No. 18-1605

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REX ALLEN FREDERICKSON, Plaintiff-Appellee, v. TIZOC LANDEROS, Detective, Defendant-Appellant.	Appeal from the U.S. District Court Northern District of Illinois Eastern Division Case No. 11-cv-03484 District Judge Thomas M. Durkin

Appeal from the U.S. District Court,
For the Northern District of Illinois, Eastern Division
Case No. 11-cv-03484
The Honorable Judge Thomas M. Durkin

REPLY BRIEF OF DEFENDANT-APPELLANT

ANCEL GLINK, P.C.
Thomas G. DiCianni / ARDC #03127041
tdicianni@ancelglink.com
Attorney for the Defendant-Appellant
140 S. Dearborn, #600
Chicago, Illinois 60603
312-782-7606

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

ARGUMENT

DEFENDANT LANDEROS IS ENTITLED TO QUALIFIED IMMUNITY ON PLAINTIFF'S CLASS OF ONE EQUAL PROTECTION CLAIM, IN THAT THE IRRATIONAL CONDUCT ELEMENT DOES NOT EXIST, AND LANDEROS' ACTIONS DID NOT VIOLATE CLEARLY ESTABLISHED LAW

In defendant Landeros' Appellant Brief, he established that the district court erred in denying him qualified immunity. Landeros showed that although there are many fluid concepts involved, a class of one claim at least requires irrational conduct by a governmental defendant motivated by personal animus of some sort. Landeros established that the qualified immunity analysis has two questions: did the plaintiff establish a constitutional violation, and was the constitutional right allegedly violated clearly established at the time? A plaintiff must satisfy both parts of the test to overcome qualified immunity. Plaintiff's claim here fails both parts. First, plaintiff does not establish a constitutional violation, because the element of irrational conduct is lacking. Plaintiff's claim fails the second prong too, because there is no law clearly establishing that Landeros' conduct was unconstitutional.

Plaintiff's Appellee Brief misses the mark completely. His Appellee Brief uses a classic strategy of misdirection, indiscriminately hurling at the Court a cacophony of irrelevant and misused facts and distortions of the applicable legal concepts hoping something sticks and the case gets punted to the jury. That result, if accepted, denies Landeros qualified immunity. Plaintiff misunderstands the class of one claim, qualified immunity, and the district court's decision.

A. Plaintiff's Claim Fails the First Prong of the Qualified Immunity Test

In his brief, Landeros pointed out the many cases that have held that irrational conduct is an essential element of the class of one claim. (Appellant Brief, p. 16-17). Landeros covered in his Brief how courts have found two ways that a plaintiff can establish irrational conduct: by

showing that a comparator, who is very similarly situated to the plaintiff, was treated differently from the plaintiff; or lacking a comparator, that the conduct of the defendant was objectively irrational. Landeros demonstrated that the undisputed facts, the facts as found by the district court, do not satisfy the irrational conduct element, as a matter of law.

The district court erroneously found sufficient evidence of irrational conduct here, purportedly using either method of proving it. Landeros showed in his Brief how the district court stretched to find a comparator, itself an approach that is inconsistent with the proper qualified immunity analysis and its clearly established law requirement. Landeros pointed out that the district court all but relieved plaintiff of the comparator requirement for his class of one claim, even though the existence of a very similarly situated comparator has been held to be a paramount consideration in the class of one theory. E.g., *Wade v. Collier*, 783 F.3d 1081, 1088-89 (7th Cir. 2015); *Reget v. City of LaCrosse*, 595 F.3d 691, 695-96 (7th Cir. 2010); *LaBella Winnetka, Inc. v. Village of Winnetka*, 628 F.3d 937, 942 (7th Cir. 2010); *McDonald v. Village of Winnetka*, 371 F.3d 992, 1002 (7th Cir. 2004).

The district court completely dispensed with the comparator element. The district court found no need for a comparator, because "Frederickson has shown that a request for a transfer of a LEADS file is not normally rejected; that the requirement to first register out of an old jurisdiction before registering in a new jurisdiction is not enforced; and Detective Landeros testified that he had no reason to question Frederickson's report of residence in Bolingbrook." (Appendix p. A23). None of this, however, establishes what a comparator establishes. That a LEADS file transfer is not normally rejected does nothing to accomplish what the comparator does. That Bolingbrook did not enforce the register-out requirement the same way as Joliet cannot reflect on whether Landeros discriminated against plaintiff. *United States v. Moore*, 543

F.3d 891, 897 (7th Cir. 2008) ("Moore apparently regards the fact that he and the state defendants were charged and prosecuted by separate sovereigns in different fora as immaterial to the similarly situated analysis; indeed his similarly situated argument depends on the premise. However, it is a premise that we reject.") And Landeros may not have known whether Frederickson truly moved out of Joliet, but it is undisputed that Landeros knew Frederickson had not registered out of Joliet yet. How do any of these facts replace the comparator element?

Plaintiff argues that taking issue with the district court's conclusion that these circumstances are the equivalent of a very similarly situated comparator is an appeal of the district court's factual findings. Plaintiff is incorrect. Landeros is appealing the district court's dismissal of the legal importance of the comparator analysis in the class of one claim, not the facts the district court relied on. Landeros is not contesting the district court's finding about Landeros' prior transfers, or refusals to transfer, a LEADS file, or how Bolingbrook handles situations where a sex offender switched jurisdictions without registering-out first. Landeros is contesting that those facts can satisfy the element of a comparator in the class of one construction. Landeros questions the materiality of these facts, that is, what the facts are capable of proving. Materiality of facts is a question of law, not a question of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[W]hile the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Any proof of evidentiary requirements imposed by the substantive law are not germaine to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes.")

Whether those facts can satisfy the comparator requirement is a question of law, which the Court can address in this interlocutory appeal, on the first prong of the qualified immunity analysis. A true comparator in this case would be one who, like plaintiff, failed to register out of Joliet before registering into a new community, but for whom Joliet did not refuse to transfer his LEADS file. That could be a true comparator for purposes of a class of one claim. The facts that the district court relied on to dismiss the comparator requirement are not material to the comparator requirement. Landeros appeals that question of law, proper for review in this case. Because cases have been so clear that the comparator must be very similarly situated, the district court's conclusion that the comparator element of the class of one claim has been satisfied is incorrect, and a question of law for this Court. Reaching for new concepts to satisfy an element of an already confusing and unclear constitutional claim is not how a police officer should be denied qualified immunity.

Landeros then went on to show in his Appellant Brief that the second method of proving irrational conduct, proof of no conceivable rational basis for the government action, is also lacking in this case. Plaintiff argues first that lack of a conceivable rational basis is not part of the class of one analysis. That statement is wrong, at least according to cases that have described class of one jurisprudence. *DelMarcelle v. Brown County Corp.*, 680 F.3d 887, 899 (7th Cir. 2012) ("[O]ur proposed standard requires the plaintiff to plead and prove intentional discriminatory treatment that lacks any justification based on public duties and that there must be some improper personal motive for the discriminatory treatment." See also *Miller v. City of Monona*, 784 F.3d 1113, 1120 (7th Cir. 2015); *Fares Pawn, LLC v. Indiana Department of Financial Institution*, 755 F.3d 839, 845 (7th Cir. 2014); *Louth v. McCollum*, 424 F.3d 631, 634 (7th Cir. 2005). The district courts also read the law differently from plaintiff. See, e.g., *Guth v.*

Tazewell County, 2011 WL 13193294 *4 (C.D. Ill.); *Pearson v. Village of Broadview*, 2018 WL 3036953 *3 (N.D. Ill.); *Eilenfeldt v. Comm. Unit Sch. Dist. #304*, 84 F.Supp. 3d 834, 848 (C.D. Ill. 2015); *Snedeker v. Grotk*, 2017 WL 3704843 *4 (N.D. Ill.); *Paramount Media Group, Inc. v. Village of Bellwood*, 2017 WL 590281 *11 (N.D. Ill.); *Vazquez v. Village of Bensenville*, 22 F.Supp.3d 861, 869 (N.D. Ill. 2014); *Dyson v. City of Calumet City*, 306 F.Supp. 3d 1028, 1036 (N.D. Ill. 2018); *A.J. v. Butler Illinois Sch. Dist. #53*, 2018 WL 1469005 *7 (N.D. Ill.); *CBS Outdoor, Inc. v. Village of Plainfield*, 38 F.Supp.3d 896, 907 (N.D. Ill. 2014). It is clear that a court's ability to hypothesize a conceivable rational basis is a part of the class of one calculation.

Plaintiff goes on to argue that the entire rational basis element is a fact question which cannot be attacked here. But plaintiff is wrong again. Behind plaintiff's major misinterpretation of the class of one claim is his view which equates action motivated by personal animus and *per se* irrational conduct. That clearly is not the case. Plaintiff argues that the jury must decide rational basis and personal animus. (Appellee Brief, p. 18). Plaintiff collapses the two onto each other, or of at other times argues that only one or the other is required. Although Landeros is not conceding any personal animus, the question of personal animus is not at issue in this appeal. What is at issue is that personal animus does not in and of itself establish a class of one cause of action. If it did, it would realize all of the concerns that the courts have shown about constitutionalizing every disappointment of a citizen who has had a previous run-in with the government.

DelMarcelle discussed the irrational conduct element at length, coming to no consensus on its precise role in the class of one analysis. However, even under what this Court has referred to "as the least demanding standard articulated in *DelMarcelle*, plaintiffs must allege that state actions lacked a rational basis for singling them out for intentionally discriminatory treatment."

Miller v. City of Monona, 784 F.3d 1113, 1121 (7th Cir. 2015). "If we [this Court] can come up with a rational basis for the challenged acts, that will be the end of the matter – animus or no." *Fares Pawn, LLC v. Indiana Dept. of Financial Inst.*, 755 F.3d 839, 845 (7th Cir. 2014). See also *Kurtis v. Kopp*, 725 F.3d 681, 686 (7th Cir. 2013).

Whether a government's official's conduct was irrational is a legal questions that depends on whether there is a conceivable rationality for the decision. Plaintiff cites only one case to support his contention that the rationality element is a jury question, but that case does not stand for what plaintiff contends it stands for. Plaintiff cites *T.E. v. Grindle*, 599 F.3d 583 (7th Cir. 2010), in a footnote on page 15 of his Brief, but that case does not in any way stand for the proposition that irrationality in a class of one case is a jury question. It is likely why plaintiff relegated the case to a footnote. Plaintiff splices quotes from *T.E. Grindle* with his own to argue that the case holds that: "if the defendant 'wishes to argue' [quote from the opinion] that her actions were rational, 'she can present these arguments to the jury, but such suggestions do not mean that she is entitled to judgment as a matter of law.'"

Plaintiff's representation of the Court's holding is blatant slight of hand editing. *T.E. v. Grindle* was not a class of one case. It was a traditional equal protection case alleging gender-based discrimination as a result of sexual abuse of students. In discussing whether "a policy of deliberately refusing to respond to complaints of sexual harassment" would support an inference of intentional discrimination, the Court's actual quote was as follows:

> If Grindle wishes to argue that she merely wanted to avoid a scandal or that she would have taken similar steps to conceal abuse if boys had been the victims, she can present those arguments to the jury, but such suggestions do not mean that she is entitled to judgment as a matter of law.

599 F.3d at 589.

The question that the Court in *T.E. v. Grindle* left for the jury turned on the subjective reasonableness of the defendant Grindle's actions. Here, the question is objective rationality, which the jury could never be asked to decide. In a case such as this, could a jury interpret what SORA allows or doesn't in its enforcement? How would parties elucidate a jury on the labyrinth of the SORA statute? A jury would never be equipped to make a decision on whether Landeros' conduct here was objectively rational.

Plaintiff argues Landeros is appealing facts, based on the reference in the Appellant Brief that there was "absolutely no evidence" of a comparator. The statement is accurate, because the district court dismissed the need for a comparator. But the reference to "no evidence" does not make this an appeal disputing factual findings. In *Gutierrez v. Kermon*, 722 F.3d 1003, 1011 (7th Cir. 2013), which plaintiff cites, the Court held "the mere mention of disputed facts in an otherwise purely legal argument is not fatal, and we have held accordingly that jurisdiction exists where the appellant mentions factual disputes but the legal argument is not dependent on those factual disputes….". The solid ground upon which this appeal rests is compared by plaintiff to *Gutierrez*, 722 F.3d 1003 and *Stinson v. Gauger*, 868 F.3d 516 (7th Cir. 2015), but those cases are completely different from this case, and highlight why this Court has jurisdiction to hear this appeal. In *Gutierrez*, the Court held that "we lack jurisdiction when his argument on appeal depends upon and is inseparable from disputed facts," *Gutierrez*, 722 F.3d at 1011, because the argument on the defendant's appeal there depended on whether the plaintiff had an unsteady gait when arrested. *Id.* at 1009-10. The defendant's argument that he had probable cause to arrest the plaintiff rested heavily on this fact, which was disputed. *Id.* at 1011.

Likewise, in *Stinson.* there were key disputed factual issues upon which the defendant relied, like whether certain meetings took place between the defendants and those who organized

these meetings. *Stinson*, 868 F.3d at 527. Landeros' appeal here does not contest facts, it raises only legal issues. Landeros accepts the district court's version of the facts, but argues that they do not show a constitutional violation.

B. Plaintiff's Claim Also Fails the Second Prong of the Qualified Immunity Test

In his Appellant Brief, Landeros showed that there was no clearly established law that his conduct in refusing to transfer the LEADS file violated plaintiff's constitutional rights. Landeros showed that the unusual and unique facts in this case are precisely what qualified immunity is designed to cover. Landeros argues that the district court's conclusion that "the right to police protection uncorrupted by personal animus is clearly established," is a highly generalized statement of clearly established law, and contrary to the correct qualified immunity analysis. The Supreme Court has made fewer principles more pronounced in the past several years than that qualified immunity must look at the precise factual scenario, and not the general principle of law, to determine whether a constitutional right has been violated.

Plaintiff first argues that the challenge here to the constitutional right that the district court found to exist is an "impermissible back-door attempt to argue the facts." (Appellee Brief, p. 22). This again misunderstands Landeros' argument and qualified immunity. Landeros does not re-litigate factual issues here. He simply shows that taking the facts as the district court found them, they do not constitute a violation of any clearly established constitutional right. The law was not adequately developed at the time of Landeros's conduct so that it can be fairly concluded that Landeros, or any objectively reasonable police officer, would know that his actions amount to a constitutional wrong.

A challenge to whether the district court correctly identified and applied clearly established law has never lead to a rejection of an appeal for want of jurisdiction. Such challenges are reviewed all the time. *See, e.g., City & Cty. of San Francisco, Calif. v. Sheehan,*

135 S. Ct. 1765 (2015); *Plumhoff v. Rickard*, 572 U.S. 765 (2014); *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011).

Plaintiff argues that "accepting Landeros' framing of the right would require this Court to credit Landeros' characterization of his conduct, namely that he was simply acting as a responsible officer when he refused to transfer Frederickson's LEADS file." (Appellee Brief, p. 12). Plaintiff misunderstands Landeros' argument. Landeros' motivations, for purposes of this appeal, are irrelevant to the determinations that go into qualified immunity. Qualified Immunity here focuses on the "how," not the "why." Landeros certainly contests that he acted with animus toward plaintiff, but not in this appeal. The district court's finding that there is a fact question on animus and whether it played any part in not immediately transferring plaintiff's LEADS file is not contested here. What is contested here is the conclusion that objectively looking at Landeros' conduct, not his subjective motives, shows a violation of Frederickson's clearly established rights.

Plaintiff argues that the district court found a pattern of discrimination, and a pattern of discrimination against a person has been clearly established as unconstitutional. (Appellee Brief, p. 12). Whether any pattern of discrimination is unconstitutional depends on whether the discrimination is unconstitutional, a question not at issue here. But the premise for plaintiff's argument is wrong, because the district court did not find any pattern of discrimination. The only act that the district court found violative of plaintiff's constitutional rights was the failure to transfer the LEADS file. The other acts that plaintiff argues constituted a pattern of discrimination were only credited by the district court as evidence of animus, and whether there was animus does not make Landeros' conduct clearly unconstitutional, or clearly established as unconstitutional. The district court did not find a pattern of discrimination, nor could it.

The district court deemed the history between plaintiff and Landeros as evidence of animus, not independent unconstitutional acts. The first act plaintiff argues was a part of this pattern is his arrest in 2008, which resulted in a not-guilty verdict. The district court never found, nor was it ever litigated, that there was anything illegal or unconstitutional about that arrest, or Landeros' role in that arrest (other Joliet detectives were also involved, as were private citizens), or whether there was probable cause for the arrest. A finding of not guilty because the charge was not proven beyond a reasonable doubt says nothing about whether there was anything unconstitutional or discriminatory about Landeros' involvement in that arrest.

The next act plaintiff points to is his arrest in 2010 for driving with a suspended license. Plaintiff complains that he was not arrested while driving, but after driving. Landeros gave a reasonable explanation as to why he did not arrest plaintiff on the spot when seeing him driving and knowing he did not have a license (it wasn't to complete some paperwork first, as plaintiff suggests). Nevertheless, there could be nothing unconstitutional about that arrest, because plaintiff was convicted of it. *Graham v. Connor*, 490 U.S. 386 (1989), forecloses any argument that plaintiff's 2010 arrest was actionable under a class of one theory. *DelMarcelle*, at 902-03. And *United States v. Moore*, 543 F.3d 891, 900 (7th Cir. 2008), forecloses any argument that selective prosecution can form a basis for a class of one claim. The district court found the 2010 arrest may support evidence of animus, but not that it was part of an unconstitutional pattern of discrimination.

The next act plaintiff points to is that Landeros allegedly promised plaintiff that he would arrest him if he ever tried to leave Joliet. Assuming that the district court, or any court, is required to credit testimony that could only be true in some alternative universe, Landeros showed in the district court why such a claim could not violate plaintiff's constitutional rights, as

a matter of law, and the district court never found that these claims were part of a pattern that violated plaintiff's rights.

A police threat to a citizen must be "so brutal or wantonly cruel as to shock the conscience," or the threat must exert "coercive pressure on the plaintiff" for the plaintiff to suffer a deprivation of a constitutional right. *Busch v. City of Anthon, Iowa,* 173 F. Supp. 2d 876, 889-90 (N.D. Iowa 2001). This is a really high bar. A few cases from the Seventh Circuit explain just how high the bar is set for a threat to constitute a constitutional violation. In *Renneke v. Florence Cty*., Wis., 594 Fed. Appx. 878 (7th Cir. 2014), the plaintiff had lived in a trailer which the sheriff seized. The plaintiff told the sheriff's deputies that he planned to go to the impound lot and take his trailer out, and alleged that in response to his report, "the sheriff deputies orally threatened to 'arrest, shoot, or kill' him if he tried to access his trailer." This Court held that the plaintiff failed to allege that these threats violated his due process rights "because mere oral threats to arrest and use force to enforce a court order, without the alleged actual use or even show of any force, do not cross the line from tortious misconduct to a violation of substantive due process." Id. at 880-81. See also *Christensen v. County of Boone,* 483 F.3d 454, 464-65 (7th Cir.2007) (alleged trailing of a couple in a squad car to annoy and intimidate them did not shock the conscience); *United States v. Hollingsworth*, 495 F.3d 795, 802 (7th Cir.2007) (questioning child at school without mother's presence did not shock conscience).

Cases from other jurisdictions where police threats fell short of a constitutional violation include: *King v. Olmsted Cnty*., 117 F.3d 1065, 1067 (8th Cir.1997) ("The Constitution does not protect against all intrusions on one's peace of mind. Fear or emotional injury which results solely from verbal harassment or idle threats is generally not sufficient to constitute an invasion of an identified liberty interest."); *Ernst v. Hinchliff*, 129 F. Supp. 3d 695 (D. Minn. 2015) (court

found that though the disclosure of the plaintiff's cell phone number at a community meeting by police was unnecessary and imprudent, it did not constitute a substantive due process violation because it did not "shock the conscience or ... otherwise offend [ ] ... judicial notions of fairness and human dignity"); *Hendricks v. Boltja*, 20 Fed. Appx. 34, 36 (2d Cir.2001) (where the court found that there was no substantive due process violation even though a correctional officer allegedly harassed an inmate on multiple occasions by seizing his legal documents and destroying them, directing racial epithets at him and telling him "to get [his] black ass out of the library," because "verbal harassment was not actionable."); *Hopson v. Fredericksen*, 961 F.2d 1374, 1378 (8th Cir.1992) ("Generally, mere verbal threats made by a state-actor do not constitute a § 1983 claim."); *Patton v. Przybylski*, 822 F.2d 697, 700 (7th Cir. 1987) ("Defamation is not a deprivation of liberty within the meaning of the due process clause. No more is a derogatory racial epithet."); *Maguire v. Municipality of Old Orchard Beach*, 783 F.Supp. 1475, 1484 (D.Me.1992) (police officer removing night stick and threatening the plaintiff with physical harm if he continued to protest did not implicate constitutional right); *Arce v. Banks*, 913 F.Supp. 307, 309 (S.D.N.Y.1996) ("yelling, cursing, or even race-baiting does not violate any constitutionally protected rights" of the plaintiff).

The only cases where a police officer's verbal threats were found unconstitutional involved threats to use force against the plaintiff for no reason, where the threat was imminent and legitimate. In *Black v. Stephens*, 662 F.2d 181 (3d Cir.1981), a plain-clothes officer pointing his weapon at the head of a motorist, without any legitimate law enforcement purpose for doing so, was sufficient to state a claim for a violation of substantive due process. In *Robinson v. Solano County*, 278 F.3d 1007, 1014 (9th Cir.2002), an officer's pointing a loaded weapon at a civilian without a legitimate law enforcement reason shocked the conscience. In *Hawkins v.*

Holloway, 316 F.3d 777 (8th Cir. 2003), the defendant sheriff violated his employees' substantive due process rights when he pointed a loaded gun at them and threatened to shoot them, and the employees believed the threats were legitimate because the sheriff was agitated and had his hand on the trigger. In *Burton v. Livingston*, 791 F.2d 97 (8th Cir. 1986), a prisoner stated a substantive due process claim when he alleged that a prison guard drew and pointed a loaded pistol at him, used a racial epithet, and said "run so I can blow your Goddamn brains out, I want you to run so I'll be justified [in shooting you]."); *Hopson v. Fredericksen*, 961 F.2d 1374, 1378-79 (8th Cir.1992) (distinguishing Burton and finding no due process violation where the officer threatened to knock out the plaintiff's teeth, but did not threaten to kill the plaintiff and never brandished a lethal weapon).

Landeros' alleged threats are galaxies short of the conduct discussed above. The alleged threats were unspecific; lacked any imminency; and were not at all believable, at least if we can have any faith in our judicial system to require that an arrest be based on probable cause. Plaintiff has not and cannot find a case to clearly establish that the alleged threats (which might be better characterized as mere teasing or needling), violated any of plaintiff's constitutional rights.

Finally, plaintiff argues that the fourth act which constituted this pattern of discrimination was plaintiff's arrest in March of 2011, for failing to register. The record is clear that the arrest in March, 2011, had nothing to do with any of the events that occurred in February, which is what the district court focused on as the unconstitutional activity. But plaintiff was also convicted for the arrest in March, so there can be no argument that there was a pattern of discrimination or misconduct based on the March arrest, or that it was unconstitutional.

The distinction is important. It is important for purposes of qualified immunity that this Court focus precisely on the acts which the district court found purportedly violating plaintiff's constitutional rights. The events were in February, 2011, when Landeros did not transfer the LEADS file. That is the only act that the district court found potentially unconstitutional. But as Landeros demonstrated in his Appellant Brief, there was nothing objectively irrational about that action.

The law was not clearly established that plaintiff suffered a constitutional violation. Plaintiff makes the most cardinal mistake regarding qualified immunity, in finding the general legal right as being clearly-established. It's surprising how many times the United States Supreme Court has had to say that analysis of a qualified immunity claim requires focus on the facts of the case, and general rules of law will not suffice.

For Landeros' argument that the law was not adequately developed at the time, he points again to *Saiger v. City of Chicago.,* 37 F.Supp.3d 979 (N.D. Ill. 2014) and *Derfus v. City of Chicago.,* 42 F. Supp.3d 888 (N.D. Ill. 2014), as instructive. While plaintiff's argument is correct that these cases explore whether the plaintiffs' due process rights were violated (Appellee Brief at 26), and the instant matter deals with whether plaintiff's equal protection right was violated, the cases remain relevant. The important takeaway from *Saiger* and *Derfus* is that the law regarding the enforcement of SORA was in flux at the time of the events at issue in the instant matter, and that it was impossible for Landeros to determine whether his conduct constituted a violation of SORA. The right was certainly not "sufficiently clear such that every reasonable official would have understood that what he is doing violates that right because how a reasonable police officer must respond in that situation is completely unclear." *Saiger,* 37 F.Supp.3d, at 986. See also, *Doe v. Village of Arlington Hts.*, 782 F.3d 911, 916 (7th Cir. 2015);

Thayer v. Chiczewski, 705 F.3d 237, 253 (7th Cir. 2012). Interpretation and enforcement of SORA is difficult. Qualified immunity was created for this type of case. *See DelMarcelle v. Brown Cty. Corp.*, 680 F.3d 887, 915 (7th Cir. 2012) ("if discretion is broad and the rules are vague, it will be difficult to show both a violation of a constitutional right and the clearly established nature of that right.").

Plaintiff's argument requires the Court to accept that any act motivated by animus, however that is measured, clearly violates equal protection. That simply is not what the class of one cases have ever established. If plaintiff were correct, the *DelMarcelle* observations about application of qualified immunity in a class of one claim would be way he may off base. It would not matter "if discretion is broad and the rules are vague." Evidence of animus would trump qualified immunity, because any evidence of animus would create a fact question for the jury.

Landeros also must ask what happened to the requirement that the alleged unconstitutional act be significant, rather than de minimus. E.g, *DelMarcelle*, at 895. As Landeros pointed out in his Appellant Brief, plaintiff was never arrested as a result of the LEADS file not being transferred. Plaintiff merely had to register out of Joliet. The district court found that the fear of arrest was sufficient to establish an actionable injury. However, this Court recently decided that the due process clause does not protect a sex offender who was prevented from registering from the fear of apprehension. *Beley v. City of Chicago*, 901 F.3d 823, 827 (7th Cir. 2018). Why would it be any different for a class of one equal protection claim?

Plaintiff's argument that *Hilton v. City of Wheeling*, 209 F.3d 1005 (7th Cir. 2000) and *Hanes v. Zurick*, 578 F.3d 491 (7th Cir. 2009), clearly established plaintiff's right here is

misguided. Neither of those cases involved SORA. Neither shed any light on the circumstances under which a sex offender has the right to have his LEADS file transferred or when an officer can conduct an investigation into a sex offender's registering. While they articulate the point that a government official cannot act corruptly out of animus, they could not have provided fair warning to Landeros at the time of his conduct that what he was doing was a constitutional violation, because they do not take into account the myriad of factors that Landeros encountered. They are not "particularized" to the facts of this case, and therefore cannot be found to clearly establish the rights that plaintiff claims Landeros violated. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

It is true that the Supreme Court's case law does not require a case directly on point for a right to be clearly established. *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018). But there has to be something to show similar circumstances in order for the officer to have warning that his or her conduct violates such a right. *White v. Pauly*, 137 S. Ct. 548 (2017), demonstrates this. In *White*, the Supreme Court chastised the lower court because it "misunderstood the 'clearly established' analysis: it failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment." *Id.* at 552. Because the lower court only relied on cases that set general principles that were not particularized to the circumstances the officer faced, no clearly established right could be found. *Id.* This failure to identify a case that was factually similar was reason enough for qualified immunity to be granted. *Id; see also Thompson v. Cope*, 900 F.3d 414 (7th Cir. 2018) (reversing the district court in part because it failed to identify a case with facts sufficiently particularized to those of that case).

Like *White*, neither the district court nor plaintiff has identified a case with facts sufficiently particularized to the instant matter that could have given Landeros fair warning that his conduct violated a clearly established right. An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Kisela*, 138 S. Ct. at 1153. The contours of such a right were not clearly defined enough for Landeros when the events which are the subject of this action took place. This failure is fatal to Plaintiff's argument and is why qualified immunity should be granted in favor of Landeros.

CONCLUSION

The district court interpreted qualified immunity far more narrowly than it should have. The violation of a clearly established constitutional right is an "exacting standard" that "protects all but the plainly incompetent or those who knowingly violate the law." *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1774 (2015). This appeal challenges the district court's interpretation of qualified immunity, and argues that the facts as accepted by the district court do not show that Landeros violated any of plaintiff's clearly established constitutional rights. The appeal does not rest upon a disputed issue of material fact, as plaintiff claims, nor does it raise impermissible factual challenges. It challenges the district court's legal conclusions, which improperly interpreted the application of the qualified immunity doctrine. Therefore, this Court should reverse the district court's ruling and find that Defendant Landeros was entitled to qualified immunity as to plaintiff's claim.

Respectfully submitted,

/s/ Thomas G. DiCianni
Thomas G. DiCianni / ARDC #3127041

tdicianni@ancelglink.com
ANCEL GLINK, P.C.
140 South Dearborn Street / Sixth Floor
Chicago, IL 60603
312-782-7606

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

1. This brief complies with the type volume limitation of FED. R. APP. P. 32(a)(7)(B) because: this brief contains 6,580 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because: this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in 12-point Times New Roman font.

Dated: October 15, 2018

/s/ Thomas G. DiCianni
Thomas G. DiCianni / ARDC #3127041
Attorney for Defendant/Appellant Tizoc Landeros

CERTIFICATE OF SERVICE
Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on **October 16, 2018**, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

By: /s/ Thomas G. DiCianni
Attorney for Detective Tizoc Landeros

4810-3912-3320, v. 1