UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EMMANUEL ANDRO, Plaintiff, v. TOWN OF BROOKLINE, et al., Defendants.	Civil Action No. 15-13030-NMG **LEAVE TO FILE EXCESS PAGES GRANTED ON 6/30/2016**

THE NORFOLK DA DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS COMPLAINT (BY DEFENDANTS MORRISSEY, FRIEDMAN, MARATHAS, AND NELSON)

Respectfully submitted,

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Dated: June 30, 2016

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INTRODUCTION

At the heart of this case is the plaintiff's allegation that his detention by the Brookline Police pursuant to an immigration detainer, and his subsequent detention by U.S. Immigration and Customs Enforcement (ICE), violated his federal constitutional rights. The plaintiff fails to allege—nor could he allege—any active role in this detention by Norfolk District Attorney Michael Morrissey or the victim-witness advocates employed by the Norfolk District Attorney's Office, Pamela Friedman, Erica L. Marathas, and Steven G. Nelson (collectively, the "Norfolk DA Defendants"). At most, the plaintiff alleges that the Norfolk DA Defendants knew of the detention and did not act to prevent it, which, as discussed below, is insufficient to state a cognizable claim against them.

The plaintiff further attempts to draw the Norfolk DA Defendants into this suit by making conclusory allegations that, in connection with two state criminal matters (in which the plaintiff was a victim and a defendant, respectively), the Norfolk DA Defendants discriminated against the plaintiff on the basis of his national origin. But the well-pleaded facts in the Complaint do not plausibly support such a claim.

In addition, several immunity doctrines, including sovereign immunity, absolute prosecutorial and quasi-prosecutorial immunity, and qualified immunity, bar the plaintiff's claims against the Norfolk DA Defendants and deprive this Court of subject matter jurisdiction. For all of these reasons, as argued in detail below, the claims against the Norfolk DA Defendants must be dismissed in their entirety.

SUMMARY OF RELEVANT FACTS[1]

A. The Plaintiff Suffers Abuse at the Hands of His Domestic Partner, David Sanderson, and Receives Services as the Victim in a State Criminal Case.

In March of 2014, the plaintiff, Emmanuel Andro, was living with his then domestic partner, David M. Sanderson, in Brookline, Massachusetts. Compl. ¶¶ 10, 50. On Friday March 14, 2014, Mr. Sanderson assaulted the plaintiff. Compl. ¶ 50. The plaintiff called 911, and Mr. Sanderson was subsequently arrested and charged with assault and battery. Compl. ¶ 50. Defendant Erica L. Marathas, a victim-witness advocate employed by the Norfolk District Attorney's Office, met with the plaintiff to discuss the case. Compl. ¶¶ 43, 51. Defendant Marathas informed him that "he was within his rights to request medical supervision of Mr. Sanderson." Compl. ¶ 51. She also "mentioned the availability of" a restraining order pursuant to M.G.L. c. 209A, but she did not inform Mr. Andro that "an alleged domestic violence abuser could retaliate against his victim by filing [for] a frivolous restraining order." Compl. ¶ 51.

B. Mr. Sanderson Files a Retaliatory Restraining Order, the Brookline Police Arrest the Plaintiff for Violation of the Order, and ICE Issues an Immigration Detainer Against Him.

Mr. Sanderson filed a restraining order against the plaintiff, and the Brookline Police arrested the plaintiff for violation of the order on Monday, March 17, 2014. Compl. ¶ 52. Upon his arrest, the Brookline Police transported the plaintiff to the police station for booking. Compl.

[1] This summary focuses on allegations against the Norfolk DA Defendants. "The facts are taken from the operative complaint, and are assumed true for the purpose of resolving the motion to dismiss." *Durand v. Harpold*, 807 F.3d 392, 393 (1st Cir. 2015). Allegations containing legal conclusions are not entitled to an assumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Norfolk DA Defendants also refer to certain materials outside the Complaint, which this Court may consider in resolving a motion to dismiss. *See Freeman v. Town of Hudson*, 714 F.3d 29, 36 (1st Cir. 2013) (citing *Watterson v. Page*, 987 F.2d 1, 3-4 (1st Cir. 1993)) (on a motion to dismiss pursuant to Rule 12(b)(6), the court may consider official public records, documents that are incorporated by reference into the complaint, and documents that are "central to the plaintiff's claim"); *see also Carroll v. United States*, 661 F.3d 87, 94 (1st Cir. 2011) (on a motion to dismiss pursuant to Rule 12(b)(1), the court may "may consider whatever evidence has been submitted") (quotations omitted). Citations to "Compl." refer to the plaintiff's Complaint for Injunctive and Declaratory Relief and Monetary Damages in this action (Doc No. 1).

¶ 52. During the booking process, the Brookline Police questioned the plaintiff regarding his national origin.[2] Compl. ¶ 52. The Brookline Police then reported the plaintiff's information to ICE. Compl. ¶ 55. ICE subsequently issued an immigration detainer against the plaintiff and faxed it to the Brookline Police. Compl. ¶ 55-56. The detainer stated that "[i]f the individual may be the victim of a crime, or if you want this individual to remain in the United States for prosecution or other law enforcement purposes, including acting as a witness, please notify [ICE]." Compl. ¶ 63. Neither the Brookline Police nor the Norfolk District Attorney's Office notified ICE that the plaintiff was a victim of domestic violence or that he might be a witness in a criminal prosecution. Compl. ¶ 63.

C. After the Plaintiff's Arraignment on State Criminal Charges, the Brookline Police Hold the Plaintiff Pursuant to the ICE Detainer, and he is Transferred to ICE Custody.

The plaintiff was brought before a judge of the Brookline District Court for arraignment on Tuesday, March 18, 2014. Compl. ¶ 65. The court ordered that the plaintiff be released on his own recognizance. Compl. ¶ 66. However, the Brookline Police requested that the ICE detainer be enforced. Compl. ¶ 67. This was the first time the plaintiff learned that an immigration detainer had been lodged against him. Compl. ¶ 68. Defendant Marathas was in the courtroom during these events. Compl. ¶ 69. Neither Defendant Marathas nor anyone else raised the fact that the plaintiff was a victim of domestic violence. Compl. ¶ 69. Neither the Brookline Police nor the Norfolk DA Defendants provided the plaintiff with a copy of the detainer or with an opportunity to respond to the allegations in the detainer. Compl. ¶ 72. "By honoring an I.C.E. detainer (a non-binding request that was accompanied by neither a warrant, an

[2] The plaintiff was born in France and holds French and Spanish citizenship. Compl. ¶ 48. He speaks English with an accent. Compl. ¶ 49. The plaintiff's surname "Andro" is of Celtic origin. Compl. ¶ 49.

affidavit of probable cause, nor a removal order), the Norfolk District Attorney and his Office set a course of discriminations [sic] against Mr. Andro, based on his national origin." Compl. ¶ 161.

After the arraignment, the Brookline Police retained custody of the plaintiff until ICE officials picked him up later that day. Compl. ¶ 73. The plaintiff remained in ICE custody for nearly 18 days. Compl. ¶ 76. During that time, the plaintiff was housed in the South Bay House of Correction, under the supervision of the Sheriff of Suffolk County, Steven W. Tomkins, who is also named as a defendant in this action. Compl. ¶¶ 46-47. While in ICE custody, the plaintiff was denied access to a court hearing in Brookline. Compl. ¶ 3.[3] Defendants Morrissey, Friedman, and Nelson, among others, "caus[ed] and promot[ed] … Mr. Andro's in absentia status from the Brookline District Court in favor of a U.S. born litigant, [and] fail[ed] to seek [] incriminating evidence[] against Mr. Andro's abuser." Compl. ¶ 164. In addition, Defendants Morrissey and Friedman "discriminated against Mr. Andro by denying him victim certification … on the basis of national origin." Compl. ¶ 161.[4]

[3] It is unclear which hearing the plaintiff alleges that he missed. The dockets for *Commonwealth v. Andro*, No. 1409CR000242, and *Commonwealth v. Sanderson*, No. 1409CR000235, do not indicate that any hearings were held during the time that the plaintiff alleges he was in ICE custody. *See* Exs. A and B to Motion to Dismiss.

[4] Non-citizens who are victims of qualifying criminal activity, including domestic violence, may petition the U.S. Department of Homeland Security for "U Nonimmigrant Status" or a U-Visa, using form I-918. *See* https://www.uscis.gov/i-918. Petitioners for such status must submit Form I-918 Supplement B, U Nonimmigrant Status Certification, or U-Visa certification, in support of their application. *See id.* According to the instructions for Form I-918 Supplement B, a certifying agency or official should use the form "to certify that an individual submitting [the U-Visa petition] is a victim of certain qualifying criminal activity and is, has been, or is likely to be helpful in the investigation or prosecution of that activity." *See* Instructions at 1, https://www.uscis.gov/sites/default/files/files/form/i-918supbinstr.pdf. "An agency's decision to provide certification is entirely discretionary; the agency is under no legal obligation to complete a Form I-918, Supplement B, for any particular alien." *Id.*

Here, an order issued by the Brookline District Court on September 28, 2015, in connection with a motion by the plaintiff for U-Visa certification, indicates: "After a complete hearing, testimony from Mr. Andro, arguments of counsel as well as a statement by the Special ADA Andrew Lynch the Court is unable to certify the cooperation aspect of the Application. Denied." *See* Exs. B and C to Motion to Dismiss (docket sheets and margin order). Under the doctrine of *res judicata*, the state court's adjudication of this issue precludes the plaintiff from re-litigating it here. *See, e.g., Blake v. Murphy*, No. CIV.A. 05-10508-RGS, 2010 WL 447780, at *2 (D. Mass. Feb. 9, 2010).

During the plaintiff's detention by ICE, the Norfolk District Attorney's Office did not keep the plaintiff informed of the criminal proceedings against his former domestic partner and did not make contact with the plaintiff again until July 2014 through a new victim-witness advocate, Defendant Steven G. Nelson. Compl. ¶ 81. Defendant Nelson "failed to provide support and assistance pursuant to the Massachusetts Victim Bill of Rights, thus targeting Plaintiff illegally … on the basis of national origin." Compl. ¶ 163.

D. The Plaintiff Alleges Discrimination against the District Attorney's Office, and the District Attorney Appoints Special Prosecutors to the Criminal Matters Involving the Plaintiff.

In October 2014, the plaintiff filed a complaint against the Norfolk District Attorney's Office with the Massachusetts Commission Against Discrimination ("MCAD"), alleging discrimination by Defendants Morrissey, Friedman, Marathas, and Nelson on the basis of national origin. Compl. ¶ 82. After the MCAD complaint was filed, District Attorney Morrissey appointed special prosecutors to the criminal cases against the plaintiff and Mr. Sanderson.[5] *See* Exs. A and B to Motion to Dismiss (docket sheets). The MCAD dismissed the plaintiff's complaint for lack of probable cause. *See* Ex. D to Motion to Dismiss (Investigative Disposition and MCAD Dismissal and Notification of Rights). The plaintiff appealed, and the MCAD affirmed the dismissal. *See* Ex. E to Motion to Dismiss (MCAD Letter dated February 3, 2016).

[5] The plaintiff alleges that appointing special prosecutor Lynch to the case against Mr. Sanderson was part of a pattern of discrimination. Compl. ¶ 162. However, the docket sheets reflect that this was done in both his case and Mr. Sanderson's case following the filing of the MCAD complaint, belying any allegation of disparate treatment based on national origin. *See* Exs. A and B to Motion to Dismiss (docket sheets indicating the appearance of special prosecutors Kevin Mullen and Andrew Lynch, respectively, on November 25, 2014).

The plaintiff alleges that all of the foregoing actions by the Norfolk DA Defendants were pursuant to "a policy of enforcing all immigration detainers"[6] and "a policy or practice of disregarding or neglecting to request any available evidence, i.e., charging documents showing that individuals named in detainers are subject to arrest warrant or judicial orders of detention." Compl. ¶ 95. He further alleges that the Norfolk DA Defendants "had no training and no policies in place to prevent unlawful detentions based on wrongly issued immigration detainers. Nor did they have any policies in place regarding the treatment of individuals subject to detainers." Compl. ¶ 96.

According to the plaintiff, the Norfolk District Attorney's Office "has a fiduciary duty for victims of domestic violence," and "[b]y accepting [campaign] contributions from employees, Defendant Morrissey failed to avoid the very appearance of conflicts of interest or impropriety and failed to maintain standards of equal protection and fairness of trial in violation of Mr. Andro's constitutional rights." Compl. ¶ 41.

ARGUMENT

I. Standard of Review on a Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

Rule 12(b) of the Federal Rules of Civil Procedure provides the vehicle for a defendant to challenge the sufficiency of a complaint, among other reasons, for lack of subject matter jurisdiction, *see* Fed. R. Civ. P. 12(b)(1), and for failure to state a claim upon which relief can be granted, *see* Fed. R. Civ. P. 12(b)(6). Such a motion tests the complaint against the requirements of Rule 8(a) that the complaint contain "a short and plain statement of the grounds for the court's

[6] The plaintiff elsewhere refers to "Norfolk County's policy of treating I.C.E. detainers as mandatory under all circumstances." Compl. ¶ 153.

jurisdiction," Fed. R. Civ. P. 8(a)(1), as well as "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2).

Challenges to the court's subject matter jurisdiction ordinarily should be addressed prior to determining whether the complaint states a claim upon which relief can be granted. *Deniz v. Municipality of Guaynabo*, 285 F.3d 142, 149 (1st Cir. 2002) (citing *NE Erectors Ass'n v. Sec'y of Labor*, 62 F.3d 37, 39 (1st Cir. 1995) and *Bell v. Hood*, 327 U.S. 678, 682 (1946)). "After all, if the court lacks subject matter jurisdiction, assessment of the merits becomes a matter of purely academic interest." *Id.* at 150. Such challenges include an assertion that sovereign immunity requires dismissal of the action, which is properly analyzed under Rule 12(b)(1). *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 362 (1st Cir. 2001). However, in appropriate circumstances, a federal court "may resolve a case on the merits in favor of a state without first resolving any Eleventh Amendment [immunity] issues the state raises." *Mulero-Carrillo v. Roman-Hernandez*, 790 F.3d 99, 105 (1st Cir. 2015) (citing *Brait Builders Corp. v. Mass. Div. of Capital Asset Mgmt.*, 644 F.3d 5, 11 (1st Cir. 2011)). Here, due to the lack of allegations that the Norfolk DA Defendants played any active role with respect to the plaintiff's detention pursuant to the ICE detainer, or his subsequent detention by ICE, it may be more efficient for the Court to address whether such claims survive a motion under Rule 12(b)(6), without first addressing immunity issues.

Under either Rule 12(b)(1) or 12(b)(6), the Court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in plaintiff's favor. *Roman-Oliveras v. Puerto Rico Elec. Power Auth.*, 655 F.3d 43, 45 & n.3 (1st Cir. 2011) (citing *McCloskey v. Mueller*, 446 F.3d 262, 265–66 (1st Cir. 2006)). This tenet, however, does not apply to legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Maldonado v. Fontanes*, 568 F.3d 263, 268 (1st Cir. 2009). "In keeping with these principles a court considering a motion to dismiss

can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679.

Once a complaint is stripped of its conclusory allegations, for the purposes of a Rule 12(b)(6) analysis, the Court must assess whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (quoting *Twombly*, 550 U.S. at 555). As the Supreme Court has explained, "[d]etermining whether a complaint states a plausible claim for relief will … be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense … . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

II. The Claims Against the Norfolk DA Defendants Must Be Dismissed for Failure to State a Claim Upon Which Relief Can Be Granted.

A. The Plaintiff Does Not Allege That the Norfolk DA Defendants Played Any Active Role in the Plaintiff's Detention Pursuant to the Immigration Detainer, Nor Did They Have a Legal Duty to Intervene in Such Detention.

In Counts IV, V, and VI of the Complaint, the plaintiff alleges that his detention by state officials pursuant to the ICE detainer violated his Fourth Amendment right against unreasonable seizures, his procedural due process rights, and his right to equal protection. *See* Compl. ¶¶ 141-68. Of these three counts, the Norfolk DA Defendants are only named as defendants in Count VI (equal protection). *See id.* However, the Complaint is interspersed with conclusory allegations

suggesting that the Norfolk DA Defendants are liable for all three alleged violations, so all are addressed here.[7]

Any and all claims against the Norfolk DA Defendants arising from the plaintiff's detention pursuant to the ICE detainer, or his subsequent detention by ICE, must be dismissed. The well-pleaded factual allegations in the Complaint state that the Brookline Police contacted ICE regarding the plaintiff's immigration status and that they, not the Norfolk DA Defendants, held the plaintiff in custody pursuant to the subsequently-issued ICE detainer. Compl. ¶¶ 55-56, 62, 67. At most, the plaintiff alleges sufficient facts to support an inference that Defendant Marathas and others within the Norfolk District Attorney's Office were aware of the plaintiff's detention by the Brookline Police pursuant to the ICE detainer and did nothing to prevent it. Compl. ¶¶ 67, 69. This is legally insufficient to state a claim against the Norfolk DA Defendants. *Cf. Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D.R.I. 2014) (dismissing similar complaint against an ICE employee who merely received a fax from a law enforcement agency informing him that the plaintiff was being held on the basis of an ICE detainer, without alleging that the defendant "had any duty, authority, or ability to investigate or respond" to the notice).

Here, there can be no plausible suggestion that the District Attorney, much less a victim-witness advocate in his employ, had a constitutional duty to intervene in the efforts of the Brookline Police to honor ICE's request for detention in an immigration matter wholly separate

[7] *See, e.g.*, Compl. ¶ 71 ("By depriving Mr. Andro of his liberty, Brookline and Norfolk Defendants effected an unreasonable seizure of Mr. Andro in violation of the Fourth Amendment."); Compl. ¶ 72 ("Brookline and Norfolk Defendants also deprived Mr. Andro of his liberty by failing to provide him with a copy of the detainer and with an opportunity to respond to the allegations (if any) in the immigration detainer."); Compl. ¶ 161 ("By honoring an I.C.E. detainer (a non-binding request that was accompanied by neither a warrant, an affidavit of probable cause, nor a removal order), the Norfolk District Attorney and his Office set a course of discrimination against Mr. Andro, based on his national origin.").

from the criminal complaint being prosecuted by the District Attorney's Office.[8] In fact, one of the crucial allegations in the Complaint is that, at the time the Brookline Police sought to enforce the immigration detainer, any custody in relation to the state criminal matter being prosecuted by the Norfolk District Attorney's Office had ceased. Compl. ¶¶ 66, 70.[9] This lack of a duty to act is also fatal to any claim for negligence against the Norfolk DA Defendants for failure to intervene in the plaintiff's detention in relation to immigration matters. *See Roe No. 1 v. Children's Hosp. Med. Ctr.*, 469 Mass. 710, 713, 16 N.E.3d 1044, 1048 (2014) ("To recover for negligence, a plaintiff must show the existence of an act or omission in violation of a ... duty owed to the plaintiff[s] by the defendant.") (internal quotations omitted); *cf.* Compl. Count VIII, ¶¶ 174-76. Accordingly, any claims against the Norfolk DA Defendants with respect to the propriety of the plaintiff's detention by Brookline Police pursuant to the ICE detainer, or ICE's subsequent detention of the plaintiff in connection with immigration matters, must be dismissed.

B. The Plaintiff Fails to Allege a Plausible Claim That the Norfolk DA Defendants Discriminated Against Him Based on His National Origin.

Separate and apart from issues related to the ICE detainer and ICE's detention of the plaintiff, the Complaint alleges that the Norfolk DA Defendants violated the plaintiff's right to equal protection by discriminating against him on the basis of national origin when performing their duties as prosecutor and victim-witness advocates. "The Equal Protection Clause of the Fourteenth Amendment commands that no state shall 'deny to any person within its jurisdiction

[8] The undersigned counsel searched for but could not locate any cases in which a state prosecutor or an employee of a state prosecutor's office was held liable in connection with the enforcement of an immigration detainer by another state law enforcement agency.

[9] Nor did the Norfolk DA Defendants have a duty to provide the plaintiff with notice or an opportunity to be heard regarding the ICE detainer. *See, infra*. Section III. E. *Cf.* Compl. ¶ 72.

the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike.'" *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). To properly plead such a claim, the plaintiff would need to allege that (1) the Norfolk DA Defendants treated him differently from "similarly situated" persons; and (2) that the differential treatment resulted from invidious discrimination on the basis of an impermissible characteristic, in this case, national origin. *See Pagan v. Calderon*, 448 F.3d 16, 34 & n.9 (1st Cir. 2006) (setting forth the standard for alleging an equal protection claim in the analogous context of the discretionary denial of a government benefit and citing cases). Here, the plaintiff fails to allege a plausible claim with respect to either prong of the equal protection analysis, as to any of the four Norfolk DA Defendants. Allegations against each of the Norfolk DA Defendants will be addressed in turn.[10]

1. The Allegations Against District Attorney Morrissey Fail to State a Plausible Claim of Discrimination.

The specific factual allegations against District Attorney Morrissey are few and far between. From what can be discerned, the plaintiff alleges that the District Attorney discriminated against him by:

- accepting campaign contributions from his employees, Compl. ¶ 41;
- "fail[ing] to notify [ICE] that Mr. Andro was a victim of domestic violence and that his 'status as a witness' in Commonwealth of Massachusetts v. David M. Sanderson might be relevant to the Prosecution," Compl. ¶ 63;

[10] For the purposes of this section, conclusory group allegations against the Norfolk DA Defendants with respect to alleged policies regarding the enforcement of ICE detainers or the enforcement of this particular ICE detainer will be set aside. *See, e.g.*,Compl. ¶¶ 70-72, 89, 95-96, 162, 164. As discussed above, the well-pleaded facts in the Complaint establish that the Brookline Police, not the Norfolk District Attorney's Office, held the plaintiff in custody pursuant to the ICE detainer, and neither the District Attorney, nor any of the victim-witness advocates in his employ, had any affirmative duty to intervene—or to establish policies, procedures, or trainings—to prevent the plaintiff's detention on immigration matters. *See, supra*, Section II.A.

- "failing to inform Mr. Andro of the proceedings in 'Commonwealth of Massachusetts v. Sanderson' and [failing to] make contact with Mr. Andro before July 2014 through a new Victim Witness Advocate (Defendant Nelson)," Compl. ¶ 81;

- denying the plaintiff "victim certification" [also known as U-Visa certification], Compl. ¶ 161;

- appointing a special prosecutor to handle the criminal case against Mr. Andro's abuser, Compl. ¶ 162;

- "causing and promoting de facto Mr. Andro's in absentia status from the Brookline District Court in favor of a U.S. born litigant [and] failing to seek the incriminating evidences [sic] against Mr. Andro's abuser," Compl. ¶ 164; and

- "favor[ing] certain categories of people (U.S. citizens) in [his] prosecutorial efforts, not only discriminating against a protected characteristic (one's national origin) but also undermining the core mission of the justice system to treat everyone fairly," Compl. ¶ 165.

It is unclear how the District Attorney's acceptance of campaign contributions from employees would support a claim of differential treatment of individuals based on national origin or a general favoritism for U.S. citizens over non-citizens. With respect to the District Attorney's Office's processing of requests for U-Visa certification, only non-citizens would have occasion to apply for a U-Visa, so it is unclear how the District Attorney could favor U.S. citizens in the provision of U-Visa certifications. Moreover, the plaintiff offers no factual support for the remaining, conclusory allegations of invidious discrimination in the Norfolk District Attorney's Office, whether through a policy or practice, or in District Attorney Morrissey's own "prosecutorial efforts," including the assembly of evidence in the case against Mr. Sanderson, the appointment of a special prosecutor to Mr. Sanderson's case, or the provision of victim services to the plaintiff in connection with Mr. Sanderson's prosecution.[11] Perhaps

[11] As noted above, following the filing of a complaint against the District Attorney's Office with the MCAD, special prosecutors were appointed to both the case against Mr. Sanderson and the case against the plaintiff, Mr. Andro. *See* Exs. A and B to Motion to Dismiss.

even more importantly, the plaintiff has alleged nothing that would bring these claims outside the ambit of the District Attorney's absolute immunity from suit for all actions in the performance of his prosecutorial duties, as discussed *infra*, Section III.D.

Finally, to the extent the plaintiff suggests that District Attorney Morrissey is vicariously liable for the alleged actions of his subordinates, *e.g.*, victim-witness advocates employed by the Norfolk District Attorney's Office, including Defendants Friedman, Marathas, and Nelson, such claims are not cognizable under § 1983. *See, e.g., Iqbal*, 556 U.S. at 676 ("vicarious liability is inapplicable to ... § 1983 suits"). A supervisor may be held liable for constitutional violations of subordinates only where "an affirmative link between the behavior of a subordinate and the action or inaction of his supervisor exists such that the supervisor's conduct led inexorably to the constitutional violation." *Maldonado v. Fontanes*, 568 F.3d 263, 275 (1st Cir. 2009). Here, the plaintiff has not established any such "affirmative link" through well-pleaded facts to support a claim of supervisory liability. For all of these reasons, the equal protection claim against District Attorney Morrissey must be dismissed.

2. The Allegations Against Chief Victim-Witness Advocate Pamela Friedman Fail to State a Plausible Claim of Discrimination.

With respect to Chief Victim-Witness Advocate Pamela Friedman, the plaintiff alleges:

- "Defendant Friedman denied Plaintiff victim's privilege thus creating a bias or discrimination against Mr. Andro in the prosecution of his case," Compl. ¶ 42;
- Defendant Friedman, among others, "failed to notify [ICE] that Mr. Andro was a victim of domestic violence and that his 'status as a witness' in Commonwealth of Massachusetts v. David M. Sanderson might be relevant to the Prosecution," Compl. ¶ 63;
- Defendant Friedman "discriminated against Mr. Andro by denying him victim certification," Compl. ¶ 161; and
- "By causing and promoting de facto Mr. Andro's in absentia status from the Brookline District Court in favor of a U.S. born litigant, by failing to seek the incriminating evidences [sic] against Mr. Andro's abuser, [Defendant Friedman,

among others,] subjected Mr. Andro to adverse treatment based on his ethnicity and/or national origin," Compl. ¶ 164.

To the extent these allegations relate to Defendant Friedman's processing of requests for U-Visa certification, as noted above, it is unclear how Defendant Friedman could disfavor non-citizens, as a class, in that process, where only non-citizens would be in a position to apply for such certification. Stated differently, Defendant Friedman could not favor U.S. citizens in a process that is wholly inapplicable to them. Moreover, the plaintiff fails to allege any basis from which this Court could conclude that Defendant Friedman or anyone else at the District Attorney's Office had an affirmative duty to reach out to ICE to advocate for his release based on his victim status. On the contrary, as noted above, "[a]n agency's decision to provide [U-Visa] certification is entirely discretionary; the agency is under no legal obligation to complete a Form I-918, Supplement B, for any particular alien." *See* Instructions to Form I-918, Supplement B, at 1, https://www.uscis.gov/sites/default/files/files/form/i-918supbinstr.pdf. Beyond that, the plaintiff offers nothing more than legal conclusions and rote recitations of a cause of action without well-pleaded factual support. *See Iqbal*, 556 U.S. at 677-79. And, as with District Attorney Morrissey above, any claim that Defendant Friedman is vicariously liable for the actions of her subordinates must fail. *Id.* at 676. The equal protection claims against Defendant Friedman must be dismissed.

3. The Allegations Against Victim-Witness Advocate Erica L. Marathas Fail to State a Plausible Claim of Discrimination.

With respect to Victim-Witness Advocate Erica L. Marathas, the plaintiff alleges:

- Defendant Marathas failed to properly inform the plaintiff of his rights after he was assaulted, specifically, by failing to inform him that an alleged domestic violence abuser could retaliate against his victim by filing for a frivolous restraining order, Compl. ¶¶ 43, 51;

- Defendant Marathas, among others, "failed to notify [ICE] that Mr. Andro was a victim of domestic violence and that his 'status as a witness' in Commonwealth of

Massachusetts v. David M. Sanderson might be relevant to the Prosecution," Compl. ¶ 63; and

- Defendant Marathas was in the courtroom during the plaintiff's arraignment, but she failed to raise the fact that the plaintiff was a victim of domestic violence, Compl. ¶ 69.

The allegations against Defendant Marathas primarily concern failures to act, without any legal basis to conclude that Marathas had any affirmative duty to perform the alleged actions. For example, there is no basis in the Complaint to infer that a victim-witness advocate, such as Defendant Marathas, would be required—or even permitted—to offer the plaintiff legal advice regarding the possibility that his alleged abuser might take action against him in the form of a restraining order.[12] And, there is no basis to conclude that Defendant Marathas had a duty to advocate on behalf of the plaintiff with respect to the legal matter of his release from custody, either at the arraignment or subsequently with ICE. Even if there were a basis to infer a duty to act, the plaintiff provides no factual support—as opposed to threadbare conclusions—that Defendant Marathas acted (or failed to act) with discriminatory intent based on the plaintiff's national origin. Therefore, the equal protection claims against Defendant Marathas must be dismissed.

4. The Allegations Against Victim-Witness Advocate Steven G. Nelson Fail to State a Plausible Claim of Discrimination.

With respect to Victim-Witness Advocate Steven G. Nelson, the plaintiff alleges:

- "The District Attorney … did not make contact with [the plaintiff] until July 2014 through a new victim-witness advocate (Defendant [Steven G.] Nelson)," Compl. ¶ 81.

[12] The Massachusetts "Victim Bill of Rights," which the plaintiff cites in his Complaint, does not require that a victim of domestic violence be informed of this legal risk, although it provides for notification of victims regarding other topics, such as their rights in the criminal process, hearing dates and cancellations, the availability of protection from threats of harm related to cooperation with law enforcement, and the availability of financial assistance and other social services. *See* Mass. Gen. Laws ch. 258B, § 3.

- Defendant Nelson "failed to provide support and assistance pursuant to the Massachusetts Victim Bill of Rights, thus targeting Plaintiff illegally … on the basis of national origin," Compl. ¶ 163; and

- "By causing and promoting de facto Mr. Andro's in absentia status from the Brookline District Court in favor of a U.S. born litigant, by failing to seek the incriminating evidences [sic] against Mr. Andro's abuser, [Defendant Nelson, among others,] subjected Mr. Andro to adverse treatment based on his ethnicity and/or national origin," Compl. ¶ 164.

These bare allegations are not specific enough to meet the minimum pleading standards embodied in Rule 8(a). For example, although he alleges that Defendant Nelson "failed to provide support and assistance pursuant to the Victim Bill of Rights Act," he does not specify which services were denied, when, or how. It is difficult to discern from this which of Defendant Nelson's actions form the basis for his inclusion in the lawsuit. Moreover, as above, the plaintiff does not provide any factual support from which one could infer that Defendant Nelson treated the plaintiff differently from other similarly situated persons or that Defendant Nelson's actions were motivated by invidious discriminatory intent on the basis of the plaintiff's national origin. The equal protection claims against Defendant Nelson must be dismissed.

III. The Norfolk DA Defendants Are Immune From Suit.

A. Sovereign Immunity Bars This Suit for Damages and Other Retrospective Relief Against the Norfolk DA Defendants in Their Official Capacities.

Claims against the Norfolk DA Defendants in their official capacities for damages and other retrospective relief are barred by the sovereign immunity principles embodied in the United States Constitution and its Eleventh Amendment. *Alden v. Maine*, 527 U.S. 706, 712-30 (1999); *see also Papasan v. Allain*, 478 U.S. 265, 277-78 (1986) ("Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant."); *Green v. Mansour*, 474 U.S. 64, 66 (1985) (holding that "the Eleventh Amendment … and

applicable principles governing the issuance of declaratory judgments forbid the award" of "notice relief" or "a declaration that [a state official's] prior conduct violated federal law"); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (holding that a suit against an officer in his official capacity is a suit against the state); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (holding that a suit "seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment"). This bar applies to civil rights violations, as well as to state-law claims brought to the federal court through pendent jurisdiction, such as those alleged here. *Pennhurst*, 465 U.S. at 97-123.[13] Accordingly, to the extent the plaintiff purports to sue the Norfolk DA Defendants in their official capacities for damages and other retrospective relief, any such claims must be dismissed.

B. The Norfolk DA Defendants in Their Official Capacities Are Not "Persons" Under the Federal or State Civil Rights Statutes.

The plaintiff may not bring a claim for damages against the Norfolk DA Defendants in their official capacities pursuant to 42 U.S.C. § 1983 because they are not "persons" subject to liability under that statute. Section 1983 creates a cause of action against a "person who, under color of [state law], subjects or causes to be subjected, … [another person] to the deprivation of any rights, privileges or immunities secured by the Constitution and laws." But "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 71 (1989) (commenting in part that § 1983 "provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties");

[13] For the reasons set forth, *infra*, Sections III.B. and C., no abrogation or waiver of immunity has occurred with respect to the plaintiff's claims.

see also Lapides v. Board of Regents of Univ. Sys. of Ga., 535 U.S. 613, 617 (2000) ("[A] State is not a 'person' against whom a § 1983 claim for money damages might be asserted."). Nor are they "persons" under 42 U.S.C. § 1985 (conspiracy to commit a civil rights violation), *see, e.g., Santiago v. Keyes*, 839 F. Supp. 2d 421, 428 (D. Mass. 2012), or the under the Massachusetts Civil Rights Act, *see id.* at 428; *Commonwealth v. ELM Medical Laboratories, Inc.*, 33 Mass. App. Ct. 71, 75-80, 596 N.E.2d 376, 379 (1992), to the extent that the plaintiff may be construed to have alleged any such claims. Accordingly, any claims for damages against the Norfolk DA Defendants in their official capacities under the federal or state civil rights statutes must be dismissed.

C. The Norfolk DA Defendants Are Immune From the Plaintiff's State-law Tort Claims Under the Doctrine of Sovereign Immunity and the Provisions of the Massachusetts Tort Claims Act.

The Norfolk DA Defendants are protected against any state-law tort claims based on state-law principles of sovereign immunity and the provisions of the Massachusetts Tort Claims Act (MTCA). These sources place limitations not only on the jurisdiction of state courts, but also on causes of action provided for under state law. They are thus applied by federal courts confronting civil claims under Massachusetts law. *See, e.g., Crete v. City of Lowell*, 418 F.3d 54, 60-65 (1st Cir. 2005).

Under its common law, the Commonwealth enjoys sovereign immunity against civil actions. *DeRoche v. Massachusetts Comm'n Against Discrimination*, 447 Mass. 1, 12, 848 N.E.2d 1197, 1205 (2006); *Morris v. Massachusetts Maritime Academy*, 409 Mass. 179, 181-86, 565 N.E.2d 422, 424-27 (1991). Those acting on the Commonwealth's behalf are entitled to the same protection when sued in their official capacities. *See, e.g., Sullivan v. Chief Justice for Admin. & Management of the Trial Court*, 448 Mass. 15, 24-27, 858 N.E.2d 699, 708-11 (2006)

(discussing availability of sovereign immunity defense for Chief Justice of Administration and Management against claims for declaratory and equitable relief, where immunity not waived).

In enacting the MTCA, the Massachusetts Legislature waived the protection of sovereign immunity as to tort claims only in certain limited circumstances, *see* Mass. Gen. Laws ch. 258, §§ 1-13; *Sharon v. City of Newton*, 437 Mass. 99, 111, 769 N.E.2d 738, 748 (2002) (MTCA "abrogat[es] sovereign immunity only within a narrow statutory framework"), and subject to several exceptions, *see* Mass. Gen. Laws ch. 258, § 10. When a claim falls within an exception listed in Mass. Gen. Laws ch. 258 § 10, the assumption of liability does not apply, and immunity is retained. *See Kent v. Commonwealth*, 437 Mass. 312, 315 n.4, 771 N.E.2d 770, 773 (2002); *cf. Irwin v. Commissioner of Dep't of Youth Servs.*, 388 Mass. 810, 811, 448 N.E.2d 721, 722 (1983) (MTCA did not waive sovereign immunity in federal court).

For example, the MTCA does not waive immunity with respect to intentional torts, including malicious prosecution, false imprisonment, and the like. *See* Mass. Gen. Laws ch. 258, § 10(c) (excluding "any claim arising out of an intentional tort, including assault, battery, false imprisonment, false arrest, intentional mental distress, malicious prosecution, malicious abuse of process, libel, slander, misrepresentation, deceit, invasion of privacy, interference with advantageous relations or interference with contractual relations"). Thus, to the extent the plaintiff seeks to bring any intentional tort claims against the Norfolk DA Defendants, such claims are barred by sovereign immunity.

Similarly, the MTCA does not extend liability to tort claims based on discretionary functions, which would apply to the extent the plaintiff alleges tortious conduct with respect to District Attorney Morrissey's investigative decisions, charging decisions, decisions to appoint a special prosecutor, or any other action requiring the exercise of discretion in the scope of his duties as District Attorney. Mass. Gen. Laws ch. 258, § 10(b); *see, e.g.*, *Sena v. Commonwealth*,

417 Mass. 250, 254-59, 629 N.E.2d 986, 989-91 (1994) (concluding that law-enforcement officers' steps in investigation qualified as discretionary functions, largely because the officers "had to rely on their own judgment, based on their experience and their knowledge of the law"; and observing that "[f]ederal courts generally have held that decisions regarding whether, when, how, and whom to investigate or to prosecute … fall within the discretionary functions exception [of the Federal Tort Claims Act]"); *Jones v. Office of Suffolk County Dist. Attorney*, 82 Mass. App. Ct. 1101, 969 N.E.2d 185 (2012) (unpublished) (discretionary function exception applicable to prosecutor's decisions).[14]

In addition, although claims for negligence do not to fall within any exclusions contained in Mass. Gen. Laws ch. 258, § 10, the plaintiff is still barred from maintaining such claims against the Norfolk DA Defendants because "public employees"—as opposed to "public employers"—retain immunity from such claims under the express terms of the MTCA, regardless of whether they are sued in their official or individual capacities. Mass. Gen. Laws ch. 258, § 2 (providing, subject to certain exceptions, that "[p]ublic employers shall be liable for … the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment" and that "no such public employee … shall be liable for … his negligent or wrongful act or omission while acting within the scope of his office or employment); *see also Pruner v. Clerk of Superior Court*, 382 Mass. 309, 314-15, 415 N.E.2d 207, 210 (1981). For all of the above reasons, the plaintiff's state-law claims against the Norfolk DA Defendants are precluded based on principles of sovereign immunity, and this Court lacks

[14] This exception would also apply to claims against Defendants Friedman, Marathas, and Nelson in the performance of discretionary functions delegated to them by the District Attorney. *See infra*, Section III.E. (discussing immunity for actions delegated by a prosecutor to a subordinate).

subject matter jurisdiction over them. *See, e.g.*, *Kent*, 437 Mass. at 315 n.4, 771 N.E.2d at 773; *see also Vining v. Commonwealth*, 63 Mass. App. Ct. 690, 691 (2005) (where claims barred by sovereign immunity, court lacks subject matter jurisdiction).

Finally, even if sovereign immunity did not bar the plaintiff's state-law tort claims, he could not maintain this action under the MTCA because he fails to allege compliance with the MTCA's presentment requirements. Under § 4 of the MTCA, "[b]efore any civil action for damages may be brought against a public employer, the claimant must present his claim to the employer's executive officer; only if the claim is denied, or if the executive officer fails to deny the claim within six months of its presentment, may the claimant file a civil suit." *Pruner*, 382 Mass. at 315, 415 N.E.2d at 210. Section 4's requirement of "[p]resentment is … a statutory condition precedent to recovery under G.L. c. 258." *Vasys v. Metropolitan Dist. Comm'n*, 387 Mass. 51, 55, 438 N.E.2d 836, 840 (1982). The failure to allege presentment provides an additional, independent basis for the dismissal of the plaintiff's state-law tort claims under Fed. R. Civ. P. 12(b)(6). *See G & B Associates, Inc. v. City of Springfield*, 39 Mass. App. Ct. 51, 54, 653 N.E.2d 203, 206 (1995) ("If the claimant fails to make any presentment of his or her claim prior to bringing an action against the public employer, the plaintiff's complaint is subject to dismissal on a motion made under Mass. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted." (Quotation omitted.)); *Lodge*, 21 Mass. App. Ct. at 284, 486 N.E.2d at 768 ("A plaintiff must demonstrate that he has properly complied with the presentment requirement when the defendant raises the issue in a timely manner.").

D. Absolute Immunity Bars All Claims Against Defendant Morrissey in his Role as Prosecutor.

The plaintiff's claims against District Attorney Morrissey in his individual capacity are barred by the doctrine of absolute prosecutorial immunity. That doctrine bars claims for

damages against prosecutors arising from the performance of duties "'intimately associated with the judicial phase of the criminal process.'" *Buckley v. Fitzsimmons*, 509 U.S. 259, 269-70 (1993) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976)); *see also Chicopee Lions Club v. Dist. Attorney for Hampden Dist.*, 396 Mass. 244, 251, 485 N.E.2d 673, 677 (1985) (discussing immunity under both federal and state law). Absolute immunity protects the performance of such functions even if the prosecutor is alleged to have acted "maliciously and corruptly" or to have committed "grave procedural errors." *Goldstein v. Galvin*, 719 F.3d 16, 24 (1st Cir. 2013) (internal quotations omitted). Without such protection, "harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Burns v. Reed*, 500 U.S. 478, 485 (1991) (quoting *Imbler*, 424 U.S. at 423).

The doctrine of absolute prosecutorial immunity is not limited to the act of prosecuting a case before a judge; rather, it extends to "actions preliminary to the initiation of a prosecution," actions in "initiating a prosecution and … presenting the State's case," and even "actions apart from the courtroom." *Buckley*, 509 U.S. at 270, 272 (quotations omitted). For example, absolute immunity extends to acts such as "an out-of-court effort to control the presentation of a witness's testimony" and "the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." *Id.* at 272-73 (quotation and brackets omitted). It further extends to acts of the prosecutor before a grand jury or in a probable cause hearing. *Burns*, 500 U.S. at 490-91. Also relevant to the allegations here, absolute immunity extends to alleged failures to properly train and supervise prosecutors, and to establish information systems, at least with

respect to activities related to the conduct of trials and "requir[ing] legal knowledge and the exercise of related discretion." *Van de Kamp v. Goldstein*, 555 U.S. 335, 344 (2009).

Here, the task of classifying the allegations against District Attorney Morrissey is somewhat difficult because, as discussed above, the plaintiff alleges very few, if any, specific actions by District Attorney Morrissey himself. However, what is clear is that the plaintiff's claims against the District Attorney all arise from the plaintiff's status as either a defendant or a victim in a criminal proceeding that was being prosecuted by the Norfolk District Attorney's Office. For example, the plaintiff alleges that District Attorney Morrissey "failed to avoid the very appearance of conflicts of interest or impropriety and failed to maintain standards of equal protection and fairness of trial in violation of Mr. Andro's constitutional rights." Compl. ¶ 41. The plaintiff alleges that District Attorney Morrissey and others violated his rights by "causing and promoting" Mr. Andro's absence from a Brookline District Court hearing and by failing to seek incriminating evidence against Mr. Andro's abuser. Compl. ¶ 161. The plaintiff also alleges that the Norfolk District Attorney's Office "had no training and no policies in place to prevent unlawful detentions based on wrongly issued immigration detainers." Compl. ¶ 96.[15] Each of these allegations relates to functions intimately associated with the judicial phase of the criminal process, *e.g.*, the initiation of the case against the plaintiff and Mr. Sanderson, the evaluation and presentation of evidence against them at trial and other court hearings, the preparation of witnesses, the decision whether to take steps to procure the plaintiff's presence in

[15] As discussed above, the well-pleaded factual allegations in the Complaint demonstrate that the Norfolk District Attorney's Office had no role in enforcing the ICE detainer, so there can be no inference that the absence of policies on the topic was in violation of any legal duty. Nonetheless, seeking to enforce a detainer before the Brookline District Court—or training prosecutors in performing such a function—would constitute an act intimately associated with the judicial phase of the criminal process to which absolute immunity applies. *Cf. Van de Kamp*, 555 U.S. at 344.

court, and the establishment of policies and training for assistant prosecutors and others in performing these discretionary functions. *See Van de Kamp*, 555 U.S. at 344; *Buckley*, 509 U.S. at 272-73; *Burns*, 500 U.S. at 490-91; *see also Goldstein*, 719 F.3d at 27 (claim that a prosecutor "failed to investigate enough" cannot evade the bar of absolute prosecutorial immunity as it is merely "a creative, but plainly unavailing, reformulation of an underlying challenge to the decision to prosecute"). Accordingly, District Attorney Morrissey is entitled to absolute prosecutorial immunity, and all claims against him in his individual capacity must be dismissed.

E. Absolute Quasi-Prosecutorial Immunity Bars All Claims Against Defendants Friedman, Marathas, and Nelson in Their Role as Victim-Witness Advocates.

All claims against Defendants Friedman, Marathas, and Nelson for actions in the scope of their duties as victim-witness advocates for the Norfolk District Attorney's Office must be dismissed because such claims are barred by the doctrine of absolute quasi-prosecutorial immunity. "Absolute immunity applies to a narrow swath of public officials, including judges performing judicial acts within their jurisdiction, prosecutors performing acts intimately associated with the judicial phase of the criminal process, and agency officials with functions similar to judges and/or prosecutors." *Goldstein*, 719 F.3d at 24 (internal quotations omitted). "If a function is protected by an absolute immunity, it does not matter if a high-ranking official delegates that function to a lower-ranking official. Notwithstanding the delegation, the scope of immunity is measured by reference to the higher-ranking official." *Id.* at 26 (citing *Ricci v. Key Bancshares of Me., Inc.*, 768 F.2d 456, 462 (1st Cir. 1985)).

Here, as alleged by the plaintiff, Massachusetts has a "Victim Bill of Rights," Compl. ¶ 81, which establishes the rights of crime victims to be "informed by the prosecutor" of certain events and information related to the criminal trial process. Mass. Gen. Laws ch. 258B, § 3. As the Massachusetts Supreme Judicial Court has observed, many of these functions are now

performed by victim-witness advocates. *See Commonwealth v. Bing Sial Liang*, 434 Mass. 131 (2001) (discussing the role of victim-witness advocates in "guid[ing] crime victims, their family members, and witnesses through the criminal justice process" and noting that "[p]erformance of these functions had traditionally fallen to the prosecutors themselves").

Regardless of whether prosecutors perform these functions themselves, or delegate them to victim-witness advocates, they remain prosecutorial functions intimately associated with the judicial phase of the criminal process. *See Goldstein*, 719 F.3d at 26 (delegation does not affect the scope of the immunity). In fact, Mass. Gen. Laws ch. 258B, § 1, expressly includes "victim-witness advocates" in the definition of "prosecutor." Just as an official who acts as an "arm of the court" is entitled to absolute quasi-judicial immunity, victim-witness advocates who act as an "arm of the prosecutor" should be entitled to absolute quasi-prosecutorial immunity in the performance of traditionally prosecutorial functions. *Cf. Brown v. Newburger*, 291 F.3d 89 (1st Cir. 2002) (individuals who performed court-ordered child sexual abuse evaluations entitled to absolute quasi-judicial immunity); *Cok v. Cosentino*, 876 F.2d 1, 3 (1st Cir. 1989) (court-appointed guardian *ad litem* and conservator entitled to absolute quasi-judicial immunity for their actions in assisting and informing the court and acting under court's direction); *Hughes v. Long*, 242 F.3d 121 (3d Cir. 2001) (court-appointed evaluators in child custody cases entitled to absolute immunity as arms of the court engaged in neutral fact-finding); *Myers v. Morris*, 810 F.2d 1437, 1466-67 (8th Cir. 1987) (court-appointed guardians, therapists, and attorneys entitled to absolute quasi-judicial immunity for providing reports and recommendations to state court).

In sum, because the claims against Defendants Friedman, Marathas, and Nelson are based on their performance of prosecutorial functions delegated to them by the District Attorney, the claims must be dismissed as barred by absolute quasi-prosecutorial immunity. *See Goldstein*, 719 F.3d at 24-26.

F. Qualified Immunity Bars Plaintiff's Procedural Due Process Claims Against the Norfolk DA Defendants.

Any procedural due process claims against the Norfolk DA Defendants in their individual capacities—if not barred by absolute prosecutorial and quasi-prosecutorial immunity as discussed above—must be dismissed because such claims are barred by the doctrine of qualified immunity. *See, e.g.*, Compl. ¶ 72 (alleging that "Brookline and Norfolk Defendants … deprived [the plaintiff] of his liberty by failing to provide him with a copy of the detainer and with an opportunity to respond to the allegations (if any) in the immigration detainer"). Qualified immunity "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). This doctrine "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* The protection applies "regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Id.* (quoting *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)).

Qualified immunity is "an immunity from suit rather than a mere defense to liability." *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). As such, "it is effectively lost if a case is erroneously permitted to go to trial." *Id.* Accordingly, the Supreme Court has "'repeatedly … stressed the importance of resolving immunity questions at the earliest possible stage of the litigation.'" *Id.* (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*)).

The Supreme Court has set forth a two-part inquiry for determining whether a state official is entitled to qualified immunity: (1) whether the facts alleged "make out a violation of a

constitutional right," and (2) "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* at 815-16 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). If the court answers either prong in the negative, then qualified immunity applies to the state official's conduct. The decision whether to address the two prongs sequentially, or whether to move directly to the second prong, rests within the sound discretion of the court. *Id.* at 818.

Here, neither prong is met with respect to the plaintiff's procedural due process claims against the Norfolk DA Defendants. First, the plaintiff's allegations do not make out the violation of any procedural due process right because the federal statute and regulations authorizing immigration detainers do not provide the subject of a detainer with a right to notice or an opportunity to be heard before the detainer is enforced. *See* Immigration and Nationality Act, §§ 103, 287, *codified at* 8 U.S.C. §§ 1103, 1357; 8 C.F.R. § 287.7. Second, where no such right exists, it is equally plain that such a right was not clearly-established at the time of the Norfolk DA Defendants' conduct. *See Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D.R.I. 2014) (holding that the right to notice and an opportunity to be heard before an ICE detainer is issued has not been clearly established and noting that "there is no provision in the regulation for notice and an opportunity to be heard before the issuance of a detainer"). Accordingly, any procedural due process claims against the Norfolk DA Defendants must be dismissed.

CONCLUSION

For the foregoing reasons, the Norfolk DA Defendants respectfully request that this Court grant their motion to dismiss all claims against them and enter judgment in their favor.

Respectfully submitted,

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Dated: June 30, 2016

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on June 30, 2016, including:

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