No. 18-1605

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH DISTRICT

**REX ALLEN FREDERICKSON,**

Plaintiff-Appellee

v.

**DETECTIVE TIZOC LANDEROS,**

Defendant-Appellant

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

# PLAINTIFF-APPELLEE REX FREDERICKSON'S RESPONSE TO DEFENDANT-APPELLANT TIZOC LANDEROS'S APPEAL

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**Oral Argument Requested**

## CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, counsel for Plaintiff-Appellee Rex Frederickson states as follows:

**1.** The full name of every party that the undersigned attorneys represented in this case is: Rex Frederickson.

**2.** The names of all law firms and the partners and associates that appeared for the party now represented by us in the trial court or are expected to appear in this Court are:

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**3.** The parent corporations and any publicly held companies that own ten percent or more of the stock of the party represented by the attorneys: N/A.

RESPECTFULLY SUBMITTED,
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## I. JURISDICTIONAL STATEMENT

The jurisdictional statement filed by Appellant Tizoc Landeros ("Landeros") is complete and correct as regards the district court's jurisdiction.

Landeros's jurisdictional statement regarding the appellate jurisdiction in this Court is neither complete nor correct. This Court lacks jurisdiction to hear this appeal.

Pursuant to the collateral-order doctrine, under 28 U.S.C. § 1291, this Court has jurisdiction over denials of qualified immunity on summary judgment only to the extent that the appellant seeks review of purely legal determinations. *Johnson v. Jones*, 515 U.S. 304, 313 (1995); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Landeros raises one issue in this appeal: whether Landeros should be denied qualified immunity based on the district court's determination that evidence existed that he harbored animus toward Appellee Rex Frederickson ("Frederickson"). *See* ECF 22, Br. & Required Short App'x of Def.-Appellant ("Br.") at 3. In his brief, Landeros answers this question in the negative, arguing the district court erred by (1) finding a genuine issue of material fact exists as to whether Landeros treated Frederickson differently and had no rational basis for doing so; and (2) finding Landeros violated Frederickson's constitutional right to equal protection by investigating Frederickson instead of immediately transferring his registration information to Bolingbrook Police Department so that Frederickson could register as required by the Illinois Sex Offender Registration Act ("SORA") in Bolingbrook. *Id.* at *passim*. As discussed below, the first argument impermissibly asks this Court to "reconsider the district court's determination that certain genuine issues of fact

exist." *McKinney v. Duplain*, 463 F.3d 679, 688 (7th Cir. 2006) (finding there was no appellate jurisdiction where the defendant-appellant challenged material facts while arguing his actions were "objectively reasonable"). The second argument mischaracterizes the district court's holding by casting Landeros's conduct in the light most favorable to him and ignoring evidence the district court found regarding the history of harassment and the "extraordinary" nature of Landeros's actions. Although Landeros attempts to frame this argument as a purely legal question, it too impermissibly asks this Court to accept Landeros's version of the facts. This Court has warned officials seeking qualified immunity at summary judgment against appeals based solely on factual determinations, stating that if "we detect a back-door effort to contest the facts, we will reject it and dismiss the appeal for want of jurisdiction." *Gutierrez v. Kermon*, 722 F.3d 1003, 1010 (7th Cir. 2013) (quoting *Jones v. Clark*, 630 F.3d 677, 680 (7th Cir. 2011)). This appeal constitutes just such a "back-door effort." As such, it should be dismissed for lack of jurisdiction. *See id.*; *see also Stinson v. Gauger*, 868 F.3d 516, 528 (7th Cir. 2015); *see also Whitlock v. Brueggemann*, 682 F.3d 567, 575 (7th Cir. 2012) ("No matter how vigorously the police defendants contend that these issues are the sort of abstract legal questions we have jurisdiction to review at this stage of the litigation, they are not.").

## II. STATEMENT OF THE ISSUES

1. Whether this Court lacks jurisdiction over this interlocutory appeal because the district court properly determined that there are genuine issues of material fact regarding whether Landeros's actions were

motivated solely by personal animus, precluding summary judgment on qualified immunity.

2. If the Court determines that it has jurisdiction, whether Landeros may be held liable for violating Frederickson's equal protection right to police protection uncorrupted by personal animus.

## III. STATEMENT OF THE CASE

### A. Procedural History

On May 24, 2011, Frederickson brought this civil rights action under 42 U.S.C. Section 1983. *See Frederickson v. Cnty of Will et al.*, 1:11-cv-03484 (N.D. Ill.), Dkt. 1 (hereinafter, "Dkt."), Compl.. Frederickson alleged that members of the Joliet and Bolingbrook Police Departments violated his constitutional rights to due process and equal protection by preventing him from registering as a sex offender as he is required to do under SORA. Dkt. 115, Third Amend. Compl.. Frederickson also asserted a conspiracy under the Fourteenth Amendment and a state law civil conspiracy claim against the defendants. *Id.*

Following the conclusion of fact discovery, Frederickson voluntarily settled the claims against the Bolingbrook defendants. Dkt. 241, Mot. for Leave to File Fourth Amend. Compl.; Dkt. 248, Stip. for Dismissal. The Joliet defendants filed a motion for summary judgment, arguing, among other things, that they were entitled to qualified immunity. Dkt. 207; 208, Joliet Mot. for Summary Judgment and Mem. In Support of Mot. for Summary Judgment. The district court granted summary judgment as to Frederickson's claims of due process and conspiracy, but denied summary judgment as to Frederickson's equal protection claim against Landeros,

holding that a reasonable jury could find that Landeros violated Frederickson's right to police protection uncorrupted by personal animus. *See* Dkt. 263, Mem. Op. and Order ("Op."). Landeros wrongly filed this interlocutory appeal. *See* Br. at *passim*.

### B. Frederickson Dutifully Registered As A Homeless Sex Offender

Frederickson was trying to start a new chapter in his life, with a new job and living in a new town, when the actions of Landeros forced Frederickson to quit that job and move back to Joliet. Due to a past criminal conviction, Frederickson is a convicted sex offender and, as such, is subject to SORA, which requires sex offenders to register periodically with their local police department. Dkt. 216, Pl. Stmt. Of Add'l. Material Facts ("Dkt. 216"), at Ex. F. SORA requires that sex offenders who are homeless register each week with the police department in the jurisdiction where they are staying. 730 ILCS 150/6; 730 ILCS 150/3(a). Violations of SORA constitute a felony. 730 ILCS 150/10(a). Between 2004 and February 2011, Frederickson was homeless living in Joliet and under SORA, was required to—and did—register with the Joliet Police Department each week. Defs.' Local R. 56.1 Stmt. Of Material Facts, Dkt. 209 ( "Dkt. 209") at ¶4.

When an offender registers pursuant to SORA, he provides a "statement in writing signed by the [offender] giving the information that is required by the [Illinois] State Police." 730 ILCS 150/8; *see also* 730 ILCS 150/3(a). The information an offender must provide includes "address," "place of employment," "telephone number," and "e-mail addresses." 730 ILCS 150/3(a). After an offender provides the required written statement with the required information, his

registration is complete. *See* 730 ILCS 150/8. The law enforcement agency then transmits the registration information into the electronic Law Enforcement Agency Data System ("LEADS"). *See, e.g.*, Dkt. 209, Ex. A, Excerpts of Apr. 28, 2016 Dep. of Tizoc Landeros, ("Def. Landeros Dep.") at 74:24-77:24 (explaining how registration details are updated into LEADS). LEADS is a statewide database that enables law enforcement officers across Illinois to search for individuals and see their registration details. *Id.* at 80:1-81:24. Only one law enforcement agency has "ownership" of a LEADS file at any given time. *Id.* at 75:15-77:24 Other law enforcement agencies can view a LEADS file, but only the jurisdiction that "owns" the LEADS file can update it. *Id.* at 75:15-81:24.

Additionally, SORA requires offenders to inform law enforcement of any change to an offender's "residence address." *See* 730 ILCS 150/6. While SORA prescribes that when an offender changes residences, he must register both in the jurisdiction of his new address and register out of the jurisdiction of his old address, there is no requirement that an offender register out of the old jurisdiction *prior to* registering into the new one. *Id.* Rather, they are independent requirements, both of which need to occur within three days of the change of address. *Id.*

### C. Landeros Harassed Frederickson For Years

For approximately the first four years that Frederickson lived in Joliet, Joliet Detective Moises Avila ("Avila") registered Frederickson. Dkt. 209, Ex. F, March 9, 2016 Dep. of Moises Avila ("M. Avila Dep."), at 61:15-62:5. Frederickson and Avila never had a conflict during this time. *Id.* In 2007, Landeros replaced Avila as the detective in charge of SORA registrations. *Id.* at 31:16-20; Def. Landeros Dep. at

147:22-148:12. From then on, Frederickson was regularly and repeatedly harassed by Landeros. Dkt. 216, Ex. A, July 6, 2016 D. Brown Dep. ("D. Brown Dep.") at 95:7-12.

Landeros refused Frederickson's repeated requests to make small changes to his registration—such as amending the name of Frederickson's employer from Greg's Auto Body to Greg's Body Shop—despite knowing that if an offender has inaccurate information on his registration form, that is a violation of SORA that can subject an offender to arrest and prosecution. Dkt. 183, Ex. A, Feb. 18, 2016 R. Frederickson Dep. ("Frederickson Dep.") at 45:16-18; Def. Landeros Dep. at 169:18-175:15. After Landeros refused to update Frederickson's registration forms multiple times, Frederickson told Landeros that he planned to leave Joliet. Frederickson Dep. at 300:18-302:4; Dkt. 216, Ex. K, Feb. 22, 2011 R. Frederickson Aff. ("Frederickson Aff.") at ¶8. In response, Landeros threatened Frederickson with arrest if Frederickson ever left Joliet. *Id.*

In 2008, Landeros decided to investigate Frederickson's residency. Def. Landeros Dep.at 185:1-21 He subsequently arrested Frederickson for failure to register under SORA. *Id.* After spending a year in jail, Frederickson was acquitted of the charge. *See* Dkt. 209 at ¶53; *see also* Dkt. 216, Ex. G, *People v. Frederickson*, No. 08 CF 1134 (Ill. Cir. Ct. – Will Cty. (12th Cir)).

In November 2010, while Frederickson was waiting to register in the Joliet police department lobby, Landeros took the unusual and unprecedented action of arresting him for driving on a suspended license. Frederickson Dep. at 344:19-

345:2; Def. Landeros Dep. at 193:7-194:1. Landeros claimed that he had seen Frederickson driving a week previously, but that he did not make the arrest at the time because he wanted to handle some paperwork first. Def. Landeros Dep. at 198:16-199:4. Landeros admitted this was the only time he ever arrested someone for driving on a suspended license while that individual was not driving and two of Landeros's fellow police officers admitted they had never heard of such a situation. *Id.* at 200:16-21; M. Avila Dep. at 121:21-122:24; Dkt. 216, Ex. D., March 9, 2016 P. Rodriguez Dep. ("P. Rodriguez Dep.") at 66:3-11.

After being arrested twice by Landeros within eighteen months, Frederickson decided to leave Joliet. Dkt. 209, Ex. B, Frederickson Dep. at 296:22-298:19. On January 26, 2011, Frederickson registered with Landeros, and told Landeros that he planned to leave Joliet. *Id.* Again, Landeros refused to update Frederickson's registration form to accurately reflect his place of employment and threatened to arrest Frederickson if he left Joliet. *Id.* at 295:10-299:3.

### D. Landeros Interfered With Frederickson's Attempts To Register In Bolingbrook

On February 8, 2011, Frederickson moved to Bolingbrook to take a job on a trial basis with J&J Autobody. Dkt. 216, Ex. E, May 31, 2016 J. Scacco Dep. ("J. Scacco Dep.") at 20:17-21:9; Dkt. 216, Ex. I, Frederickson's J&J Autobody Application. The next day—one week after his last registration in Joliet—Frederickson reported to the Bolingbrook Police Department to register. Dkt. 183, Ex. M, Feb. 25, 2016 N. Schmidt Dep. at 30:23-32:7; 34:10-14. Bolingbrook took his registration. *Id.* The Bolingbrook records clerk, Nicole Wlodarski, then contacted the Joliet Police

Department to request that they transfer jurisdiction of Frederickson's LEADS file so that Bolingbrook could input Frederickson's February 9, 2011 registration into the database. Dkt. 183, Ex. I, Apr. 1, 2016 N. Wlodarski Dep. ("N. Wlodarski Dep.") at 65:17-66:1. Wlodarski's notes indicate she spoke with Landeros (*see* Dkt. 216 at Ex. O, June. 12, 2015 K. Teppel Memo. to File), and Landeros testified that he "advised Bolingbrook that [Frederickson] was a homeless sex offender employed in Joliet, and . . . his LEADS file belonged to the Joliet Police Department." N. Wlodarski Dep. at 64:3-65:11; *see also* Dkt. 209 at Ex. G, Trial Tr. at 22, *People v. Frederickson*, No. 11 CF 415 (Ill. Cir. Ct. – Will. Cty. (12th Cir.)). The Joliet Police Department refused to release Frederickson's LEADS file to Bolingbrook. N. Wlodarski Dep. at 65:17-66:1. During her deposition, Wlodarski testified that on approximately twenty occasions she had previously encountered a situation where an offender registered in Bolingbrook while his or her LEADS file was still owned by a different jurisdiction, and this was the only occasion she could remember where the other police department refused to transfer the LEADS file. *Id.* at 119:19-121:8. Similarly, Bolingbrook Detective Sean Talbot ("Talbot") testified at his deposition that he could not recall a single other time where a police department refused to transfer ownership of a LEADS file. Dkt. 183, Ex. C, Apr. 8, 2016 S. Talbot Dep. ("S. Talbot Dep.") at 28:17-22. Likewise, Diane Kloepfer, who handled transferring of LEADS files for Bolingbrook Police Department for "most of" 19 years, could not recall such an instance. Dkt. 183, Ex. B, May 19, 2016 D. Kloepfer Dep. ("D. Kloepfer Dep.") at 24:11-25:15.

At some point between February 9 and February 11, 2011, Landeros spoke to Talbot about Frederickson. Def. Landeros Dep. at 207:12-208:2. Talbot testified during his deposition that Landeros told him Frederickson was trying to "pull the wool over [the Bolingbrook Police Department's] eyes," and that Landeros "was working on proving that he was actually living in Joliet." S. Talbot Dep. at 65:18-66:24. After his conversation with Landeros, Talbot spoke with another Bolingbrook records clerk, Pamela Dunning-Ganczewski, who sent an email to the Bolingbrook Police Department Records listserv, stating that "[Talbot] came in on 2/11/11 and stated that Rex Frederickson will becoming [*sic*] in on 2/16/11 to do his sex offender registration again we will not take his registration due to the fact he lives in Joliet [sic] he is not homeless." Dkt. 216, Ex. B, May 19, 2016 P. Dunning-Ganczewski Dep. at 22:12-15; Dkt. 216, Ex. J, Feb. 11, 2011 Email from P. Dunning. Another Bolingbrook police officer, Sergeant Craig Gunty, then forwarded that email to the entire Bolingbrook Police Department, adding that "[Joliet Police Department] has alerted us to the fact that this guy doesn't want to pay their mandatory fee so he is going to try and scam us into doing it. Per JPD don't register him here please." Dkt. 216, Ex. J, Feb. 11, 2011 Email from C. Gunty. Despite the fact that Landeros told individuals at Bolingbrook's Police Department that they should refuse Frederickson's registration because he was living in Joliet, Landeros testified at his deposition that he had no reason to believe that Frederickson was not residing in Bolingbrook. Def. Landeros Dep. at 228:23-229:5; 232:5-16; 235:23-236:8.

Then, on the morning of February 16, 2011, Frederickson was in Joliet picking up his tools. Frederickson Dep. at 83:3-5; 99:20-23. Because he did not know whether he would be able to travel to Bolingbrook that day, he registered in Joliet that morning. *Id.* That afternoon, he was able to obtain a ride to Bolingbrook, and tried to register in Bolingbrook as he intended to work at J&J Autobody during the upcoming week. *Id.* at 84:23-85:4. However, the Bolingbrook officer Frederickson spoke with refused to register him, and ordered Frederickson to go back to Joliet. Dkt. 183, Ex. K, Apr. 14, 2016 J. Brick Dep. ("J. Brick Dep.") at 43:1-49:23. Bolingbrook officials also refused to register Frederickson on February 23, 2011. J. Brick Dep. at 59:2-10; S. Talbot Dep. at 83:19-85:4. The Bolingbrook Police Department, through its corporate representative, admitted that Frederickson is the only person whom Bolingbrook has ever refused to register. Dkt. 183, Ex. F, K. Teppel Dep. ("Teppel Dep.") at 70:13-17. Similarly, Joliet Detective Moises Avila could not recall any instance where he refused to update a registration form over the three years in which he was in charge of registrations in Joliet. M. Avila Dep. at 48:1-16.

As the District Court properly found, when viewed in the light most favorable to Frederickson, the evidence shows that Frederickson relocated to Bolingbrook when he registered in Bolingbrook on February 9, 2011 and that he lived in Bolingbrook on an intermittent to full-time basis between February 9, 2011 and February 23, 2011. Op. at 8-9; Frederickson Dep. at 102:23-103:6; 103:20-104:4; D. Brown Dep. at 51:10-14; 54:5-11. However, after Bolingbrook refused to register Frederickson

on February 23, 2011, Frederickson had no choice but to quit his job in Bolingbrook and move back to Joliet or be subject to arrest for violations of SORA. Frederickson Dep. at 95:15-23. Frederickson therefore reported to the Joliet Police Department each day on March 1, 2, and 3, 2011, trying to register. *Id.* at 321:18-323:6. Frederickson was refused each time, and he was arrested and charged with failure to register on March 3, 2011. *Id.* at 325:1-326:9 (March 1), 326:10-328:2 (March 2), 328:4-23 (March 3); Landeros Dep. at 263:16-264:5.

## IV. SUMMARY OF ARGUMENT

In his appeal, Landeros argues that the district court erroneously denied summary judgment on the basis of qualified immunity because Frederickson failed to show that Landeros violated a clearly established constitutional right. *See* Br. at 13-14. According to Landeros, the district court wrongly determined that a reasonable jury could conclude Landeros's actions violated Frederickson's constitutional right to equal protection. *See id.* In doing so, Landeros impermissibly asks this Court to re-examine the facts and reverse the district court's determination that there are genuine issues of material fact regarding whether Landeros's actions were irrational and motivated by animus. This Court lacks jurisdiction to consider disputes of material fact on an interlocutory appeal, and therefore this appeal should be dismissed for want of jurisdiction. *See McKinney*, 463 F.3d at 691-92; *Stinson*, 868 F.3d at 528; *Gutierrez*, 722 F.3d at 1014.

In an attempt to avoid dismissal for lack of jurisdiction, Landeros purports to raise a question of law, namely, whether the district court erred in finding that

Frederickson had a clearly established right to have his LEADS file transferred immediately, such that a police officer who investigates a homeless sex offender's residence before doing so violates the Constitution. *See* Br. at 20. As an initial matter, Landeros misstates the constitutional right on which the district court based its decision. The district court held that a reasonable jury could conclude Landeros violated Frederickson's right to police protection uncorrupted by personal animus. *See* Op. at 23-24. Further, Landeros's improper framing of the constitutional right at issue represents just the kind of "back-door effort to contest the facts" that requires dismissal for lack of jurisdiction. *Gutierrez*, 722 F.3d at 1010. Accepting Landeros's framing of the right would require this Court to credit Landeros's characterization of his conduct, namely, that he was simply acting as a responsible officer when he refused to transfer Frederickson's LEADS file. But the district court found that a jury could conclude Landeros was not so motivated and in fact abused his authority by discriminating against Frederickson due to personal animus. *See* Op. at 20-25. Landeros's attempt to relitigate in this forum a factual issue determined by the district court must be rejected on jurisdictional grounds. *See, e.g., Gutierrez*, 722 F.3d at 1010.

Even if Landeros had properly framed the constitutional right at issue, his appeal should be denied on the merits. It is well settled in this Circuit that a pattern of discrimination by a state actor violates the equal protection clause, and that there is a clearly established right to police protection uncorrupted by personal animus. *Esmail v. Macrane,* 53 F.3d 178, 180 (7th Cir. 2005); *Hilton v. City of*

*Wheeling*, 209 F.3d 1005, 1007 (7th Cir. 2000). As the district court properly found, Frederickson presented "strong" evidence of Landeros's history of harassment, threats, and arrests. Op. at 23. That evidence, combined with the "extraordinary" nature of Landeros's actions to "stymie[]" Frederickson's ability to register, work, and live in Bolingbrook, "is sufficient for a reasonable jury to conclude" that Landeros's actions were wholly irrational, taken solely out of personal animus, and violated Frederickson's equal protection rights. *Id*. at 24-25.

## V. STANDARD OF REVIEW

The Court reviews a denial of summary judgment for qualified immunity *de novo*. *See Estate of Escobedo v. Bender*, 600 F.3d 770, 778 (7th Cir. 2010). The Court must credit each and every fact favorable to Frederickson, while discounting each and every fact attributable to Landeros that contradicts any facts favorable to Frederickson. *See Estate of Clark v. Walker*, 865 F.3d 544, 550 (7th Cir. 2017) (stating that "[w]hen we review a defendant's motion for summary judgment based on qualified immunity we consider '. . . whether the facts, taken in the light most favorable to the plaintiff, show that the defendant violated a constitutional right'" and holding that the Seventh Circuit did not have jurisdiction to address that question because it "turn[ed] on factual questions"). Indeed, "[t]he official's right to immunity turns on two questions," the first being "whether the facts presented, taken in the light most favorable to the plaintiff, describe a violation of a constitutional right." *Jones*, 630 F.3d at 680 (affirming the denial of qualified immunity where the facts, as presented by plaintiff-appellee, "reveal[] nothing but a blatant and embarrassing abuse of police power"); *Trepanier v. Davidson*, No. 03-cv-

6687, 2006 WL 1302404, *10 (N.D. Ill. May 5, 2006) ("for purposes of summary judgment, the Court may not accept Defendants' version of the facts") (citing *Abdullahi v. City of Madison*, 423 F.3d 763, 773 (7th Cir. 2005)). Accordingly, to the extent that any of Landeros's facts contradict Frederickson's facts, the Court must disregard the former entirely and credit only the latter. *See Williams v. Ind. State Police Dep't*, 797 F.3d 468, 482 (7th Cir. 2015) (declining to credit the police officers' version of events because the Court lacks jurisdiction to review the record "to determine whether the district court erred in finding that a genuine issue of material fact exists").

This Court has an obligation to examine its own jurisdiction in every case before it, *sua sponte* if necessary. *Mostly Memories, Inc. v. For Your East Only, Inc.*, 526 F.3d 1093, 1096-97 (7th Cir. 2008).

## VI. ARGUMENT

### A. This Court Lacks Jurisdiction To Review The District Court's Finding That A Genuine Issue Of Material Fact Precludes Summary Judgment

Frederickson asserted an equal protection "class-of-one" claim against Landeros. As the district court recognized, to prevail on his claim, Frederickson will ultimately have to convince a jury that he was intentionally treated differently from other similarly situated individuals, and there was no rational basis for the difference in treatment. Op. at 18; *see also Brunson v. Murray*, 843 F.3d 698, 707-08 (7th Cir. 2016) (finding that Plaintiff "offered evidence sufficient to avoid summary judgment

that there was no rational and legitimate basis" for the discriminatory treatment).[1] Landeros does not argue that irrational conduct by a government actor can never be the basis of a meritorious equal protection claim. *See* Br. at *passim*. Rather, he argues that the evidence supported a rational basis for his conduct towards Frederickson. *See*, *e.g.*, Br. at 18 ("The district court erred on the rationality element."); *id.* at 19 ("So what then was irrational about Landeros' holding up of the transfer of plaintiff's LEADS file? . . . . What was irrational about Landeros' actions?"); *id.* at 20 (arguing that "it cannot be concluded that Landeros [sic.] refusal to immediately transfer plaintiff's LEADS file was wholly, objectively, and irrefutably irrational"). As a result, his appeal must be dismissed for lack of jurisdiction.

[1] Throughout his brief, Landeros suggests that at summary judgment, Frederickson was required to prove conclusively that there "could be no conceivable objective rational basis for [Landeros's] action." *See, e.g.,* Br. at 19-20 ("Plaintiff has failed the first part of the part of the qualified immunity test, because it cannot be concluded that Landeros refusal [*sic*] to immediately transfer plaintiff's LEADS file was wholly, objectively, and irrefutably irrational."); *id.* at 16 (stating Frederickson's claim fails because he has not shown "objective proof . . . of irrational conduct."). Landeros is wrong. In order to defeat qualified immunity at summary judgment, Frederickson only needed to show that a reasonable jury could find that Landeros's actions were motivated by personal animus and lacked a rational basis. *See T.E. v. Grindle*, 599 F.3d 583, 588–89 (7th Cir. 2010) (holding that "plaintiffs have offered evidence sufficient to defeat summary judgment" because they "have offered evidence that would let a jury easily conclude" defendant violated plaintiffs' equal protection rights and that if the defendant "wishes to argue" that her actions were rational, "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").

### 1. This Court Has Repeatedly Held That There Is No Appellate Jurisdiction Over Factual Determinations After The Denial Of Qualified Immunity At Summary Judgment

This Court lacks jurisdiction to re-examine the district court's finding that a genuine issue of fact exists as to the rationality of Landeros's conduct. Indeed, it is well-established that in an interlocutory appeal from the district court's denial of qualified immunity at summary judgment, appellate jurisdiction only extends to purely legal questions. *See*, *e.g.*, *McKinney*, 463 F.3d at 686 (dismissing interlocutory appeal from denial of qualified immunity at summary judgment where defendant argued that his actions were "objectively reasonable" and the district court erred in finding genuine issue of fact for trial); *Huff v. Reichert*, 744 F.3d 999, 1004 (7th Cir. 2014) (stating that summary judgment orders are only appealable where they "concern 'an abstract issue of law'") (citing *McKinney*, 463 F.3d at 686).

This Court routinely dismisses for lack of jurisdiction interlocutory appeals of orders denying summary judgment where, as here, the arguments depend on and are inseparable from factual disputes. *See, e.g.*, *Gutierrez,* 722 F.3d at 1010; *id.* at 1014 (dismissing for lack of jurisdiction because defendant's "entire argument is dependent upon a disputed fact"); *see also Stinson*, 868 F.3d at 526; *McKinney*, 463 F.3d at 688; *Huff*, 744 F.3d at 1004; *Whitlock*, 682 F.3d at 575; *Via v. LaGrand*, 469 F.3d 618, 625 (7th Cir. 2006) (dismissing an appeal for lack of jurisdiction where the defendant-appellant argued that there was "evidence in support" of her contention that she acted reasonably, but "the district court, however, concluded otherwise"); *Nettles-Bey v. Williams*, 819 F.3d 959, 961 (7th Cir. 2016) (holding that the Court

did not have jurisdiction where "Appellants' brief makes it clear that they think that the district judge got the facts wrong").

For example, in *Stinson v. Gauger*, the district court found that the plaintiff, a man wrongfully accused of murder, presented sufficient evidence that the defendants fabricated evidence and withheld exonerating evidence in his criminal trial, to defeat a claim of qualified immunity. 868 F.3d at 525. In their appeal of the district court's denial of summary judgment, the defendants claimed to credit the plaintiff's account of the facts, "ask[ing] only whether [the plaintiff's] versions of the facts means they violated a clearly established constitutional right." *Id.* And yet, this Court noted the defendants omitted any mention of a meeting that was critical to when and why a defendant changed his analysis regarding certain evidence in the case. *Id.* ("[Defendants]' briefs omit the November 6 pre-interview meeting, despite the centrality of it to the district court's analysis and [Plaintiff]'s fabrication and *Brady* claims."). Further, the "nature of the defendants' appeals further demonstrate[ed] that they do not present the requisite abstract questions of law," because the defendants "maintain[ed] they did not intentionally fabricate their opinions and so did not fail to turn over *Brady* material." *Id.* at 526. However, whether the defendants intentionally fabricated their opinions was a question of fact. *Id.* at 527-28; *see also Johnson*, 515 U.S. at 316. Because the defendants' appeal made clear that they did not accept the plaintiff's version of facts

as true, this Court dismissed the appeal for lack of jurisdiction. *Stinson*, 868 F.3d at 528.

*Gutierrez v. Kermon* is also instructive. There the plaintiff sued police officers for violating his Fourth Amendment rights by seizing him without reasonable suspicion or probable cause after the officers arrested plaintiff-appellee for public intoxication and resisting arrest. 722 F.3d 1003. One of the defendants argued he was entitled to qualified immunity as a matter of law despite the factual disputes identified by the district court, which included whether the plaintiff was swaying or unsteady on his feet. *Id.* at 1009-10. However, the defendant's appellate arguments were premised on a self-serving version of the disputed facts. Specifically, he argued that he had reasonable suspicion to arrest the plaintiff in part because the plaintiff had an unsteady gait. *Id.* On summary judgment, the parties disputed whether or not the plaintiff's gait was unsteady, and the district court had found that this was a genuine factual dispute. *Id.* at 1009. Because the defendant's argument was "entirely dependent" on a finding that the plaintiff's gait was unsteady at the time of the arrest, this Court held the defendant "effectively plead[ed] himself out of court by interposing disputed factual issues in his argument." *Id.* at 1011. Accordingly, this Court lacked jurisdiction to consider the appeal. *Id.* at 1014.

#### 2. Landeros Impermissibly Challenges The District Court's Factual Determinations

In this appeal, Landeros's argument hinges on a disputed factual issue—whether his actions were motivated by animus or whether there was a rational

basis for his treatment of Frederickson. *Stinson*, 868 F.3d at 527-28 ("The intent . . . is a question of fact that the district court concluded could be inferred in [Plaintiff-Appellee]'s favor by the evidence in the record at summary judgment, and the defendants' challenge to whether that is true is the type of appeal forbidden by *Johnson*."); *cf. Greengrass v. Int'l Monetary Sys. Ltd.*, 776 F.3d 481, 487 (7th Cir. 2015) (in employment case, reversing the district court's grant of summary judgment because "there is a question of fact as to the believability of an employer's reasons for an employment decision"). Landeros "interpos[es] disputed factual issues in his argument" throughout his brief. *See Gutierrez*, 722 F.3d at 1011. For example, in arguing that his actions were rational, Landeros wrongly asserts that there was "absolutely no evidence" that Frederickson was treated differently from other sex offenders. *See* Br. at 17; *see also Nettles-Bey*, 819 F.3d at 961 (dismissing an appeal for lack of jurisdiction where the defendant-appellant argued that "the record is devoid of evidence to support the inference that religious discrimination led to Plaintiff's arrest and detention"). Yet, Frederickson presented, and the district court credited at summary judgment ample evidence that Landeros singled him out for differential treatment on numerous occasions. For example:

- Landeros repeatedly threatened Frederickson with arrest if Frederickson moved out of Joliet. Frederickson Dep. at 300:18-302:4; Frederickson Aff. at ¶8; Dkt. 209, Ex. B, Frederickson Dep. at 295:10-299:3.
- Landeros refused to update Frederickson's registration, even though Landeros admitted that he generally updated registrations for other offenders with new information. Frederickson Dep. at 45:16-18; Def. Landeros Dep. at 98:14-18; 169:18-175:15; 295:10-299:3.
- Landeros arrested Frederickson for driving on a suspended license while Frederickson was standing in the lobby of Joliet Police Department trying

to register. Frederickson Dep. at 344:19-345:2; Def. Landeros Dep. at 193:7-194:1. The unrebutted deposition testimony of Landeros and two other Joliet officers established they knew of no other occasion when an individual was arrested for driving on a suspended license when he or she was not driving. Def. Landeros Dep. at 200:16-21; M. Avila Dep. at 121:21-122:34; P. Rodriguez Dep. at 66:3-11.

- Three individuals from Bolingbrook Police Department testified that requests from one law enforcement agency to another to transfer a LEADS file were generally granted as a matter of course. N. Wlodarski Dep. at 119:19-121:8; S. Talbot Dep. at 28:17-22; D. Kloepfer Dep. at 24:11-25:15. The request to transfer Frederickson's LEADS file, however, was denied.

- SORA does not require that an offender register out of a jurisdiction before he can register with a new law enforcement agency. *See generally* 730 ILCS 150/1 *et seq.* Moreover, law enforcement agencies generally did not enforce the requirement to register out of a jurisdiction. N. Wlodarski Dep. at 119:19-121:8; S. Talbot Dep. at 28:17-22; D. Kloepfer Dep. at 24:11-25:15.

In support of his rationality argument, Landeros asserts that he "could not have known whether [Frederickson] had truly moved" when he refused to transfer Frederickson's LEADS file, and that in refusing to transfer the file, Landeros was merely enforcing "a standard Joliet practice."[2] *See* Br. at 18; *see also, id.* at 19 (asserting "[i]t is also relevant to the irrationality component that Landeros did not arrest [Frederickson] for failure to register"). Landeros's assertion contravenes his deposition testimony in which he admitted he had no reason to believe that Frederickson had not moved to Bolingbrook, and that evidence showed there was no

[2] Although Landeros claims he was following "standard Joliet procedure," the district court found that his actions were "extraordinary." *Compare* Br. at 18 *with* Op. at 24.

"standard Joliet practice" to support Landeros's refusal to transfer Frederickson's file. Op. at 24.[3]

As in *Gutierrez,* "rather than accept the district court's factual assumptions, [Landeros] has simply ignored or denied that a factual dispute exists and built his argument on that disputed fact." *Id.* at 1014. And as in *Stinson*, Landeros omits his harassment of and threats towards Frederickson, which the district court deemed sufficient to raise a genuine issue of material fact as to Landeros's motive.[4] *See* Op. at 23-24. Therefore, here, like in *Stinson* and *Gutierrez*, this Court lacks jurisdiction. *Stinson*, 868 F.3d at 525; *Gutierrez*, 722 F.3d at 1014.

### 3. Landeros's Comparator Argument Is Dependent Upon Disputed Facts

As the district court correctly found, and as Landeros admits, a "class-of-one" plaintiff need not necessarily identify a similarly situated comparator who was

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[3] Landeros contends that his "investigation actually proved what [Landeros] suspected, that plaintiff had not moved out of Joliet, but was living in Joliet at an auto body shop." Br. at 19. That statement is, at best, a gross mischaracterization of the record. Landeros's investigation did not "prove" Frederickson was living in Joliet; rather, Landeros's actions *prevented* Frederickson from living in Bolingbrook long-term and by February 23, 2011, Frederickson had no choice but to move back to Joliet. *See* Frederickson Dep. at 95:15-23; *see also* Op. at 21 ("Having rejected Frederickson's attempt to report his move, Detective Landeros cannot now claim that his efforts to prevent Frederickson's registration in Bolingbrook were justified by Frederickson's failure to withdraw from Joliet."). At summary judgment, and in this appeal, the Court accepts Frederickson's version of the facts. *See Trepanier* 2006 WL 1302404 at *10; *Estate of Clark*, 865 F.3d at 550.

[4] Landeros's assertion that his behavior was rational is also belied by the fact that Landeros admits the government has an interest in ensuring an offender's SORA registrations are up-to-date. *See* Br. at 19; *see also People v. Molnar*, 222 Ill. 2d 495, 499 (Ill. 2006) ("[SORA] was designed to aid law enforcement by allowing them to monitor the movements of the perpetrators by allowing ready access to crucial information."). Yet, as the district court found, "the evidence tends to show that Frederickson was continually providing information to both Joliet and Bolingbrook about where he was residing and working." Op. at 20.

treated differently "[i]f the animus is readily obvious." *See* Op. at 22 (citing *Swanson v. City of Chetek*, 719 F.3d 780, 784 (7th Cir. 2013)); *see also* Br. at 18 (acknowledging that "the absence of a true comparator does not necessarily doom plaintiff's class of one claim"). Although Landeros argues that the district court gave "short shrift to the comparator analysis," (Br. at 17), this too is an impermissible factual challenge as it is dependent upon Landeros's incorrect assertion that there was "absolutely no evidence presented that plaintiff was treated any differently from any other registering sex offender." *Id.* at 17. This Court has repeatedly recognized that where "animus is readily obvious," it is "redundant to require that the plaintiff show disparate treatment in a near exact, one-to-one comparison to another individual." *Swanson*, 719 F.3d at 784; *see also Brunson*, 843 F.3d at 707-708; *see also Geinosky v. City of Chicago*, 675 F.3d 743, 748 (7th Cir. 2012) ("Here, the pattern and nature of defendants' alleged conduct do the work of demonstrating the officers' improper discriminatory purpose."). Here, the district court held there was "strong" evidence that Frederickson was treated differently (*see* Op. at 23) and Landeros cannot challenge this factual finding through an interlocutory appeal. *See Stinson*, 868 F.3d at 525.

### B. Landeros's Purported Challenge To The Constitutional Right At Issue Is An Impermissible Back-Door Attempt To Argue The Facts

In an attempt to avoid dismissal for lack of jurisdiction, Landeros also argues the district court erred in denying summary judgment based on qualified immunity because "[t]here is no clearly established law making it illegal for an officer to investigate a homeless sex offender to determine whether he lives where he says he

does, and then refuse to transfer a LEADS file pending the results of the investigation." *See* Br. at 20. That is, Landeros attempts to raise a purely legal question. In doing so, however, Landeros ignores the constitutional right the district court found was implicated—that "the evidence [was] sufficient for a reasonable jury to find that Detective Landeros was motivated by personal animus towards Frederickson when he stymied his attempt to register in Bolingbrook." *See* Op. at 24.

Implicit in Landeros's framing of the right at issue is his presumption that he was acting rationally when he refused to transfer Frederickson's LEADS file. Whether a police officer can investigate before transferring a LEADS file is beside the point because the district court held that, when viewing the facts in the light most favorable to Frederickson, that is not what happened here. *See* Op. at 24-25. Instead, after viewing the evidence in the light most favorable to Frederickson, as it was required to do at summary judgment, the district court held that a reasonable jury could find that Landeros was not simply trying to carry out SORA's requirements in good faith, but was motivated by personal animus and deliberately trying to "stymie" Frederickson's attempts to leave Joliet by refusing to transfer the LEADS file and directing Bolingbrook not to register Frederickson. *See id.* Landeros's attempt to relitigate this factual issue on appeal must be rejected for lack of jurisdiction.[5] *See, e.g., Gutierrez*, 722 F.3d at 1014; *Stinson*, 868 F.3d at 526.

[5] Perhaps recognizing that this Court has no jurisdiction over disputes of material facts on an appeal of a denial of summary judgment, Landeros superficially claims that he does not dispute Frederickson's version of the facts. *See* Br. at 21 n.3 ("The district court obviously confused the facts here . . . [n]evertheless, defendant takes the facts as presented for this

### C. The District Court Correctly Held That Landeros Violated Frederickson's Clearly Established Constitutional Right To Police Protection Uncorrupted By Personal Animus

As set forth above, Landeros incorrectly describes the constitutional right at issue. In its opinion, the district court held that a jury could conclude Landeros violated Frederickson's right to police protection uncorrupted by personal animus. *See* Op. at 23-24. Even if this Court had jurisdiction to review the district court's decision, it should affirm the denial of Landeros's summary judgment motion on the merits.[6]

First, Landeros wrongly claims that he could be on notice that his conduct was unconstitutional only if there was a Seventh Circuit case ruling that homeless sex offenders have a constitutional right to have their LEADS file transferred to another jurisdiction without having registered out of first jurisdiction. *See* Br. at 21. But to overcome qualified immunity, a plaintiff is not required to identify a case presenting the same exact factual scenario at issue in his case. Rather, a defendant is not entitled to qualified immunity if he had fair warning that his conduct is unconstitutional. *See Estate of Escobedo*, 600 F.3d at 781 ("[T]he salient question here is not whether there is a prior case identical to the [Plaintiff]'s current claim

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interlocutory appeal."). However, as noted above, Landeros's brief repeatedly misrepresents and omits key facts that the district court found raise genuine issues of material fact. *See Gutierrez,* 722 F.3d at 1010 (dismissing for lack of jurisdiction because "[e]ven if the appellant disclaims any attempt to challenge the district court's conclusion that genuine factual disputes exist, we lack jurisdiction when his argument on appeal depends upon and is inseparable from disputed facts"); *see also* disc. *supra* at 18-21.

[6] Landeros asserts that the district court's holding "presume[d] it was clearly established that Landeros deprived plaintiff of police protection." Br. at 20. The district court did no such thing. Rather, the district court found that Frederickson provided sufficient evidence such that a reasonable jury could conclude that Landeros violated Frederickson's constitutional rights. *See* Op. at 24-25.

but whether the state of the law at the relevant time gave the Defendants fair warning that their treatment of [Plaintiff] was unconstitutional."); *see also Grindle*, 599 F.3d 583 at 590 ("The plaintiff need not point to a 'fundamentally similar' past case.").

Neither Frederickson's equal protection claim nor the district court's opinion denying summary judgment was based on the premise that it is illegal for an officer to investigate the residence of a homeless sex offender and to delay transferring a LEADS file pending the investigation's results. *See* Op. at 23-25; Dkt. 215, Pl. Resp. to Def. Mot. for Summary Judgment, at *passim*. Rather, Frederickson presented evidence of a pattern of harassment and threats that culminated in Landeros preventing Frederickson from registering in, and thereby living and working in, Bolingbrook. *See* disc. *supra* at 5-11. The district court, in turn, held that a reasonable jury could find that Landeros was motivated by personal animus when he "stymied [Frederickson's] attempt to register in Bolingbrook." *See* Op. at 24.

Landeros had reasonable notice that using his position as a detective to harass Frederickson—including arrests and threats thereof and culminating in preventing and instructing others to prevent an individual from registering in and moving to another jurisdiction—violated Frederickson's constitutional rights. *See Esmail,* 53 F.3d 178 at 180 (finding that plaintiff stated a claim that his equal protection rights were violated where he alleged an "action taken by the states . . . was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective");

*Olech v. Vill. of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998); *Brunson*, 843 F.3d at 707 (finding plaintiff "offered evidence of a pattern of discriminatory behavior on the part of a government" to survive summary judgment). And since at least 2000, the Seventh Circuit has recognized the constitutional right to police protection uncorrupted by personal animus. *See Hilton*, 209 F.3d at 1007 (recognizing that "[i]f the police decided to withdraw all protection from [Plaintiff] out of sheer malice . . . [Plaintiff] would state a claim").

Landeros claims that because that right was recognized in "dicta" in *Hilton,* Landeros did not have notice of the constitutional violation. That argument is wrong for two reasons. First, this Court has ruled that constitutional rights recognized in dicta provide notice to officials for the purpose of equal protection claims. *Hanes v. Zurick,* 578 F.3d 491, 496 (7th Cir. 2009) ("[E]ven dicta may clearly establish a right."). Second, Landeros pointedly ignores *Hanes v. Zurick*, the case on which the district court relied on in its determination that Landeros's actions, as alleged by Frederickson, violated clearly established law.[7] *Id.*; *see also* Op. at 23-24. *Hanes* conclusively recognized there is a constitutional right to "police protection uncorrupted by personal animus," that right was clearly established in

[7] Landeros also tries to confuse the issue by citing *Saiger v. City of Chicago* and *Derfus v. City of Chicago*, to support his argument that Landeros did not violate a clearly established right. *Saiger v. City of Chi.*, 37 F.Supp.3d 979, 986 (N.D. Ill. 2014); *Derfus v. City of Chi.*, 42 F. Supp.3d 888, 900 (N.D. Ill. 2014). In *Saiger* and *Derfus*, the courts held that as of 2014, it was not clearly established that a homeless offender has a due process right to register pursuant to SORA. Because the district court dismissed Frederickson's due process claims, those cases are inapplicable here, where Frederickson has provided sufficient evidence to show that Landeros, motivated by personal animus, conducted a years-long pattern of threats and harassment such that he violated Frederickson's equal protection right.

the *Hilton* case, and the defendants had notice thereof. *Hanes,* 578 F.3d at 496 (holding that allegation that police officers repeatedly arrested plaintiff solely for reasons of personal animus stated an equal protection class-of-one claim). Given that *Hanes* was decided in 2009, Landeros's claim that the law "was unsettled in 2011" is obviously incorrect.

Moreover, since at least 1995, it has been clearly established in the Seventh Circuit that the equal protection clause provides a remedy when "a powerful public official picked on a person out of sheer vindictiveness." *Esmail*, 53 F.3d at 178; *see also Olech*, 160 F.3d at 388 ("If [a public entity] refuses to perform this obligation for one of the residents, for no reason other than a baseless hatred, then it denies that resident equal protection of the laws."). Landeros's argument that he had no fair warning that targeting an individual for a pattern of harassment and discrimination for no reason other than personal animus violates the Constitution is meritless.

Finally, Landeros argues the district court erred because police action that has a rational basis but is "accompanied" by animus does not violate a clearly established constitutional right. *See* Br. at 23. In so doing, Landeros mischaracterizes the district court's holding. The district court correctly held that police action, *motivated* by animus and *lacking* any rational basis, defeats qualified immunity. *See* Op. at 24-25; *see also Hanes,* 578 F.3d at 496; *Brunson*, 843 F.3d at 708 (affirming the denial of summary judgment on qualified immunity where plaintiff-appellee "offered evidence of substantial animus and a continuing misuse of power

by government agents," including the refusal to renew a liquor license, which was generally a *pro forma* matter).[8]

Landeros's reliance on *D.B. ex rel Kurtis B. v. Kopp* to argue that "despite [Frederickson]'s claim of animus," Landeros's actions were not "objectively irrational" is misplaced. 725 F.3d 681 (7th Cir. 2013); *see also* Br. at 23. In that case, this Court found that at the motion to dismiss stage, the plaintiff's complaint revealed a rational basis for the disparate treatment, and therefore the plaintiff failed to allege an equal protection class of one claim. *See D.B. ex rel Kurtis B.*, 725 F.3d at 687. In contrast, here, the district court considered competing facts and evidence, and concluded at summary judgment that a rational jury could determine there *was no* rational basis for Landeros's treatment of Frederickson. *See* Op. at 24-25; *see also id.* at 18 (noting that at trial, Frederickson would need to prove that no "reasonably conceivable state of facts could provide a rational basis" for Landeros's actions).

[8] Landeros's attempt to rely on SORA's complexity to convince the Court his actions were rational and he was not on notice that his actions violated Frederickson's constitutional rights is unavailing. Landeros suggests that the district court found Landeros violated the Constitution because Landeros could not cite statutory authority supporting his purported view that Frederickson's failure to register out of Joliet justified Landeros's efforts to prevent Frederickson from registering in Bolingbrook. *See* Br. at 21. That is not what the district court held. Rather, the district court cited Landeros's inability to cite any authority supporting his interpretation of SORA in its finding that the absence of any such authority, when viewed alongside the evidence of Landeros's history of harassment towards Frederickson and the "extraordinary" nature of his actions in preventing Frederickson from registering, could support the conclusion Landeros was motivated by personal animus. *See* Op. at 21-25.

## VII. CONCLUSION

For the foregoing reasons, Frederickson respectfully requests that the Court: (1) dismiss Landeros's appeal for lack of jurisdiction; or, in the alternative (2) affirm the district court's holding that Landeros is not entitled to qualified immunity because a reasonable jury could find that Landeros violated Frederickson's constitutional right to police protection uncorrupted by personal animus.

Dated: September 28, 2018

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## CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Fed. R. App. P. 32(a)(7)(B), that this brief conforms to the type volume limitations of Fed. R. App. P. 32(a)(7)(B). This brief contains 7,957 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I hereby certify, in accordance 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), as amended by Cir. R. 32(b), that this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century Schoolbook 12 points, and 11 points in the footnotes.

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## CERTIFICATE OF SERVICE

I, Mary Rose Alexander, hereby certify that on September 28, 2018, I electronically filed the foregoing PLAINTIFF-APPELLEE REX FREDERICKSON'S RESPONSE TO DEFENDANT-APPELLANT TIZOC LANDEROS'S APPEAL with the Clerk of Court using the CM/ECF system, which constitutes service on all counsel of record, registered filing users, pursuant to Fed. R. App. P. 25(c)(2) and Cir. R. 25(a).

Dated: September 28, 2018

*s/ Mary Rose Alexander*
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