UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

SHAMEL ALEXANDER,
Plaintiff

v. No. 5:16-cv-192

ANDREW HUNT, in his individual capacity, PETER URBANOWICZ, in his individual capacity, PAUL DOUCETTE, individually and in his capacity as Chief of Police for the Town of Bennington, the BENNINGTON POLICE DEPARTMENT, and the TOWN OF BENNINGTON,
Defendants

Plaintiff's Opposition to Defendants' Motions to Dismiss, Response to Defendant Bennington Police Department's Motion to Amend Caption, and Motion to Amend the Complaint

In this lawsuit, Plaintiff Shamel Alexander seeks to vindicate his rights to equal protection, against unreasonable search and seizure, and to freedom from race-based discrimination. The Defendants, Andrew Hunt, Peter Urbanowicz, Paul Doucette, the Bennington Police Department, and the Town of Bennington, have separately moved to dismiss the complaint [ECF Nos. 10, 11, 12, 13, 14, 15]. Because their arguments rest on misinterpretation and misapplication of relevant law and ignore critical allegations in Mr. Alexander's complaint, the Defendants' motions must be denied.

I. Statement of Facts

As spelled out in detail in the complaint, on July 11, 2013, Plaintiff Shamel Alexander, an African-American male, was traveling in Bennington, Vermont, in a taxi that hailed from New York, searching unsuccessfully for a Chinese restaurant whose correct name he did not know. Defendant Peter Urbanowicz, then a detective with the

Bennington Police Department [BPD], thought this conduct was suspicious and encouraged Defendant Andrew Hunt, then an officer with BPD, to try to find a reason to stop the taxi. Although Urbanowicz and Hunt were aware of information developed from anonymous tips and confidential informants that an African-American male who went by the nickname "Sizzle" brought controlled substances into Bennington from New York, neither officer believed—or had reason to believe—that Mr. Alexander was "Sizzle" (and he is not "Sizzle"). Instead, they determined to treat him as a suspect because of his race.

After pulling over the taxi for a pretextual traffic violation and after completing his investigation into that violation, Hunt quickly converted the traffic stop into a drug investigation, thereby expanding the scope and extending the duration of the stop, notwithstanding the lack of reasonable suspicion to believe that Mr. Alexander was involved in any criminal activity. After conducting an illegal detention and search, Hunt located marijuana and heroin in Mr. Alexander's belongings.

The Vermont Supreme Court vacated Mr. Alexander's subsequent conviction of trafficking heroin, finding that Hunt's extension of the seizure violated the Fourth Amendment. In defiance of this ruling, Defendant Paul Doucette, Chief of the Bennington Police Department, continued to insist that his officers had acted properly and that there was no need for the Department to make any changes in response to the violation of Mr. Alexander's constitutional rights.

II. The Motion to Dismiss Standard

The Defendants have accurately quoted cases interpreting the standards for defeating a Fed. R. Civ. P. 12(b)(6) motion to dismiss. *See* Urbanowicz Mot. 6-7. As will

be discussed below, however, they have incorrectly argued that various factual matters must be specifically alleged at the pleading stage. Mr. Alexander will address those arguments as they arise in responding to the relevant parts of the Defendants' motions.

III. Argument

The Defendants have explained why various claims that Mr. Alexander did not bring should fail.[1] However, they have failed to defeat the claims that Mr. Alexander actually did raise.

A. Mr. Alexander's Fourth Amendment Rights Were Violated by the Expansion of the Purpose of the Traffic Stop and the Extension of Its Duration

1. Qualified immunity cannot shield Hunt from liability for these violations

Despite the Defendants' claim to the contrary, it was clearly established law at the time of the stop that the Fourth Amendment did not permit a police officer to expand a traffic stop into a drug investigation and extend the duration of the stop beyond the time needed to issue a traffic ticket absent reasonable suspicion of a separate offense. The Defendants claim that Hunt's expansion of the traffic stop into a drug investigation was only clearly established as unconstitutional when the Supreme Court decided *United States v. Rodriguez*, 135 S. Ct. 1609 (2015), nearly two years after the incident here at

[1] See Hunt Mot. 2 (Hunt argues that, where a more specific constitutional right exists, a Fourteenth Amendment substantive due process claim will not lie, but in Count I, the Fourteenth Amendment was cited as source of the Fourth Amendment's applicability to the States, not as a separate substantive due process claim), 3-4 (Hunt attempts to justify the initial traffic stop, but Mr. Alexander did not allege that the initial stop violated the Fourth Amendment); Urbanowicz Mot. 10-12 (Urbanowicz sets out the requirements for a selective prosecution claim, but Mr. Alexander did not bring a selective prosecution claim, but rather a claim that Hunt and Urbanowicz discriminated against him on the basis of his race when deciding to treat him as a criminal suspect, notwithstanding the absence of reasonable suspicion that he was involved in any criminal offense).

issue. However, as *Rodriguez* itself explains, that case was simply a straightforward application of prior Supreme Court precedent, most notably *Illinois v. Caballes*, 543 U.S. 405 (2005). *See Rodriguez*, 135 S. Ct. at 1612 ("A seizure justified only by a police-observed traffic violation, therefore, become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission of issuing a ticket for the violation. The Court so recognized in *Caballes,* and we adhere to the line drawn in that decision." (citation and internal quotation marks omitted)); *id*. at 1616 ("As we said in *Caballes* and reiterate today, a traffic stop prolonged beyond [the point that the officer completes traffic-based inquiries] is unlawful." (internal quotation marks omitted)).

Pre-*Rodriguez* Supreme Court precedent clearly established that the expansion of the scope of a stop from a traffic violation into a drug investigation absent reasonable suspicion of a drug offense and the extension of a stop's duration past the time required to complete its original mission violate the Fourth Amendment—a point amply demonstrated by the trio of Supreme Court cases Hunt cites for the proposition that, pre-*Rodriguez*, confusion abounded as to what limitations applied to officers' actions after a traffic stop.

Caballes held that a traffic stop could not be extended beyond the time necessary to complete the mission of the stop, 543 U.S. at 407, and that the "mission" includes determining whether to issue a citation along with the "ordinary inquiries incident to such a stop," *id*. at 408, such as inspecting paperwork and checking for outstanding warrants, *Rodriguez*, 135 S. Ct. at 1615 (citing *Delaware v. Prouse*, 440 U.S. 648, 658-60 (1979)). These inquiries are permitted because they "serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." *Id*. (citing *Prouse*, 440 U.S. at 658-59; 4 W. LaFave, Search and

Seizure § 9.3(c), at 516 (5th ed. 2012)). But when the objective of the officer's efforts switches from the offense as to which he has reasonable suspicion to one as to which he does not, prolonging the seizure is not reasonable. *Caballes*, 543 U.S. at 407 ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete *that* mission." (emphasis added)).[2]

In *Arizona v. Johnson*, 555 U.S. 323, 332 (2009), the Court held that, just as an officer is permitted to perform a patdown during a lawful *Terry* stop if she has reasonable suspicion to believe the suspect is armed and dangerous, so too may an officer perform a patdown during a lawful traffic stop based on that same suspicion. Inquiries into matters unrelated to those as to which such suspicion exists are limited to those that do not "measurably extend" the detention. *Id.* at 333; *see also Muehler v. Mena*, 544 U.S. 93, 101 (2005) (questioning about immigration status during execution of search warrant did not constitute an "additional seizure within the meaning of the Fourth Amendment" where the detention was not prolonged by the questioning).[3]

In *United States v. Sharpe*, 470 U.S. 675, 682, 687-88 (1985), the Court merely held that, where the delay was "attributable almost entirely to" the suspect's actions, a

[2] In addition, *Caballes* involved a dog sniff during a lawful traffic stop, and rested on the notion that a dog sniff does not infringe any constitutionally protected privacy interest and therefore is not a search for Fourth Amendment purposes; thus, the sniff, which did not require any extension of the duration of the stop, did not "change the character" of the lawful traffic stop into a separate investigation of a separate offense requiring independent reasonable suspicion. 543 U.S. at 408. The Defendants do not dispute, nor could they, that the expansion of the scope and extension of the duration of the stop in this case changed the character of the stop from one purportedly investigating a traffic violation to one investigating a suspected drug offense.

[3] The *Muehler* Court noted that the plaintiff argued that the immigration-related questioning had, in fact, prolonged the detention, but declined to address this claim where the court of appeals had not done so in the first instance. 544 U.S. at 102. The Court left that question to be resolved by the court of appeals on remand, indicating that the reasonableness of the additional questioning hinged on whether it in fact prolonged the detention beyond the time necessary to accomplish the detention's mission. *Id.*; *see also id.* at 105 (Stevens, J., concurring in the judgment) ("I agree that it is appropriate to remand the case to enable the Court of Appeals to consider whether the evidence supports Mena's contention that she was held longer than the search actually lasted.").

twenty-minute detention while officers diligently investigated an offense as to which they had reasonable suspicion was not unreasonable. *Sharpe* says nothing about the reasonableness of extending a detention so as to investigate an offense where, as here, such suspicion is absent, and where, as here, no delay was attributable to the "suspect."

Here, absent reasonable suspicion of an additional offense, Hunt "measurably extend[ed]" the duration of the stop and "changed the character" of the investigation by expanding its scope to pursue an investigation entirely separate from, and after the completion of, the investigation related to the traffic violation that justified the stop.[4] These cases clearly establish that the expansion of the purpose of, and extension of the detention for, the stop were unconstitutional.

Likewise, qualified immunity does not shield Hunt from Mr. Alexander's claim that Hunt lacked reasonable suspicion to believe that he was engaged in criminal activity. As detailed below, *infra* Part III.B.1, neither Hunt nor Urbanowicz believed that Mr. Alexander was "Sizzle." Once any reliance on the "Sizzle" tip is removed from the equation, all that remains is an African-American male in a New-York-based taxi looking for a restaurant located in an area where drugs are believed to be bought and sold. No reasonable officer could believe that these facts suffice to form reasonable

[4] Hunt cites *United States v. Harrison*, 606 F.3d 42 (2d Cir. 2010), for the proposition that the Second Circuit has approved of detentions that were extended by longer periods than the one here. However, the entire interval in *Harrison*—from stop to arrest—was five to six minutes, and the brief questioning unrelated to the reason for the stop was "subsumed" within the period devoted to the mission of the initial stop. *Id.* at 45. Likewise, the intervals cited with approval by *Harrison* refer to the duration of the entire stop, during which some unrelated questioning occurred, and/or were supported by reasonable suspicion as to the new offense. *See United States v. Turvin*, 517 F.3d 1097, 1101-02 (9th Cir. 2008) (brief pause to ask unrelated questions in course of writing ticket during fourteen-minute period between stop and request for consent to search was reasonable; "officers are not required to move at top speed when executing a lawful traffic stop"); *United States v. Hernandez*, 418 F.3d 1206, 1210-11 (11th Cir. 2005) (seventeen-minute period between stop and request for consent to search was reasonable where, "*[f]rom the first minute of the stop*, the driver and Defendant demonstrated suspicious behavior that could warrant an objectively reasonable policeman to believe that Defendant might be involved in other criminal activity . . . [and] as each answer to the Trooper's investigative questions failed to allay his concerns, the Trooper's reasonable suspicion was bolstered, thus justifying his continuing to detain Defendant" (emphasis added)). That is not the case here, where, after concluding the traffic stop, Hunt forged ahead with an unrelated drug investigation, absent reasonable suspicion to do so.

suspicion.[5]

Finally, although Hunt argues that there can be no Fourth Amendment violation when a search is conducted pursuant to voluntary consent, he ignores altogether the fact that "consent" was given during the course of an illegal seizure. An illegal seizure vitiates any consent, which consent cannot thus absolve Hunt from liability for conducting an illegal search. *See United States v. Jerez*, 108 F.3d 684, 695 (7th Cir. 1997) (where consent was obtained following illegal seizure and no intervening event broke the causal chain between the illegality and consent, illegal seizure vitiated consent); *cf. Florida v. Royer*, 460 U.S. 491, 507-08 (1983) ("Because . . . Royer was being illegally detained [beyond the limits of a *Terry* investigative stop] when he consented to the search of his luggage, we agree that the consent was tainted by the illegality and was ineffective to justify the search.").

For all of these reasons, Hunt cannot avail himself of the protection of qualified immunity in this case.

2. Mr. Alexander has adequately pleaded municipal and supervisory liability for his Fourth Amendment claim

The Defendants are correct that there is no *respondeat superior* liability under § 1983, *e.g.*, *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 403 (1997), and Mr. Alexander does not seek to impose it. Instead, Mr. Alexander alleges that the violations of his constitutional rights were caused by Chief Doucette's, the BPD's, and

[5] Hunt's assertion that a contrary finding here would require this Court to hold that the trial judge was "clearly incompetent" in denying Mr. Alexander's motion to suppress is incorrect. Hunt Mot. 14. The trial judge appears to have believed that Urbanowicz and/or Hunt thought Mr. Alexander may have been "Sizzle." As alleged by Mr. Alexander and as developed below, they did not believe that. With that understanding of the facts, the trial judge would have rendered a different decision.

the Town's policy, practice, and/or custom of unlawfully seizing and searching individuals in the absence of reasonable suspicion to believe they were engaged in illegal activity and their failure to properly train or supervise its officers to prevent these constitutional violations.

It is true that Mr. Alexander did not point to a specific departmental policy or provide details of the Defendants' training and supervision program. That is because he could not, absent discovery, know these things. Notwithstanding the Defendants' representations that *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), represented a sea change in pleading doctrine, there remains considerable dispute as to whether that is so, particularly in civil rights cases. Before *Iqbal*, the Supreme Court explicitly held that notice pleading is sufficient to establish municipal liability unless a specific rule or statutory provision required heightened pleading. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 165-68 (1993) (holding that Fed. R. Civ. P. 8(a) mandates that federal courts cannot impose heightened pleading standards on municipal liability claims); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002) (reaffirming *Leatherman* and extending it to "all civil actions, with limited exceptions," such as those involving matters that must be pleaded with particularity under Fed. R. Civ. P. 9(b)). *Iqbal* did not so much as mention either case, and the Second Circuit has held that *Twombly* and *Iqbal* did not heighten the pleading requirements set out in these earlier cases. *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 119-121 (2d Cir. 2010). Specifically, *Twombly* and *Iqbal* "do[] not prevent a plaintiff from pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant." *Id.* at 120.

Here, Mr. Alexander could have simply alleged, as he did in paragraphs 158-159 of the complaint, that the Defendants had a practice or custom of performing unlawful searches and seizures without reasonable suspicion and that they failed to properly train and/or supervise officers to prevent these violations. That alone would suffice under *Arista Records*. But Mr. Alexander alleged, in addition, that Chief Doucette, when confronted with the Vermont Supreme Court's conclusion that Hunt violated Mr. Alexander's Fourth Amendment rights, continued to assert that nothing had been done wrong and claimed that there was no need for the BPD to make any changes to prevent such violations in the future. Chief Doucette's defiance of the Supreme Court's decision and refusal to acknowledge that his department could and should learn from that decision makes it, at minimum, plausible that the BPD had a practice or custom, created and perpetuated by Chief Doucette,[6] of engaging in exactly the constitutional violations that Chief Doucette insists were proper. Indeed, if the BPD operates according to Chief Doucette's version of constitutional law (and given that, as the BPD concedes, BPD Mot. 7, he has final policymaking authority for the BPD, one must assume it does), then it de facto has a practice or custom of engaging in unlawful searches and seizures.[7] Likewise,

[6] Regardless of whether *Iqbal* removed some of the grounds for establishing supervisory liability, *see* Doucette Mot. 5 (reciting the five bases for supervisory liability laid out in *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995)), Doucette cites no support for the proposition that a claim that a supervisor actually created and perpetuated the practice or custom that caused the constitutional violations is no longer viable, *see Kucera v. Tkac*, No. 5:12-cv-264, 2013 WL 1414441, at *5 (D. Vt. Apr. 8, 2013) (reviewing the state of supervisory liability law post-*Iqbal* and noting that the majority view is that all grounds survived *Iqbal* where, as in a Fourth Amendment claim, the claim does not require a showing of discriminatory intent and noting that even those courts that found that *Iqbal* invalidated some of the *Colon* categories nevertheless continue to recognize liability for creation of a policy or custom that caused the constitutional violations).

[7] This is also why the Town's assertion that Doucette's post-stop comments are irrelevant misses the mark. *See* Town Mot. 8-9. The case the Town relies on, *Burwell v. Peyton*, 131 F. Supp. 3d 268 (D. Vt. 2015), does not support this assertion. In *Burwell*, the court held that a plaintiff could not *prove*, for summary judgment purposes, the existence of a municipal policy by pointing to the police chief's post-incident comments indicating that the officers' actions were "consistent with Town policies." *Id.* at 304. At the pleading stage, a plaintiff need only "nudge[] his claims across the line from conceivable to plausible," *Twombly*, 550 U.S. at 570; Chief Doucette's statement that the unconstitutional conduct of his officers was legitimate and was not in need of correcting does exactly that. *Burwell* also appears to misinterpret the import of the chief's post-incident statement. The plaintiff relied on the chief's

if the BPD trains and supervises its officers in accordance with this version of constitutional law, and is as resistant to correction when confronted with findings of unconstitutional conduct as Chief Doucette's statement indicates, it is, at minimum, plausible that BPD was (and remains) deliberately indifferent to the risk that its employees will commit these constitutional violations.[8] This is sufficient to survive a motion to dismiss and justify discovery in this case. *See Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 130 n.10 (2d Cir. 2004) ("It is unlikely that a plaintiff would have information about the city's training programs or about the cause of the misconduct at the pleading stage, and therefore need only plead that the city's failure to train caused the constitutional violation. After discovery, on the other hand, a plaintiff is expected to proffer evidence from which a reasonable factfinder could conclude that the training program was actually inadequate, and that the inadequacy was closely related to the violation."); *see also Simms v. City of New York*, 480 Fed. App'x 627, 631 n.4 (2d Cir. 2012) (unpublished) ("[I]t may be true that § 1983 plaintiffs cannot be expected to know the details of a municipality's training programs prior to discovery, . . . [but] [t]here are a number of ways that plaintiffs can plausibly allege a § 1983 claim for

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statement not in an attempt to establish municipal liability by simply pointing to the fact that the incident occurred but rather to demonstrate what the department's policy, practice, or custom consisted of. There is a critical distinction between the incident itself and a final policymaking official's statement that the incident was in keeping with how the department does and should operate.

[8] Unlike claims based on a municipal practice or custom, failure-to-train or failure-to-supervise claims require allegations that, taken as true, would show that the policymaker exhibited deliberate indifference to the risk of constitutional violations. *Brown*, 520 U.S. at 407. A plaintiff satisfies this requirement if he alleges facts that, taken as true, would show that "(1) 'that a policymaker knows "to a moral certainty" that her employees will confront a given situation'; (2) 'that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation'; and (3) 'that the wrong choice by the . . . employee will frequently cause the deprivation of a citizen's constitutional rights.'" *Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 440 (2d Cir. 2009) (quoting *Walker v. City of New York*, 974 F.3d 292, 297-98 (2d Cir. 1992)). Any police department policymaker would know to a moral certainty that officers will have to make decisions about whether the facts within their awareness are sufficient to lawfully detain and search an individual. Officers are trained and supervised on these matters because it is plain that such training and supervision makes it less difficult to make these decisions correctly. The wrong choice about whether a detention and search are lawful will routinely result in constitutional violations. All the *Walker* requirements are satisfied here.

municipal liability premised on a failure to train theory without having detailed knowledge of a municipality's training programs."); *Edwards v. City of New York*, No. 14-cv-10058 (KBF), 2015 WL 5052637, at *4 (S.D.N.Y. Aug. 27, 2015) (quoting *Amnesty*'s footnote 10 notwithstanding *Iqbal* and *Twombly*). As *Twombly* itself recognized, "[a]sking for plausible grounds to infer an [element of the claim] does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [that element]." Mr. Alexander has made that showing and deserves the opportunity to conduct discovery to prove his claims.

B. Mr. Alexander's Right to Equal Protection Was Violated When He Was Profiled and Discriminated Against on the Basis of His Race

1. Urbanowicz and Hunt unlawfully treated Mr. Alexander as a suspect on the basis of his race

The Defendants set forth two reasons why Mr. Alexander's equal protection claim against Urbanowicz and Hunt should be dismissed. The first relies on a misstatement of the applicable law and the second ignores critical allegations in the complaint.

The Defendants first argue that Mr. Alexander's equal protection claim fails because he did not plead that he was treated differently than others similarly situated. However, while an equal protection violation may be made out by such a showing,[9] that

[9] It appears that a similarly situated requirement may apply universally to equal protection claims that are based on a theory of selective prosecution, at least in the criminal context. This heightened pleading requirement rests on the "special deference" courts grant "to the executive branch in the performance of the 'core' executive function of deciding whether to prosecute." *Pyke v. Cuomo*, 258 F.3d 107, 109 (2d Cir. 2001) (citing *United States v. Armstrong*, 517 U.S. 456, 465 (1996)). "As *Pyke* and other cases have explained, the *Armstrong* rule is based upon the special deference courts owe to prosecutorial discretion, and the separation of powers implications that arise when courts interfere with charging decisions made by the executive. Law enforcement officers, in contrast, never have been afforded the same [deference][.]" *Winfield v. Trottier*, No. 5:08-cv-278, 2011 WL 4442933, at *16 (D. Vt. Sept. 21,

is but one legal theory that can establish an equal protection violation. "[A] plaintiff who . . . alleges an express racial classification, or alleges that a facially neutral law or policy has been applied in an intentionally discriminatory race-based manner, or that a facially neutral statute or policy with an adverse effect was motivated by discriminatory animus, is not obligated to show a better treated, similarly situated group of individuals of a different race in order to establish a claim of denial of equal protection." *Pyke v. Cuomo*, 258 F.3d 107, 110 (2d Cir. 2001); *see also Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 1999) (explaining "several ways for a plaintiff to plead intentional discrimination that violates the Equal Protection Clause," only some of which, such as selective prosecution, require allegations that similarly situated others were treated differently); *Wright v. Yacovone*, No. 5:12-cv-27, 2012 WL 5387986, at *19 (D. Vt. Nov. 2, 2012); *Winfield v. Trottier*, No. 5:08-cv-278, 2011 WL 4442933, at *15-16 (D. Vt. Sept. 21, 2011), *rev'd in part on other grounds*, 710 F.3d 49 (2d Cir. 2013).

Courts have recognized additional reasons that racial profiling claims, in particular, do not require a showing that similarly situated others were treated differently: such a requirement is both unnecessary and often impossible to meet in this context. *See Winfield*, 2011 WL 4442933, at *16 ("*Pyke* dispenses with the need to [show] that a similarly situated group was treated differently because, whenever racially discriminatory intent infects the application of a neutral law or policy, . . . adverse [discriminatory] effects can be presumed." (citations and internal quotation marks omitted)); *Rodriguez v. Cal. Highway Patrol*, 89 F. Supp. 2d 1131, 1141 (N.D. Cal. 2000) ("In the civil context, however, [a similarly situated requirement] well might be

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2011), *rev'd in part on other grounds*, 710 F.3d 49 (2d Cir. 2013) (citations and internal quotation marks omitted); *see also Rodriguez v. Cal. Highway Patrol*, 89 F. Supp. 2d 1131, 1141 (N.D. Cal. 2000).

impossible to meet. In the present [racial profiling] action, the class of similarly situated individuals necessarily would include all motorists present in areas where Defendants were patrolling. It is highly doubtful that Defendants or any other law enforcement agency maintain records identifying law-abiding individuals who are not stopped.").

Here, Mr. Alexander relies on the second theory set forth in *Pyke*: that Urbanowicz and Hunt applied the facially neutral laws and policies regarding traffic stops, detentions, and searches in an intentionally discriminatory race-based manner. *See* Compl. ¶¶ 165-167. Therefore, he is not required to allege that the Defendants treated him differently from similarly situated others. *Diesel v. Town of Lewisboro*, 232 F.3d 92 (2d Cir. 2000), relied upon by Hunt, is not to the contrary. There, a police officer claimed that, in retaliation for his cooperation in an internal affairs investigation, his fellow officers investigated him for misconduct more vigorously than they did both other officers (essentially arguing he had a right to be protected by the "blue wall of silence" that protected other officers, the deprivation of which the court found constituted no cognizable constitutional injury) and average citizens. *Id*. at 103-05. Because the gravamen of Diesel's claim was that similarly situated others were treated better than he was, it is unexceptional that he was required to establish the factual basis for that claim. Because there is no such requirement for Mr. Alexander's claim, the Defendants' request that the Court dismiss his Equal Protection claim for failure to plead it must be denied.

Next, Urbanowicz and Hunt claim that the complaint set forth no facts showing that their conduct was motivated by race. Notably, however, they omit any reference to the complaint's allegation that Urbanowicz, in encouraging Hunt to find a reason to stop the taxi, specifically told Hunt that the passenger in the taxi was an African-American

male and that he did not know who that man was. *See* Compl. ¶ 31. The Defendants suggest that they were not impermissibly motivated by race and that, instead, they were simply relying on "descriptors such as race 'as one of several elements' in identifying potential suspects for investigation." Urbanowicz Mot. 14 (quoting *Brown*, 221 F.3d at 337-38). In *Brown*, a victim of a violent crime had given police a description of a suspect that consisted primarily of the suspect's race (black) and gender (male); based on that information, police stopped and questioned "[m]ore than two hundred non-white persons." 221 F.3d at 334. The court found no equal protection violation because the police were "searching for a particular perpetrator of a violent assault, relying in their search on the victim's description of the perpetrator as a young black man with a cut on his hand"—a "description, which originated not with the state but with the victim, [that] was a legitimate classification within which potential suspects might be found." *Id.* at 338.

Brown is inapplicable here. As detailed in Mr. Alexander's complaint, Urbanowicz and Hunt did *not* believe that Mr. Alexander might be a particular suspect, "Sizzle" or otherwise. They had information that unspecified drug dealers traveled from various parts of New York to Bennington via various modes of transportation; that drug activity took place in the area of the Lucky Dragon and nearby streets; and that one particular suspect, known only as "Sizzle" and described only as a heavyset African-American male, traveled to Bennington via taxis and public transportation in the company of a woman named Danielle Lake to sell controlled substances. Compl. ¶¶ 33-35. Nowhere in Hunt's or Urbanowicz's motions do they claim that either officer believed that Mr. Alexander may be "Sizzle." Urbanowicz told Hunt that there was an African-American male in the taxicab whom he did not know; he did not indicate that he

believed that male might be "Sizzle" (or anyone else about whom they had obtained tips). Indeed, they would have had no reason to so believe: Mr. Alexander did not match the description of a heavyset African-American male traveling with a female named Danielle Lake; Mr. Alexander did not know the name or location of the restaurant that was supposedly an epicenter Bennington's drug trade; and neither Urbanowicz nor Hunt had any information to suggest that "Sizzle" would be in Bennington on the date of the stop.

Although the Defendants claim that "[t]his was not a situation in which police officers had no information about a suspect's race and yet made a decision to stop only those vehicles in which the passengers were African-American," Urbanowicz Mot. 14; *see also Brown*, 221 F.3d at 337 ("Plaintiffs do not allege that upon hearing that a violent crime had been committed, the police used an established profile of violent criminals to determine that the suspect must have been black."), it is in fact *precisely* such a situation. Urbanowicz and Hunt did not believe that Mr. Alexander was the "suspect" about whom they had received information, and they had no information about any other individual's race, but they nevertheless determined to treat Mr. Alexander as a suspect on the basis of his race. Urbanowicz told Hunt that the unfamiliar passenger in the taxi was African-American because he believed that his race was relevant to the likelihood that he was a criminal, and Hunt stopped the taxi and commenced a drug investigation because he believed the same.[10] Moreover, any

[10] Urbanowicz suggests that it is "significant" that Hunt was "polite, courteous and professional" during the stop, Urbanowicz Mot. 14, but racial profiling and discrimination are no less violative of the guarantee of equal protection if they are paired with a smile than with a growl. Hunt's external display of animus, or lack thereof, is irrelevant to Mr. Alexander's equal protection claim: "All you need is that the state actor *meant* to single out a plaintiff because of the *protected characteristic* itself. . . . [I]ntentional discrimination need not be motivated by ill will, enmity, or hostility to contravene the Equal Protection Clause," *Hassan v. New York*, 804 F.3d 277, 298-99 (3d Cir. 2015) (citations and internal quotation marks omitted).

suspicion, reasonable or otherwise, that Mr. Alexander was "Sizzle" was quickly dispelled when: (1) Hunt learned that Mr. Alexander's nickname was Snacks, not Sizzle; (2) neither Hunt nor Urbanowicz had ever heard Mr. Alexander or Snacks or received information suggesting he was involved in any illegal activity. Hunt nevertheless decided to expand the traffic stop into a drug investigation and advised other officers of his intent to do so. This was a textbook case of racial profiling, and it violated Mr. Alexander's right to equal protection under the law.

2. Mr. Alexander has adequately pleaded municipal and supervisory liability for his equal protection claim

As detailed above, *see supra* Part III.A.2, the Defendants have incorrectly asserted that *Twombly* and *Iqbal* require plaintiffs to plead factual matter in support of municipal and supervisory liability that cannot, in most cases, be acquired absent discovery. Mr. Alexander's allegations in paragraphs 170-171 of his complaint that the Defendants had a practice or custom of unlawfully discriminating against individuals because of their race and that they failed to properly train and/or supervise officers to prevent these violations are sufficient under *Arista Records* to survive a motion to dismiss and justify discovery into those matters. *See also Leatherman*, 507 U.S. at 168-69 ("Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.").

C. The BPD and/or the Town of Bennington Violated Title VI in Intentionally Discriminating Against Mr. Alexander on the Basis of His Race

Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Title VI, Title IX of the Education Amendments of 1972, and § 504 of the Rehabilitation Act all operate in a similar manner, conditioning the receipt of federal financial assistance on a promise not to discriminate. *See, e.g.*, *U.S. Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986) ("Under the program-specific statutes, Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision."). The Rehabilitation Act is expressly based on Title VI, *see* 29 U.S.C. § 794a(2), and courts have interpreted the two acts consistently, *see, e.g.*, *Hodges v. Pub. Bldg. Comm'n of Chi.*, 864 F. Supp. 1493, 1506 n.6 (N.D. Ill. 1994) ("The Rehabilitation Act closely tracks the language of Title VI, which was its model. Accordingly, the definition of 'program or activity' for purposes of the Rehabilitation Act is essentially identical to its definition for purposes of Title VI."). Likewise, the Supreme Court "has interpreted Title IX consistently with Title VI." *Barnes v. Gorman*, 536 U.S. 181, 185 (2002). Therefore, cases interpreting any one of these statutes guide interpretation of any other.

The BPD cites many cases for the proposition that it is not a suable entity. Under Fed. R. Civ. P. 17(b), the capacity of a governmental entity to sue or be sued is determined by state law. Mr. Alexander does not contest that this Court has routinely

held that, in Vermont, no statute or ordinance confers that capacity on municipal police departments and that suit must instead be directed to the municipality itself. However, some courts have held that a municipality is not a "program or activity" for purposes of Title VI. For example, one district court has held:

> The City is not an 'operation' of 'a department, agency, special purpose district, or other instrumentality of a State or of a local government,' or of 'the entity of such State or local government that distributes such assistance,' or of any of the other entities enumerated in § 2000d–4a. Rather, the City is a municipality and, as such, it does not fit within the definition of 'program or activity' for purposes of Title VI.

Hodges, 864 F. Supp. at 1505; *see also Pathways Psychological Support Ctr. v. Town of Leonardtown*, No. Civ.A. DKC 99-1362, 1999 WL 1068488, at *3 (D. Md. July 30, 1999) ("It has been held that an entire department of a local government is subject to the Rehabilitation Act if part of the department receives federal funding. However, receipt of federal funding by one department or agency of a county does not render the entire county subject to the provisions of the Rehabilitation Act." (citations omitted)). Other cases suggest that, where a municipal department lacks Rule 17(b) capacity, claims under the federal-financial-assistance civil rights statutes are properly directed to the municipality, if state law so dictates. *See, e.g.*, *Haines v. Metro. Gov't of Davidson Cnty.*, 32 F. Supp. 2d 991, 994-95 (M.D. Tenn. 1998) ("The fact that [a municipal board] lacks the capacity to be sued does not mean that it is free to disregard Title IX's prohibitions. It simply means that Plaintiffs' lawsuit must be directed towards the appropriate division of government. . . . Under Tennessee law, such capacity lies with the Metropolitan Government and not the [board]."). It is immaterial to Mr. Alexander whether the Town or the Department defends against Mr. Alexander's Title VI claim. All that matters is that some defendant be required to do so—recipients of federal financial

assistance cannot be wholly exempted from Title VI liability based on state law determining capacity to be sued.

Rule 17(b) capacity is generally treated as a waivable defense rather than a jurisdictional requirement. *See* Charles Alan Wright et al., 6A Federal Practice and Procedure § 1295, § 1559, nn.12-24 and accompanying text (3d ed. Apr. 2016 update). It could be argued that, by accepting federal financial assistance, an entity waives its capacity defense to a Title VI suit, either in much the same way that a state's acceptance of such assistance waives its sovereign immunity in Title VI cases (although without the express statutory terms found in 42 U.S.C. 2000d-7), or by the express terms of the federal assistance agreement. Alternatively, it could be argued that, notwithstanding the caselaw holding that municipalities are not "programs or activities" for Title VI purposes, the Town is the proper defendant under Vermont law. The BPD has not cited, and Mr. Alexander has not found, any Vermont case that addressed Rule 17(b) capacity in the context of a Title VI claim or any other claim based on the federal-financial-assistance civil rights statutes. Thus, it appears that the proper defendant in Title VI claims remains an open question.

Should the Court determine that the Town of Bennington, and not its Police Department, is the proper Defendant for the Title VI claim, Mr. Alexander does not object to the BPD's request to be removed from the caption in this case, and requests that the Court either construe the Title VI claim against the Town or grant Mr. Alexander leave to file an amended complaint amending the caption and substituting the Town for the Department as the Defendant for this claim. *See, e.g.*, *Abunaw v. Prince George's Corrs. Dep't*, No. DKC 13-2746, 2014 WL 3697967, at *1-2 (D. Md. July 23, 2014) (determining under Rule 17(b)(2) that civil rights claims should have been

brought against municipality rather than its police and corrections departments and construing complaint accordingly).

As to the merits of the Title VI claim, the BPD attempts to erect several pleading requirements that simply do not apply to Mr. Alexander's claim.

First, it argues that dismissal is appropriate where Mr. Alexander did not allege that he was the intended beneficiary of any federal financial assistance extended to the Defendants. However, at least since the Supreme Court decided *National Credit Union Administration v. National Bank & Trust Co.*, 522 U.S. 479 (1998), there is no such requirement. In *National Credit*, the Court considered whether plaintiffs seeking judicial review of agency-drafted regulations under the Administrative Procedure Act were required to show that they were intended beneficiaries of the statute whose associated regulations they challenged. The Court held that, "[a]lthough [its] prior cases have not stated a clear rule for determining when a plaintiff's interest is 'arguably within the zone of interests' to be protected by a statute, they nonetheless establish that we should not inquire whether there has been a congressional intent to benefit the would-be plaintiff." *Id.* at 488-89.

Even before *National Credit*, the Ninth Circuit rejected any "intended beneficiary" requirement at the pleading stage. *Fobbs v. Holy Cross Sys. Corp.*, 29 F.3d 1439, 1447 (9th Cir. 1994), *overruled on other grounds by Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131 (9th Cir. 2001) ("To state a claim for damages under 42 U.S.C. § 2000d, et seq., a plaintiff must allege that (1) the entity involved is engaging in racial discrimination; and (2) the entity involved is receiving federal financial assistance. . . . There is no requirement that plaintiff plead that he was an intended beneficiary of the federally funded program in which defendants are alleged to have

participated." (citations omitted)). After *National Credit*, several courts have come to the same conclusion. *See, e.g.*, *Bryant v. N.J. Dep't of Transp.*, 998 F. Supp. 438 (D.N.J. 1998) (reversing its prior dismissal, based on plaintiffs' failure to show they were intended beneficiaries of federal financial assistance, of Title VI claim in light of *National Credit*'s subsequent rejection of the intended beneficiary test); *Md. State Conference of NAACP Branches v. Md. Dep't of State Police*, 72 F. Supp. 2d 560, 567 (D. Md. 1999) (determining that, under *National Credit*, Title VI plaintiffs need not satisfy the "intended beneficiary" test); *Rogers v. Bd. of Educ. of Prince George's Cnty.*, 859 F. Supp. 2d 742, 750 n.7 (D. Md. 2012) ("To the extent the Board argues that Plaintiffs' claims depend on whether they are 'intended beneficiaries' of the federal funding, that argument fails. '[T]here is no requirement that a plaintiff plead that he was an intended beneficiary of the federally-funded program in which defendants are alleged to have participated.'" (quoting *Grimes v. Superior Home Health Care of Middle Tenn.*, 929 F. Supp. 1088, 1092 (M.D. Tenn. 1996))).

In any event, a person subjected to racial profiling is inarguably within the zone of interests sought to be protected by, and the intended beneficiary of, Title VI. "The two goals of Title VI are to avoid the use of federal resources to support discriminatory practices and to provide individual citizens effective protection against those practices. Thus, the interests to be protected by the statute are those of persons against whom federally funded programs discriminate." *Md. State Conference*, 72 F. Supp. 2d at 567 (citations omitted) ("Since the . . . plaintiffs are asserting that federal funding is being used to stop minority motorists in a discriminatory fashion, these plaintiffs fall within the 'zone of interests' sought to be protected by Title VI."). The BPD's argument that people subjected to racial profiling by law enforcement agencies receiving federal

financial assistance are not the intended beneficiaries of, or within the zone of interests sought to be protected by, federal law prohibiting racial discrimination both misstates the law and utterly misses the point of federal anti-discrimination legislation.

The Defendant next argues that dismissal is appropriate for failure to allege a "logical nexus between the use of federal funds and the alleged discrimination." BPD Mot. 5. The Defendant appears to have extracted this nexus requirement from specific statutory prerequisites to Title VI claims based on allegations of employment discrimination. In such cases, Title VI imposes an additional requirement—non-existent in other contexts—that the plaintiff show that the "primary objective of the Federal financial assistance is to provide employment." 42 U.S.C. 2000d-3 ("Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment."). The Second Circuit, in the case the Defendant relies on here, has construed this employment-related provision to "in effect require[] a logical nexus between the use of federal funds and the practice toward which agency action is directed," a requirement the court also extended from enforcement actions by federal agencies to private rights of action. *Ass'n Against Discrimination in Employment v. City of Bridgeport*, 647 F.2d 256, 276 (2d Cir. 1981). The Defendant has identified no controlling authority to support importing this requirement into other, non-employment contexts, and there is no statutory support for doing so.[11]

[11] The Defendants cite *Brown-Dickerson v. City of Philadelphia*, Civ. Action No. 15-4940, 2016 WL 1623438, at *8 (E.D. Pa. Apr. 25, 2016), for the proposition that this nexus requirement and the requirement that a plaintiff show he

Even if *Bridgeport*'s nexus requirement were deemed to extend beyond the employment context—which, given that it was based on an express statutory requirement specifically and exclusively for the employment context, it does not—the BPD's reliance on *Bridgeport* is foreclosed by the subsequently enacted Civil Rights Restoration Act of 1987 [CRRA], 42 U.S.C. § 2000d-4a. In *Grove City v. Bell*, 465 U.S. 555 (1984), the Supreme Court narrowly interpreted Title IX's scope, concluding that Title IX reached only so far as the specific program or activity receiving the federal financial assistance. Congress passed the CCRA in response, defining "program or activity" or "program" to mean "all of the operations of," *inter alia*, "(A) a department, agency, special purpose district, or other instrumentality of a State or local government; or (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government . . . , any part of which is extended Federal financial assistance." § 2000d-4a(1). Thus, if any "part" of an entity described in § 2000d-4a(1) receives federal financial assistance, all of that entity's "operations" are subject to Title VI. *See, e.g.*, *Haybarger v. Lawrence Cnty. Adult Probation & Parole*, 551 F.3d 193, 199-200 (3d Cir. 2008); *Lucero v. Detroit Pub. Schs.*, 160 F. Supp. 2d 767, 785-86 (E.D. Mich. 2001) ("Under [the CRRA's] definition, an entity falls under Title VI if it is an "operation of" or "part" of an entity described in § 2000d–4a and any part of that entity receives federal assistance. The

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is the intended beneficiary of the federal assistance apply in a claim alleging racial discrimination in policing. With respect, the *Brown-Dickerson* court erred. In setting forth these requirements, it relied exclusively on cases that predated the Civil Rights Restoration Act of 1987 [CRRA], 42 U.S.C. § 2000d-4a (*see infra*), *NAACP v. Med. Ctr., Inc.*, 599 F.2d 1247, 1252 (3d Cir. 1979), were in the employment context, *Burks v. City of Phila.*, 950 F. Supp. 678, 683 (E.D. Pa. 1996) (noting that, because plaintiffs claim that they were subjected to racially discriminatory employment practices, § 2000d-3 requires them to show that "a primary objective of the federal money that Congress extends to the program or activity is to provide employment"), or both, *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1235 (7th Cir. 1980).

Sixth Circuit . . . found in reference to a school's receipt of federal funds that Congress has made its intent to extend the scope of Title IX's equal opportunity obligations to the furthest reaches of an institution's programs." (citations and internal quotation marks omitted)). Outside of the employment context, the Defendants' purported nexus requirement cannot withstand scrutiny where Congress has plainly mandated that, if one "part" of an entity receives federal financial assistance, all other "parts" are subject to Title VI, regardless of whether any "nexus" exists between the funding provided to one part and the discrimination practiced by another. [12]

Mr. Alexander has adequately pleaded that he was discriminated against on the basis of his race, *see supra* Part III.B.1, by an agency receiving federal financial assistance. Nothing more is needed to state a claim under Title VI. *See Fobbs*, 29 F.3d at 1447 ("To state a claim for damages under 42 U.S.C. § 2000d, *et seq.*, a plaintiff must allege that (1) the entity involved is engaging in racial discrimination; and (2) the entity involved is receiving federal financial assistance." (citations omitted)); *Rodriguez*, 89 F. Supp. 2d at 1139 (noting these two pleading requirements and stating that "[n]othing more is required to state a claim under Title V").

For all of these reasons, the Defendants' request for dismissal of Mr. Alexander's Title VI claim must fail.

[12] Along the same lines, the Defendant faults the complaint for failing to plead "with requisite specificity" what federal financial assistance the BPD receives and how that funding is used in any program as to which Mr. Alexander is an intended beneficiary. BPD Mot. 5. As described above, Mr. Alexander need not have pleaded that he was an intended beneficiary. As for the purported requirement that a plaintiff plead the specific source of the federal financial assistance, any such requirement is wholly inappropriate at the motion to dismiss stage. Again, without the benefit of discovery, a plaintiff cannot be expected to plead "with requisite specificity" the details of information wholly within the Defendant's control.

IV. Conclusion

For the reasons set forth above, this Court should deny the Defendants' motions to dismiss Mr. Alexander's complaint, and, if the Court determines that the Town of Bennington is the proper Title VI Defendant, grant BPD's motion to amend that caption and/or grant Mr. Alexander's motion for leave to amend the complaint.

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Dated: November 11, 2016

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

SHAMEL ALEXANDER,
Plaintiff

v. No. 16-cv-192

ANDREW HUNT, in his individual capacity, PETER URBANOWICZ, in his individual capacity, PAUL DOUCETTE, individually and in his capacity as Chief of Police for the Town of Bennington, the BENNINGTON POLICE DEPARTMENT, and the TOWN OF BENNINGTON,
Defendants

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2016, I electronically filed the above using the CM/ECF system, which will send notification of such filing to the following: Nancy G. Sheahan, Esq., and Michael J. Leddy, Esq.

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