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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Jose Chavez, et al.,

Plaintiffs,

v.

United States of America, et al.,

Defendants.

No. CV-01-00245-TUC-FRZ

ORDER

Pending before the Court is the Report and Recommendation [Doc. 266] issued by United States Magistrate Judge Rateau that recommends the Court deny Defendant Hunt's Motion for Summary Judgment [Doc. 235] and grant Defendants Demik, Rios, and Scharnweber's Motion for Summary Judgment [Doc. 238]. The Court has conducted an independent review of the record, including review of Defendant Scharnweber's Partial Objections to Summary Judgment Report and Recommendation [Doc. 269], Objection to Report and Recommendation (*sic*) to Deny Summary Judgment for Defendant Hunt [Doc. 271], Plaintiffs' Objections to Magistrate's Report and Recommendations (*sic*) [Doc. 272], Defendant Rios, Scharnweber, and Demik's Objections to the Report and Recommendation [Doc. 273], Plaintiffs' Response to Defendant Scharnweber's Partial Objections to Summary Judgment Report and Recommendation [Doc. 274], and Plaintiffs' Response to Defendant Hunt's Objection to Report and Recommendation to Deny Summary Judgment for Defendant Hunt [Doc. 275]. As more fully set forth herein, the Court will **adopt** in part and **reject** in part the

1 recommendations of Magistrate Judge Rateau.¹

2 **Procedural Background**²

3 Plaintiffs Jose and Maria Chavez initiated this case on May 25, 2001. Their First
4 Amended Complaint [Doc. 12] (“FAC”) was filed on January 7, 2002. The FAC named
5 as defendants the United States of America, the United States Immigration and
6 Naturalization Service Commissioner James Ziglar, United States Border Patrol Sector
7 Chief David Aguilar, and fifteen current and former Border Patrol agents. The FAC
8 alleges: (1) assault; (2) battery; (3) false imprisonment/false arrest; (4) intentional
9 infliction of emotional distress; (5) negligence; and (6) constitutional violations
10 (monetary, declaratory, and injunctive relief). *Id.*

11 Defendants filed motions to dismiss or in the alternative motions for summary
12 judgment seeking to dispose of the entire case. At the same time Plaintiffs filed their
13 responsive briefs opposing dismissal, Plaintiffs filed their Rule 56(f) motion seeking
14 deferment of any ruling on the alternative motion for summary judgment as Plaintiffs had
15 not had any opportunity to conduct discovery. In 2002, the Honorable David C. Bury
16 (who presided over the case at the time) ordered nearly all of the substantive claims
17 dismissed whereby only a minor property damage claim remained. As the motion to
18 dismiss was granted, the Rule 56(f) motion was denied as moot as well as the alternative
19 motion for summary judgment. Subsequently, Judge Bury recused himself from the case,
20 the case was reassigned to Magistrate Judge Marshall, and the parties proceeded to a
21 bench trial before Magistrate Judge Marshall in 2005. Magistrate Judge Marshall found

22
23 ¹ This Court reviews de novo the objection-to portions of the Report and
24 Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The Court reviews for
25 clear error the unobjected-to portions of the Report and Recommendation. *Johnson v.*
Zema Systems Corp., 170 F.3d 734, 736 (7th Cir. 1999); *see also Conley v. Crabtree*, 14
F.Supp.2d 1203, 1204 (D. Or. 1998).

26 ² This matter has been pending for 13 years and has been on appeal to the Ninth
27 Circuit twice. The background is lengthy. Given that the current Report and
28 Recommendation recommends granting summary judgment in favor of all but one of the
Defendants (Defendant Hunt) thereby disposing of the entire case (except the Plaintiffs’
claim as to Hunt), a detailed history of the case is set forth. Some of the background is
taken from this Court’s order of September 30, 2008 [Doc. 118] and from the pending
Report and Recommendation [Doc. 266].

1 in favor of Plaintiffs in the amount of \$3,700.00. Thereafter, Plaintiffs appealed Judge
2 Bury's previous dismissal order.

3 Chavez I

4 On March 27, 2007, the Ninth Circuit issued an order affirming in part and
5 reversing in part Judge Bury's decision and remanding for further proceedings. See
6 *Chavez v. U.S.*, 226 Fed. Appx. 732 (9th Cir. 2007) (hereinafter, *Chavez I*). The Ninth
7 Circuit reversed the dismissal of Plaintiffs' *Bivens* claims as to Agents Rios, Demik³,
8 Scharnweber, Hunt, Obregon, Chavez, Campbell, Ziglar and Aguilar, and reinstated
9 Plaintiffs' claims for equitable relief under the Fourth Amendment. The Ninth Circuit
10 found that the dismissal of these claims pursuant to Rule 12(b)(6) for failure to state a
11 claim was erroneous and also found that the previous denial of the Rule 56(f) motion and
12 motion for summary judgment as moot was also error. The Ninth Circuit held, *inter alia*,

13 We disagree, however, with the district court's finding that the Chavezes
14 have failed to satisfy the notice pleading requirement with respect to the
15 remaining defendants. First, the Chavezes bring claims against Agents,
16 Rios, Demek, (*sic*) and Scharnweber. Unlike the vague and conclusory
17 allegations regarding the other defendants discussed *supra*, the complaint
18 alleged that Rios, Demek, (*sic*) and Scharnweber each stopped the shuttle
19 on a specific occasion. Those allegations, coupled with the allegation that
20 "[i]ndividual Defendants['] lacked consent, probably cause, and reasonable
21 suspicion, and warrants," are sufficient to provide notice of the claims
22 against Agents Rios, Demek, (*sic*) and Scharnweber.

23 Thus, the Ninth Circuit remanded the case to the District Court for its consideration of the
24 Rule 56(f) and summary judgment motions.

25 After remand to the District Court, the United States Supreme Court decided
26 *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). In light of
27 *Iqbal*, the supervisory Defendants filed a motion for judgment on the pleadings under
28 Rule 12(c). This Court denied the motion to dismiss, finding that the supervisory

³ Defendant Demik's name is spelled differently throughout the case. Compare, *Chavez v. U.S.*, 682 F.3d 1102 (9th Cir. 2012) (Demek), with Doc. 272 (using both Demek and Demik), with Doc. 238 (Demik). The Court will use the spelling "Demik" as that is the spelling used by Defendant Demik's counsel. See Doc. 238.

1 defendants failed to provide a plausible nondiscriminatory explanation for the alleged
2 stops. This Court also held that Plaintiffs did not need to allege that the supervisory
3 defendants directly participated in constitutional violations. *Id.* Instead, relying upon
4 *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991), this Court held Plaintiffs
5 had plausibly alleged that the supervisory defendants had either knowingly refused to
6 terminate a series of acts they reasonably should have known would cause constitutional
7 violations, acquiesced in constitutional deprivations by subordinates, or displayed
8 reckless or callous indifference to others' rights. The supervisory defendants appealed.

9 *Chavez II*

10 On the supervisory defendants' appeal, the Ninth Circuit held, *inter alia*, "taking
11 qualified immunity into account, a supervisor faces liability under the Fourth Amendment
12 only where 'it would be clear to a reasonable supervisor that his conduct was unlawful in
13 the situation he confronted.'" *Chavez v. United States*, 683 F.3d 1102, 1110 (9th Cir.
14 2012) (hereinafter, *Chavez II*). Under this standard, the Ninth Circuit held Plaintiffs' FAC
15 failed to state a Fourth Amendment claim against any supervisory defendant except as to
16 Defendant Hunt. *Id.* The Ninth Circuit further held that, in contrast to the other
17 supervisory defendants, Hunt faces liability not only as a supervisor, but also for his
18 direct participation in the stops. *Id.* at 1111. The Fourth Amendment prohibits an officer
19 on roving patrol near the border from stopping a vehicle in the absence of an objectively
20 "reasonable suspicion" that the "particular vehicle may contain aliens who are illegally in
21 the country" or is involved in some other criminal conduct. *Id.*, quoting *United States v.*
22 *Brignoni-Ponce*, 422 U.S. 873, 881, 95 S.Ct. 275, 45 L.Ed.2d 607 (1975).

23 The Ninth Circuit held that the facts alleged in the FAC did not indicate that, when
24 Hunt made the two stops, any observable characteristics other than race could have
25 provided a basis for reasonable suspicion. *Chavez II*, 683 F.3d at 1112, citing *Brignoni-*
26 *Ponce*, 422 U.S. at 886, 95 S.Ct. 2574 ("At best the officers had only a fleeting glimpse
27 of the persons in the moving car..."). Indeed, although the supervisory defendants argue
28 that Hunt's knowledge that Plaintiffs' shuttle had carried undocumented passengers on
previous occasions would have supported reasonable suspicion, the FAC indicates that,

1 on one of the two occasions when Hunt stopped Plaintiffs, Plaintiffs drove a rental van
2 because their usual shuttle was under repair. *Chavez II*, 683 F.3d at 1112. Based upon the
3 facts set forth in the FAC, Plaintiffs have plausibly alleged that Hunt stopped them based
4 solely on their and their passengers’ “apparent Mexican ancestry,” a characteristic that a
5 reasonable officer clearly would have known did not create reasonable suspicion. *Id.*
6 Accordingly, the Ninth Circuit held the FAC adequately states a claim against Defendant
7 Hunt for Fourth Amendment violations, and, at least on the facts alleged, qualified
8 immunity does not shield Hunt from liability. *Id.*

9 *Post-Chavez II*

10 The mandate in *Chavez II* was issued on August 15, 2012. Thereafter, the parties
11 engaged in discovery relating to what was left of the allegations contained in Plaintiffs’
12 FAC. On August 3, 2013, Defendants Scharnweber, Demik, and Rios filed a motion to
13 amend their answer to add the defense of the statute of limitations. This Court entered an
14 Order granting Defendants’ motion by adopting the conclusion of Magistrate Judge
15 Rateau’s Report and Recommendation. On September 1, 2013, Defendant Hunt filed his
16 Motion for Summary Judgment. On that same date, Defendants Scharnweber, Rios and
17 Demik filed their Motion for Summary Judgment.

18 It is against this lengthy backdrop that the Court considers the current Report and
19 Recommendation [Doc. 266] regarding the disposition of Defendants Hunt, Scharnweber,
20 Rios, and Demik’s motions for summary judgment.

21 **The Pending Report and Recommendation**

22 The Chavez Shuttle

23 Plaintiffs Jose and Maria Chavez operated a shuttle (the “Chavez Shuttle”)
24 between Tucson and Sasabe, Arizona between the years 1998 and 2003. The Chavez
25 Shuttle was usually driven by Plaintiff Jose Chavez although Maria Chavez would drive
26 the Chavez Shuttle on an emergency basis. Initially, the Chavez Shuttle made three (3)
27 daily trips between Tucson and Sasabe but later reduced the number of trips to two (2).
28 Passengers were picked up by the Chavez Shuttle in Sasabe near the port of entry and at
the general store.

1 During the time Plaintiffs operated the Chavez Shuttle there were approximately
2 100 residents in Sasabe. There are approximately 10 pedestrian and 80 to 100 vehicle
3 legal crossings per day from Mexico unto the United States at the Sasabe port of entry.
4 Most of those crossing were thought to be bound for Tucson. During that time, the
5 Chavez Shuttle was stopped by Border Patrol agents on almost a daily basis. Plaintiff
6 Jose Chavez agrees with Border Patrol estimates that approximately 80 persons were
7 removed from the Chavez Shuttle as undocumented aliens over a four year span.

8 The Border Patrol Stops of the Chavez Shuttle

9 The remaining claims in the case arise out of five (5) border patrol stops of the
10 Chavez Shuttle. The stops are as follows. First stop: Defendant Rios is alleged to have
11 threatened to strike Plaintiff Jose Chavez. Second stop: On or about January 5, 1999,
12 Defendant Scharnweber is alleged to have stopped the Chavez Shuttle while it was driven
13 by Plaintiff Marie Chavez and removed six (6) undocumented passengers. Third stop: On
14 August 24, 2000, Defendant Hunt is alleged to have stopped the Chavez Shuttle being
15 driven by Plaintiff Jose Chavez and removed the keys from the van. Fourth stop: In the
16 winter of 2000-2001 Defendant Hunt is alleged to have stopped the Chavez Shuttle as it
17 was driven by Plaintiff Jose Chavez and told him (Jose Chavez) that he was under arrest.
18 Fifth stop: On March 6, 2001, Defendant Demik is alleged to have stopped Plaintiff Jose
19 Chavez and taken pictures of the Chavez Shuttle. The issues arising out of each of these
20 stops are taken in turn below.

21 **Summary Judgment Standard**

22 Summary judgment is appropriate “if the pleadings, deposition, answers to
23 interrogatories, and admissions on file, together with the affidavit, if any, show that there
24 is no genuine issue as to any material facts and that the moving party is entitled to a
25 judgment as a matter of law.” Fed. R. Civ. P. 56(c). Summary judgment is not proper if
26 material factual issues exist for trial. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 318,
27 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In evaluating a
28 motion for summary judgment, the Court must draw all reasonable inferences in favor of
the nonmoving party, and cannot make credibility determinations or perform any

1 weighing of the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133,
2 150 (2000).

3 **Defendant Rios (First Stop):** Defendant Rios was a Border Patrol agent from 1993 until
4 1998 and was a Border Patrol supervisor from 1998 until 2001. Plaintiff Jose Chavez
5 does not recall the date that he was stopped by Defendant Rios. Defendant Rios cannot
6 recall any specific encounter with Plaintiffs or anything that may have happened during
7 an encounter. The sole record of a stop of the Chavez Shuttle initiated by Defendant Rios
8 establishes the date of the stop as being September 8, 1997.

9 Defendant Rios moved for entry of judgment in his favor on two grounds: (1)
10 qualified immunity and (2) statute of limitations. Magistrate Judge Rateau recommends
11 granting judgment in favor of Defendant Rios on statute of limitations grounds. In the
12 alternative, Magistrate Judge Rateau recommends granting judgment in Defendant Rios's
13 favor on qualified immunity grounds. Magistrate Judge Rateau also concludes that,
14 "Plaintiffs have not expressly alleged that Rios was involved in an illegal stop (as
15 opposed to the activities that alleged occurred after the stop). (Emphasis added.) Because
16 of this conclusion, Magistrate Judge Rateau did not analyze whether Defendant Rios's
17 stop of the Chavez Shuttle complied with the Fourth Amendment.⁴ As explained below,
18 the Court will adopt the recommendation of Magistrate Judge Rateau that the claims
19 against Defendant Rios are time barred.

20 *Statute of Limitations*

21 The applicable statute of limitations for Plaintiffs' *Bivens*⁵ claims is the two year

22
23 ⁴ Plaintiffs have lodged an objection to the Magistrate Judge's "cursory
24 elimination of the Fourth Amendment claims based on the illegality of the stops
25 themselves." Doc. 272 at p. 2, ll. 13-14. The Court agrees with Plaintiffs that the mandate
26 of the Ninth Circuit in *Chavez I* largely compels the conclusion that Plaintiffs pled a
claim against Defendants Rios and Demik for their respective stops of the Chavez
Shuttle. However, since the Court concludes that Plaintiffs claims against Defendant Rios
are time barred, any Fourth Amendment issue arising out of the stop initiated by
Defendant Rios is moot.

27 ⁵ Plaintiffs' claims arise under *Bivens v. Six Unknown Agents of the Federal*
28 *Bureau of Narcotics*, 403 U.S. 388, 395-95 (1971). The basis of a *Bivens* action is some
illegal or inappropriate conduct on the part of a federal officer or agent that violates a
clearly established constitutional right. *Balser v. Department of Justice, Office of the*

1 period provided by Ariz. Rev. Stat. § 12-542(1). Border Patrol records that are not in
2 dispute establish that Defendant Rios stopped the Chavez Shuttle on September 8, 1997,
3 and discovered undocumented aliens. However, Plaintiff Jose Chavez does not recall
4 whether the alleged threat by Defendant Rios occurred at this stop in 1997. Complicating
5 matters for Plaintiffs Chavez is the fact that the Tucson sector of the Border Patrol does
6 not keep records of stops where no illegal immigrants are located. Attempting to turn this
7 complication into a benefit, Plaintiffs Chavez argue that they have put forth enough
8 evidence to survive summary judgment because Plaintiffs Chavez assert that Defendant
9 Rios *could* have stopped the Chavez Shuttle after September 8, 1997, since not every stop
10 is documented.

11 However, once the defendant has established a *prima facie* case entitling him to
12 summary judgment on a statute of limitations defense, the plaintiff has the burden of
13 showing available, competent evidence that would justify a trial. *Logerquist v. Danforth*,
14 188 ARiz. 16, 19, 932 P.2d 281, 284 (App. 1996) (quoting *Ulibarri v. Gerstenberger*, 178
15 Ariz. 151, 156, 872 P.2d 698, 703 (App. 1993)). Here, Defendant Rios has put forth a
16 *prima facie* case that he initiated a stop of Plaintiff Jose Chavez driving the Chavez
17 Shuttle on September 8, 1997. Indeed, this is the only Border Patrol record of Defendant
18 Rios' stop of the Chavez Shuttle. Fatal to Plaintiffs' claim is the fact that Plaintiffs
19 Chavez have not come forward with available, competent evidence from which a trier of
20 fact could conclude that Defendant Rios' alleged threat occurred at a stop after
21 September 8, 1997, and within the 2 year statute of limitations period preceding the filing
22 of their Complaint.

23 Plaintiffs Chavez argue the decision in *Nicacio v. United States I.N.S.*, 979 F.2d
24 700, 706 (9th Cir. 1985), *overruled in part on other grounds by Nodgers-Durgin, v. de la*
25 *Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999), supports their argument that they have met
26 their burden to come forward with competent, admissible evidence demonstrating a
27 genuine issue of fact for trial. The language relied upon by Plaintiffs Chavez from
28 *Nicacio* was used by the Court of Appeals after a verdict to describe the district court's

United States Trustee, 327 F.3d 903, 909 (9th Cir. 2003).

1 “careful credibility findings” at trial. 979 F.2d at 706. Here, the Court is faced with a
2 different situation in that Plaintiff Jose Chavez cannot even recall that the alleged Rios
3 stop took place at a time within the statute of limitation.

4 For the foregoing reasons, the Court will adopt the conclusion of Magistrate Judge
5 Rateau that Plaintiffs’ claims against Defendant Rios are time barred.

6 **Defendant Scharnweber (Second Stop):** On January 5, 1999, Defendant Scharnweber
7 stopped the Chavez Shuttle as it was being driven by Maria Chavez. Defendant
8 Scharnweber initiated the stop based on his observation that it was carrying passengers
9 from Sasabe and had previously been found to be carrying aliens. After making the stop,
10 Defendant Scharnweber opened the van door and demanded documentation from the
11 passengers. All seven passengers on the Chavez Shuttle at the time were determined to
12 lack documentation. Defendant Scharnweber seized the Shuttle, arrested Maria Chavez
13 on suspicion of alien smuggling and transported her and the undocumented aliens to the
14 Tucson Border Patrol station.

15 Magistrate Judge Rateau recommends dismissing the claim against Defendant
16 Scharnweber on statute of limitations grounds. Just as with Defendant Rios, the
17 applicable statute of limitations for Plaintiffs’ *Bivens* claims is two years. Plaintiffs
18 alleged that Defendant Scharnweber stopped the Chavez Shuttle on January 5, 1999. As
19 set forth above, Plaintiffs filed their Complaint in May of 2001 and their FAC on January
20 7, 2002.

21 The Court will adopt the recommendation of the Magistrate Judge that the claim
22 against Defendant Scharnweber be dismissed as time barred.

23 **Defendant Hunt (Third and Fourth Stops):** *The August 24, 2000, stop by Defendant*
24 *Hunt:* Around 9:00 p.m. on August 24, 2000, Defendant Hunt was observing traffic on
25 Route 286 about 11 miles north of the border. Defendant Hunt saw a van occupied by
26 only the driver heading south. About twenty minutes after he initially saw the van
27 heading south, Defendant Hunt saw it heading north with two (2) passengers inside.
28 Defendant Hunt then pulled the vehicle over. As Defendant Hunt approached the van he
saw the van was being driven by Plaintiff Jose Chavez and that the passengers had

1 muddy shoes and pants. Defendant Hunt then decided to seize the van. *The 00/01 Winter*
2 *stop by Defendant Hunt*: Defendant Hunt recalls the stop occurred at night, was very
3 close to Sasabe, was after the port of entry had been closed for some time, and that
4 Plaintiff Jose Chavez was driving the shuttle.

5 Magistrate Judge Rateau recommends that the Court deny Defendant Hunt's
6 request for judgment in his favor as a matter of law that the two stops he conducted
7 violated the Plaintiffs' Fourth Amendment rights and that he is entitled to qualified
8 immunity. Defendant Hunt objects to the conclusion reached by Magistrate Judge Rateau
9 that he did not have reasonable suspicion that criminal activity was afoot when he made
10 the August 24, 2000, stop and the 00/01 Winter stop. Defendant Hunt argues that the
11 Magistrate Judge erred in not considering the stops through his lens of extensive Border
12 Patrol experience (11 years). Defendant Hunt also argues that the Magistrate Judge did
13 not give enough weight to the location and surrounding area of the stops in reaching her
14 conclusion that he (Defendant Hunt) did not have reasonable suspicion to support the two
15 stops. Plaintiffs Chavez assert that the Magistrate Judge reached the correct conclusion
16 and point out that in the cases cited by Defendant Hunt, each court (in its own way),
17 cautioned that innocent activity occurs in a high crime area and the area of the stop itself
18 provides no basis for converting innocuous conduct into suspicious conduct. *See United*
19 *States v. Mallides*, 473 F.2d 859, 861 n. 3 (9th Cir. 1973).⁶ Plaintiffs also point out that
20 while the Court is to consider officer experience, with respect to the August 24, 2000
21 stop, Defendant Hunt did not even know he was stopping the Chavez shuttle at the time
22 he made the stop so Defendant Hunt could not possibly have relied upon his knowledge
23 of the history of the Chavez Shuttle as part of the basis for the stop. As explained below,
24 the Court will adopt the recommendation of Magistrate Judge Rateau.

25
26 ⁶ *See also, United States v. Diaz-Juarez*, 299 F.3d 1138 (9th Cir. 2002) (Presence
27 in a high-crime area cannot alone provide reasonable suspicion that he had committed or
28 was about to commit a crime.); *United States v. Montero-Camargo*, 208 F.3d 1122, 1138
(9th Cir. 2000) (We note initially that an individual's presence in a high crime area is not
enough to support reasonable, particularized suspicion that the individual in question has
committed or is about to commit a crime.)

1 *Standards for Stops*

2 Officers enforcing the immigration laws must comply with the Fourth
3 Amendment. An investigatory stop is lawful if an officer “reasonably suspects that the
4 person apprehended is committing or has committed a criminal offense.” *Arizona v.*
5 *Johnson*, 555 U.S. 323, 326 (2009). Stopping a vehicle is usually analogous to a so-called
6 ‘*Terry stop*’ and officers ordinarily may stop a vehicle based on reasonable suspicion of
7 criminal activity. *Berkmer v. McCarty*, 465 U.S. 420, 439 (1984). Such a stop is
8 permitted where officers are “aware of specific articulable facts, together with rational
9 inferences from those facts, that reasonably warrant suspicion that the vehicles contain
10 aliens who may be illegally in the county.” *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 884
11 (1975).

12 Reasonable suspicion for a federal officer to stop a car to investigate the
13 immigration status of the occupants depends upon the “totality of the circumstances.”
14 *U.S. v. Arvizu*, 534 U.S. 266, 277 (2002). In considering the totality of the circumstances,
15 however, “an officer cannot rely solely on generalizations that, if accepted, would cast
16 suspicion on large segments of the law-abiding population.” *U.S. v. Manzo-Jurado*, 457
17 F.3d 928, 935 (9th Cir. 2006). Hispanic appearance, for example, is “of such little
18 probative value that it may not be considered as a relevant factor where particularized or
19 individualized suspicion is required.” *U.S. v. Montero-Camargo*, 208 F.3d 1122, 1135
20 (9th Cir. 2000). Moreover, while an inability to speak English is probative of immigration
21 status, it does not supply reasonable suspicion unless “other factors suggest that the
22 individuals are present in this country illegally.” *Manzo-Jurado*, 457 F.3d at 937.

23 The undisputed facts surrounding Defendant Hunt’s August 24, 2000, stop and his
24 00/01 Winter stop of the Chavez Shuttle establish that there was little more than the
25 presence of the Chavez Shuttle in an area close to the border at a time when the border
26 had already closed in support of the argument that Defendant Hunt had reasonable
27 suspicion to stop the Chavez Shuttle. Case law is clear that mere presence in a high crime
28 area, without more, will not support a finding of reasonable suspicion. *See, e.g., Montero-*
Camargo, 208 F.3d at 1138 (an individual’s presence in a high crime area is not enough

1 to support reasonable, particularized suspicion that the individual in question has
2 committed or is about to commit a crime); *Brown v. Texas*, 443 U.S. 47, 52, 99 S.Ct.
3 2637, 61 L.Ed.2d 357 (1979) (holding that an investigatory stop was not justified when
4 police officers detained two men walking away from each other in an alley in an area
5 with a high rate of drug trafficking because “the appellant's activity was no different from
6 the activity of other pedestrians in that neighborhood”). Moreover, although Defendant
7 Hunt urges this Court to conclude that he had reasonable suspicion to support his two
8 stops in light of his 11 years of experience, experience does not itself serve as an
9 independent factor in the reasonable suspicion analysis. *Montero-Camargo*, 208 F.3d at
10 1131-32. While Defendant Hunt seeks to have the Court agree with him that his prior
11 experience with the Chavez Shuttle supports a reasonable suspicion finding, with respect
12 to the August 24, 2000 stop, Defendant Hunt did not even know he was stopping the
13 Chavez Shuttle when he initially pulled it over.

14 Accordingly, the Court cannot say, as a matter of law, that the stops initiated by
15 Defendant Hunt were supported by reasonable suspicion.

16 *Qualified Immunity – Defendant Hunt*

17 To determine whether a government official sued in his individual capacity is
18 entitled to qualified immunity, a court must first determine whether, when considered in
19 the light most favorable to the party asserting the injury, the facts alleged show the
20 officer’s conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201
21 (2002). If a constitutional violation occurred, the court must determine whether the right
22 was clearly established at the time of the alleged violation. *Id.* If the law did not put the
23 defendant on notice that her conduct would be clearly unlawful, summary judgment
24 based upon qualified immunity is appropriate. *Id.* at 202.

25 The first *Saucier* prong has already been analyzed and the Court concludes that
26 Defendant Hunt has not established that as a matter of law he had reasonable suspicion to
27 stop the Chavez Shuttle. The second *Saucier* prong, whether the case law establishes that
28 Defendant Hunt should have been aware that his conduct was unlawful, is also satisfied.
As of 2000, the law that mere presence in a high crime area is not sufficient, in and of

1 itself, to establish reasonable suspicion was well established. *See, e.g., Montero-*
2 *Camargo*, 208 F.3d at 1138 (holding, in 2000, that an individual’s presence in a high
3 crime area is not enough to support reasonable, particularized suspicion that the
4 individual in question has committed or is about to commit a crime); *Brown v. Texas*, 443
5 U.S. at 52 (holding, in 1979, that an investigatory stop was not justified when police
6 officers detained two men walking away from each other in an alley in an area with a
7 high rate of drug trafficking because “the appellant’s activity was no different from the
8 activity of other pedestrians in that neighborhood”).

9 The Court will adopt the recommendation of Magistrate Judge Rateau that
10 Defendant Hunt is not entitled to entry of judgment in his favor as a matter of law that:
11 (1) he had reasonable suspicion to support the stops of Plaintiff Jose Chavez and (2) he is
12 entitled to qualified immunity.

13 **Defendant Demik (Fifth Stop):** Plaintiffs assert that on March 6, 2001, Defendant
14 Demik stopped the Chavez Shuttle as it was being driven by Plaintiff Jose Chavez.
15 Defendant Demik is alleged to have taken pictures of the Chavez Shuttle during this stop.
16 The Magistrate Judge recommends granting judgment in Defendant Demik’s favor on the
17 grounds that Plaintiffs Chavez have failed in their burden to establish that Defendant
18 Demik’s conduct was sufficiently egregious to rise to the level of a Fourth Amendment
19 violation. Also, just as with Defendant Rios,⁷ the Magistrate Judge concluded that
20 Plaintiffs Chavez did not adequately plead a claim against Defendant Demik based on the
21 stop itself (as opposed to conduct that occurred during the stop). Plaintiffs Chavez
22 objected to this conclusion. Defendant Demik has asserted three arguments in support of
23 his position that the Magistrate Judge correctly concluded that Plaintiffs Chavez did not
24 state a claim against him for his stop of the Chavez Shuttle, namely: (1) in his deposition
25 testimony Plaintiff Jose Chavez said he was not challenging the stop by Defendant
26 Demik; (2) the mandate in *Chavez I* was issued prior to *Ashcroft v. Iqbal* and no longer
27 relevant; and (3) even if Plaintiffs had sufficiently stated a Fourth Amendment claim

28 ⁷ (*see n.3, supra*)

1 against Defendant Demik, Plaintiffs have failed to demonstrate a genuine issue of
2 material fact for trial.

3 The Court does not agree with the conclusion that Plaintiffs have not sufficiently
4 stated a claim against Defendant Demik for his stop of the Chavez Shuttle on March 6,
5 2001. However, the Court will adopt the recommendation by Magistrate Judge Rateau
6 that Defendant Demik is entitled to qualified immunity for his alleged conduct during the
7 March 6, 2001, stop.

8 *The Claim Against Defendant Demik for His Stop of the Chavez Shuttle*

9 The allegations in the Plaintiffs' FAC against Defendant Demik expressly state, in
10 relevant part, "On March 6, 2001, Plaintiff Jose Chavez was stopped by Defendant
11 Demek (*sic*) during a regularly scheduled run. Defendant Demek (*sic*) took photographs
12 of Plaintiffs' shuttle..." See Doc. 12 at ¶ 37. This express allegation in the FAC, coupled
13 with the mandate from *Chavez I*, is sufficient to support the conclusion that Plaintiffs
14 Chavez pled a claim against Defendant Demik for his stop of the Chavez Shuttle.
15 Defendants Demik's citations to Plaintiff Jose Chavez's deposition testimony for his
16 argument that Plaintiff Jose Chavez testified that he is not stating a claim based on
17 Defendant Demik's stop of the Chavez Shuttle is not convincing. Based upon a reading
18 of Plaintiff Jose Chavez's testimony it is not clear that Plaintiff Jose Chavez understood
19 the questioning by Defendants' counsel regarding the stop by Defendant Demik. See Doc.
20 248 at Ex. 2 at p. 71-72, ll. 16-14 (For instance, when asked whether he was challenging
21 a stop, Plaintiff Jose Chavez testified, in part, "He's a Border Patrol and he has to make a
22 stop). Accordingly, the Court concludes that Plaintiffs Chavez did plead a Fourth
23 Amendment claim against Defendant Demik based upon his March 6, 2001, stop of the
24 Chavez Shuttle.

25 In his summary judgment motion, Defendant Demik argues that he is entitled to
26 qualified immunity for his alleged conduct during the March 6, 2001, stop and
27 specifically stated, "[P]laintiffs do not allege that this specific stop by Defendant Demik
28 violated the Fourth Amendment." The Court concludes otherwise and determines that
Defendant Demik has not met his burden of establishing that he is entitled to entry of

1 judgment as a matter of law regarding whether his stop of the Chavez Shuttle violated
2 Plaintiff Jose Chavez's Fourth Amendment rights and, if so, whether he is nevertheless
3 protected by the doctrine of qualified immunity for his March 6, 2001, stop of the Chavez
4 Shuttle.

5 *Qualified Immunity – Defendant Demik*

6 Assuming the allegation that Defendant Demik photographed the Chavez Shuttle
7 during the March 6, 2001, stop of the Chavez Shuttle to be true, the Magistrate Judge
8 concluded that such conduct by Defendant Demik does not rise to the level of a
9 constitutional violation. The Magistrate Judge reasoned that, “[w]hen viewed as a
10 discreet event, there is no authority suggesting that the photographing of a vehicle in a
11 public place could amount to a constitutional violation.” *See Dow Chemical Company v.*
12 *United States*, 476 U.S. 22 (1986) (taking aerial photographs of an industrial plan
13 complex from navigable airspace is not a search prohibited by the Fourth Amendment).
14 Therefore, the Magistrate Judge recommends granting Defendant Demik's request for
15 qualified immunity for this alleged action. Plaintiffs offer no argument that the
16 Magistrate Judge's conclusion is incorrect and the Court concludes that the Magistrate
17 Judge's conclusion is, in fact, correct.

18 The Court adopts the recommendation by the Magistrate Judge with respect to
19 Defendant Demik's alleged conduct during the March 6, 2001, stop.

20 **Conclusion**

21 IT IS HEREBY ORDERED:

- 22 1. Summary judgment in favor of Defendants Rios and Scharnweber is granted.
23 2. Summary judgment in favor of Defendant Hunt is denied.

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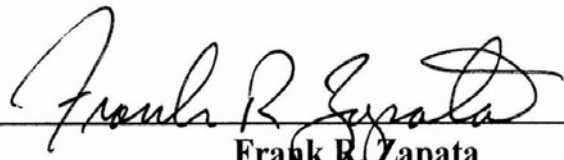
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3. Summary judgment in favor of Defendant Demik is granted with respect to Defendant Demik's conduct during the March 6, 2001, stop and summary judgment is denied with respect to Defendant Demik's stop of the Chavez Shuttle on March 6, 2001.

Dated this 3rd day of September 2014.



Frank R. Zapata
Senior United States District Judge