 102 S. Ct. 2785-86. The specific issue in the case was whether the state was liable for due-process violations when nursing homes discharged patients without notice or an opportunity for a hearing. *Id.* at 993, 1002 S. Ct. at 2780.

Children's cites another extensive-regulation case, *NCAA v. Tarkanian,* 488 U.S. 179, 109 S. Ct. 454. In the *Tarkanian* case, the University of Nevada at Las Vegas (UNLV) suspended its basketball coach for NCAA violations. *Id.* The issue in the case was whether the "UNLV's compliance with NCAA rules and recommendations turned the NCAA's conduct into state action." *Id.* at 193.

Children's last extensive-regulation case is *Jackson v. Metro. Edison Co.,* 419 U.S. 345, 350, 95 S. Ct. 449 (1974). The defendant was Metropolitan Edison, a public utility company that supplied electricity to Catherine Jackson. *Id.* at 346, 95 S. Ct. at 451. When Metropolitan Edison cut off Ms. Jackson's electricity, she sued claiming that she had not received due process. *Id.* at 347-48, 95 S. Ct. at 452. The issue in the case was whether Pennsylvania's extensive regulation of the public utilities made Metropolitan Edison a state actor. *Id.* at 349-50, 95 S. Ct. at 453.

There is no conflict between the *Siefert* case and these extensive-regulation cases, because none of the cases had anything to do with Defendants working in tandem with state actors, collaborating and communicating to block a child's release, relying on each other to keep the child from going home, giving significant encouragement to a state actor, and acting as willful participants in joint activity with the county agents. (See *supra* at 29-31.)

ii. *No Conflict: Involuntary Confinement Cases*

Children's also cites an involuntary confinement case, *Harvey v. Harvey,* 949 F.2d 1127 (11th Cir. 1992). In that case, Betty Harvey was committed to a private mental institution based on the state of Georgia's involuntary confinement statute. *Id.* at 1129. The institution was an emergency receiving facility for mental health patients, Charter-by-the-Sea. *Id.* The issue in that case

was whether Charter-by-the-Sea was a state actor based on its participation in the Georgia involuntary commitment statute. *Id.* at 1130-31.

Children's also cites an involuntary commitment case from the Tenth Circuit, *Pino v. Higgs,* 75 F.3d 1461, 1466-67 (10th Cir. 1996). The doctor in *Pino* conducted an evaluation of a patient and determined that the patient was severely depressed and likely to harm himself. *Id.* at 1464.

Children's cites another involuntary-commitment case, *Hogan v. A.O. Fox Memorial Hospital,* 346 Fed App'x 627 (2nd Cir. 2009). In the *Hogan* case, Dr. Rocci was a medical designee who signed a transport order requiring law enforcement officer to bring Loren Hogan to A.O. Fox Hospital for an emergency psychiatric evaluation. *Id.* at 629. The Second Circuit assumed without deciding that Dr. Rocci was a state actor for the purposes of Ms. Hogan's due-process claim. *Id.*

Children's last involuntary confinement case is *Spencer v. Lee,* 864 F.2d 1376, 1377 (7th Cir. 1989). In that case, William Spencer's private physician, Bumyong Lee, authorized Spencer to be involuntarily committed to St. Elizabeth Hospital. *Id.* Dr. Lee signed documents that depicted Spencer as a schizophrenic with suicidal tendencies. *Id.* at 1378. Dr. Lee gave his authorization pursuant to the Illinois Mental Health and Developmental Disabilities Code. *Id.*

Spencer sued Dr. Lee and others for due-process violations. *Id.* When Judge Posner considered whether Dr. Lee could be considered a state actor, he explained that if the state of Illinois "ordered or encouraged private persons to commit the mentally ill, they would indeed be state actors, for they would be doing the state's business." *Id.* at 1378-79. As Judge Posner explained, however, the *Spencer* case was not "a case of governmental encouragement or direction of private persons." *Id.* at 1379.

Based on the facts and holdings of these involuntary confinement cases, none can be held to conflict with the *Siefert* case. That is because the Sieferts are not alleging that the county and Children's subjected Minor Siefert to involuntary confinement. (Doc. 1, at ¶¶ 60-95.) The Sieferts are alleging that Defendants interfered with their parental right to custody and control of their child. *Id.*

iii. *No Conflict: Child-Abuse Reporting Statutes*

Children's cites a pair of abuse-reporting cases, *Mueller v. Auker,* 700 F.3d 1180 (9th Cir. 2012); *Brown v. Newberger,* 291 F.3d 89 (1st Cir. 2002). In both of those cases, the defendants were so-called mandatory reporters. *Mueller,* 700 F.3d at 1191-92; *Brown v. Newberger,* 291 F.3d at 93. These mandatory reporters are persons who are required by state law to report suspected child abuse. *Mueller,* 700 F.3d at 1191-92 (Idaho); *Brown v. Newberger,* 291 F.3d at 93 (Massachusetts). As a general matter, state laws establishing these mandatory

reporters require persons such as social workers and health care providers to file reports if they have a reasonable basis to believe that a child is suffering from abuse. *Mueller,* 700 F.3d at 1191-92; *Brown v. Newberger,* 291 F.3d at 93.

But, the Sixth Circuit expressly held that Children's Defendants did "far more" than comply with reporting statutes. (Doc. 41-2, Page: 6) (see *supra* at 29-31.)

For Children's to request certiorari on the grounds that the Sixth Circuit held that compliance with State reporting statutes transform children's officials into State actors is a misstatement of the record. U.S. Sup. Ct. R. 15(2).

iv. *No Conflict: Sixth Circuit Cases and District Court Cases*

For its quasi-conflict argument, Children's also cites several Sixth Circuit cases and a number of district court cases.[2] (Petition at 30-31.) Sixth Circuit cases and district court cases, however, do not create a conflict for the purposes of certiorari. U.S. Sup. Ct. R. 10(a)-(c).

2. *No State Law Immunity For Federal Due-Process Violations*

Based on an Ohio statute, Children's argues that its officials were "specifically authorized to obtain and consider information from other entities or

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2. *Harville v. Vanderbilt University,* 95 Fed. App'x. 719, 726 (6th Cir. 2003); *Haag v. Cuyahoga County,* 619 F. Supp. 262 (N.D. Ohio 1985); *Tracy v. SSM Cardinal Glennon Children's Hosp.,* E.D. Mo. No. 4:15-CV-1513 CAS, 2016 U.S. Dist. LEXIS 89993, at *23-25 (July 12, 2016); *Blythe v. Schlievert,* 245 F. Supp. 3d 959 (N.D. Ohio 2017); *Thomas v. Beth Israel Hospital,* 710 F. Supp. 935, 940 (S.D.N.Y. 1989); *Marie v. Am. Red Cross,* 771 F.3d 344, 363 (6th Cir. 2014); *Kottmyer,* 436 F.3d at 686-87; *Ellison,* 48 F.3d at 195-97; *Collyer v. Darling,* 98 F.3d 211, 231-33 (6th Cir. 1996); *Doe v. Rosenberg,* 996 F. Supp. 343 (S.D.N.Y. 1998), aff'd 166 F.3d 507 (2d Cir. 1999) (Appellate opinion sealed by the court).)

individuals who had knowledge about Minor Siefert." (Petition at 33), citing Ohio Rev. Code § 2151.421(D)(3). Children's argues further that it was "entitled to take any steps reasonably necessary for the discharge of minor Siefert to an appropriate environment." (Petition at 29), citing Ohio Rev. Code § 2151.421(D)(5). Defendants argue that Children's officials and County officials "remained in contact simply because both parties were attempting to comply with their independent statutory duties." (Petition at 32.)

Children's references to the Ohio Revised Code amount to an oblique argument that the state's child-abuse statutes provide Children's officials immunity from federal due-process violations. In fact in their appeal brief, Children's expressly made that argument. (Doc. 24, Page: 36 (Children's Appeal Brief).) Children's argued that, under Ohio Rev. Code § 2151.421(D), "[Children's] Defendants are entitled to immunity for the medical treatment provided to [Minor Siefert] and for their conduct ensuring [Minor Siefert] was discharged to an appropriately safe environment." (Doc. 24, Page: 36.)

Defendant's argument on that basis is a misstatement of the rule of law. U.S. Sup. Ct. R. 15(2). That is because the United States Supreme Court has already completely rejected this type of argument. *Martinez,* 444 U.S. at 283-84, 100 S. Ct. at 558. In the *Martinez* case, the California state parole board released a convicted sex offender to the care of his mother. *Id.* Then, five

months after that, the offender tortured and killed a fifteen-year old girl. *Id.* at 280, 110 S. Ct. at 556.

The deceased girl's survivors brought a claim against state officials alleging that they had deprived the girl of her life in violation of the section 1983 and Fourteenth Amendment due-process clause. *Id.* at 283-84, 110 S. Ct. at 558. In response, the defendants raised a defense based on a California immunity statue. *Id.*

The Supreme Court held that it "is clear that the California immunity statute does not control this claim." *Id.* at 284, 110 S. Ct at 558. State statutes cannot immunize state actors from liability under 42 U.S.C. § 1983. *Id.* at 284, 110 S. Ct. at 558, fn. 8.

It is the same for the Ohio statutes cited by Children's. Ohio Rev. Code §§ 2151.421(D)(3), (5).

VI. CONCLUSION

For all these reasons, Mr. and Mrs. Siefert respectfully request that this Court deny the petitions for certiorari by the County Defendants and Children's Defendants.

Respectfully submitted,

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SIEFERT APPENDIX

SIEFERT APPENDIX

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13-2965 (CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ARLENE VILLAMIA DRIMAL,
Plaintiff-Appellee,

v.

DAVID MAKOL, JAN TRIGG, PAULINE TAI, FRANK LOMONACO, DAVID J. FORD, EDMUND ROM, KEVIN RIORDAN, ADRIAN BUSBY, BRIAN HARKINS, JOANN MAGUIRE, MARIA A. FONT, MARTHA M. BERDOTE, THOMAS J. D'AMICO, MARK MUNSTER, CHRISTOPHER DEGRAFF, S. MENDOZA-PENAHERRERA,
Defendants-Appellants,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

3:12-cv-00717
Judge Warren W. Eginton

BRIEF OF DEFENDANT-APPELLANT ADRIAN BUSBY

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JURISDICTIONAL STATEMENT

Plaintiff-Appellee Arlene Villamia Drimal ("Mrs. Drimal") filed a complaint in the United States District Court for the District of Connecticut, which had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, 1334(3), and 1367(a). Defendant-Appellant, former Special Agent Adrian Busby ("Special Agent" or "Agent Busby"), and 15 other named defendants filed motions to dismiss the complaint based on the failure to state a claim and based on qualified immunity.[1] The District Court denied the motions to dismiss. The denial of the defense of qualified immunity may be immediately appealed as a "final decision." *See Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). This Court has jurisdiction to consider this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the District Court erred when it denied Special Agent Busby's Motion to Dismiss based on qualified immunity.

PRELIMINARY STATEMENT

Special Agent Busby was one of 16 FBI agents directed to execute a court order to intercept telephone communications of identified interceptees over a specified telephone facility pursuant to Title III of the Omnibus Crime Control and

[1]At all times relevant to this matter Agent Busby was a Special Agent of the Federal Bureau of Investigation (FBI). Agent Busby is no longer employed by the FBI.

Safe Streets Act of 1968. *See* 18 U.S.C. §§ 2510 *et seq*. ("Title III"). Mrs. Drimal's husband, Craig Drimal ("defendant Drimal"), was one of the identified interceptees for which probable cause existed to believe interception of his conversations would evidence participation in securities fraud. The wiretap was authorized on November 15, 2007, by Naomi Reice Buchwald, USDJ, as part of the Southern District of New York U.S. Attorney's Office investigation into securities fraud perpetrated by the Galleon Group, Raj Rajaratnam, defendant Drimal, and others.

The investigation ultimately led to defendant Drimal's entry of pleas of guilty to securities fraud and conspiracy to commit securities fraud. He was sentenced to 66 months imprisonment, followed by three years of supervised release.

Following the imposition of sentence, Mrs. Drimal brought this lawsuit seeking to recover civil damages from FBI agents assigned to execute the Court's Order and who monitored the Title III interceptions in the course of their official duties. The underlying facts in defendant Drimal's criminal case provide the background for Mrs. Drimal's complaint and were judicially noticed by the District Court (Eginton, J.) in its ruling on Agent Busby's Motion to Dismiss.

The District Court erred when it denied Agent Busby's Motion to Dismiss because, *inter alia,* it failed to distinguish between differently situated defendants.

The facts judicially noticed by Judge Eginton, as they pertain to Agent Busby, conclusively belie the allegations of the complaint and conclusively demonstrate that Agent Busby did not violate Title III, the Court's Wiretap Order or *any* clearly established law or rule. Agent Busby is therefore entitled to the protections of qualified immunity and the complaint should be dismissed as against him.

STATEMENT OF THE CASE AND FACTS

I. STATEMENT OF THE CASE

Mrs. Drimal filed a civil complaint in U.S. District Court for the District of Connecticut on May 15, 2012, pursuant to Section 2520 of the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et seq. ("Title III"). That provision provides: "Any person whose wire, oral, or electronic communication is intercepted . . . in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate." Recovery is ***not*** available when a communication is intercepted by persons acting in "good faith reliance on . . . a court warrant or order . . . ." See 18 U.S.C. § 2520(d) (emphasis supplied).

On November 26, 2012, Agent Busby filed a motion to dismiss the complaint based on the failure to state a claim and based on qualified immunity. On June 6, 2013, Judge Eginton denied Special Agent Busby's motion. JA114-

JA120.[2] Agent Busby now appeals the denial of his motion to dismiss on qualified immunity grounds. For the reasons demonstrated below, the Order of the District Court should be reversed.

II. STATEMENT OF THE FACTS

Agent Busby was one of 16 Special Agents of the FBI assigned to monitor a court authorized wiretap on a telephone facility used by defendant Drimal. *United States v. Goffer*, 756 F. Supp. 2d 588, 590 (2011). Defendant Drimal was the subject of a securities fraud investigation conducted by federal authorities in the Southern District of New York. Pursuant to that investigation, the government obtained court authorization to intercept communications over defendant Drimal's cellular telephone. *Id*. Pursuant to that order, Special Agent Busby and 15 other FBI agents monitored defendant Drimal's phone for two 30-day periods, ending on January 15, 2008. *Id*. The wiretap intercepted more than 1,000 calls, approximately 180 of which were between defendant Drimal and his wife. *Id*. at 591, 595.

As mandated by 18 U.S.C. § 2518(5), the Court Order authorizing the wiretap required minimization. More particularly, the Order required: (1) that monitors "minimize," intercepted conversations if they determined the

[2] The other 15 defendants separately filed a motion to dismiss on November 20, 2012. The District Court also denied their motion to dismiss in the same Memorandum of Decision.

conversations were unrelated to communications subject to interception; and (2) that monitors "spot check" conversations after they were minimized to ensure that the subject of the intercepted conversation had not turned to criminal matters. *Id*. at 590.

In addition to the Court's Order authorizing the wiretap, written instructions provided to the monitoring agents detailed the minimization requirements for calls between a husband and wife. *Goffer*, 756 F. Supp. 2d at 590, 591, and 597 (cited as "GX 20" and available on PACER at Case No. 1:10-cr-00056-RJS-4, Docket No. 113, Exhibit E.) (hereinafter GX 20). The instructions directed the monitors to minimize marital calls unless: (1) a third party is present or (2) the conversation related to ongoing violations of the law. *See* GX 20; *see also Goffer*, 756 F. Supp. 2d at 590-91. The instructions also directed the agents to "listen to the beginning of each communication only so long as is necessary to determine the nature of the communication and, in any case, no longer than a few minutes unless the communication is 'pertinent," that is, within the scope of our authorization." GX 20 at 4.

In the underlying criminal case, defendant Drimal moved to dismiss the indictment against him and to suppress the wiretap evidence. *Goffer*, 756 F. Supp. 2d at 591. Specifically, defendant Drimal claimed the agents violated Title III by failing to properly minimize calls between him and his wife, as required by law,

and that suppression of the wiretap evidence was the appropriate remedy. *Id*. at 589, 595. In response to the motion to suppress, the District Court Judge (Sullivan, J.), reviewed all the calls between defendant Drimal and his wife. *Id*. at 594. Of the 180 such calls, the court found that the minimization of three were not adequate and that five raised "questions about the sufficiency of the agents' minimization efforts." *Id*. at 594-95. Importantly for purposes of this appeal, not a single one of the calls referenced by Judge Sullivan was monitored by Special Agent Busby.

Judge Sullivan's opinion denying the suppression motion referenced each of the eight calls using a "Session Number" denominated in exhibits in connection with the suppression hearing. *Id*. at 594-595. The exhibits are available on the court's Public Access to Court Electronic Records ("PACER") website. *Goffer*, 756 F. Supp. 2d at 591, 596, and 597 (cited as "GX 30" and "GX 30-AB" and available on PACER at Case No. 1:10-cr-00056-RJS-4, Docket No. 154, Exhibits 30 and 30-AB) (hereinafter GX 30 and GX 30-AB). These exhibits indicate which FBI agent monitored each call and the duration of each call monitored. GX 30 and GX 30-AB. The eight "Session Numbers" referenced in Judge Sullivan's opinion are: 5808, 5809, 5828, 5710, 5806, 5874, 5875, and 5945. *Goffer*, 756 F. Supp. 2d at 594-595.

After performing the detailed review described above, Judge Sullivan concluded that he was "persuaded that in the vast majority of calls the

government's monitoring of the Drimals' spousal communications was reasonable." *Id*. at 597. Specifically, the court found that "of the approximately 180 calls between Drimal and his wife, and the 1,000 calls monitored throughout the entire wiretap, the government failed to comply with Title III's minimization requirement in *no more than eight instances*." *Id*. at 597, n.9. (emphasis added) *Agent Busby was not the monitoring agent in any of those eight instances*. *Compare Goffer*, 756 F. Supp. 2d at 594-95 *with* GX 30 and GX 30-AB.

Judge Sullivan denied defendant Drimal's motion to suppress and found that "it would be difficult to review the entire wiretap in context and conclude that the monitoring, on the whole, was other than professional, thorough, and reasonable." *Id*. at 597.

Following the denial of the motion to suppress, defendant Drimal plead guilty on April 26, 2011 to securities fraud and conspiracy to commit securities fraud. He was sentenced to 66 months imprisonment, followed by three years of supervised release.

On May 15, 2012, Mrs. Drimal filed a complaint in the United States District Court for the District of Connecticut alleging a private right of action under Section 2520 of Title III. JA46 (Complaint ¶ 2). All 16 federal agents who monitored the wiretap in defendant Drimal's criminal case were named as defendants. Mrs. Drimal alleged in her complaint that the defendants, including

Agent Busby, participated in the "unlawful interception and monitoring of more than 180 confidential and privileged marital telephonic communications . . . ." JA48 (Complaint ¶ 7). To support her allegation that all 180 interceptions were "unlawful," Mrs. Drimal referred to select written submissions, select testimony and selected portions of Judge Sullivan's written opinion resulting from defendant Drimal's motion to suppress. *See* JA48-JA49 (Complaint ¶¶ 8, 11, and 13). Mrs. Drimal then enumerated for each defendant the dates on which each is alleged to have unlawfully intercepted Mrs. Drimal. In the case of Agent Busby, Mrs. Drimal's complaint alleged Agent Busby "unlawfully" intercepted and monitored calls on December 7th and 17th, 2007, and again on January 5th, 6th, and 15th, 2008. JA51 (Complaint ¶ 23).

On November 26, 2012, Agent Busby moved to dismiss the complaint because: (1) Mrs. Drimal failed to state a claim upon which relief may be granted; and (2) Agent Busby is entitled to the protection of qualified immunity from suit.[3] JA71-JA83. Specifically, Agent Busby demonstrated that Mrs. Drimal had not alleged facts supporting her legal conclusion that Agent Busby's interception and monitoring of her calls was "unlawful." For the same reason and because Mrs. Drimal failed to establish that Agent Busby violated a clearly established statutory

[3] As noted above, the other 15 defendants separately filed a motion to dismiss on November 20, 2012.

or constitutional right, he was entitled to the protection of qualified immunity and the complaint should be dismissed.

On June 6, 2013, Judge Eginton denied Agent Busby's motion to dismiss. JA114- JA120. On the same date and in the same Court Order, Judge Eginton denied the motion to dismiss of the other 15 agent defendants. *Id*.

In its Memorandum of Decision, the District Court took judicial notice of defendant Drimal's "underlying criminal case." JA117 at n.1. The District Court then found that, by referencing selected sworn testimony, written submissions, and sections of the court's opinion in her husband's criminal case, that Mrs. Drimal had alleged sufficient facts to support her complaint alleging that all 180 calls were intercepted and monitored unlawfully. JA117-JA120. In making its determination, the District Court blinked that portion of Judge Sullivan's findings that "no more than eight" calls evidenced deficient minimization. The District Court also did not address Judge Sullivan's finding that in the vast majority of calls the government's monitoring of the Drimals' communications was "reasonable." *See* JA114-JA120. Finally, the District Court treated all defendants as identically situated and failed to separately analyze the facts applicable to each individual monitoring agent. *Id*.

Agent Busby appeals the District Court's order denying his motion to dismiss.

SUMMARY OF ARGUMENT

In denying Agent Busby's motion to dismiss, the District Court took judicial notice of the facts of *United States v. Goffer*. The District Court however failed to consider the facts applicable to each individual defendant and improperly denied Agent Busby's Motion to Dismiss based on qualified immunity.

The facts judicially noticed by the District Court irrefutably demonstrate:

- Agent Busby acted pursuant to a valid warrant and court order containing a clause requiring minimization.
- Agent Busby did not monitor any of the eight calls flagged by Judge Sullivan as contravening minimization requirements.
- Agent Busby minimized nearly all of the calls he monitored between Mrs. Drimal and defendant Drimal in fewer than 20 seconds, and certainly never monitored any such call for more than the federally-accepted standard of two minutes before minimization.
- As determined by Judge Sullivan, Agent Busby's conduct was "reasonable" inasmuch as he was not a monitor on any of the eight calls the Court found problematic; Judge Sullivan found the balance of the many calls to have been monitored reasonably and professionally. *Goffer*, F. Supp. 2d at 597.

Given these facts the District Court erred when it denied Agent Busby's Motion to Dismiss based on qualified immunity.

Even if this Court were to analyze only the four corners of Mrs. Drimal's complaint, Agent Busby is entitled to qualified immunity. Mrs. Drimal's complaint contains nothing more than conclusory allegations that Agent Busby's monitoring activities were "unlawful." JA51 (Complaint ¶ 23). These bald legal

conclusions, coupled with the complete absence of facts to make the claims plausible, fails to meet basic federal pleading standards. The complaint therefore must be dismissed as against Agent Busby.

Lastly, even if the Court were to read Mrs. Drimal's complaint to allege that the interception of even one marital call is per se a violation of Title III, (it is not), then Agent Busby is nevertheless entitled to qualified immunity because the right Agent Busby is alleged to have violated is not clearly established.

ARGUMENT

I. STANDARD OF REVIEW

The District Court denied Agent Busby's motion to dismiss including that portion of the motion that relied on the defense of qualified immunity. JA114-JA120. When a District Court denies a motion to dismiss that relies on the defense of qualified immunity, the Second Circuit reviews the court's denial de novo. See *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 250 (2d Cir. 2001).

II. AGENT BUSBY IS ENTITLED TO QUALIFIED IMMUNITY

Where an official's duties require action and do not violate clearly established rights, the public interest is served by enabling the official to take action with independence and without fear of consequences. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). Officials acting in the course of their official duties and executing Court Orders should not be subject to "liability for civil damages." *See*

Id. at 818. Nor should they suffer "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *See Id.* at 816. Government officials are therefore entitled "not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

For this reason, qualified immunity claims that are dispositive should be resolved at the earliest possible stage in litigation. *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001). Qualified immunity is "immunity from suit rather than a mere defense to liability," and this privilege is effectively lost if a case is erroneously permitted to go to trial. *Mitchell*, 472 U.S. at 526. Unless the pleadings "state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Id*.

Government officials are "shielded 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*, 457 U.S. at 818. In determining on a motion to dismiss whether a government official is entitled to qualified immunity, courts look to the allegations in the complaint to determine (1) whether the plaintiff has alleged facts, taken as true, that make out a violation of a

statutory or constitutional right; and (2) if so, whether that right was "clearly established" at the time of the alleged incidents. *See Gonzalez v. City of Schenectady*, 728 F.3d 149, 154 (2d Cir. 2013); *see also Bell v. Luna*, 856 F. Supp. 2d 388, 400-01 (D. Conn. 2012).

When considering the validity of a motion to dismiss on qualified immunity grounds, courts must consider the facts as pleaded in the complaint to determine whether they state a violation of a clearly established statutory or constitutional right. *See Ashcroft v. Iqbal*, 556 U.S. 662, 672-73 (2009). In this way the pleadings are "inextricably intertwined" and "directly implicated by" the qualified immunity defense at the motion to dismiss stage. *Id*. (*citing Swint v. Chambers County Comm'n*, 514 U.S. 35, 51 (1995) and *Hartman v. Moore*, 547 U.S. 250, 257 (2006)). In addition to the independent basis to deny a claim, a failure to state a claim is also justification to find qualified immunity from defense of suit. *Id*.

A. Agent Busby Is Entitled To Qualified Immunity Because Plaintiff Has Not (and Cannot) Allege Facts Establishing that Agent Busby Violated Title III.

1. The Court In the Underlying Criminal Case Found By Implication That Agent Busby Did Not Violate Title III's Minimization Requirement.

As a general rule, "in considering a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a District Court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or

incorporated in the complaint by reference." *Kramer v. Time Warner, Inc*. 937 F.2d 767, 773 (2d Cir. 1991). There are, however, several recognized exceptions to this rule. "For example, it is well-established that the court may consider a document, even if not attached or incorporated by reference, where the complaint 'relies heavily upon its terms and effect,' thus rendering the document 'integral' to the complaint. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (quoting *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995)); *see also, Mangiavico v. Blumenthal*, 471 F.3d 391, 397-98 (2d Cir. 2006).

The court may also consider matters of which judicial notice may be taken, even if the corresponding documents are not attached to or incorporated by reference in the complaint, and especially when those documents are "in the public record." *Munno v. Town of Orangetown*, 391 F. Supp. 2d 263, 268 (S.D.N.Y. 2005) (*citing Kramer*, 937 F.2d at 774 and *Thomas v. Westchester County Health Care Corp.*, 232 F. Supp. 2d 273, 275 (S.D.N.Y. 2002).

The District Court, in its Memorandum of Decision on Defendants' Motions to Dismiss, took judicial notice of defendant Drimal's criminal case and cited the opinion authored by Judge Sullivan. JA117 at n.1. The District Court then erroneously concluded that Mrs. Drimal had alleged sufficient facts to "support a finding that defendants did not properly comply with the minimization requirement

of [Title III]." JA119. For the reasons demonstrated below, the District Court erred in this determination.

Agent Busby did not violate Title III's minimization requirements or violate any clearly established law or rule. The court in the underlying criminal case was "persuaded that in the vast majority of calls the government's monitoring of the Drimals' spousal communications was reasonable." *Goffer*, 756 F. Supp. 2d at 597. Judge Sullivan determined, however, that certain monitors failed to comply with Title III's minimization requirements in "no more than eight" instances. *Goffer*, 756 F. Supp. 2d at 597, n.9. The court itemized in its written opinion the specific calls it found problematic by referencing "Session Numbers" found on exhibits filed on PACER. *See* GX 30 and GX-30AB. A review of these exhibits demonstrates that Agent Busby did not monitor a single call questioned by the court. *Compare Goffer*, 756 F. Supp. 2d at 594-95 *with* GX 30 and GX 30-AB (showing that none of the eight "Session Numbers" flagged Judge Sullivan were calls monitored by Agent Busby).

Mrs. Drimal has failed to state a claim that Agent Busby violated Title III or even that he improperly minimized a single call intercepted pursuant to the Court Order. Given these facts, the District Court erred in denying Agent Busby the protection of qualified immunity.

2. The Facts Demonstrate Agent Busby Complied with Minimization Requirements.

"The touchstone in assessing minimization is the objective reasonableness of the interceptor's conduct." *United States v. Uribe*, 890 F.2d 554, 557 (1st Cir. 1989) (citing *Scott v. United States*, 436 U.S. 128, 137 (1978)); *see also United States v. Tortorello*, 480 F.2d 764, 783-84 (2d Cir. 1973). "The government is held to a standard of honest effort; perfection is usually not attainable, and is certainly not legally required." *Uribe*, 890 F.2d at 557. Title III "does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to 'minimize' the interception of such conversations." *Scott,* 436 U.S. at 140. The "mere fact that every conversation is monitored does not necessarily render the surveillance violative of the minimization requirement of the statute." *United States v. Bynum*, 485 F.2d 490, 500 (2d Cir. 1973). "[N]o electronic surveillance can be so conducted that innocent conversation can be totally eliminated. Before a determination of innocence can be made there must be some degree of eavesdropping." *Id*.

Similarly, and as was determined in the underlying criminal case, Title III also does not bar the interception of privileged phone calls. *See Goffer*, 756 F. Supp. 2d at 593-94 (holding that "[c]ourts interpreting Title III … have found no such per se bar to the interception of privileged calls."); *see also*, *United States v. Hyde*, 574 F.2d 856, 870 (5th Cir. 1978) (agents did not violate Title III when they

monitored privileged call only long enough to determine that the doctor and attorney were not participating in the criminal conduct). "Courts addressing this issue have generally found that the monitoring of privileged calls is subject to the same reasonableness standard that applies to non-privileged calls. *Id*. In addition, the provisions of Title III itself anticipate the interception of privileged calls and provides that no privileged communication "shall lose its privileged character" just because monitors intercept it. 18 U.S.C. § 2517(4). To the extent that a privileged call retains its privileged character the calls may not be admissible as evidence, but that "does not mean that their monitoring constitutes a violation of Title III." Goffer, 756 F. Supp. 2d at 593. "Title III does not prohibit the government from monitoring 'communications not otherwise subject to interception,' but only requires that agents 'minimize' the interception of such conversations." *Id*. at 594 (citing 18 § U.S.C. 2518(5)).

Agents monitoring a wiretap face the difficult chore of determining in real time whether a particular call is pertinent to their investigation and, if not, whether and when to minimize a call and whether a call originally non-pertinent may become pertinent as a conversation progresses. This task can require agents to identify voices and inflections, to determine if more than one person is on the phone, to quickly characterize the nature of the conversation and to determine

whether it is criminal or non-criminal. [4]

As the Eighth Circuit and other courts have found, "[i]t is all well and good to say, after the fact, that certain conversations were irrelevant and should have been terminated. However, the monitoring agents are not gifted with prescience and cannot be expected to know in advance what direction the conversation will take." *United States v. Cox*, 462 F.2d 1293, 1301 (8th Cir. 1972) (citing *United States v. LaGorga*, 336 F. Supp. 190, 196 (W.D. Pa. 1971)). Because making real-time judgments about the appropriateness of an interception is difficult, courts have consistently held that calls of two minutes or less should not be considered when determining the reasonableness of an agent's efforts to minimize intercepted calls. *United States v. Bynum*, 485 F.2d 490, 500 (2d Cir. 1973) (eliminating all calls lasting less than two minutes from consideration because two minutes is "too brief a period for an eavesdropper even with experience to identify the caller and characterize the conversation"); *See also, United States v. Mullen*, 451 F. Supp. 2d 509, 536 (W.D.N.Y. 2006) (citing *Bynum*); *United States v. Capra*, 501 F.2d 267, 276 (2d Cir. 1974) (determining that two minutes is too little time for an

[4] It does not take a fertile imagination to conclude that Special Agents of the FBI and other qualified law enforcement authorities will be reluctant to participate in the lawful execution of Court Orders to intercept wire communications if they will be held individually liable to the subjects of the wire interceptions for the exercise of good faith judgment in performing voice recognition, making pertinency determinations, and conducting spot checks for purposes of fulfilling minimization requirements.

experienced investigator to determine the nature of a conversation); *United States v. Giordano*, 259 F. Supp. 2d 146, 155 (D. Conn. 2003) (citing *Capra* and holding that "calls lasting less than two minutes need not be minimized."); *Goffer*, 756 F. Supp. 2d at 597 (S.D.N.Y. 2011) ("[A]s a general matter, calls under two minutes need not be minimized."); *United States v. Salas,* No. 07 Cr. 557 (JGK), 2008 U.S. Dist. LEXIS 92560, at *20 (S.D.N.Y. Nov. 5, 2008) (minimization requirement did not apply to the 1,491 calls that lasted under two minutes). Other Circuits are in agreement. *See United States v. Armocida*, 515 F.2d 29, 45 (3d Cir. 1975) (eliminating two-minute conversations from consideration as not violating minimization requirement); *United States v. Dumes*, 313 F.3d 372, 380 (7th Cir. 2002) (agreeing that "short calls" such as those less than two minutes do not require minimization); *United States v. Segura*, 318 F. App'x 706, 712 (10th Cir. 2009) ("[I]n analyzing the reasonableness of the government's minimization efforts, we exclude calls under two minutes" (citation omitted) (internal quotation marks omitted)); *United States v. Willis*, 890 F.2d 1099, 1102 (10th Cir. 1989) (eliminating non-pertinent calls that lasted less than two minutes when analyzing whether agents satisfied minimization requirement); *United States v. Suggs*, 531 F. Supp. 2d 13, 21 (D.D.C. 2008) *aff'd sub nom. United States v. Glover*, 681 F.3d 411 (D.C. Cir. 2012) (government did not need to minimize calls under two minutes).

With the above described backdrop, the two-minute threshold has become a well-established standard and is frequently included in minimization instructions given to agents before commencing wiretaps. In the underlying criminal case, for example, the written directions provided to Agent Busby and the other agents instructed them to "listen to the beginning of each communication only so long as is necessary to determine the nature of the communication and, in any case, *no longer than a few minutes* unless the communication is 'pertinent,' that is, within the scope of our authorization." *See* GX 20, at 4 (emphasis added); *see also Goffer*, 756 F. Supp. 2d at 590, 591, and 597(citing to GX 20). These instructions also provided that agents should "spot monitor" non-pertinent or "privileged calls" even after minimizing them to ensure the conversation has not turned to criminal matters. *Id*.

Agent Busby is entitled to qualified immunity because the facts noticed by the District court demonstrate that Agent Busby's conduct was objectively reasonable. Agent Busby did not monitor any calls between Mrs. Drimal and defendant Drimal for more than two-minutes and he complied with both the court order authorizing the wiretap and the minimization instructions. In fact, the exhibits from the underlying criminal case evidence that of the 18 calls between Mrs. Drimal and defendant Drimal intercepted by Agent Busby, he minimized 16 of them in less than twenty seconds. *See* GX 30 and GX 30-AB. The remaining

two calls lasted less than 38 seconds, and one of the two calls had no content because the call reached voicemail and ended before the proverbial "beep." *Id*.

As the criminal court stated in *Goffer* as regards the minimization efforts of the spousal calls: "Given that the wiretap instructions were silent on the [exact] amount of time that an agent was permitted to listen to a privileged call prior to minimizing, the agents' conduct was, on the whole, not unreasonable. This conclusion is further supported by case law suggesting that, as a general matter, calls under two minutes need not be minimized." *Id*. at 597.

The complaint fails to allege facts showing that Agent Busby's conduct in minimizing the calls he intercepted was objectively unreasonable. The facts noticed by the District Court include the fact that Agent Busby aggressively minimized calls he monitored, often well-short of the federally recognized "two minute" rule, and that he followed the minimization instructions provided to him by the U.S. Attorney's office for the Southern District of New York.

For all the foregoing reasons, the District Court erred in denying Agent Busby's motion to dismiss. Agent Busby is entitled to the protections afforded by qualified immunity.

3. The Statute Alleged to Have Been Violated Incorporates An Affirmative Defense Which Defeats Plaintiff's Claim.

A motion to dismiss under 12(b)(6) for failure to state a claim is meant to test the sufficiency of the allegations in a complaint. *See Bell Atlantic Corp. v.*

Twombly, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). When a pleading itself demonstrates a defense that defeats the claim for relief, the court can dismiss the complaint as having failed to state a claim. *See Pani v. Empire Blue Shield*, 152 F.3d 67, 74-75 (2d Cir. 1998); s*ee also Staehr v. Hartford Financial Services Group, Inc.*, 547 F.3d 406, 425-26 (2d Cir. 2008) (citing *Conopco, Inc. v. Roll Int'l*, 231 F.3d 82, 86 (2d Cir. 2000), for the proposition that dismissal under a 12(b)(6) motion is warranted when an affirmative defense "is clear from the face of the complaint, *and matters of which the court may take judicial notice*, that the plaintiff's claims are barred as a matter of law.") (emphasis in original). An affirmative defense that appears on the face of the complaint may be raised prior to the answer stage of litigation, without resorting to summary judgment. *Pani*, 152 F.3d at 74-75; *see also* Wright & Miller, Federal Practice and Procedure: Civil 3d § 1357.

Section 2520 of Title III allows for the recovery of civil damages where a plaintiff can prove that a "wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter . . . ." 18 U.S.C. § 2520(a). However, Section 2520(d) provides a complete defense to civil claims brought under Section 2520(a) in circumstances where the defendant can show a "good faith reliance" on a "court warrant or order." 18 U.S.C. § 2520(d) ("A good faith reliance on—(1) a court warrant or order . . . is a complete defense against

any civil or criminal action brought under this chapter or any other law.").

Agent Busby and the other federal agents intercepted Mrs. Drimal's calls pursuant to a valid Court Order. *Goffer*, 756 F. Supp. 2d at 590. The Title III interceptions were authorized by Judge Buchwald in an effort to further an investigation into widespread securities fraud. Good faith reliance on the Court Order is a complete defense to this civil suit. Judge Sullivan denied a motion to suppress the wiretap evidence gathered and specifically found that "in the vast majority of calls the government's monitoring of the Drimals' spousal communications was reasonable. . . ." *Goffer*, 756 F. Supp. 2d at 597. That conclusion is particularly true of calls monitored by Agent Busby who typically minimized calls in less than 20 seconds – well short of the recognized two-minute rule.

Because the statute relied upon by Plaintiff to bring her suit contains an absolute defense for which Agent Busby qualified, the District Court erred when it denied his motion to dismiss.

B. The Four Corners of Plaintiff's Complaint Without Judicially Noticed Facts Allege Only Legal Conclusions and Plaintiff Has Not Stated a Claim That Agent Busby Violated a Clearly Established Right.

The pleading standards under Fed. R. Civ. P. 8(a)(2) do not require detailed factual allegations, but do "demand more than an unadorned, the defendant-

unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id*. "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id*. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*. In reviewing the viability of a complaint, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. Rule 8 of the Federal Rules of Civil Procedure "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions" because legal conclusions are "not entitled to the assumption of truth." *Id*. at 678-79. As such, when considering a motion to dismiss the court "can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id*. at 679.

Analysis of the four-corners of Mrs. Drimal's complaint evidences that she has alleged legal conclusions only. The complaint alleges that Agent Busby and the other agents "*unlawfully* intercepted and listened to privileged, confidential marital telephone communications." *See* JA51 (Complaint ¶ 23) (emphasis added).

Beyond specifying the dates of the calls intercepted by Agent Busby, Mrs. Drimal provides no additional facts regarding Agent Busby's conduct. She has not alleged facts showing Agent Busby acted without a valid warrant or court order; she has not alleged facts showing that Agent Busby acted pursuant to a defective warrant or court order; and she has not alleged facts showing Agent Busby failed to properly minimize any of the calls that he monitored. The reason for Mrs. Drimal's failure to include such facts is that they do not exist. There are simply no facts from which one could conclude that agent Busby acted unlawfully—particularly where Judge Sullivan found in the underlying case that the monitoring was on the whole reasonable and professionally accomplished.

Absent facts supporting Mrs. Drimal's conclusory allegation that Agent Busby's conduct was "unlawful," the district court should have dismissed her complaint on qualified immunity grounds. Labeling Agent Busby's interception as "unlawful" is nothing more than a legal conclusion and does not raise her "right to relief above the speculative level." See *Bell Atl. Corp. V. Twombly*, 550 U.S. 544, 556 (2007). Mrs. Drimal's legal conclusion about Agent Busby's conduct is not entitled to the assumption of truth and she has therefore failed to state a claim showing that Agent Busby violated her rights under Title III. Agent Busby is therefore entitled to qualified immunity.

C. Even Crediting the Allegations of Plaintiff's Complaint, Agent Busby is Entitled to Qualified Immunity Because the Complaint Fails To Allege The Violation of a Clearly Established Right.

Title III does not include an absolute bar to the interception of privileged or non-pertinent phone calls. *See Goffer*, 756 F. Supp. 2d at 593-94 (holding that "[c]ourts interpreting Title III … have found no such per se bar to the interception of privileged calls."); *see also*, *United States v. Hyde*, 574 F.2d 856, 870 (5th Cir. 1978) (agents did not violate Title III when they monitored privileged call only long enough to determine that the doctor and attorney were not participating in the criminal conduct).

The Supreme Court has observed that Title III "does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to 'minimize' the interception of such conversations." *Scott*, 436 U.S. at 140. Indeed Title III itself anticipates the interception of privileged calls and provides that no privileged communication "shall lose its privileged character" just because monitors intercept it. 18 U.S.C. § 2517(4). As the *Goffer* court observed: "Title III does not prohibit the government from monitoring 'communications not otherwise subject to interception,' but only requires that agents 'minimize' the interception of such conversations. *Id.* 756 F. Supp. 2d at 594 (citing 18 § U.S.C. 2518(5)).

If Mrs. Drimal's allegations are read to mean that *any* interception of her

marital calls is "unlawful," then Agent Busby is entitled to qualified immunity because the statutory right Mrs. Drimal claims Agent Busby violated was not and is not clearly established. Title III simply does not bar outright the interception of privileged calls or non-pertinent calls. Instead, privileged or non-pertinent calls can be intercepted pursuant to a valid warrant and monitored for the detection of criminal conduct, but such monitoring must be done in accordance with Title III's minimization requirements. This should be obvious, given the nature of criminal conduct, which can involve calls between parties involving a privilege about crimes, can involve seemingly innocent language disguised with a code to achieve a criminal aim, or can begin between two parties enjoying a privilege who then hand the phone to a third party during the conversation to pursue criminal objectives. For this reason, Title III authorizes interception of all calls so long as monitors make a good faith effort to determine whether the call is pertinent and to minimize the call if it is not.

Under Title III it is clearly established that—privileged or not—all calls can be monitored by federal agents acting pursuant to a court authorized wiretap so long as they properly minimize the calls. Any allegation that the interception of a martial call is somehow per se prohibited by Title III is not clearly established and Agent Busby is therefore entitled to qualified immunity.

CONCLUSION

For the reasons stated above, the judgment of the District Court should be reversed and Mrs. Drimal's complaint against Agent Busby should be dismissed on qualified immunity grounds.

Respectfully submitted,

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Dated: December 24, 2013

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s/James I. Glasser
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13-2963

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 13-2963(L), 13-2965(CON)

ARLENE VILLAMIA DRIMAL,

Plaintiff-Appellee,

v.

DAVID MAKOL, JAN TRIGG, PAULINE TAI, FRANK LOMONACO, DAVID J. FORD, EDMUND ROM, KEVIN RIORDAN, ADRIAN BUSBY, BRIAN HARKINS, JOANN MAGUIRE, MARIA A. FONT, MARTHA M. BERDOTE, THOMAS J. D'AMICO, MARK MUNSTER, CHRISTOPHER DEGRAFF, S. MENDOZA-PENAHERRERA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE FEDERAL DEFENDANTS-APPELLANTS

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IN THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE FEDERAL DEFENDANTS-APPELLANTS

JURISDICTIONAL STATEMENT

Plaintiff brought a Title III damages action against sixteen employees of the Federal Bureau of Investigation ("FBI"), invoking the district court's jurisdiction under 28 U.S.C. §§ 1331, 1332, 1343(3), 1367(a), and 18 U.S.C. § 2520. JA 46. On June 6, 2013, the district court denied defendants' motions to dismiss, both for failure to state a claim and on grounds of qualified immunity. JA 117-20. The fifteen federal

defendants filed a timely notice of appeal on August 2, 2013. JA 121-23; Fed. R. App. P. 4(a)(1)(B).[1] This Court has jurisdiction under 28 U.S.C. § 1291 and the collateral order doctrine to review the district court's order denying the defendants' motion to dismiss because the court's denial rejects defendants' qualified immunity defense and turns on issues of law. *See, e.g., Ashcroft* v. *Iqbal*, 556 U.S. 662, 672-75 (2009); *Hartman* v. *Moore*, 547 U.S. 250, 257 n.5 (2006); *Behrens* v. *Pelletier*, 516 U.S. 299, 313 (1996).

STATEMENT OF THE ISSUES

This appeal arises out of a federal securities fraud investigation concerning plaintiff's husband, Craig Drimal, that included a court-authorized wiretap of Mr. Drimal's cellular telephone. During the course of that wiretap, over 1,000 phone calls were intercepted, including about 180 calls between Mr. Drimal and plaintiff, which were monitored by defendants. None of the calls between plaintiff and her husband turned out to be pertinent to the criminal investigation. Plaintiff subsequently brought an action for damages against defendants in their individual capacities,

[1] The fifteen federal defendants, represented by government counsel, are: David Makol, Jan Trigg, Pauline Tai, Frank LoMonaco, David J. Ford, Edmund Rom, Kevin Riordan, Brian Harkins, Joann Maguire, Maria A. Font, Martha M. Berdote, Thomas J. D'Amico, Mark Munster, Christopher DeGraff, and S. Mendoza-Penaherrera. One of the federal defendants, Pauline Tai, moved to voluntarily dismiss her appeal on December 20, 2013. The sixteenth defendant, Adrian Busby, is no longer employed by the FBI and is represented by private counsel (both in this appeal and in the district court). Mr. Busby filed a notice of appeal on August 5, 2013. JA 124-25. His appeal (No. 13-2965) has been consolidated with that of the federal defendants.

alleging that they unlawfully intercepted and monitored the calls between her and her spouse. The issues presented on appeal are:

1. Whether the district court erred in denying the federal defendants' motion to dismiss because plaintiff's complaint fails to allege sufficient facts to state a claim against each defendant for violation of the wiretapping statute.

2. Whether the federal defendants are entitled to qualified immunity because the portions of the underlying criminal case which plaintiff and the district court cited reflect that defendants minimized all calls over two minutes, and there is no clearly established law requiring defendants to minimize calls that are less than two minutes long.

STATEMENT OF THE CASE

This case arises out of a damages action brought pursuant to 18 U.S.C. § 2520 against sixteen FBI employees, in their individual capacities, alleging a violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.* JA 46-53. Defendants moved to dismiss for failure to state a claim and on grounds of qualified immunity. JA 57, 71. The district court (Eginton, J.) denied the motions to dismiss, rejecting defendants' assertion of qualified immunity. JA 114-20. Defendants (with the exception of defendant Tai) appeal. JA 121-23, 124-25.

A. Statutory Background

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.*, permits judges to authorize the interception of "wire, oral, or electronic

communications" if they determine that there is probable cause to believe (a) that an individual was committing, had committed, or is about to commit a specified crime, (b) that communications concerning that crime would be obtained through the wiretap, and (c) that the premises to be wiretapped were being used for criminal purposes. 18 U.S.C. § 2518. Such authorization extends to the interception of communications that might be privileged, such as communications between spouses or between attorney and client. *See* 18 U.S.C. § 2517(4) (a privileged communication "shall [not] lose its privileged character" just because it has been intercepted).

Once a Title III wiretap is authorized, law enforcement officers are required to conduct the wiretap "in such a way as to minimize the interception of communications not otherwise subject to interception[.]" 18 U.S.C. § 2518(5). "What the minimization requirement means, essentially, is that once the monitoring agent has had a reasonable opportunity to assess the nature of an intercepted communication, he or she must stop monitoring that communication if it does not appear relevant to the government's investigation." *United States* v. *Mansoori*, 304 F.3d 635, 646 (7th Cir. 2002). Once a communication has been minimized because it is determined to be non-pertinent, law enforcement officials are permitted to periodically spot check the conversation to ensure that the call has not turned to criminal matters. *See, e.g., Mansoori*, 304 F.3d at 645 (recognizing that "a conversation may begin on a non-pertinent topic but switch to a pertinent subject in short order").

Title III provides two potential remedies for its violation. First, "[a]ny aggrieved person in any trial, hearing, or proceeding * * * may move to suppress the contents of any wire or oral communication intercepted" on the grounds that the intercept was unlawful. 18 U.S.C. § 2518(10)(a). Alternatively, Title III authorizes "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter" to bring a civil action for damages. 18 U.S.C. § 2520. Good faith reliance on a court order authorizing a wiretap is a "complete defense" to any civil or criminal action under Title III. 18 U.S.C. § 2520(d).

B. Factual Background Regarding The Drimal Wiretap

As part of a federal securities fraud investigation, the government obtained court authorization to intercept communications over plaintiff's husband's cellular telephone. *See United States* v. *Goffer*, 756 F. Supp. 2d 588, 590 (S.D.N.Y. 2011), *aff'd*, 721 F.3d 113 (2d Cir. 2013). Pursuant to that authorization, the government monitored Mr. Drimal's phone for two 30-day periods: from November 16, 2007 to December 15, 2007, and from December 17, 2007 to January 15, 2008. *Id.* The court order authorizing the wiretap contained a minimization instruction that provided: "'Monitoring of conversations must immediately terminate when it is determined that the conversation is unrelated to communications subject to interception * * * . If a conversation is minimized, monitoring agents shall spot check to ensure that the conversation has not turned to criminal matters.'" *Id.*

Before the wiretap began, the FBI employees conducting the wiretap were specifically instructed by a Supervising Assistant United States Attorney about the minimization requirement. *Id.* The written instructions that they were given stated that the agents "'should listen to the beginning of each communication only so long as is necessary to determine the nature of the communication and, in any case, no longer than a few minutes unless the communication is 'pertinent,' that is, within the scope of [your] authorization * * * . If *you determine that the communication is not a Criminal Communication, turn the machine off.*'" *Id.* The monitoring agents were further instructed that "'[i]f, after several days or weeks of interception'" a pattern of "'innocent, non-crime related'" communications exists between the subject and a particular individual, then further communications between those individuals "'should not be recorded, listened to, or even spot monitored, once such an individual has been identified as a party to the communication.'" *Id.* In addition, the monitoring agents were instructed about the spousal privilege and told "'to discontinue monitoring if you discover that you are intercepting a personal communication solely between husband and wife.'" *Id.* at 591.

During the course of the wiretap, the monitoring agents intercepted over 1,000 of Mr. Drimal's calls, including about 180 calls between him and his wife, Arlene Drimal. *Id.* at 591, 595. None of the spousal calls turned out to be pertinent to the criminal investigation. *Id.* at 591.

Mr. Drimal was subsequently prosecuted for securities fraud. Although the government did not intend to introduce any of the spousal calls into evidence at trial, Mr. Drimal moved to suppress all of the wiretap evidence on the grounds that the government had intercepted and failed to minimize privileged phone calls between him and his wife. *Id.* at 589, 591. He argued that the government was not permitted to intercept privileged calls, and that once the calls were intercepted, the government further violated Title III by failing to minimize those calls. *Id.* at 593. The criminal court rejected Mr. Drimal's first argument, holding that there is no "per se bar to the interception of privileged calls." *Id.*

As to Mr. Drimal's minimization claim, the court held a hearing in which it focused on eighteen of the approximately 180 spousal intercepts as potentially violative of the minimization requirement. *Id.* at 594 (citing Scheduling Order of Feb. 16, 2011 in *Goffer*); *see also* Scheduling Order, filed Feb. 16, 2011 in *United States* v. *Goffer*, No. 1:10-cr-00056-RJS-4, Dkt. # 134 (identifying calls 5644, 5652, 5710, 5806, 5808, 5809 5828, 5843, 5874, 5875, 5945, 5948, 5950, 6087, 6692, 6710, 6845, and 7546). After the hearing, in which the court heard testimony from the monitoring agents of those eighteen calls and the Supervising Assistant United States Attorney, *Goffer*, 756 F. Supp. 2d at 591, and after reviewing transcripts of the calls, *id.* at 594; *see also* Scheduling Order, *supra*, the court denied Mr. Drimal's motion to suppress, concluding that, "on the whole, the wiretap was professionally conducted and generally well-executed." *Goffer*, 756 F. Supp. 2d at 597.

In denying Mr. Drimal's motion to suppress, the court nevertheless noted that three of the individual intercepts were "particularly egregious." *Id.* at 594. The court stated:

> In call 5808, for example, the agent monitored almost four minutes of a six-and-a-half minute call while Drimal and his wife had a deeply personal and intimate discussion about their marriage. Call 5809 was obviously a continuation of the private conversation initiated in call 5808 – it was placed less than a minute after call 5808 ended – however, the monitoring agent listened to the entire 19-second call without minimizing. In call 5828, the agent monitored, without minimizing, as Drimal listened to a 52-second message from his wife in which she discussed, in detail, intimate aspects of their relationship. At the hearing the agent who monitored these calls provided no credible explanation for his failure to minimize after it became clear that such conversations were privileged and non-pertinent.

Id.

The court also found that five other calls "raise[d] questions about the sufficiency of the agents' minimization efforts." *Id.* at 595. The court stated:

> Call 5710, for example, was a 93-second conversation that was not minimized, even though it was clear from very early in the call that the discussion was about the Drimals' children. In call 5806, the monitoring agent, who began monitoring while the call was in progress, listened to the last 49 seconds of a non-pertinent conversation that was obviously a marital spat. In calls 5874 and 5875, the agent listened, minimizing only once per call, while the Drimals carried on discussions of patently non-pertinent subjects such as their children and home renovation projects. In call 5945 – a conversation that the monitoring agent later 'kick[ed] [him]self' for not minimizing – the Drimals had a 95-second conversation about their children.

Id.

Overall, the court concluded that these eight calls illustrated that "the government failed to take appropriate steps to ensure that unnecessary intrusions into the private lives of its targets were kept to a minimum." *Id.*; *see also id.* at 597 n.9 ("[T]he government failed to comply with Title III's minimization requirement in no more than eight instances."). The court noted that while most of these calls were under two minutes, "in each of these calls it should have been apparent within seconds that the conversation was privileged and non-pertinent." *Id.* at 595. The court also noted that the government did not dispute that "'several calls between Drimal and his wife were improperly monitored.'" *Id.* at 595 n.4.

Given these "isolated" failures to minimize, however, the court concluded that total suppression of the evidence obtained from the wiretap was inappropriate. *Id.* at 596-97; *id.* at 597 ("in the vast majority of calls the government's monitoring of the Drimals' spousal communications was reasonable"). As the court explained, the "most egregious failures occurred in the early stages of the wiretap, when agents were presumably still learning to recognize the voices" being intercepted on the calls. *Id.* at 596-97. At some point later in the wiretap, Mrs. Drimal's telephone number was posted at the monitoring office, with instructions that calls to or from her number should be minimized. *Id.* Moreover, "[a]s the wiretap progressed, agents began consistently minimizing Drimal's spousal calls within the first ten seconds of the conversation." *Id.* Finally, the court also noted that every conversation between Mr. Drimal and his wife that lasted two minutes or longer was at least partially minimized,

that the wiretap instructions "were silent on the amount of time that an agent was permitted to listen to a privileged call prior to minimizing," and that "case law suggest[s] that * * * calls under two minutes need not be minimized." *Id.* at 597.[2]

Mr. Drimal was subsequently convicted and sentenced for conspiracy to commit securities fraud and for securities fraud. *United States* v. *Goffer*, 721 F.3d 113, 118 (2d Cir. 2013). This Court affirmed the conviction. *Id.* at 132; *see also United States* v. *Goffer*, 529 Fed. Appx. 17, 19 & n.1 (2d Cir. 2013) (noting that Mr. Drimal waived his right to appeal his conviction by pleading guilty, but that, if the court were to reach his challenge to the wiretap minimization procedures, the court would reject it "for substantively the same reasons [it was] rejected" by the criminal court).

C. Plaintiff's Action And Procedural History

Plaintiff filed an action pursuant to 18 U.S.C. § 2520, seeking damages against the sixteen FBI employees, in their individual capacities, who intercepted and monitored the "more than 180 confidential and privileged marital telephonic communications" between her and her husband. JA 46-48. As to each of the sixteen defendants, plaintiff alleges that on a specified date or dates, the named defendant "unlawfully intercepted and listened to * * * privileged, confidential marital telephone communications" to which she was a party. JA 48-52. With the few exceptions noted

[2] The criminal court also rejected Mr. Drimal's argument that the monitoring agents violated Title III by spot-monitoring calls that had already been minimized. *Id.* at 597 n.8.

below, plaintiff does not allege any additional facts pertaining to the defendants' actions or to any of the "more than 180" communications that she alleges were unlawfully intercepted and monitored. JA 48-52.

As to four of the defendants, plaintiff's complaint includes additional allegations. Plaintiff alleges that defendants LoMonaco and Ford admitted, in sworn testimony during Mr. Drimal's criminal proceedings, that they listened to privileged communications that they had no right to hear. JA 49 ("Lomonaco admitted that he had intentionally listened to confidential and privileged marital communication involving the plaintiff which he had no right to overhear."); *id.* ("Ford admitted that he remembered 'kicking [him]self' because he knowingly had listened to confidential and privileged marital communications involving the plaintiff which he had no right to overhear."). Plaintiff further alleges that defendants Makol and Trigg were the supervising agents on the wiretap and "were aware of the unlawful actions of the other defendants and tolerated or encouraged such unlawful actions." JA 47. Finally, plaintiff also alleges that the U.S. Attorney for the Southern District of New York, in a written submission in Mr. Drimal's criminal proceedings, admitted that "'several calls between Drimal and his wife were improperly monitored,'" and that, "in at least one instance," the monitoring was "'indefensible.'" JA 48.

Defendants moved to dismiss plaintiff's action both for failure to state a claim and on grounds of qualified immunity. Regarding the failure to state a claim, the federal defendants argued that interception of privileged communications does not, by

itself, violate Title III. JA 63-64. Moreover, defendants argued that plaintiff failed to allege any facts to support a claim that defendants unlawfully monitored the intercepted spousal calls by failing to minimize those calls, particularly given that courts have declined to apply the minimization requirement to calls of less than two minutes' duration, and plaintiff failed to allege whether any of the monitored calls lasted more than two minutes. JA 64-65. Additionally, the federal defendants argued that they were entitled to qualified immunity because plaintiff failed to allege any facts to suggest that defendants violated a clearly established right under Title III. JA 67-68.

D. The District Court's Ruling

The district court denied defendants' motion to dismiss as to all of the defendants. Regarding the failure to state a claim, the court held that plaintiff's complaint does allege specific facts to support her claims, "including the acknowledgment of improper behavior by multiple defendants during federal court testimony," as well as the United States Attorney's concession that "'several calls * * * were improperly monitored'" and that the monitoring of one call was "'indefensible.'" JA 118. The district court stated that plaintiff's allegation that defendants "unlawfully" intercepted and listened to her phone calls "implied" both that "these telephone conversations were not subject to interception and that the FBI failed to minimize such interceptions." JA 118. The court also acknowledged the criminal court's holding that the government had failed to minimize "'for at least portions of

the wiretap.'" JA 118-19. The district court, therefore, concluded that plaintiff had adequately alleged a violation of Title III and refused to dismiss the complaint as to any of the defendants. JA 119.

The district court also concluded that none of the defendants were entitled to qualified immunity. The court explained that certain, selected portions of Mr. Drimal's criminal proceedings, which were referenced in plaintiff's responsive filings, and of which it took judicial notice, JA 117, provided some evidence of improper minimization. JA 119-20. The court specifically quoted the criminal court's discussion of the three most "egregious" calls. JA 120. The district court held that because the minimization requirement is clearly established, defendants' actions could not have been objectively reasonable. JA 120.

SUMMARY OF ARGUMENT

The district court erred in denying the federal defendants' motion to dismiss for failure to state a claim and in rejecting their defense of qualified immunity.

I. Plaintiff's complaint generally alleges that defendants "unlawfully" intercepted and monitored over 180 privileged telephone calls between her and her spouse, without alleging any concrete facts regarding those communications. The district court erroneously concluded that those general, conclusory allegations were sufficient to state a claim both as to unlawful interception and improper minimization. But legal conclusions, unsupported by factual allegations, do not render a complaint sufficient.

Moreover, the wiretapping statute does not prohibit the interception of privileged calls; the statute just requires that such calls be minimized. Accordingly, plaintiff's allegation that her calls were "unlawfully" intercepted because they are privileged fails to state a legal claim.

The district court also erred in concluding that plaintiff's complaint stated a claim for failure to minimize. Plaintiff's complaint never even uses the word "minimize" or includes any factual allegations that would support such a claim. Nor does plaintiff's complaint allege any facts to make clear that defendants even had a duty to minimize the spousal calls at issue; in this Circuit, courts have declined to consider calls under two minutes' duration in determining whether there is a minimization violation, and plaintiff includes no allegations about the length of any of the spousal calls.

Although the district court attempted to bolster plaintiff's complaint by incorporating particular findings from the underlying criminal proceedings – a practice that is itself legally questionable – those allegations are nevertheless insufficient to state a claim for failure to minimize. The criminal court criticized only eight of the over 180 phone calls, three of which were minimized, and the other five of which were under two minutes' duration. Nor did the criminal court even identify which defendants were responsible for monitoring those calls. Yet the district court nevertheless concluded that plaintiff's complaint stated a claim as to all sixteen defendants. That decision must be reversed.

II. The district court likewise erred in denying qualified immunity. In this Circuit, the law is not clearly established that law enforcement officials have a duty to minimize calls under two minutes. Accordingly, defendants could have reasonably believed that they were authorized to listen to plaintiff's spousal calls for up to two minutes prior to deciding whether to minimize a call. Given that there are no allegations – even if the criminal court's findings are considered – that defendants failed to minimize any calls that were two minutes or longer, defendants' actions here were objectively reasonable and they are entitled to qualified immunity. Thus, the order of the district court should be reversed and judgment entered for defendants.

In any event, even if the district court had concerns as to the objective reasonableness of the monitoring of a handful of calls, the district court erred in denying qualified immunity across-the-board, without any regard as to which defendants were responsible for those calls or their particular actions. At a minimum, such an error requires a remand.

STANDARD OF REVIEW

"When a district court denies immunity on a Rule 12(b)(6) motion to dismiss, we review the district court's denial *de novo*[.]" *See Warney* v. *Monroe Cnty.*, 587 F.3d 113, 120 (2d Cir. 2009) (citation and internal quotation marks omitted); *see also Field Day, LLC* v. *County of Suffolk*, 463 F.3d 167, 191 (2d Cir. 2006) ("[t]his Court reviews de novo a ruling granting or denying a Rule 12(b)(6) motion," including a qualified immunity defense).

ARGUMENT

I. PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM FOR A TITLE III VIOLATION AS TO EACH DEFENDANT.

To survive a motion to dismiss for failure to state a claim, a complaint must allege sufficient "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) ("'naked assertion[s]' devoid of 'further factual enhancement'" do not suffice). This requires "more than a sheer possibility that defendant has acted unlawfully." *Id.* And although a court must normally accept all factual allegations in the complaint as true, the court need not do so for "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.*; *id.* at 679 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."). The district court here misapplied this standard and erroneously denied the motion to dismiss as to all defendants.

A. Interception Of Privileged Calls Does Not Violate Title III.

In denying defendants' motion to dismiss for failure to state a claim, the district court implicitly rejected defendants' argument that interception of privileged calls, by itself, does not amount to a Title III violation. The district court stated that "plaintiff has alleged that defendants unlawfully intercepted and listened to more than 180 confidential and privileged marital communications. That these telephone

conversations were not subject to interception * * * is implied by the adverb 'unlawfully.'" JA 118. That was legal error.

As an initial matter, the district court erred in assuming the truth of plaintiff's allegation that defendants violated Title III by intercepting her privileged communications. That allegation is a legal conclusion and should not be credited as true. *Iqbal*, 556 U.S. at 678 ("[T]he tenet that a court must accept as true all of the allegations in a complaint is inapplicable to legal conclusions."); *id.* at 679 ("legal conclusions * * * must be supported by factual allegations"). As the Supreme Court has explained, the complaint must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. Plaintiff's claim that defendants "unlawfully intercepted" her privileged communications is just such an accusation.

In any event, plaintiff's asserted legal conclusion – that it is unlawful to intercept privileged communications – is contrary to law. Title III does not prohibit the interception of privileged conversations. The statute itself recognizes that privileged conversations may be intercepted. *See* 18 U.S.C. § 2517(4) (a privileged communication "shall [not] lose its privileged character" just because it has been intercepted). Indeed, in denying Mr. Drimal's suppression motion, the criminal court recognized that Title III does not bar the interception of privileged communications. *Goffer*, 756 F. Supp. 2d 588, 593-94 (S.D.N.Y. 2011) (noting that other courts similarly concluded that there is "no such per se bar to the interception of privileged calls").

That conclusion is undoubtedly correct. Without at least some measure of monitoring, an agent cannot even identify the conversants or the subject matter to verify whether a call is, in fact, privileged. *See United States* v. *Hyde*, 574 F.2d 856, 870 (5th Cir. 1978) (agents did not violate Title III when they monitored privileged call only long enough to determine that the doctor and attorney were not participating in the criminal conduct); *see also Scott* v. *United States*, 436 U.S. 128, 140 (1978) ("The statute does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to 'minimize' the interception of such conversations."); *United States* v. *De La Cruz Suarez*, 601 F.3d 1202, 1215 (11th Cir. 2010) (privileged calls, once intercepted, were to be minimized); *United States* v. *Rivera*, 527 F.3d 891, 906 (9th Cir. 2008) (privileged spousal communications should be minimized); *United States* v. *Malekzadeh*, 855 F.2d 1492, 1496 (11th Cir. 1988) (Title III does not "restrict[] interception of marital communications"). Thus, there is no basis for the district court's conclusion that defendants may have violated Title III by intercepting plaintiff's privileged calls; such behavior is not prohibited by Title III and therefore does not state a claim.

B. Plaintiff's Allegations Do Not Establish A Plausible Claim That Each Of The Defendants Failed To Minimize Calls In Violation Of Title III.

Plaintiff also alleges that defendants unlawfully monitored her spousal calls, which the district court construed as an allegation that defendants failed to minimize those calls in violation of Title III. JA 118. The district court, however, erred in

concluding that plaintiff's bare-bones, conclusory allegations, which do not even refer to "minimization," were sufficient to establish a plausible minimization violation as to each of the federal defendants.

1. Plaintiff's Complaint Fails To Allege Sufficient Facts To Show A Plausible Minimization Violation.

According to the gloss placed on the complaint by the district court, plaintiff generally alleges that all of the approximately 180 spousal calls that were monitored violated the minimization requirement. But plaintiff's complaint includes no pertinent factual allegations about any of those calls that would permit a court to conclude that defendants failed to minimize calls that were, in fact, privileged and/or not relevant to the investigation, or that the calls were even long enough to trigger a duty to minimize. And even if this Court were to incorporate the criminal court's findings as allegations in plaintiff's complaint, those allegations are still insufficient to permit a court to conclude that plaintiff stated a claim for failure to minimize as to all fifteen federal defendants. Indeed, although the criminal court criticized the monitoring of a handful of calls, that court made no finding either as to how many defendants were responsible for those calls or which individual defendants monitored those calls. Certainly the Supreme Court in *Iqbal* did not contemplate that a court of appeals would have to wade through underlying documents and pleadings to ferret out such information if a complaint were, in fact, sufficient.

As the Supreme Court has explained, in evaluating whether a law enforcement officer has satisfied the minimization requirement, a court must objectively assess the officer's actions in light of the circumstances confronting him. *Scott*, 436 U.S. at 136. "Whether the agents have in fact conducted the wiretap in such a manner [as to minimize the interception of non-relevant conversations] will depend on the facts and circumstances of each case." *Id.* at 140. There are a number of factors that courts consider when determining whether agents have failed to minimize non-pertinent calls, such as the scope of the conspiracy or investigation; the type of telephone being monitored; at what point during the wiretap the interception was made; whether the calls were ambiguous in nature or used coded language; whether the calls were "one-time only" calls; and the length of the calls. *Id.* at 140-42. Courts have also looked to whether the officials had in place measures that establish a good faith effort to minimize, such as minimization instructions, maintenance of monitoring logs, prosecutorial supervision, and judicial supervision of the wiretap. *See, e.g., United States* v. *Bynum*, 485 F.2d 490, 501 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974); *United States* v. *Zemlyansky*, No. 12CR171JPO, 2013 WL 2151228, at * 31 (S.D.N.Y. May 20, 2013); *United States* v. *Uribe*, 890 F.2d 554, 557-58 (1st Cir. 1989).

So long as the government has undertaken reasonable efforts to minimize, to state a claim for failure to minimize, a plaintiff must, at a minimum, identify particular conversations that should have been minimized and/or efforts that would have resulted in more effective minimization. *See, e.g., United States* v. *Yarbrough*, 527 F.3d

1092, 1098 (10th Cir. 2008); *United States* v. *Carter*, 449 F.3d 1287, 1295 (D.C. Cir. 2006) ("a defendant must identify particular conversations so that the government can explain their non-minimization"); *Mansoori*, 304 F.3d at 648 ("If * * * defendants believed that the government's eavesdropping was too intrusive and that a greater degree of minimization was warranted, then it was incumbent upon them to identify at least a sample of intercepted calls that proves their point.").

As the criminal court recognized, the government did adopt appropriate measures regarding minimization of the wiretap here. *See Goffer*, 756 F. Supp. 2d at 597. "The agents, while engaging in nearly round-the-clock monitoring, completed contemporaneous line sheets that were forwarded on a daily basis to the Supervising AUSA, who reviewed them in real time before providing periodic reports to the supervising court on the progress of the wiretap. These periodic or '10-day reports' provided summaries of the most pertinent calls as well as tables setting forth the total number of calls and identifying how many were pertinent and non-pertinent, how many exceeded two minutes, and how many were minimized." *Id.*

Plaintiff's complaint, however, fails to allege any facts either as to specific spousal conversations that were not minimized or as to how more effective minimization could have taken place. For example, she fails to allege any facts that would tend to establish a plausible claim for failure to minimize as to particular spousal calls, such as the non-pertinent/personal topic of conversation, that the call occurred late in the wiretap when all the monitoring agents should have either

recognized her voice or known that her calls were not to be intercepted (because of a pattern of non-pertinence), that the call was monitored for a significant amount of time without minimization, that she was identified early in the phone call as one of the parties, or that the call was to or from her cellular telephone (the number for which was, at some point, posted in the monitoring station with instructions to minimize). Indeed, the only pertinent facts that plaintiff alleges are the dates of the monitored calls, which span the range of the 60-day period for which the wire was up. *See* JA 48-52. As many courts have recognized, a call might be reasonably monitored at the early stages of a wiretap, whereas that same call, if it occurred at a later stage of the wiretap, might be required to be minimized. *See, e.g., Scott*, 436 U.S. at 141 ("During the early stages of surveillance the agents may be forced to intercept all calls to establish categories of nonpertinent calls which will not be intercepted thereafter. Interception of those same types of calls might be unreasonable later on, however[.]").

In addition, in this Circuit, courts have presumptively treated calls monitored for two minutes or less as properly minimized. As this Court has explained, "[b]efore a determination of innocence can be made there must be some degree of eavesdropping." *Bynum*, 485 F.2d at 500. Where the call being monitored is "less than 2 minutes * * * * it would be too brief a period for an eavesdropper even with experience to identify the caller and characterize the conversation as merely social or possibly tainted." *Id.* As a result, this Court "eliminate[s] these calls from consideration" in determining whether there has been a minimization violation. *Id.*;

accord United States v. *Capra*, 501 F.2d 267, 276 (2d Cir. 1974); *see also Zemlyansky*, 2013 WL 2151228, at *32 ("there is a strong presumption that calls under two minutes need not be minimized").

Other circuits are in agreement. *See, e.g., United States* v. *Yarbrough*, 527 F.3d 1092, 1098 (10th Cir. 2008) ("in analyzing the reasonableness of the government's minimization efforts, we exclude calls under two minutes"); *United States* v. *Suggs*, 531 F. Supp. 2d 13, 22 (D.D.C. 2008) (government did not need to minimize calls under two minutes), *aff'd sub nom. United States* v. *Glover*, 681 F.3d 411 (D.C. Cir.), *cert. denied*, 133 S. Ct. 548 (2012); *United States* v. *Dumes*, 313 F.3d 372, 380 (7th Cir. 2002) (commenting upon the two minute rule and agreeing that "minimization of short calls is not required"); *United States* v. *Homick*, 964 F.2d 899, 903 (9th Cir. 1992) (concluding that instructions to monitor calls for two minutes before determining pertinence of call did not violate minimization requirement); *United States* v. *Malekzadeh*, 855 F.2d 1492, 1496 (11th Cir. 1988) (affirming that calls running "a second or two after the two-minute interval" did not require suppression); *United States* v. *Losing*, 560 F.2d 906, 909 n.1 (8th Cir. 1977) (holding that agents' practice of monitoring first two-three minutes of call complied with minimization requirement); *United States* v. *Armocida*, 515 F.2d 29, 45 (3d Cir. 1975) (eliminating calls of one-and-one-half minutes to two minutes from minimization requirement).

Indeed, such a rule is consistent with Supreme Court precedent, which has explicitly acknowledged that "it may not be unreasonable to intercept almost every

short conversation because the determination of relevancy cannot be made before the call is completed." *Scott*, 436 U.S. at 141. As the Court explained, it may be difficult for "even a seasoned listener" to "determine with any precision the relevancy of" calls that are "very short." *Scott*, 436 U.S. at 141-42; *id.* at 140 (if calls are "very short," "agents can hardly be expected to know that the calls are not pertinent prior to their termination"). *See also Bynum* v. *United States*, 423 U.S. 952, 954 (1975) (Brennan, J., dissenting from denial of certiorari) (noting that brief calls – apparently those under three minutes – will generally not be subject to minimization).

In other words, there is generally no duty to minimize, and hence no minimization violation, for calls that are monitored for less than two minutes. Nowhere in the complaint does plaintiff include any allegations about the length of the spousal calls or suggest that any of those calls were monitored for more than two minutes. This deficiency further underscores the insufficiency of plaintiff's complaint to state a violation of the minimization requirement as to any of the defendants.

And even if this Court incorporates into the complaint as allegations the findings of the criminal court, as the district court seemed to do, JA 118-20,[3] plaintiff

[3] The district court stated that it was "tak[ing] judicial notices of the underlying criminal case without converting defendants' motions to dismiss into motions for summary judgment." JA 117. Although a court is normally limited to the four corners of the complaint in ruling on a motion to dismiss, the court may take judicial notice of public records, including judicial opinions. *See Staehr* v. *Hartford Fin. Servs. Group, Inc.*, 547 F.3d 406, 425 (2d Cir. 2008) (noting that judicial notice of such documents is taken "without regard to the truth of their contents"); *see also* Fed. R.

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still fails to state a claim for minimization. As the criminal court explained, out of the more than 180 spousal calls, that court identified only eighteen calls as potentially

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Evid. 201(b) (permitting judicial notice of "a fact that is not subject to reasonable dispute"). The court may also properly consider documents that were either incorporated by reference in the complaint or that were heavily relied upon in the complaint. *See Int'l Audiotext Network, Inc.* v. *Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995); *Cortec Ind., Inc.* v. *Sun Holding LP*, 949 F.2d 42, 47-48 (2d Cir. 1991).

The district court's consideration of the criminal court's opinion and its findings is arguably more appropriate under the latter rationale. However, a district court's authority, on a motion to dismiss, to consider documents relied upon in a complaint does not authorize the court to selectively pick and choose portions of those documents on which to rely. *See Global Network Communications, Inc.* v. *City of New York*, 458 F.3d 150, 157 (2d Cir. 2006) (noting that documents incorporated by reference should be considered in their entirety to prevent "plaintiffs from generating complaints invulnerable to Rule 12(b)(6) motions simply by clever drafting"); *see also Southern Cross Overseas Agencies, Inc.* v. *Wah Kwong Shipping Group, Ltd.*, 181 F.3d 410, 427 (3d Cir. 1999) (noting courts "may therefore examine [a cited] decision to see if it contradicts the complaint's legal conclusions or factual claims"). Here, the district court gave no indication that it actually considered the underlying documents in the criminal proceedings, as opposed to the select portions of those documents that plaintiff chose to cite.

Regardless of which rationale the district court applied, the fact that prior judicial proceedings may (or may not) have put defendants on notice as to some aspects of plaintiff's claims should not absolve plaintiff from her duty to include sufficient and necessary factual allegations in her complaint. Indeed, given the prior judicial proceedings, it would have been a relatively simple matter for plaintiff to include in her complaint any allegations she thought were relevant from the criminal court's opinion. The requirement for factual allegations in a complaint is not only to put defendants on notice as to a plaintiff's claims, but also so that (1) plaintiff's understanding or interpretation of the law can be assessed at the threshold of a case and (2) discovery and trial proceedings are appropriately tailored to the scope of the complaint. *See, e.g., Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Medical Centers Retirement Plan* v. *Morgan Stanley Inv. Management Inc.*, 712 F.3d 705, 719 (2d Cir. 2013). The latter two goals are not served if plaintiff is permitted to file a bare-bones complaint and then add or subtract legal claims in responsive pleadings, presenting defendants with a moving target. *See Wright* v. *Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998) (affirming order dismissing complaint when plaintiff tried to raise new allegations in an opposition brief).

violative of the minimization requirement. *Goffer*, 756 F. Supp. 2d at 594, 596 n.6 (citing Gov't Exh. 30). After the suppression hearing, the court concluded that, at most, eight calls violated the minimization requirement. *Id.* at 594-95, 597 n.9. But the facts identified by the criminal court about those eight calls, even if incorporated into the complaint, are insufficient to allege a plausible claim that defendants failed to minimize even those eight calls.

Three of the calls (5808, 5874, 5875) identified by the criminal court were, in fact, minimized. *Goffer*, 756 F. Supp. 2d at 594-95 (call 5808 was monitored for about four minutes out of six-and-a-half minutes and calls 5874 and 5875 were minimized "once per call"); *see also* Gov't Exh. 30 at 1, filed on Mar. 18, 2011 in *United States* v. *Goffer*, No. 1:10-cr-00056-RJS-4, Dkt. # 154. Call 5808 was monitored for about 97 seconds before it was minimized. *See* Gov't Exh. 30 at 1. The monitoring agent then spot-checked, monitoring for another 84 seconds before minimizing again. *Id.* The monitoring agent spot-checked one more time, listening to the last 36 seconds of the call. *Id.* In total, the call was monitored for almost four minutes, but the longest period that the call was monitored for was 97 seconds. *Goffer*, 756 F. Supp. 2d at 594-95; Gov't Exh. 30 at 1. Call 5874 was monitored for 44 seconds, then minimized,

then spot-checked and monitored for the last 42 seconds of the call. Gov't Exh. 30 at 1. Call 5875 was monitored for 67 seconds before it was minimized. *Id.*[4]

As to the other five calls, the only relevant facts that the criminal court provides are the topic of conversation, that the calls were monitored for less than two minutes, and the criminal court's view that "in each of these calls it should have been apparent within seconds that the conversation was privileged and non-pertinent." *Goffer*, 756 F. Supp. 2d at 594-95. But those allegations say nothing about which agents were responsible for monitoring those calls, at what point during the wiretap those calls were intercepted, what telephone number was making or receiving the call, whether the parties to the call were vocally identified, or other facts that would be relevant to determining whether, in the particular circumstances, defendants should have minimized those calls. *See Mansoori*, 304 F.3d at 648 ("The adequacy of the government's minimization efforts typically cannot be determined in a generalized fashion."). The district court, therefore, erred in concluding that those allegations stated a claim for failure to minimize even as to those five calls.

Moreover, as the criminal court recognized, "*every* conversation between Drimal and his wife lasting two minutes or longer was at least partially minimized." *Goffer*, 756 F. Supp. 2d at 597. And plaintiff's complaint articulates no allegations to the

[4] The fact that the criminal court found these three calls, which were minimized, to violate the minimization requirement seems somewhat inconsistent with its rejection of Mr. Drimal's claim that defendants had violated Title III by spot-monitoring calls. *Goffer*, 756 F. Supp. 2d at 597 n.8.

effect that, even if defendants did minimize calls, they failed to properly minimize those calls.

Once the district court looked to the criminal court's decision to supplement the allegations in plaintiff's complaint, the court compounded its errors by treating all the defendants the same, and denying the motion to dismiss as to all defendants, even though defendants' actions should have been considered individually, in light of the circumstances each faced in monitoring the particular calls. Even considering just the statements incorporated from the criminal court's opinion, that up to eight calls were improperly minimized, at least three of those calls were monitored by the same agent. *Id.* at 596 n.7. Thus, plaintiff's factual allegations, based on the criminal court's findings, at most could support a claim for failure to minimize against six of the monitoring agents.[5] Yet the district court denied the motion to dismiss the complaint as to all fifteen federal defendants. That is reversible error. At a minimum, the district court had a duty to determine whether the complaint stated a claim as to each defendant, rather than refusing to dismiss the complaint as to all defendants. *See Gill* v. *Monroe County Dep't. of Soc. Servs.*, 547 F.2d 31, 32 (2d Cir. 1976) (remanding defendants' motion to dismiss for reconsideration so that district court could make

[5] For the reasons explained above, the criminal court's findings were insufficient to state a minimization violation as to any of the defendants. In any event, the criminal court's opinion does not articulate exactly how many of the defendants were responsible for the eight calls the court criticized, further underscoring the insufficiencies in plaintiff's complaint and the district court's errors in addressing them.

the necessary analysis regarding "each defendant" and the "alleged failure to state a cause of action"). And if the district court was unable to determine, on the basis of plaintiff's allegations, which defendants, if any, were potentially proper defendants, then the district court should have either dismissed the complaint as to all defendants, or given plaintiff an opportunity to amend her complaint.

The district court's implicit conclusion, however, that plaintiff adequately stated a claim as to all fifteen federal defendants for failure to minimize, however, is insupportable, given that plaintiff's complaint only includes factual allegations that, at most, six of the monitoring agents may have failed to minimize calls. That error, at a minimum, requires a remand to the district court to determine how many defendants were responsible for those calls and to determine their identities. However, given the fact that the allegations incorporated from the criminal complaint are insufficient to state a claim as to even six defendants, for the reasons explained above, this Court should reverse the decision below and grant defendants' motion to dismiss.

2. Plaintiff's Additional Allegations Do Not Render Her Complaint Sufficient.

Although most of the allegations in plaintiff's complaint are general allegations that defendants unlawfully intercepted and monitored her spousal calls, plaintiff does include a few particularized allegations as to a few calls, and as to defendants Makol, Trigg, LoMonaco, and Ford. Those allegations are entirely conclusory, however, and should not be credited as true.

a. Admission By United States Attorney's Office

First, plaintiff alleges that the United States Attorney's Office for the Southern District of New York admitted that "'several calls'" were improperly monitored, and that "in at least one instance the conduct of one of the defendants in listening to the plaintiff's confidential telephone communications was 'indefensible.'" JA 48. Plaintiff, however, does not indicate as to which calls and/or which defendants those alleged admissions pertained, or whether those calls were over two minutes. Moreover, the statement that several calls were improperly monitored, or that one such monitoring was indefensible, are legal conclusions, unsupported by any facts about those particular calls or the particular monitoring agents' actions. Accordingly, those statements should not be credited as true. *Iqbal*, 556 U.S. at 678-79. But, even assuming that *several* calls were improperly monitored, including one instance that was "indefensible," such an allegation would, at best, support a claim only against the particular defendants who monitored those calls.

b. Defendants Makol And Trigg

Plaintiff alleges that defendants Makol and Trigg were the supervising agents on the wiretap "who directly and personally supervised all of the actions of the other defendants." JA 47. She further alleges that they "were aware of the unlawful actions of the other defendants and tolerated or encouraged such unlawful actions." JA 47. She also alleges that defendant Makol was "warned by Assistant United States Attorney Andrew Fish that privileged marital communications of the plaintiff were

being intercepted and monitored by the defendants under his supervision and that he should take actions to prevent such unlawful conduct." JA 47.

Those allegations, however are entirely conclusory and unsupported by any concrete factual allegations to demonstrate that defendants Makol and Trigg "tolerated or encouraged" any unlawful behavior. Under *Iqbal*, therefore, the court should not assume the truth of those allegations. *Iqbal*, 556 U.S. at 678-79. In any event, such allegations would only be relevant if defendants Makol and Trigg could be held liable under a theory of supervisory liability for the other defendants' alleged failures to minimize. But this action is akin to a *Bivens* action, in which a government official can only be held liable for his or her own conduct. *Iqbal*, 556 U.S. at 677. For that reason, plaintiff's allegations regarding supervisory liability for defendants Makol and Trigg are legally irrelevant to state an individual capacity claim under Title III as to those two defendants.

c. Defendants LoMonaco And Ford

Plaintiff alleges that defendants LoMonaco and Ford admitted, in sworn testimony before the criminal court, that they had knowingly or intentionally "listened to confidential marital communication involving the plaintiff" that they had "no right to overhear." JA 49. Plaintiff does not even identify the particular calls to which those statements relate. More importantly, however, such conclusory allegations regarding statements of opinion or subjective belief, made by the relevant officials in hindsight, after it was determined that none of the spousal calls were pertinent to the

criminal investigation, do not fulfill plaintiff's duty to allege concrete facts about defendants' actions that could support a claim for liability. As explained above, plaintiff has failed to allege any facts about the particular calls monitored by defendants LoMonaco or Ford that could support a claim that they intentionally declined to minimize any call once they became aware both that the call was between Mr. Drimal and his wife and that the call was not pertinent to the authorized investigation.

But, even assuming that defendant LoMonaco's and Ford's alleged statements were sufficient to state a claim as to defendants LoMonaco and Ford, those statements cannot support a claim against any of the other defendants.

II. THE DISTRICT COURT ERRED IN DENYING DEFENDANTS QUALIFIED IMMUNITY.

In determining whether a defendant official, sued in his individual capacity, is entitled to dismissal on grounds of qualified immunity, a court must answer two questions: (1) does the evidence, viewed in the light most favorable to the non-moving party, adequately allege that the official violated a constitutional or statutory right; and (2) was that right clearly established (i.e., could the defendant official reasonably, but mistakenly, have concluded that his actions were lawful). *See, e.g., Ashcroft* v. *Al-Kidd*, 131 S. Ct. 2074, 2080 (2011); *Pearson* v. *Callahan*, 553 U.S. 223, 230-33 (2009). If no constitutional or statutory violation is alleged, or if the defendant

could have reasonably believed that his conduct did not violate any constitutional right, then the defendant is entitled to qualified immunity.

The district court held that plaintiff had alleged a failure to minimize in violation of Title III, and that "the minimization requirement is clearly established." JA 120 (Opinion at 7). Accordingly, the district court concluded that defendants' actions "were not objectively reasonable under the circumstances" and therefore denied defendants qualified immunity. *Id.* Even assuming plaintiff adequately alleged a violation of plaintiff's rights under Title III – which is not the case, for the reasons explained above – the district court erred in concluding that the law here was clearly established so as to preclude qualified immunity.

A. The Law Does Not Clearly Establish That Law Enforcement Officials Have A Duty To Minimize Calls Under Two Minutes.

The district court erred in concluding that "the minimization requirement is clearly established," JA 120, in two respects. First, the district court defined the right at issue at too high a level of generality. Second, once the relevant right is defined in a particularized sense, the law of this Circuit establishes that there is no clearly established right requiring all calls between spouses, even those under two minutes and regardless of the particular circumstances of the wiretap, to be minimized.

It is well-established that a court errs in broadly defining the right at issue for qualified immunity purposes. The Supreme Court has repeatedly held that the right must be defined in a "particularized sense," so that the contours of the right would be

clear to a reasonable official in the circumstances at issue. *See, e.g., Reichle* v. *Howards*, 132 S. Ct. 2088, 2094 (2012) ("the right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause"); *Ashcroft* v. *Al-Kidd*, 131 S. Ct. 2074, 2084 (2011). The district court's conclusion that "the minimization requirement is clearly established," JA 120, fails this test; the fact that a monitoring agent is generally required to minimize calls subject to a wiretap says nothing that would have put a reasonable official on notice about his or her obligations in the particular circumstances here: whether the monitoring agents were required to minimize all spousal calls with plaintiff, even when those calls were less than two minutes, and even when they occurred early in the course of the wiretap and before there was a pattern establishing that such spousal calls were not pertinent to the investigation.

The answer to that more particularized question is not clearly established in this Circuit. First, as discussed above, there is not a clearly established duty in this Circuit to minimize calls under two minutes. *See Bynum*, 485 F.2d at 500-02; *Capra*, 501 F.2d at 276; *Zemlyansky*, 2013 WL 2151228, at *32 n.21; *see* also *Goffer*, 756 F. Supp. 2d at 597 (recognizing "case law suggesting that, as a general matter, calls under two minutes need not be minimized"). As courts have recognized, whenever a call is intercepted, it necessarily takes some time for a monitoring agent to ascertain who the callers are and whether the subject of conversation is pertinent to the investigation.

See, e.g., Bynum, 485 F.2d at 500; *Hyde*, 574 F.2d at 870. That amount of time may be greater or lesser depending on, *inter alia*, whether the interception occurs earlier or later in the course of the wiretap, the scope of the investigation and the number of potential conversants who have to be identified, the monitoring agent's experience on the particular wiretap, and whether the conversations may be coded. *See Scott*, 436 U.S. at 140-42 (reasonableness of minimization efforts is usually judged by: the length of non-pertinent calls; whether the non-pertinent calls were "one-time" calls; the ambiguous nature of the calls; whether a wide-spread conspiracy is at issue; the public or private nature of the target phone; and the stage of surveillance). In this Circuit, courts have generally disregarded calls under two minutes, considering two minutes as a per se reasonable time period for a monitoring agent to determine whether a call is non-pertinent and should be minimized. *Bynum*, 485 F.2d at 500; *Capra*, 501 F.2d at 276; *Zemlyansky*, 2013 WL 2151228, at * 32.

B. Defendants' Monitoring Actions Were Objectively Reasonable.

Given this Court's existing precedent suggesting that law enforcement officials need not minimize calls under two minutes, defendants here could have reasonably believed that they were authorized to listen to an intercepted call for up to two minutes prior to deciding whether the call was non-pertinent and should be minimized. That precedent, alone, establishes that defendants' challenged actions here – failing to minimize a handful of calls, at most, that were less than two minutes – were objectively reasonable, and that defendants are entitled to qualified immunity.

See, e.g., Stanton v. *Sims*, 134 S. Ct. 3, 7 (2013) (officer who made warrantless entry into fenced yard of home while in hot pursuit of a suspect for a misdemeanor was entitled to qualified immunity because existing precedent did not clearly establish that such conduct was unlawful); *Reichle* v. *Howards*, 132 S. Ct. 2088, 2094-97 (2012) (officials were entitled to qualified immunity for allegedly retaliatory arrest supported by probable cause because at the time existing precedent did not clearly establish that an arrest supported by probable cause could violate the First Amendment).

Indeed, the criminal court identified only eight calls out of 180 that potentially violated Title III for failure to minimize. And out of those eight calls, the criminal court identified only five calls that were not minimized, each of which was under two minutes. *See Goffer*, 756 F. Supp. 2d at 594-95 (identifying a 19-second call, a 52-second message, a 93-second conversation, the last 49 seconds of a conversation, and a 95-second conversation).[6] There is no allegation that defendants failed to minimize any calls that were two minutes or longer.[7] Indeed, as the criminal court noted, "*every* conversation between Drimal and his wife lasting two minutes or longer was at least partially minimized." *Goffer*, 756 F. Supp. 2d at 597. Thus, the only calls that are

[6] Plaintiff makes no allegation that any calls that were minimized were improperly minimized, either because minimization occurred too late or because the calls were subsequently spot-checked.

[7] The three other calls that the criminal court identified as potentially violative of Title III were all minimized at least once, including call 5808, which is the only relevant call over two minutes, according to the findings of the criminal court. *See Goffer* 756 F. Supp. 2d at 594-95; Gov't Exh. 30 at 1.

arguably at issue in plaintiff's minimization challenge are spousal calls under two minutes, and only five of those were specifically identified and commented upon by the criminal court in a way that could even arguably lend support to any allegations for failure to minimize.

Plaintiff's allegations, including those incorporated from the criminal court's opinion, buttress the conclusion that defendants' actions were objectively reasonable. For example, the few intercepts that the criminal court identified as potentially problematic occurred early in the wiretap, when the monitoring agents may have been unfamiliar with plaintiff's voice and before there was a pattern establishing that her calls with her spouse were not pertinent to the investigation. *See Goffer*, 756 F. Supp. 2d at 596. And, as the monitoring agents gained experience with the wiretap, the criminal court recognized that calls were generally minimized more quickly. *Id.* ("[a]s the wiretap progressed, agents began consistently minimizing Drimal's spousal calls within the first ten seconds of the conversation"). Moreover, the instructions given to the defendants prior to initiation of the wiretap did not specifically limit the period of time in which they were allowed to monitor a call, except to state that monitoring should not exceed "a few minutes," unless the communication is relevant to the investigation. *See Goffer*, 756 F. Supp. 2d at 590. Given those circumstances, as well as existing Second Circuit precedent, defendants plainly acted objectively reasonably in not minimizing a handful of brief calls between plaintiff and her spouse.

Importantly, because minimization involves an exercise of judgment and is not an exact science, there must be some margin for error in determining when to minimize a call; it cannot be that every time an official monitors a phone call a few seconds longer than a judge, in retrospect, thinks was necessary, that that official is subject to suit and potentially liable for damages. After all, the underlying purpose of qualified immunity is to give "government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." *Messerschmidt* v. *Millender*, 132 S. Ct. 1235, 1244 (2012) (citation and internal quotation marks omitted). Thus, a failure to minimize must be so unreasonable that every official (without the benefit of hindsight) would have understood that the failure would violate Title III. Plaintiff has failed to allege any evidence that would support such a conclusion here. That is particularly true when one accounts for the "learning curve" in implementing a wiretap; early on in an investigation, it will generally take the monitoring agents more time to identify the parties to the conversation, the topic of conversation, and whether the conversation is pertinent to the investigation.

To be sure, one of the underlying purposes of qualified immunity is to enable government officials to perform their jobs without being hampered by a fear of possible litigation. *See Spavone* v. *New York State Dep't of Corr. Servs.*, 719 F.3d 127, 134 (2d Cir. 2013) (qualified immunity is "to serve the public good by shielding public officials from potentially disabling threats of liability"); *Harlow* v. *Fitzgerald*, 457 U.S.

800, 807, 816 (1982). If monitoring an individual call for merely a few seconds too long is sufficient to defeat a claim of qualified immunity, officials will err on the side of minimizing calls before they may reasonably be able to determine whether a call is pertinent to the investigation. Such a result would seriously curb law enforcement's efforts to conduct wiretaps. *Harlow*, 457 U.S. at 816. Nor does such behavior rise to the level of plain incompetence such that the official should not be entitled to qualified immunity.

Thus, the district court erred in concluding that defendants' actions, whether as alleged in the complaint or as found by the criminal court, were not objectively reasonable for civil liability purposes. JA 120. Although the district court noted the criminal court's observation that defendants continued to listen to the calls "'after it became clear that such conversations were privileged and non-pertinent,'" JA 120, the criminal court never explained how it reached that conclusion. Indeed, it is entirely consistent with the bare facts alleged and found by the criminal court that defendants listened only as long as was necessary to determine that the call was non-pertinent, but that that time period was longer than what the criminal court thought (in hindsight and with the added benefit of listening to all the spousal calls) was necessary.[8] According to plaintiff and the criminal court, two out of the sixteen

[8] The monitoring agents, in contrast, listened only to whatever calls they monitored individually. Thus, an individual monitoring agent may have had less experience in identifying the voices of the callers than the criminal court, and was

Continued on next page.

defendants reached similar conclusions that, in hindsight, they wished they had minimized earlier. But it is well-established that qualified immunity determinations are not to be made with hindsight, but rather from the perspective of an official at the time and in the circumstances present. *Saucier* v. *Katz*, 533 U.S. 194, 205 (2001).

Moreover, even if the district court thought a few of the defendants who were responsible for monitoring the alleged handful of non-minimized calls were not entitled to qualified immunity, that provided no basis for the district court to deny qualified immunity to all fifteen of the federal defendants.

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monitoring the calls in real-time, without the benefit of hindsight that the criminal court had, which revealed that none of the spousal calls were pertinent to the investigation. *See United States* v. *Cox*, 462 F.2d 1293, 1301 (8th Cir. 1972) ("[i]t is all well and good to say, after the fact, that certain conversations were irrelevant and should have been terminated. However, the monitoring agents are not gifted with prescience and cannot be expected to know in advance what direction the conversation will take.") (citation omitted).

CONCLUSION

For the foregoing reasons, the order of the district court should be reversed and judgment entered for defendants. In the alternative, the district court's order should be vacated and the case remanded to the district court for reconsideration.

Respectfully submitted,

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DECEMBER 2013

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) because it contains 10,402 words, excluding exempt material, according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on December 24, 2013, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that I will cause 6 paper copies of this brief to be filed with the Court.

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