No. 08-2211

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MADELINE MALDONADO, ET. AL.;

Plaintiffs-Appellees

Vs.

MUNICIPALITY OF BARCELONETA, ET. ALS;

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
(Civil Action No. CV-07-1992 -JGG)

PLAINTIFF/APPELLEES' BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellees' Counsels advise that none of the Plaintiffs/Appellees are corporate parties; they are private citizens

STATEMENT OF JURISDICTION

A district court's judgment in a civil case is a final order subject to appeal under 28 U.S.C. § 1291. Fed. R. App. P. 4 requires that a notice of appeal in a civil case be filed in the District Court within 30 days after the entry of the judgment or order appealed from.

Nevertheless, there are exceptions where Federal appellate courts may under certain circumstances, entertain interlocutory reviews of district court orders. For example, to review the denial of qualified immunity to government employees who are sued in their personal capacity while acting under color of law. However, a district court's pretrial rejection of a qualified immunity defense is not immediately appealable to the extent that it turns on either an issue of fact or an issue perceived by the trial court to be an issue of fact. Stella v. Kelley, 63 F.3d 71, 74 (1st Cir. 1995); Torres v. Puerto Rico, 485 F.3d 5, 8-9 (1st Cir. 2007). **This appeal falls in this category; hence it should be dismissed**.

STATEMENT OF THE ISSUES

I. Whether Appellant waived his procedural due process compliance argument by not presenting such before this Court.

II. Whether the denial of qualified immunity that turns on either an issue of fact or an issue perceived by the trial court to be an issue of fact can

be immediately appealed.

III. Whether Appellees' Fourth Amendment rights were clearly established where a reasonable person should have known that such conduct and actions violated their rights.

IV. Whether Appellant is able to request review of issues where a final judgment on the merits has not been issued.

STATEMENT OF THE CASE

On or about October 1, 2007, The Municipality of Barceloneta ("Barceloneta") acquired the right to operate and manage the public housing communities by transfer of such right from the Puerto Rico Housing Administration ("PHA"). Defendants, Sol Luis Fontanez and other high ranking officials of Barceloneta, established a policy whereby residents would be forced to surrender their pets.

On October 8, 2007, without any previous legal or administrative process where Plaintiff/Appellees could establish their legal positions and an opportunity to defend their property and liberty rights, all Defendants, acting under color of law and of authority and in concert and conspiring among and between each other, conducted law enforcement control type raids in three different public housing communities within the jurisdiction of Barceloneta with the purpose of depriving the residents of their pets.

The Mayor himself and other high ranking municipal officers were present and backed by a force of uniformed employees, officers of the municipal police and also backed by employees of a private contractor, Animal Control Solutions Inc. Together they executed these raids and demanded that Plaintiffs hand over their pets or face eviction; otherwise they faced the ominous specter of becoming homeless. Defendants' intent was to violate Plaintiffs' civil rights by conducting illegal warrantless searches and seizures and the illegal confiscations of their pets.

Plaintiffs had to witness Defendants removing, mistreating, injecting and/or administering their pets - small dogs and cats - with unknown chemicals, then slamming them against vehicle panels in which they were to be transported.

The family pets that survived the initial brutality were thrown from a bridge commonly known as "El Paseo del Indio" ("Indian Walk") in northwest Puerto Rico approximately 50 to 60 feet to their deaths.

Defendants, consolidated and confirmed their policy and practice as managers of the public housing communities of Barceloneta by repeating the process just two days later, on Wednesday October 10, 2007, of what has been Defendants custom, practice and policy of systemic civil rights violations against the residents, pursuant to Fontanez's orders and an alleged

municipal ordinance banning pets. Again, Defendants went to Plaintiffs' residences and in threatening and demanding demeanor with officers dressed in uniforms demanded the immediate surrender of their pets or face the inevitable: eviction and becoming homeless.

The complaint requests injunctive, declaratory and compensatory relief as a result of Defendants' violation of Plaintiffs' Constitutional, State and Federally protected rights. Plaintiffs have property rights in their pets and reasonable expectations to be safe and secure from having the City Government of Barceloneta from executing law enforcement type raids where their homes were illegally invaded and their pets illegally and without warrants, taken from them without affording *pre-deprivation* or *post deprivation* remedies prior or after the taking of their pets. Joint Appendix ("JA") at 5-8; ¶¶ 1.1-1.12.

DISTRICT COURT PROCEEDINGS

On April 29, 2008, Barceloneta and its Mayor Sol Luis Fontanez - Appellant - , filed a Rule 12(b)(6) motion to dismiss, raising the qualified immunity defense. On May 7, 2008, Plaintiffs opposed the same.

On July 29, 2008, the District Court denied most of the arguments and claims made in Defendant's Rule 12 motions and denied the qualified immunity defense. JA, at 130.

On August 25, 2008, Fontanez filed a notice of appeal requesting review the District Court's denial of the qualified immunity protection. District Court Docket ("Docket") 102.

STATEMENT OF FACTS

A. Common Factual Allegations of all Plaintiffs/Appellees

All of the named Defendants are persons, legal or natural, subject to civil rights statutes and law.

All Plaintiffs are residents of the public housing communities in Barceloneta, namely, Residencial Plazuela ("Plazuela"), Residencial Antonio Davila Freytes ("Freytes") and/or Residencial Quintas de Barceloneta ("Quintas").

Barceloneta is a legal entity created by the Puerto Rico legislature with the power to sue and be sued. Barceloneta is a "person" subject to the provisions of the federal Civil Rights Act.

Defendant Sol Luis Fontanez ("Fontanez") is the Mayor of the of Barceloneta, its Chief Executive Officer and a "person" subject to the provisions of the federal Civil Rights Act. Fontanez is responsible for the day-to-day operations of Barceloneta; he supervises, directly or indirectly, the housing operations, the municipal police department, the municipal civil defense division, the municipal emergency responses and the like. JA at 13;

¶¶ 4.1-4.7.

Fontanez planned, personally participated and executed, in concert with his employees, the raids within the public housing projects in Barceloneta which resulted in the loss of the residents' defenseless animals, - property and rights - intentionally creating a coercive environment and preventing the residents to know and exercise their rights.

Mayor Fontanez's personal involvement and participation in the events described herein, related to the pet-raid occurring on October 8, 2007 and repeated on October 10, 2007, was done under color of law and with the intention of depriving the residents of their constitutional rights and property without due process.

The remainder of the municipal employees namely Sylvia Riquelme, Leonides Gonzalez, Esther Ruiz, Amid Molina and Edgardo Santiago reported directly to the mayor. They participated actively and acted in concert with the other named Defendants in the planning and execution of the events that led to violations claimed in this Complaint. In addition, their actions were done under color of law in order to intentionally deprive the residents of their constitutional rights and property. JA at 13-16; ¶¶ 4.7-4.27.

Carlos Laboy[1] is the Chief of the PHA which transferred the administration of the public housing communities to Barceloneta. The PHA has within its scope of functions the authority to investigate and audit municipal housing operations.

The PHA has a duty to oversee that the administrators be certified, trained and comply with federal housing policies and it also has the obligation to ensure that constitutional rights and statutes of the United States are enforced according to the law of the land.

Animal Control Solution, Inc. (ACS) is a corporation that was contracted by Barceloneta with the purpose of picking up and controlling the stray animal population of the Municipality. Upon information and belief, ACS's personnel, with the support, encouragement, acquiescence and under the direct orders of its President, Julio Diaz, actively participated in the events that give rise to this complaint including the massacre of the Plaintiffs' pets, cloaked with the police power of the State and under color of law of the municipal officials whom with they acted closely and in concert with, the other named Defendants. JA at 16-17; ¶¶ 4.29-4.33.

On October 1, 2007, Barceloneta assumed the control, responsibilities

[1]Mr. Laboy is sued in his official capacity only for purposes of the implementation of injunctive relief, not as a participant of the civil rights violations. JA at 10; ¶ 3.5.

and obligations of the day-to-day operations of three public housing communities in Barceloneta. These were: (1) Plazuela, (2) Antonio Davila and (3) Quintas de Barceloneta.

Upon information and belief before the assumption of such control, Barceloneta received training and information in order to qualify as a public housing administrator.

On October 2, 2007, the first order of business was to devise a plan to deprive the residents of the public housing communities of their domestic pets, mostly dogs and cats kept in the homes. JA at 17; ¶¶ 4.34-4.36.

Barceloneta sent residents a memorandum addressed to "All Residents" of public housing, informing that the municipality was aware of families that owned dogs and cats and that they had hired ACS for the "pick-up" of the animals and that such should be "voluntarily" removed or face eviction. Attached was a purported regulation from the PHA regarding pet policies written in **English**; however, the residents are **Spanish** speaking.

The memorandum was devoid of any right to challenge the proposed action, informing of any pre-deprivation or post deprivation remedy; of where the pets could be picked up. Nor did the memorandum provide a reasonable period of time to make alternate arrangements for Plaintiffs to find homes for their pets.

These notices were delivered to the residents between October 3 and 7 of 2007. JA at 17-18; ¶¶ 4.37-4.39.

On Monday, October 8, 2007, Mayor Sol Luis Fontanez accompanied by ACS and municipal personnel (i.e. police officers, civil defense and others) including the other named Defendants arrived at the three public housing communities.

On the mentioned date and before Plaintiffs had an opportunity to respond, Defendants and ACS carried out a surprise law enforcement operation similar to those conducted by police in narcotics interdiction raids. The residents of each housing community awoke on Monday, October 8, 2007, to find a detachment of municipal employees from the police force, the civil defense, other municipal employees, ACS, the Mayor himself and the rest of defendants, going from house-to-house instructing the residents to hand over their pets or eviction proceedings would begin immediately. JA at 18-19; ¶ 4.40-4.43.

During this process, Defendants would grab the pets, without distinction of the type of pet, whether the pet was identified as having ownership or not, marked with a collar and identified as belonging to someone, whether the pet was roaming the streets as a stray or in the premises of individual housing units; they even took them away from

defenseless children without their parent's presence. Defendants opened doors to laundry areas and enclosed patios within the homes and took the pets, even when the owners were not home; threatened residents to hand over their pets or face eviction. JA at 25-51.

While the raids were going on, children watched the brutality - JA at 25-31, 35-51 - pets soiled themselves out of sheer fear and trauma, people screamed or cried and watched as Defendants including employees of ACS, grabbed the pets with an instrument described as a stick with a metal ring at the end (also known as a "catch-pole"). They would catch the animal by the neck, pull on the string, choke the pet and slam the animal inside a van. Even pregnant animals of very small size were brutalized. JA at 19, 29, 32, 36.

In the presence of Plaintiffs and their children some animals were injected and/or administered with an unknown substance by the employees of Julio Diaz and ACS; the workers said the purpose was to tranquilize the animal. JA at 19, 29, 32, 36; ¶¶ 4.46; 5.36; 5.63; 5.99.

Plaintiffs concluded that some pets were killed in their presence. During these raids there was no veterinary present in the housing communities.

Plaintiffs' pleas and warnings requesting time to challenge the actions

were ignored and rejected by Defendants who culminated their cruelty by driving away with the confiscated pets as if nothing had happened. JA at 18-20; ¶¶ 4.40-4.49.

On Wednesday, October 10, 2007, Defendants repeated the process in the three public housing communities. Again, the community was raided and pets were taken away in the same circumstances and without any regard for Plaintiffs' rights or their pleas. JA at 20; ¶¶ 4.50-4.52.

Defendants' have acted knowingly, intentionally, willfully, wantonly and/or with reckless disregard for Plaintiffs' Constitutional rights. Indeed, such actions and omissions by Defendant shock the conscience.

These actions were taken pursuant to an alleged municipal ordinance banning pet ownership in effect years prior. In fact, it was Barceloneta's housing policy to take away the pets which they implemented immediately upon taking the administration of the public housing facilities. Such policy was executed by Defendants without any regards for fundamental rights and fairness, namely, notice and due process of law prior to taking the proposed action or, any after-action remedy to object or challenge the government's conduct in a meaningful manner. *Id*; ¶¶ 4.53-4.54.

Before October 1, 2007, the residents and Plaintiffs had their pets with the knowledge and consent of the housing administrators and without

prohibition of pets. *Id.*, ¶¶ 4.55.

Defendants made a show of force and coercion, knocking on doors, entering the home premises in the laundry area or snatching pets from owners, at times from children, while threatening them with eviction if the pets were not surrendered to the government authorities and/or their agents executing the raid.

Plaintiffs later learned that their pets had been hurled off the Indian Walk Bridge.

Defendants actions and/or omissions were done with the intent of depriving Plaintiffs of their liberty and property and with the intention of violating their rights guaranteed by the US and Commonwealth's Constitutions.

Defendants acted with the intent of killing the pets, whether such acts were by hurling the pets from a bridge or by injecting or administering them with chemicals. At any rate, all Defendants acted with the intent to deprive Plaintiffs' of their pets and of killing them without their valid consent and authorization and knowingly participating in a raid that was patently illegal to any observer. Defendant ACS and its employees, including Mr. Julio Diaz were cloaked with the police power of the State and under color of law of the municipal officials with which they acted closely and in concert with.

Defendants, ACS, neither Julio Diaz nor any of its employees, had the authorization of any Plaintiff to take their property; they acted in concert and as an extension of the government's police power of the municipality, or otherwise. JA at 20-21; ¶¶ 4.56-4.60.

Defendants' failure and refusal to provide Plaintiffs with a *pre-deprivation* remedy prior to taking the adverse action and later the refusal to provide a *post-deprivation* remedy after the events complained of, violated their protected rights under the Fourteenth Amendment of the U.S. Constitution, namely guaranteeing them the right to some form of hearing before the proposed actions were to be taken and after the action; the confiscation of their pets. As such, Defendants' intentional actions constitute a violation of their property rights secured under the U.S. and the Commonwealth Constitutions, namely, due process of law.

Defendants' failure and refusal to obtain a properly authorized search warrant describing with particularity the place to be searched and the items to be seized - the pet(s) - supported by a sworn affidavit violated the Plaintiffs' Fourth Amendment rights of the U.S. Constitution *prior* to taking the pet(s); the right to be free from unreasonable searches and seizure. As such, Defendants' intentional actions and omissions constitutes a violation of their rights to be free from illegal and unreasonable searches and seizures

of their property secured under the Fourth and Fourteenth Amendment of the United States Constitution as incorporated through the due process clause.

Plaintiffs have suffered greatly due to the deprivation of their beloved pets without any due process, the violent and inhumane manner in which the raids were conducted, the loss of privacy and dignity individually and collectively and the emotional impact upon learning that their pets had undergone a violent, cruel and illegal death when Defendants hurled the pets from a bridge causing their death or, in some cases broken backs or legs.

Defendants' actions and omissions in the manner in which they illegally, arbitrarily and in a capricious manner confiscated and later killed Plaintiffs' pets violated their rights to equal protection of the law secured under Fourteenth Amendment of the U.S. Constitution and Puerto Rico law. JA at 21-23; ¶¶ 4.61-4.66.

As a result of the raids and threats received by Plaintiffs, they have suffered the absence of their pets, the fear of the raids and being evicted; the humiliation of this abuse and the impotence and powerlessness of official authority employed by Defendants to deprive Plaintiffs of their pets. They also feel shame as a result of having surrendered to intimidation. Defendants with their actions were very successful at reminding Plaintiffs of their subordinated, inferior and subservient conditions as a result of their

socio-economic conditions. JA at 23; ¶¶ 4.67.

As a result of the events described above, Plaintiffs have suffered the loss of companionship, the loss of their property, great anguish, stress, anxiety, sadness and a sense of loss of enjoyment of life.

At the time of these events, Defendants' conduct violated clearly established law and the rights of the citizens and Plaintiffs afforded to them under the U.S. Constitution, the Commonwealth's Constitution and relevant case law.

Defendants' conduct has proximately and directly caused, and will continue to cause Plaintiffs' irreparable injury.

Defendants' unlawful conduct, if allowed to prevail, will cause Plaintiffs' permanent irreparable injury if an injunction does not issue, as discussed, *ante.*

The injuries to Plaintiffs far outweigh any harm, which may be caused to Defendants should the Court grant the injunctive relief.

A permanent injunction and a declaratory judgment will serve the public interest in that Plaintiffs and other citizens will not be subjected to unlawful searches and seizures; will not be deprived of their personal property without due process of law and will be granted pre-deprivation and post-deprivation remedies before the herein complained of events occur. JA

at 23-24; ¶¶ 4.68-4.75.

B. Procedural History

The instant case was filed on October 19, 2007, against several defendants including the Municipality of Barceloneta and Sol Luis Fontanez, among others (in his personal and official capacities) for violation of the Plaintiffs' civil rights pursuant to the Fourth, Fifth and Fourteenth Amendments of the U.S. Constitution as well as violations of Puerto Rico law. Docket 1.

On December 19, 2007, the Complaint was amended to join parties - both Plaintiffs and Defendants - as well as additional causes of action. Docket 3.

On February 12, 2008, Carlos Laboy, the Chief of the PHA filed a Rule 12 motion to dismiss, which was opposed by Plaintiffs. On March 24, 2008, the Court denied Laboy's motion. Docket 20-21, 40.

On March 10, 2006, Plaintiffs filed a Second Amended Complaint. JA at 1-61.

On April 22, 2008, the District Court issued its Scheduling and Case Management Order. Docket 56.

On April 29, 2008, Sol Luis Fontanez (in personal capacity), his wife as co-administrator of their marital estate and Barceloneta requested

dismissal and immunity from suit pursuant to the qualified immunity defense. *See*, Fed. R. Civ. P. 12(b)(6). JA at 62-88.

On May 2001, Defendants Ahmid Molina, Esther Ruiz, Silvia Riquelme, Edgardo Santiago and Leonides Gonzalez requested dismissal of the suit. *See*, Fed. R. Civ. P. 12(b)(6). Docket 64, 68.

Between May 7-12, 2008, Plaintiffs opposed both Rule 12 motions. JA at 89-111; Docket 64.

On May 14, 2008, Fontanez and Barceloneta filed a reply to Plaintiffs' opposition to their motion to dismiss. Plaintiffs thereafter filed a surreply. JA at 112-128.

On May 15, 2008, Fontanez and Barceloneta requested that the District Court stay the proceedings until the issue of qualified immunity was resolved. Plaintiffs objected to the stay. The District Court denied the request for the stay. Docket 73, 77-78.

On June 19, 2008, the parties filed the Joint Case Management Conference Memorandum. Docket 86.

On July 29, 2008, the District Court issued its *Opinion and Order*, essentially denying Defendants' request for dismissal and denying the qualified immunity defense. JA at 129.

On August 25 and September 3, 2008, Defendants' requested that the

District Court certify certain issues as appealable - to this Court - and for a stay of proceedings. Plaintiffs opposed the same. And the District Court denied both requests. Docket 101, 105-113.

On August 25, 2008, Sol Luis Fontanez filed his Notice of Appeal. Docket 102.

On September 16, 2008, Defendant Fontanez requested that this Court stay the proceedings until the underlying merits of the qualified immunity defenses were resolved. Plaintiffs opposed the same.

On October 14, 2008, by order of the Clerk of the First Circuit Court of Appeals, the request for the stay of proceedings was denied. The Court entered the following order:

> The petition for stay is denied. Household pets are plainly property; there is merely an assertion by the mayor but no developed argument as to why the no-pet policy eliminates any interest in procedural due process or privacy of the home. In any event, injunctive relief is sought and as to that relief qualified immunity is irrelevant, see Lugo v. Alvarado, 819 F.2d 5, 7 (1st Cir. 1987), so there is no apparent reason for a stay of discovery.

DISTRICT COURT DECISION

Appellant Fontanez essentially argued in a motion to dismiss that he was shielded from suit pursuant to the qualified immunity defense; the claims were moot and the District Court did not have jurisdiction. JA at 62.

The District Court noted that Fontanez argued that his actions did not

amount to constitutional violations and that Plaintiffs' claims against him were barred under the doctrine of qualified immunity. JA at 138-139. In addressing the qualified immunity claims for the different causes of action, the District Court reasoned the following:

A. The Fourth Amendment Claim

Although the seizure of pets did not fall in the category of "papers", "houses" or "persons" for Fourth Amendment purposes, they were categorized as "effects." "In the case at bar, the fact that Defendants killed or seriously injured the majority of Plaintiffs' pets constitute a permanent deprivation and consequently a seizure of their property." JA at 140-141.

In determining the "reasonableness" of Defendant's conduct - the seizure of the pets - the fact that Defendants entered into Plaintiffs' homes without warrants, and "seized" their pets or "effects", then dragged the pets out of their homes, proceeded to inject them with chemicals, slammed them against cars and threw them off a 60 foot bridge caused the District Court to the conclude that Fontanez's actions were "unreasonable" and violated the Fourth Amendment. JA at 142.

As to the second prong of the qualified immunity analysis (*was the constitutional right at issue clearly established at the time of the adverse action*), in determining "….whether existing case law gave the defendants

fair warning that their conduct violated the plaintiff's constitutional rights" - JA at 143 - the District Court reasoned it was "a 'clearly established' right that the 'seizure of personal property is per se unreasonable within the meaning of the Fourth Amendment, unless it is accomplished pursuant to a judicial warrant which is issued upon probable cause and which particularly describe the items to be seized. . . . .' [And] Plaintiffs have specifically alleged that Defendants seized their property without the pertinent warrants." JA at 144.

In addressing the third prong of the qualified immunity defense (*would a reasonable individual understand that the adverse action violated a constitutional right?*), the District Court concluded "….. that Defendants' actions were so egregious that a reasonable person would have understood they were violative of a clearly established right under the Constitution. Therefore, the qualified immunity doctrine does not shield Fontanez from liability." JA at 145.

B. The Fourteenth Amendment Claim

The District Court proceeded to examine Plaintiffs' claim in terms of a property interest in their pets. Judge Garcia-Gregory noted that Commonwealth statutes and case law addressed property ownership and interest in terms of real property, chattel and defined livestock within the

concept of property. *See*, 31 P.R. LAWS ANN. § 1063 (2005). As such, the District Court analogized pets as movable property under Puerto Rico law. JA at 146.

As to procedural due process, the District Court reasoned that due process requires

> notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner'. . . 'If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. . . . ' Defendants sent Plaintiffs the memoranda on October 3-7, 2007 and went into the housing projects to enforce the policy on October 8-10, 2007. This is clearly not enough to meet the "meaningful time" requirement. We find that no meaningful time, or a hearing was provided prior to the deprivation of Plaintiffs' property.

Therefore, the District Court concluded that there was a constitutional violation of the procedural component of the Due Process Clause of the Fourteenth Amendment. JA at 148.

As to the substantive due process component, the District Court found that ". . . the act of government officials of injecting Plaintiffs' pets with chemicals, slamming them against the walls of cars, and ultimately throwing them off a bridge would seem shocking and outrageous even to individuals with extremely hardened sensibilities. Therefore, this Court finds that there is a violation of the Substantive Due Process Clause of the Fourteenth Amendment." JA at 148-149.

C. Sect. 1983 Claims

The District Court opined that given its reasoning under the qualified immunity analysis, there was a constitutional deprivation of Plaintiffs' rights under the Fourth and Fourteenth Amendments. "Furthermore, Fontanez and the Municipality were clearly acting under the color of state law, as they were present in the scene, specifically representing the municipal government to enforce the municipal policies." JA at 151.

D. Injunctive Relief

In addressing the request for dismissal by all Defendants for injunctive relief, the District Court concluded that because such relief was contingent upon a finding on the merits, a final ruling could not be entered. Thus, the request for dismissal of the injunction was denied. JA at 156. However, this is not the subject of this appeal.

E. Sect. 1985 Claims & Fifth Amendment Claim

These claims were denied by the District Court. However, they are not the subject of this appeal.

SUMMARY OF ARGUMENT

Plaintiffs' right to be safe and secure from warrantless searches and seizures have been violated. Plaintiffs' complaint articulates their protected property rights in their pets. These interests are protected by the Fourth and

Fourteenth Amendments of the United States Constitution.

Importantly as well, The Pet Ownership in Public Housing ("POPH") Act allows Plaintiffs to have pets within their homes. 42 USC § 1437z-3; *see also*, 24 C.F.R. § 960.707. Addendum 1, 3.

In order to establish liability under § 1983, a plaintiff must first show that the conduct complained of was committed by a person acting under color of state law. Destek Group, Inc. v. State of New Hampshire Public Utilities Commission, 318 F.3d 32, 39 (1st Cir. 2003). Secondly, a plaintiff must show the defendant's conduct deprived a "person of rights, privileges or immunities secured by the Constitution or laws of the United States."

As noted by the District Court's *Opinion and Order* essentially denying Appellant Fontanez's request for dismissal, the factual elements were sufficiently pleaded to establish that his conduct was the proximate cause of Plaintiffs' injuries. JA at 151-154.

Nor is Mr. Fontanez entitled to the qualified immunity defense. As articulated by the District Court, in addressing the arguments raised in the complaint, *vis-à-vis* Fontanez's motion to dismiss, - (1) if true, would the facts constitute a constitutional violation? Mihos v. Swift, 358 F.3d 91, 102 (1st Cir. 2004); (2) was the constitutional right at issue clearly established at the time of the adverse action? *Id*., at 102; (3) would a reasonable individual

understand that the adverse action violated a constitutional right? Swain v. Spinney, 117 F.3d 1, 9 (1st Cir. 1997). All of these were answered in the affirmative. As such, Fontanez is not entitled to qualified immunity.

ARGUMENT

I. WHETHER THE APPELLANT WAIVED HIS PROCEDURAL DUE PROCESS COMPLIANCE ARGUMENT BY NOT PRESENTING SUCH BEFORE THIS COURT.

In response to Plaintiffs' complaint, Fontanez responded with a motion to dismiss and asserted the qualified immunity defense. Fed. R. Civ. P. 12(b)(6); *see* JA page 62-88. In requesting a dismissal of the complaint as it related to the claims of procedural due process guarantees and violations, *vis-à-vis* qualified immunity, Mr. Fontanez's essentially argued that "Plaintiffs cite no case whatsoever that delineates what exact process is due in matters like the instant case. Nor do Plaintiffs cite with any particularity how the Mayor's and Barceloneta's actions limited any due process available to the Plaintiffs." JA page 81.

In the lower court, Mayor Fontanez's attack of procedural due process claims was not even perfunctory. "Merely mentioning an issue in a pleading is insufficient to carry a party's burden actually to present a claim or defense to the district court before arguing the matter on appeal." Violette v. Smith & Nephew Dyonics, 62 F.3d 8, 11 (1st Cir. 1995).

Notwithstanding the Mayor's perfunctory argumentation - fully rebutted by Plaintiffs (JA pages 98-103) -, the District Court reasoned that due process requires

> notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner'. . . 'If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. . . . ' Defendants sent Plaintiffs the memoranda on October 3-7, 2007 and went into the housing projects to enforce the policy on October 8-10, 2007. This is clearly not enough to meet the "meaningful time" requirement. We find that no meaningful time, or a hearing was provided prior to the deprivation of Plaintiffs' property.

Therefore, the District Court concluded that there was a constitutional violation of the procedural component of the Due Process Clause of the Fourteenth Amendment. JA at 147.

Further, the Clerk of this Court, in denying Fontanez's motion to stay the proceedings, on October 14, 2008, entered the following order:

> The petition for stay is denied. Household pets are plainly property; there is merely an assertion by the mayor but no developed argument as to why the no-pet policy eliminates any interest in procedural due process or privacy of the home. In any event, injunctive relief is sought and as to that relief qualified immunity is irrelevant, *see* Lugo v. Alvarado, 819 F.2d 5, 7 (1st Cir. 1987), so there is no apparent reason for a stay of discovery.

In the pending proceedings before this Court, Appellant Fontanez does not request qualified immunity protection for procedural due process violations. *See*, U.S. Const., Amend. XIV, § 1. It is well settled that "an

appellant waives any issue which it does not adequately raise in its initial brief." KPS Assocs., Inc. v. Designs by FMC, Inc., 318 F.3d 1, 25 (1st Cir. 2003); *see also* Playboy Enterprises v. Public Service Comm'n, 906 F.2d 25, 40 (1st Cir. 1990). As such, Mayor Fontanez is not entitled to qualified immunity protections for the Fourteenth Amendment violations, given his waiver, surrender and abandonment of this defense.

II. WHETHER THE DENIAL OF QUALIFIED IMMUNITY THAT TURNS ON EITHER AN ISSUE OF FACT OR AN ISSUE PERCEIVED BY THE TRIAL COURT TO BE AN ISSUE OF FACT CAN BE IMMEDIATELY APPEALED.

Appellate jurisdiction typically is limited to the review of final orders and judgments; that limitation sometimes is relaxed when a public official, *qua* Defendant, unsuccessfully asserts a qualified immunity defense in a pretrial motion. 28 U.S.C. § 1291.

Qualified immunity is a defense where government officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate *clearly established* statutory or constitutional rights of which a reasonable person should have known. *See*, Harlow v. Fitzgerald 457 US 800 (1982); Surprenant v. Rivas, 424, F. 3d 5 (1st Cir. 2005).

In order to determine whether Defendant's assertion of qualified immunity would shield him from responsibility a tripartite analysis must be

made. Saucier v. Katz 533 U.S. 194 (2001); Limone v. Condon 372 F.3d 39 (1st Cir. 2004). The three-part analysis is as follows:

(1)if true, would the facts constitute a constitutional violation? Mihos v. Swift, 358 F.3d 91, 102 (1st Cir. 2004);

(2) was the constitutional right at issue clearly established at the time of the adverse action? *Id*. at 102;

(3) would a reasonable individual understand that the adverse action violated a constitutional right? Swain v. Spinney, 117 F.3d 1, 9 (1st Cir. 1997).

The remainder of this appeal should not be heard at this time given that Defendant's qualified immunity denial was fact-laden and fact intensive, as opposed to being a pure question of law.

Generally, the denial of a claim of qualified immunity, if the claim turns on an issue of law, is an appealable interlocutory ruling. Mitchell v. Forsyth, 472 U.S. 511, 525 (1985). However, a district court's pretrial rejection of a qualified immunity defense is not immediately appealable to the extent that it turns on either an issue of fact or an issue perceived by the trial court to be an issue of fact. Stella v. Kelley, *Supra*; Torres v. Puerto Rico *Supra*.

Normally, when a complaint is challenged on jurisdictional grounds,

the review consists of an evaluation of the four corners of the complaint. A complaint must allege "a plausible entitlement to relief." Rodriguez-Ortiz v. Margo Caribe Inc., 490 F.3d 92, 95-96 (1st Cir. 2007); Swierkiewicz v. Sorema, *N.A.*, 534 U.S. 506 (2002). The district court is to accept all well-pleaded factual allegations as true, and draws all reasonable inferences in Plaintiff's favor. Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 51 (1st Cir. 1990).

In the case at bar, Fontanez converted the Rule 12 motion into a *de facto* motion for summary judgment. Fed. R. Civ. P. 56. Fontanez's motion began by addressing "*Salient Facts Omitted By Plaintiff*s" and proceeded to address a plethora of facts outside of the complaint. JA at 68. In fact, Fontanez went as far as including as an exhibit part of some unidentified chapter of some manual. *Appellant's Brief Addendum,* page 32. Here, again, Fontanez similarly argues, by captioning his plea as "*Facts on the Public Record Omitted by Plaintiffs/Appellees and Summary of Documents Referenced in Plaintiffs' Complaint*." *See,* Appellant's brief at page 9.

Fontanez submitted an incomplete and an unauthenticated document. Even assuming, that this document was the entirety of the manual - which obviously it is not, given that it is captioned as "Chapter Ten Pet Policy" there at least nine chapters preceding it - at the outset, the manual clearly

allows for animals based on certain needs[2]. Appellant's brief, Addendum page 32-35. Arguably, the manual could possibly contain detailed procedural safeguards of the process that had to be followed prior to enforcing any covenant, statute, rule or regulation, with after-action remedies that Plaintiffs could then pursue once the deprivation occurred. *Infra.*

In any event, Federal statutes and regulations clearly allowed for public housing tenants to own pets. 42 USC § 1437z-3; *see also*, 24 C.F.R. § 960.707. Addendum, pg. 1, 3. More specifically, the Pet Ownership in Public Housing Act allows Plaintiffs to have pets within their homes. Under POPH, residents of public housing may own one or more common household pets subject to the "reasonable requirements of the public housing agency." 42 U.S.C. § 1437z-3(a).

At any rate, even assuming that the "Chapter Ten Pet Policy" was in effect, which Plaintiffs do not concede, the document provides that the "PRPHA grievance procedures is applicable. . . arising out of . . . alleged violations of this policy." Appellant's brief, Addendum page 33, ¶ 2. Grievance procedures that Fontanez refused to provide notwithstanding that

[2] At the time defendants submitted the Manual it was not known whether the document was valid and in full force. At this time, the discovery contradicts his assertion because the document was only a **draft**; it was NEVER implemented.

Federal law mandated the safeguarding of tenants' rights through a grievance process. 42 U.S.C. § 1437c-1(d)(6). In fact, regulations mandated that Defendant provide Plaintiffs with, *inter alia*, informal hearing, review procedures and public housing grievance procedures. Requirements that Fontanez determined he was not going to comply with. 24 C.F.R. § 903.7(f). Addendum, 8, 16, 21.

It should be noted that the manual does not provide or allow for homes to be invaded in order to ***confiscate*** tenants' pets when not at home; nor for Plaintiffs who were at home, to have to surrender their pets through means of duress and intimidation and through threats of eviction. Such actions violated Plaintiffs' Constitutional rights. Thus, the "Chapter Ten Pet Policy" document does not excuse, immunize, or suffice to cloak or shield Defendant with qualified immunity, particularly when Fontanez admits to participating in pet **confiscation,** precisely, one of the pillars of Plaintiffs' complaint. JA at 70.

Defendant's exhibit presents more questions that what it attempts to clear. For example, at the bottom of the document it indicates "Admission and Continued Occupancy Policies . . . . PRHPA 11/15/01." Thus, arguably, tenants that had pets prior to the mentioned date received a waiver from such clauses. Indeed, the leases that Defendant relies on to bolster his argument,

but not provided to the Court, could possibly address Plaintiffs' entitlement to have pets, or not prohibit them altogether, thus, establishing a waiver or a *de facto* grand-fathering of tenants who had pets prior to November 2001. As such, these are fact-based circumstances as opposed to legal questions.

Fontanez further argues factual issues outside of the complaint when he alleged that Plaintiffs having animals within their tenancy violated the *lease agreements*. JA page 74, 81. Fontanez's *factual* averments, outside of the four corners of the complaint, of a no pet policy that Plaintiffs' purportedly acquiesced to and their alleged breach of the "*lease agreements*" removes the qualified immunity from the realm of interlocutory appellate review for a question of law, given that these are factual issues. Such averments became factual issues and arguments as opposed to legal questions capable of disposition in interlocutory appellate revision.

In Mr. Fontanez's brief, he argues that this same *lease*, purportedly captioned as "Housing and Urban Development Directive Number 97-96" to justify his illegal and warrantless search and seizure of the Plaintiffs' homes and in the confiscation of their pets. However, this buttresses Plaintiffs' assertion of fact-laden issues as opposed to legal issues. Appellant's brief, page 9. This is an assertion never presented to the District Court. In fact, a search of the HUD website did not reveal this document. As such, the

Plaintiffs submit this is a self-serving reference that has yet to be considered by the District Court and should not be considered at this level. This would ensure that arguments are considered with the benefit of a fully developed factual record, offering the appellate court the benefit of the district court's prior analysis, and preventing one party from sandbagging the other with new arguments on appeal. Dream Palace v. County of Maricopa, 384 F.3d 990, 1005 (9th Cir. 2004).

As to Plaintiffs' specific claims, the denial of the qualified immunity defense turned on factual issues. Regarding the Fourth Amendment claims, in determining the "reasonableness" of Defendant's conduct - the warrantless seizure of the pets - the District Court determined that the fact that Defendants entered into Plaintiffs' homes without warrants, and "seized" their pets or "effects", then dragged the pets out of their homes, proceeded to inject them with chemicals, slammed them against cars and threw them off a 60 foot bridge caused the District Court to the conclude that Defendants' actions were "unreasonable" and, as such, violated the Fourth Amendment. Indeed, this qualified immunity analysis shows that it was fact-laden analysis, making the decision unappealable. Stella v. Kelley, *Supra*; Torres v. Puerto Rico, *Supra.* JA at 142.

Moreover, the complaint describes, *ad nauseum*, fact based conduct

which violated the Fourth Amendment. For example, the first order of business once Barceloneta assumed the role as housing administrators was to send Plaintiffs a letter dated October 2, 2007, instructing them that they would be visiting the housing communities to "pick-up" their pets. The failure to "voluntarily" surrender the pets would cause eviction. The letters were delivered between October 3 and 7, 2008. It is worth noting that the letter contained a purported regulation attached thereto, in **English**, when most of the residents could not read the document, given that their native language is **Spanish**. In fact, they had never heard of any policy banning or prohibiting pet ownership prior to the events that led to this civil action.

Defendant's October 2, 2007, letter - delivered between October 3 & 7 - did not provide any information or notice as to how Plaintiffs could challenge this arbitrary action. In sum, the letter did not inform of any pre or post-deprivation remedy. JA at 17-18, ¶¶ 4.37-4.39.

On October 8, 2007, Defendants, arrived in the early hours in the public housing communities to execute a law enforce type raid to deprive Plaintiffs of their pets. The residents of each housing community awoke on Monday, October 8, 2007, to find a detachment of municipal employees from the police force, the civil defense, other municipal employees, employees of ACS, the Mayor - Fontanez - and the rest of defendants, going

from house-to-house instructing the residents to hand over their pets or they would be evicted immediately. JA at 13, ¶ 4.7.

Defendants would even grab the pets from children; they would take pets that had collars on them, thus identifying them, as belonging to neighbors. Defendants were so cavalier that they even went into Plaintiffs' fenced-in laundry areas, thus breaching into a sacrosanct zone: Plaintiffs' homes. JA at 25-26, 34-35, 39-42, 49; ¶¶ 5.1-5.15; 5.83-5.92; 5.128-5.139; 5.146-5.150; 5.192-5.196. The residents, including children, had to watch as dogs - crying, yelping and soiling themselves from the sheer terror - were dragged with a catch-pole, injected with chemicals and then slammed into a van. When Plaintiffs pleaded and protested, they were simply ignored. JA at 18-20, 29, 32, 36, ¶¶ 4.40-4.49. 4.45, 5.36, 5.63, 5.99.

Not satisfied, even emboldened with the results of their operations of Monday October 8, 2007, Defendants repeated the actions two days later, on Wednesday October 10, 2007. JA at 20; ¶¶ 4.50-4.52.

This conduct is particularly egregious given that Federal statutes and regulations governing public housing specifically allow for pet ownership by tenants living in subsidized housing. 42 USC § 1437z-3.; 24 C.F.R. § 960.707. Addendum, 1, 3.

To this end, the District Court reasoned that "the [qualified immunity]

doctrine eschews a line that separates the constitutional from the unconstitutional and instead draws a line that separates unconstitutional but *objectively reasonable acts from obviously unconstitutional acts*." Cox v. Hainey, 391 F.3d 25, 31." JA at 144.

Defendant Fontanez fairs no better in his attack to the District Court's denial of the qualified immunity defense for the Fourteenth Amendment due process violations. The District Court reasoned that due process requires notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner under circumstances when the deprivation can still be prevented.

The District Court noted that Defendants had sent Plaintiffs the memoranda regarding the pet pick-up between October 3 and 7, 2007, and thereafter, went into the housing projects to enforce the policy on October 8 and 10, 2007, concluding that this was clearly not enough to meet the "meaningful time" requirement. JA at 147. Indeed, this is also a fact intensive reasoning, taking such decision outside of the realm of appellate review of the denial of the qualified immunity defense. Stella v. Kelley, *Supra*; Torres v. Puerto Rico, *Supra.* Be that as it may, Fontanez conceded this allegation when the chose to not address it.

As such, Plaintiffs submit that because the denial of the qualified

immunity defenses turned on issues of fact, this appeal should not proceed. Nevertheless, even appealing the denial of the qualified immunity from a substantive standpoint, Fontanez fairs no better. We explain herein under.

III. WHETHER APPELLEES' FOURTH AMENDMENT RIGHTS WERE CLEARLY ESTABLISHED, WHERE A REASONABLE PERSON SHOULD HAVE KNOWN THAT SUCH CONDUCT AND ACTIONS VIOLATED THEIR RIGHTS.

The Fourth Amendment Provides that:

[1] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, *and* [2] no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. Amend. IV.

It is clear, unequivocal and incontrovertible that these rights existed prior to October 8 and 10, 2007, when the complained-of events carried out by Fontanez occurred. *See*, Annals of Cong., 1st Cong., 1st Sess., p. 452.

The complaint describes in great detail Fontanez's conduct where Plaintiffs' homes were penetrated - without warrants or consent - in order to execute the pet-raids, how they were threatened and intimidated so they would surrender their pets, thus, illegally confiscating them. Fontanez admits the events when he posits that he "performed some of his duties by overseeing some employees of Barceloneta ***confiscate*** animals that were on

the premises of the public housing projects in violation of the Pet Policy." JA at 70. This confiscation violated Plaintiffs' Fourth and Fourteenth Amendments rights.

To the extent that the qualified immunity defense turns upon a purely legal question, this Court reviews qualified immunity determinations *de novo*. *See* Mitchell v. Forsyth, *Supra*.

Plaintiffs' property rights and interest in their pets has been defined at protected since at least the Nineteenth century. Sentell v. New Orleans & C.R. Co., 166 U.S. 698, 701(1897) ("By the common law, as well as by the law of most, if not all of the states, dogs are so far recognized as property that an action will lie for their conversion or injury").

Likewise, Puerto Rico law defines property rights in animals. 31 L.P.R. §§ 1063, 1480 (domesticated or tamed animals are considered as tame or domestic if they retain the habit of returning to the home of the possessor) - Addendum, 14; The Richards Group of PR v. Junta de Planificacion de PR, 108 PRR 23, 34 (1978)(The "property" concept is not static. The idea represents one that historically has been distinguished by its extraordinary fluidity); *See also* Brown v. Muhlenberg Township, 269 F.3d 205, 209 (3rd Cir. 2001), Altman v. City of High Point, 330 F.3d 194, 205 (4th Cir.2003), Fuller v. Vines, 36 F.3d 65, 68 (9th Cir. 1994), Lesher v.

Reed, 12 F.3d 148, 150-51 (8th Cir. 1994).

Sister States have also recognized property interest in pets. For the improper taking, at common law, a dog owner could bring an action of trover for conversion of a dog. Jones v. Craddock, 210 N.C. 429, 187 S.E. 558, 559 (1936)("Even in the days of Blackstone, while it was declared that property in a dog was 'base property,' it was nevertheless asserted that such property was sufficient to maintain a civil action for its loss"). *See also*, Brown v. Crocker, 139 So. 2nd 779 (1962)(La. App. 2d Cir.)(damages for pain and suffering for illegal shooting of horse); Campbell v. Animal Quarantine Station, 632 P. 2d 1066; 63 Haw. 557(1981)(HI S. Ct., upheld award for tort claim for negligent destruction and emotional compensation); Hyland v. Borras; 719 A.2d 662; 316 NJ Super. 22 (N.J. Super. A.D., 1998)(a household pet is not like other fungible or disposable property, intended solely to be used and replaced after it has outlived its usefulness; defendants were required to "make good the injury done" as the result of their conduct); Womack v. Von Rardon, 135 P.3d 542; 133 Wn App 254 (2006)(malicious injury to a pet can support a claim for, and be considered a factor in measuring a person's emotional distress damages).

The occurrence of the seizure in the instant case is clear and unambiguous. A "seizure" of property occurs when there is some

meaningful interference with a person's possessory interests in that property. Lesher, 12 F.3d at 150, *citing* United States v. Jacobsen, 466 U.S. 109, 113 (1984)). "Destroying property meaningfully interferes with an individual's possessory interest in that property by changing a temporary deprivation into a permanent deprivation." Altman, 330 F.3d at 205. By killing and/or seriously injuring the majority of Plaintiffs' pets constituted a permanent deprivation and consequently a seizure of their property.

And the seizure of Plaintiffs' pets was unreasonable. To determine whether a particular seizure is "reasonable" under the Fourth Amendment requires careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interest against countervailing governmental interests at stake. Graham v. Connor, 490 U.S. 386 (1989). Further, in determining the "reasonable" standard, the question is whether the government's actions are "objectively reasonable" in light of facts and circumstances confronting them, without regard to their underlying intent or motivation. *Id*. at 396.

The *Reasonableness Clause*, of the Fourth Amendment provides an overriding check on criminal investigations by the government, prohibiting all "unreasonable searches and seizures." *See*, Soldal v. Cook County, 506 U.S. 56, 63, (1992); Go-Bart Importing Co. v. United States, 282 U.S. 344,

357 (1931). The second clause, the *Warrant Clause*, explains the process for obtaining a warrant to authorize a search. *See,* Maryland v. Garrison, 480 U.S. 79, 84-85 (1987); United States v. Leon, 468 U.S. 897, 914 (1984). The two clauses do not stand alone.

A search that satisfies the *Warrant Clause* will generally, but not invariably, satisfies the *Reasonableness Clause*. Richards v. Wisconsin, 520 U.S. 385, 395 (1997) (despite the issuance of a warrant, "the reasonableness of the officers' decision . . . must be evaluated as of the time [of the search and seizure]"). And a search of a residence or building without a warrant is "presumptively unreasonable," Payton v. New York, 445 U.S. 573, 586 (1980), but will not invariably violate the *Reasonableness Clause*.

The Fourth Amendment protects against "unreasonable" searches and seizures and, broadly speaking, an unconsented-to, warrantless entry into the home by government agents is presumptively unreasonable - valid only if an exception to the warrant requirement applies. McCabe v. Lifeline Ambulance Serv., Inc., 77 F.3d 540, 544 (1st Cir. 1996), *cert. denied*, 519 U.S. 911 (1996); *See,* 1 LaFave, Search and Seizure § 2.3, at 465 (3d ed. 1996).

In the case at bar, Defendants penetrated Plaintiffs' zone of safety within the confines of their homes; in other homes, Defendants penetrated

the enclosed back-yard or laundry areas, where they had reasonable expectations of privacy and to be free from the government's intrusion when they were not home. Needless to say, Defendants had no warrants or consent to intrude as they did. JA at 25-26, 34-35, 39, 42-43, 49-50; ¶¶ 5.2-5.4; 5.11-5.13; 5.84-5.85; 5.89-5.90; 5.129; 5.147; 5.152; 5.193-5.194; 5.199-5.200.

In addition to protecting Plaintiffs' homes, the Fourth Amendment also extends its scope of protection to the immediately surrounding property, or curtilage. Specifically, "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." California v. Ciraolo, 476 U.S. 207, 213 (1986).

Defendants' entry into Plaintiffs' home were presumptively illegal unless they can justify exceptions to the *Payton* rule. Payton v. New York, *Supra*. Examples of permissible warrantless searches are, for example, (1) hot pursuit of a fleeing felon, (2) imminent destruction of evidence, (3) the need to prevent a suspect's escape, or (4) a risk of danger to the police or others. United States v. McClain, 430 F.3d 299, 304 (6th Cir. 2005); *See also*, U.S. v. Perez-Montanez, 202 F.3d 434 (1st Cir. 2000). *Infra*.

Plaintiffs who were forced to surrender their pets over to the government did so under duress, coercion and threats of being immediately thrown out of their homes by the government and were facing the ominous specter of homelessness. Such actions were not consented to. Any argument where Plaintiffs' voluntarily surrendered their pets is not even specious.

Fontanez, relying on Altman v. City of High Point, *Supra,* argues for reversal of the District Court's denial of qualified immunity because "substantial interest in protecting their citizens from all the dangers and nuisances associated with dogs. Dogs may harass or attack people, livestock, or other pets. Dogs can maim or even kill. Dogs may also spread disease or cause property damage" justified his warrantless searches and seizures. *Id*., 205; Appellant's brief at 20.

Altman is materially dissimilar; it involved roaming dogs that were at-large, threatening the citizenry, and in fact, lunging and attempting to attack the City's animal control officers. The officers involved were executing their duties pursuant to a municipal ordinance. *Id*., 197-199.

The Altman court reasoned that notwithstanding a dog-owner's possessory interest in his pet, when he allows the dog to run at large, the government interest in controlling the animal and preventing the attacks or

damages dramatically increases, while the private interest in the dogs correspondingly diminishes. *Id*. 205.

Contrary to Altman, in the instant case, Plaintiffs' pets were not roaming - or running at large - or involved in the kind of activity that the city ordinance in Altman was designed to prevent. Nor did plaintiffs in Altman experience and allege a warrantless search and seizure of their homes, as the instant case presents. On the contrary, Fontanez, with a show of force, backed up by municipal police, personnel from the Emergency Management Division of Barceloneta dressed in uniforms, went to the three public housing communities in an operation that resembled a narcotics interdiction raid.

Once the posse arrived at the neighborhoods, they breached some the Plaintiffs' homes, without consent and without warrants; they even penetrated the enclosed back yards of homes while Plaintiffs were not at home. For Plaintiffs that were home, Fontanez and his posse proceeded to threaten and intimidate them with eviction; they were now facing the specter of being homeless. In fact, Fontanez even admits that he went to Plaintiffs' home to supervise the **confiscation** of their pets. JA at 170.

In terms of qualified immunity, the case at bar is more analogous to the factual scenario of Andrews v. City of West Beach, 454 F.3d 914 (8th

Cir. 2006), where an officer shot and killed an owner's dog while the dog was in that plaintiff's enclosed back yard. *Id.*, 916. In Andrews, the Eighth Circuit addressed the Fourth Amendment claim regarding the warrantless seizure of plaintiff's dog in terms of "[w]hen the state claims a right to make a warrantless seizure, we must balance 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' " *Id.*, 918.

The Eighth Circuit reasoned that "the state's interest in protecting life and property may be implicated when there is reason to believe the pet poses an imminent danger. Brown v. Muhlenberg Twp., 269 F.3d 205, 210 (3rd Cir. 2001)". . . . [However] This does not permit an officer to 'destroy a pet when it poses no immediate danger and the owner is looking on, obviously desirous of retaining custody.' " *Id.* And the defendant in Andrews seized plaintiff's dog, it was "not on the loose, growling, acting fiercely, or harassing anyone at the time [defendant seized] him." *Id*. In the instant case, Plaintiffs' dogs were "not on the loose, growling, acting fiercely, or harassing anyone at the time [Fontanez seized them]."

Given that Plaintiffs' homes were breached without consent and others surrendered their pets under circumstances of duress, harassment and

intimidation, Fontanez's conduct simply does not fall under the exceptions to the Fourth Amendment. United States v. McClain, *Supra*, 304; U.S. v. Perez-Montanez, *Supra*. As such, Fontanez violated clearly established law prohibiting warrantless, unconsented searches and seizures of Plaintiffs' pets.

Fontanez also argues that Plaintiffs voluntarily subscribed to the purported pet policy - the "Chapter Ten Pet Policy" – and such action diminished their Fourth Amendment rights, and in any event, the Mayor acted reasonably in collecting those animals that were surrendered voluntarily to municipal representatives. Appellant's brief, page 21-22. Not so, Plaintiffs never subscribed to the purported pet policy. Nor did they voluntary surrender their pets. JA at 20; ¶ 4.55. In fact, this is a self-serving unsupported asseveration by the Mayor. Form a legal standpoint, there was no prohibition in owning pets. 42 USC § 1437z-3; 24 CFR 960.707. *See*, Addendum, 1, 3.

Fontanez's admission that he was personally supervising the pet **confiscation** defies his logic of a purported voluntary surrender of pets. On the contrary, Plaintiffs protested, some ran, children went into deep hiding; many broke down and decompensated. Others demanded their rights. To this, Fontanezs responded: surrender the pets or your out on the street.

Plaintiffs submit that Fontanez's show of force, where he was accompanied by his cabal who arrived unannounced, in many cases two or three days after Plaintiffs received a copy of part of a manual, in **English**, which they could not understand, belies his argument of a "voluntary surrender" and acquiescence to a policy that was never in effect.

Further, Fontanez's refusal to provide a grievance procedure notwithstanding that he was mandated by law to provide one, even after Plaintiffs were requesting redress to challenge the action, together with threats of immediate eviction, served to intimidate them, belying a "voluntary surrender." JA at 20; ¶ 4.49; 24 C.F.R. § 903.7(f). *See*, Addendum, 8.

As discussed, *ante*, Plaintiffs' Fourth Amendment rights were clearly established and a reasonable person would know that such conduct violated Plaintiffs' rights. As such, Fontanez should not be entitled to qualified immunity.

A. Fourteenth Amendment

Not withstanding that Fontanez waived and surrendered the due process claims, Plaintiffs will address the fact that the Mayor's conduct did not comply with procedural due process requirements.

The Due Process Clause of the Fourteenth Amendment provides for a

guarantee of fair procedure. In such claims, the State deprivation of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law.* Zinermon v. Burch; 494 U.S. 113, 114 (1990). Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. Carey v. Piphus; 435 U.S. 247, 259 (1978) (quotations omitted).

As addressed above, once Barceloneta assumed control of the management of public housing communities, Fontanez devised a plan to deprive Plaintiffs of their pets. JA at 17, ¶¶ 4.34-4.37. He ordered the delivery of a letter advising that their pets would be "picked-up" and if they were not turned over the residents would be evicted.

The memorandum, delivered on extremely short notice, was devoid of any right to challenge the proposed action, informing of any pre-deprivation or post deprivation remedy; of where the pets could be picked up. Nor did the memorandum provide a reasonable period of time to make alternate arrangements for Plaintiffs to find homes for their pets. JA at 18; ¶¶ 4.38-39.

Attached to the memo was the "Chapter Ten Pet Policy" document –

in English – which the residents could not understand. Yet the document did provide that the "PRPHA grievance procedures is applicable . . . arising out of . . . alleged violations of this policy." Appellant's brief, Addendum page 33, ¶ 2. However, none was provided.

As discussed, *ante*, Plaintiffs had property interest in their pets. In addition, the Commonwealth civil code provides for property ownership in animals. *See*, 31 P.R.L. §§ 1063, 1480. Addendum, 14.

On Monday, October 8, 2007, before the residents had an opportunity to respond, Fontanez and his posse carried out a surprise law enforcement type-pet raid.

During Fontanez's operation, the Plaintiffs' pleas and warnings requesting time to challenge the actions were ignored and rejected by Defendants who culminated their cruelty by driving away with the confiscated pets as if nothing had happened. JA at 18, 20; ¶¶ 4.40 4.43, 4.49.

The foregoing scenario was repeated in every housing community again on October 10, 2007. *Id*.; ¶ 4.50.

Defendants' have acted knowingly, intentionally, willfully, wantonly and/or with reckless disregard for Plaintiffs' Federal and State rights. Indeed, such actions and omissions by the Defendants shock the conscience.

Id.; ¶ 4.53

Fontanez's actions were taken pursuant to an alleged **municipal** ordinance banning pet ownership in effect years prior. In fact, it was Barceloneta's housing policy to take away the pets which they implemented immediately upon taking the administration of the public housing facilities in Barceloneta. Such policy was executed by Defendants without any regards for fundamental rights and fairness, namely, notice and due process of law prior to taking the proposed action or, any after-action remedy to object or challenge the government's conduct in a meaningful manner. *Id*.; ¶ 4.54.

Before October 1, 2007, Plaintiffs had their pets with the knowledge and consent of the housing administrators and there was no prohibition of pet onwership. *Id*.; ¶ 4.55.

Fontanez's failure and refusal to provide Plaintiffs with a *pre-deprivation* remedy prior to taking the adverse action and *post deprivation* remedies violated their protected rights under the Fourteenth Amendment of the U.S. Constitution, namely guaranteeing them the right to some form of hearing before the proposed actions were to be taken and then after the action occurred; the confiscation of their pet. Fontanez's intentional actions constitutes a violation of their property and due process rights. JA at 21-22.;

¶ 4.61-4.62. Zinermon v. Burch; *Supra*, 114.

The Due Process Clause also provides for a guarantee of fair procedure. Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. Carey v. Piphus; *Supra*.

To determine what procedural protections the Constitution requires in a particular case, several factors are weighed: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Applying this test, the Supreme Court usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985).

In situations where the government feasibly can provide a pre-deprivation hearing before taking property, it generally must do so regardless of the adequacy of a post-deprivation remedy to compensate for

the taking. Zinermon v. Burch, at 132.

Here, as discussed above, the Fourteenth Amendment violations occurred on October 8, 2007, and were repeated again on October 10, 2007, when Defendants arbitrarily went to Plaintiffs homes and refused to provide them a pre-deprivation or a post deprivation remedy prior or after the taking of their pets. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzano, 380 U.S. 545, 552 (1965). In fact, Fontanez was aware of the requirement to provide due process mechanisms to Plaintiffs prior to even notifying of any proposed action, let alone, executing warrantless searches and seizures joined by threats of eviction. *See*, footnote three. At any rate, Federal law and regulations required grievance procedures. 42 U.S.C. § 1437c-1(d)(6); 24 C.F.R. § 903.7(f). As such, Fontanez is not entitled to qualified immunity. Addendum, 8, 16-21.

IV. WHETHER APPELLANT IS ABLE TO REQUEST REVIEW OF ISSUES WHERE A FINAL JUDGMENT ON THE MERITS HAS NOT BEEN ISSUED.

Appellate jurisdiction typically is limited to the review of final orders and judgments; that limitation sometimes is relaxed when a public official, *qua* defendant, unsuccessfully asserts a qualified immunity defense in a pretrial motion. 28 U.S.C. § 1291. However, in a veiled manner, Fontanez

attempts to reargue the denial by the District Court of his Rule 12 motion before this Court and that the District Court erred in not dismissing substantive due process claims. Appellant's brief at 15; 33-39.

As explained in Pedraza v. Shell Oil Co., 942 F.2d 48, 55 n.10 (1st Cir. 1991), "when presented with an interlocutory appeal from an order denying [for example] summary judgment on the ground of qualified immunity, we have so far refrained from endorsing any form of pendent appellate jurisdiction over otherwise nonappealable interlocutory orders." *See*, Domegan v. Fair, 859 F.2d 1059, 1061-62 (1st Cir. 1988) ("Notwithstanding that we have jurisdiction to review the denial of qualified immunity midstream, '[a]ny additional claim presented to and rejected by the district court must independently satisfy the collateral order exception to the final-judgment rule in order for us to address it on an interlocutory appeal.") (quoting Bonitz v. Fair, 804 F.2d 164, 173 (1st Cir. 1986)). In fact, the same principal applies to review of the denial of qualified immunity under Rule 12. Garnier v. Rodriguez, 506 F.3d 22, 24-25 (1st Cir. 2007)(only qualified immunity denial was reviewable).

Defendant's protest to this Court over the denial of the dismissal request of Plaintiffs' Constitutional claims does not meet the collateral order exception to the final-judgment rule. Nor does he advance any source of

authority as to why this Court should allow such claims which are outside of the collateral order exception for appellate review.

However, we proceed to analyze both issues herein. Accepting all well-pleaded factual allegations as true, and drawing all reasonable inferences in Plaintiff's favor, Fontanez's claims fail. ACA Fin. Guar. Corp. v. Advest, Inc., 512 F.3d 46, 58 (1st Cir. 2008).

A. Rule 12 Motion to Dismiss & Bell Atlantic Corp. v. Twombley

Fontanez's assertion that Plaintiffs' complaint merely recites conclusion together with a possible entitlement to relief belies his own "cherry-picked" account of the myriad of allegations pertaining to the elements of the causes of action. Fontanez essentially reduces Plaintiffs' allegations to nothing more than the use of adjectives such as "a police raid" together with an "authoritarian knock." Appellant's brief page 15. In order to state a claim under § 1983 the plaintiff must identify an act or omission undertaken under color of law. Aponte-Torres v. University of Puerto Rico, 445 F.3d 50, 55 (1st Cir. 2006). This is amply alleged.

As discussed, *ante*, and a review of the complaint - a 61 page document - shows a fact intensive and fact specific complaint that amply meets Rule 8(a)(2) standards. JA at, 1-61. Appellant's claim is without merit. In fact, Plaintiffs submit that the complaint meets the pleadings

requirements of Swierkiewicz v. Sorema, *N.A*, Erickson v. Pardus, Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit *Infra* and Fed. R. Civ. P. 8(a)(2).

In support of his request to this Court to, essentially, dismiss the compliant, Fontanez relies on a recent Supreme Court case. However, that reliance is misplaced. *See*, Bell Atlantic Corp. v. Twombley, 127 S. Ct. 1955 (2007). This case dealt with an anti-trust class action under Section 1 of the Sherman Act where plaintiffs claimed *defendants* had engaged in parallel conduct - to restrain entry of new players in the local exchange market of the communications industry and to refrain from competing against each other.

To succeed in a Section 1 Antitrust claim, a plaintiff must establish: (1) at least two or more entities acting in concert; (2) an unreasonable restraint on trade; and (3) an effect on interstate commerce. Sherman Act, 15 U.S.C. § 1. *See* Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 220 (4th Cir. 1994).

A Section 1 claim requires a conspiracy. *See,* Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774, 779 (7th Cir. 1994)(noting Sect. 1 typically applies to conspiracies). Some courts require greater factual specificity as to the conspiracy element of a Section 1 claim. The standard typically imposes

dismissal where allegations of conspiracy are made without sufficient supporting facts constituting the conspiracy, its object, and accomplishment. *See*, Five Smiths, Inc. v. Nat'l Football League Players Ass'n, 788 F. Supp. 1042, 1048 (D. Minn. 1992)(notice pleading applies to antitrust claims, but general allegations of conspiracy, without facts constituting the conspiracy, its object and accomplishment are inadequate); *see also* Fort Wayne Telsat v. Entm't & Sports Programming Network, 753 F. Supp. 109, 113 (S.D.N.Y. 1990). Of note, these cases predate Bell Atlantic.

In Bell Atlantic Corp the district court dismissed the case based on the failure of the complaint to state the elements of a violation under Section 1 of the Sherman Act because "parallel conduct", did not allege any facts supporting that the restraint on commerce was affected by a "contract, combination or conspiracy." The appellate court reversed, finding that *defendants* failed to show that "there was no set of facts that would permit plaintiffs to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence". As to the specific pleading requirements for a Sect. 1 Sherman Act claim, "[a]n 'agreement' is a material element of a § 1 claim. Therefore, a sufficient outline or adumbration of a § 1 claim must include allegations supportive of that material element." Allan Ides, Bell Atlantic and Pleading Standards, 243

F.D.R. 604, 627 (2007).

In Bell Atlantic, plaintiffs failed to plead enough facts to suggest an agreement. "In a sense, we could say that the Substantive Sufficiency of a Sherman Act claim is 'trained' in the Sherman Act in order to ensure that a legally recognized claim has, in fact, been stated. This may be a peculiarity given untrained perceptions, but it is not a peculiarity of pleading; it is a peculiarity of the governing substantive law." *Id*, at 628. In sum, the Bell Atlantic decision was narrow and it was "not premised on the law of pleadings, but on the law of antitrust." *Id*, at 631-632. (**Emphasis ours**).

In turn, the Bell Atlantic Court held that as the need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects Rule 8(a)(2)'s threshold requirement that the "plain statement" rule possess enough heft to "sho[w] that the pleader is entitled to relief." In sum, the Court redefined pleading requirements by narrowing the application of Conely, while at the same time rejecting that pleadings need not establish "probability". To that end, the Court opined that "grounds require more than labels and conclusions, and a formulaic recitation of the elements of a case of action will not do."

Some factual allegations must accompany the elements of a claim. Bell Atlantic at 1964-1965. Anything more would abrogate Rule 8 and the

re-institution of a heightened pleading standard under Rule 9. This, the Court did not do. In any event, Rule 8(f) instructs that "[a]ll pleadings shall be construed to do substantial justice."[3]

The "Court disavowed an isolated interpretation, saying instead that the phrase ["a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief"] means that a plaintiff can rely on facts not stated in the complaint to provide his claims; it does not set a minimum pleading standard." Scott Dodson, Pleading Standards after Bell Atlantic Corp. v. Twombly, 93 Virginia Law Review Journal 121, 123 (2007). (**Emphasis Ours**).

Further, the High Court left Swierkiewicz v. Sorema, *N.A.*, 534 U. S. 506 (2002), undisturbed and specifically declined the invitation to re-institute a heightened pleading standard. Therefore, "complaints in these cases, as in most others, must satisfy only the simple requirements of [*Fed. R. Civ. P.*] 8(a)." *Id.* at 513; Bell Atlantic, *Supra*. *See also*, Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993)(no heightened pleading requirement in § 1983 cases against municipalities).

[3] Fed. R. Civ. P. 8(f) (pre-Dec. 1, 2007 version).

But more importantly, just two weeks after Bell Atlantic, the Supreme Court in Erickson v. Pardus, 127 S. Ct. 2197 (2007) held that:

> "Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only " 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.' " Bell Atlantic Corp. v. Twombly, 550 U. S. ___, ___ (2007) (slip op., at 7–8) (quoting **Conley v. Gibson**, 355 U. S. 41, 47 (1957)). In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. Bell Atlantic Corp., *Supra*, at ___ (slip op., at 8–9) (citing Swierkiewicz v. Sorema N. A., 534 U. S. 506, 508, n. 1 (2002); Neitzke v. Williams, 490 U. S. 319, 327 (1989); Scheuer v. Rhodes, 416 U. S. 232, 236 (1974))."

Qualified immunity is a waivable defense, applicable in cases in which a government actor is alleged to have violated a plaintiff's constitutional rights. As a waivable defense, it is, unquestionably, the defendant's prerogative to raise it or not. Nothing in the Federal Rules suggests that the plaintiff bears any pleading burden in anticipation of that defense. Rather, under Rule 8(a)(2), plaintiff 's pleading burden in all cases is to provide a "short and plain statement of the *claim*" asserted. To contend that Plaintiffs' initial pleading burden somehow includes an obligation to anticipate a qualified immunity defense, much less to do so under a heightened pleading standard is simply incorrect. Yet this appears to be Fontanez's argument.

Nor does Appellant advance any authority that the converse is true:

Plaintiffs have a purported heightened pleading requirement. Qualified immunity is a defense against suit, tied exclusively to objective good faith; it is not a generalized policy against suit. Addressing the questions of objective good faith and clearly established law has nothing to do with the pleadings.

As discussed, *ante*, Plaintiffs complaint met the requisite pleading requirements.

B. Substantive Due Process

Defendants allege that Plaintiffs substantive due process should be reversed because treatment of animals is not covered by the substantive due process component of the Fourteenth Amendment. Plaintiffs never made such argument. Plaintiffs' allegations were based on the treatment received by Fontanez and his posse to them and their children. We explain:

The substantive due process guarantee functions to protect individuals from particularly offensive actions on the part of government officials, even when the government employs facially neutral procedures in carrying out those actions. Daniels v. Williams, 474 U.S. 327, 331 (1986).

Where a plaintiff's substantive due process claim challenges the specific acts of a state officer, the plaintiff must show both that the acts were so egregious as to shock the conscience and that they deprived him of a

protected interest in life, liberty, or property. Rivera v. Rhode Island, 402 F.3d 27, 34 (1st Cir. 2005) (stating that "[i]t is not enough to claim the governmental action shocked the conscience" but that a plaintiff must also show a deprivation of a protected interest). Consequently, "conscience-shocking conduct is an indispensable element of a substantive due process challenge to executive action." DePoutot v. Raffaelly, 424 F.3d 112, 118 n.4 (1st Cir. 2005). In order to shock the conscience, conduct must at the very least be "extreme and egregious," or, put another way, "truly outrageous, uncivilized, and intolerable," Hasenfus v. LaJeunesse, 175 F.3d 68, 72 (1st Cir. 1999).

There is no scientifically precise formula for determining whether executive action is - or is not - sufficiently shocking to trigger the protections of the substantive due process branch of the Fourteenth Amendment. Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32, 45 (1st Cir. 1992). Accordingly, the analysis will vary with the subject matter and the circumstances. Rivera, 402 F.3d at 36; Amsden v. Moran, 904 F.2d 748, 754 n.5 (1st Cir. 1990).

Therefore, the requisite inquiry involves “a comprehensive analysis of the attendant circumstances before any abuse of official power is condemned as conscience-shocking.” DePoutot, 424 F.3d at 119. It is worth noting that

the Supreme Court has "established method of substantive-due-process analysis" as having "two primary features." Washington v. Glucksberg, 521 U.S. 702, 117 (1997).

First, the High Court has observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in the Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, the substantive-due-process cases require careful description of the asserted fundamental liberty interest. *Id.* at 720-21.

To be successful, Plaintiffs must "demonstrate either that the ordinance [or policy] infringes a fundamental liberty interest or that the ordinance is 'arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.' " Village of Euclid v. Ambler Realty Company, 272 U.S. 365, 295 (1926).

In the instant case, Plaintiffs specifically argued that Fontanez and his posse acted pursuant to an alleged municipal **ordinance** banning pet ownership in effect years prior. More specifically, the **policy** in effect was to take away the pets. Such **policy** was executed without any regards for fundamental rights and fairness, namely, notice and due process of law prior

to taking the proposed action or, any after-action remedy to object or challenge the government's conduct in a meaningful manner. JA at 20; ¶ 4.54.

In order to assert valid Substantive Due Process claim, "plaintiffs have to prove that they suffered the deprivation of an established life, liberty, or property interest, and that such deprivation occurred through governmental action that shocks the conscience." Clark v. Boscher, 514 F.3d 107 (1st Cir. 2008).

In the present case, there has been a constitutional deprivation of a property interest, namely under the Fourth and Fourteenth Amendments, as discussed above. The question that remains is whether Fontanez's actions "shock the conscience." There is no scientifically precise formula for determining whether executive action is, or is not, sufficiently shocking to trigger the protections of the substantive due process branch of the Fourteenth Amendment. Nestor Colon Medina & Sucesores, Inc. v. Custodio, *Supra*, at 45.

"When a government official himself inflicts harm upon an individual or his property, that action can constitute a deprivation of a protected interest in violation of due process if the official's conduct shocks the conscience." Velez-Diaz v. Vega-Irizarry, 421 F.3d 71 (1st Cir. 2005). Here, Fontanez

admits that he supervised the pet confiscation. Thereafter, the act of government officials of injecting Plaintiffs' pets with chemicals, slamming them against the walls of cars, and ultimately throwing them off a bridge would seem shocking and outrageous even to individuals with extremely hardened sensibilities.

Defendant's arguments that substantive due process does not protect animals ignores that the deprivation that amounts to a Substantive Due Process violation relates to a property interest. And indeed, the conduct described in the complaint was executed in a cruel and shocking manner. "[W]here persons are deprived of property interests, it has long been 'clearly established' that due process safeguards must be afforded." Amsden v. Moran, 904 F.2d 748 (1st Cir. 1990)(*citing*, Paul v. Davis, 424 U.S. 693, 711 (1976)); Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972).

Plaintiffs submit that the deprivation of property without adequate procedural and substantive due process safeguards is a clearly established right under the law.

As such, Plaintiffs request that Appellant's appeal be denied.

CONCLUSION

Fontanez abandoned any defense he may have had regarding due process violations.

His arguments for not complying with the warrant requirements prior to penetrating Plaintiffs' homes and thereafter, seizing Plaintiffs' dogs do not comport with applicable law or demonstrate a legitimate governmental interest to circumvent Fourth Amendment protections. As such, he is not entitled to qualified immunity protection.

In fact, Plaintiffs posit that the Court should dismiss this appeal given that it is fact based and not reviewable. The remaining arguments are not reviewable under the collateral exception doctrine.

Lastly, Fontanez expresses certain indignation for what he mischaracterizes as, purported, "gratuitous insults." There are no such insults **anywhere** in the complaint. The complaint depicts gratuitously abusive conduct by the Mayor towards the most vulnerable members of our society: people of humble backgrounds that reside, not by choice, but by circumstances in Federal government assisted housing.

Plaintiffs submit that the Mayor's indignation emanates from having to account for his own abusive conduct as opposed to Plaintiffs being obsequious, as Fontanez would have preferred.

It should be noted that the District Court's *Opinion and Order* uses similar language found in the complaint. In fact, Plaintiffs advise that the factual depictions are understated notwithstanding their enormity. As such,

the events that transpired leading to this lawsuit are in fact graphic and horrific where the international community expressed outrage and indignation over these events.

And lastly, Plaintiffs submit that no one, regardless of their social and economic circumstances, is required to sit idly by and withstand such abusive conduct from any government.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, on this 26th day of December 2008.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. 32(a)(7)(B)

It is certified, pursuant to Fed. R. App. 32(a)(7)(B), that this Brief for the Appellant contains less that 14,000 words. Excluding the table of contents, the table of authorities, corporate disclosure statements, addendum and attorney certificates, the Brief contains 13,601 words, in 14 point type face, Times New Roman.

CERTIFICATE OF SERVICE

It is certified that on this same date, two copies of the foregoing brief were delivered to the attorney of record, at the following address by U.S. Mail: **LUIS F. COLON GONZALEZ, ESQ**., *P.O. Box 190004, San Juan, PR 00919-0004.*

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No. 08-2211

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MADELINE MALDONADO, ET. AL.;

Plaintiffs-Appellees

Vs.

MUNICIPALITY OF BARCELONETA, ET. ALS;

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
(Civil Action No. CV-07-1992 -JGG)

ADDENDUM TO BRIEF FOR APPELLEES

TABLE OF CONTENTS

42 USC § 1437z-3. Pet ownership in public housing

SUBCHAPTER I - GENERAL PROGRAM OF ASSISTED HOUSING

(a) Ownership conditions

A resident of a dwelling unit in public housing (as such term is defined in subsection (c) of this section) may own 1 or more common household pets or have 1 or more common household pets present in the dwelling unit of such resident, subject to the reasonable requirements of the public housing agency, if the resident maintains each pet responsibly and in accordance with applicable State and local public health, animal control, and animal anti-cruelty laws and regulations and with the policies established in the public housing agency plan for the agency.

(b) Reasonable requirements

The reasonable requirements referred to in subsection (a) of this section may include -

(1) requiring payment of a nominal fee, a pet deposit, or both, by residents owning or having pets present, to cover the reasonable operating costs to the project relating to the presence of pets and to establish an escrow account for additional costs not otherwise covered, respectively;

(2) limitations on the number of animals in a unit, based on unit size;

(3) prohibitions on -

(A) types of animals that are classified as dangerous; and

(B) individual animals, based on certain factors, including the size and weight of the animal; and

(4) restrictions or prohibitions based on size and type of building or project, or other relevant conditions.

(c) Pet ownership in public housing designated for occupancy by elderly or handicapped families

For purposes of this section, the term "public housing" has the meaning given the term in section 1437a(b) of this title, except that such term does not include any public housing that is federally assisted rental housing for the elderly or handicapped, as such term is defined in section 1701r-1(d) of title 12.

(d) Regulations

This section shall take effect upon the date of the effectiveness of regulations issued by the Secretary to carry out this section. Such regulations shall be issued after notice and opportunity for public comment in accordance with the procedure under section 553 of title 5 applicable to substantive rules (notwithstanding subsections (a)(2), (b)(B), and (d)(3) of such section).

24 CFR 960.707 Pet ownership.

CHAPTER IX--OFFICE OF ASSISTANT SECRETARY FOR PUBLIC AND INDIAN HOUSING, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Subpart G--Pet Ownership in Public Housing

(a) Ownership Conditions. A resident of a dwelling unit in public housing, as that term is used in § 960.703, may own one or more common household pets or have one or more common household pets present in the dwelling unit of such resident, subject to the reasonable requirements of the PHA, if the resident maintains each pet:

(1) Responsibly;

(2) In accordance with applicable State and local public health, animal control, and animal anti-cruelty laws and regulations; and

(3) In accordance with the policies established in the PHA Annual Plan for the agency as provided in part 903 of this chapter.

(b) Reasonable requirements. Reasonable requirements may include but are not limited to:

(1) Requiring payment of a non-refundable nominal fee to cover the reasonable operating costs to the development relating to the presence of pets, a refundable pet deposit to cover additional costs attributable to the pet and not otherwise covered, or both;

(2) Limitations on the number of animals in a unit, based on unit size;

(3) Prohibitions on types of animals that the PHA classifies as dangerous, provided that such classifications are consistent with applicable State and local law, and prohibitions on individual animals, based on certain factors, including the size and weight of animals;

(4) Restrictions or prohibitions based on size and type of building or project, or other relevant conditions;

(5) Registration of the pet with the PHA; and

(6) Requiring pet owners to have their pets spayed or neutered.

(c) Restriction. A PHA may not require pet owners to have any pet's vocal chords removed.

(d) Pet deposit. A PHA that requires a resident to pay a pet deposit must place the deposit in an account of the type required under applicable State or local law for pet deposits or, if State or local law has no requirements regarding pet deposits, for rental security deposits, if applicable. The PHA shall comply with such applicable law as to retention of the deposit, interest, and return of the deposit or portion thereof to the resident, and any other applicable requirements.

(e) PHA Plan. Unless otherwise provided by § 903.11 of this chapter, Annual Plans are required to contain information regarding the PHA's pet policies, as described in § 903.7(n) of this chapter, beginning with PHA fiscal years that commence on or after January 1, 2001.

24 CFR 903.7 What information must a PHA provide in the Annual Plan?

CHAPTER IX--OFFICE OF ASSISTANT SECRETARY FOR PUBLIC AND INDIAN HOUSING, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Subpart B--PHA Plans

With the exception of the first Annual Plan submitted by a PHA, the Annual Plan must include the information provided in this section. HUD will advise PHAs by separate notice, sufficiently in advance of the first Annual Plan due date, of the information, described in this section that must be part of the first Annual Plan submission, and any additional instructions or directions that may be necessary to prepare and submit the first Annual Plan. The information described in this section applies to both public housing and tenant-based assistance, except where specifically stated otherwise. The information that the PHA must submit for HUD approval under the Annual Plan includes the discretionary policies of the various plan components or elements (for example, rent policies) and not the statutory or regulatory requirements that govern these plan components and that provide no discretion on the part of the PHA in implementation of the requirements. The PHA's Annual Plan must be consistent with the goals and objectives of the PHA's 5-Year Plan.

(a) A statement of housing needs.

(1) This statement must address the housing needs of the low-income and very low-income families who reside in the jurisdiction served by the PHA, and other families who are on the public housing and Section 8 tenant-based assistance waiting lists, including:

(i) Families with incomes below 30 percent of area median (extremely low-income families);

(ii) Elderly families and families with disabilities;

(iii) Households of various races and ethnic groups residing in the jurisdiction or on the waiting list.

(2) A PHA must make reasonable efforts to identify the housing needs of each of the groups listed in paragraph (a)(1) of this section based on information provided by the applicable Consolidated Plan, information provided by HUD, and other generally available data.

(i) The identification of housing needs must address issues of affordability, supply, quality, accessibility, size of units and location.

(ii) The statement of housing needs also must describe the ways in which the PHA intends, to the maximum extent practicable, to address those needs, and the PHA's reasons for choosing its strategy.

(b) A statement of the PHA's deconcentration and other policies that govern eligibility, selection, and admissions. This statement must describe the PHA's policies that govern resident or tenant eligibility, selection and admission. This statement also must describe any PHA admission preferences, and any occupancy policies that pertain to public housing units and housing units assisted under section 8(o) of the 1937 Act, as well as any unit assignment policies for public housing. This statement must include the following information:

(1) Deconcentration Policy. The PHA's deconcentration policy applicable to public housing, as described in § 903.2(a).

(2) Waiting List Procedures. The PHA's procedures for maintaining waiting lists for admission to the PHA's public housing developments. The statement must address any site-based waiting lists, as authorized by section 6(s) of the 1937 Act (42 U.S.C. 1437d(s)), for public housing. Section 6(s) of the 1937 Act permits PHAs to establish a system of site-based waiting lists for public housing that is consistent with all applicable civil rights and fair housing laws and regulations. Notwithstanding any other regulations, a PHA may adopt site-based waiting lists where:

(i) The PHA regularly submits required occupancy data to HUD's Multifamily Tenant Characteristics Systems (MTCS) in an accurate, complete and timely manner;

(ii) The system of site-based waiting lists provides for full disclosure to each applicant of any option available to the applicant in the selection of the development in which to reside, including basic information about available sites (location, occupancy, number and size of accessible units, amenities such as day care, security, transportation and training programs) and an estimate of the period of time the applicant would likely have to wait to be admitted to units of different sizes and types (e.g., regular or accessible) at each site;

(iii) Adoption of site-based waiting lists would not violate any court order or settlement agreement, or be inconsistent with a pending complaint brought by HUD;

(iv) The PHA includes reasonable measures to assure that adoption of site-based waiting lists is consistent with affirmatively furthering fair housing, such as reasonable marketing activities to attract applicants regardless of race or ethnicity;

(v) The PHA provides for review of its site-based waiting list policy to determine if the policy is consistent with civil rights laws and certifications through the following steps:

(A) As part of the submission of the Annual Plan, the PHA shall assess changes in racial, ethnic or disability-related tenant composition at each PHA site that may have occurred during the implementation of the site-based waiting list, based upon MTCS occupancy data that has been confirmed to be complete and accurate by an independent audit (which may be the annual independent audit) or is otherwise satisfactory to HUD;

(B) At least every three years the PHA uses independent testers or other means satisfactory to HUD, to assure that the site-based waiting list is not being implemented in a discriminatory manner, and that no patterns or practices of discrimination exist, and providing the results to HUD;

(C) Taking any steps necessary to remedy the problems surfaced during the review; and

(D) Taking the steps necessary to affirmatively further fair housing.

(3) Other admissions policies. The PHA's admission policies that include any other PHA policies that govern eligibility, selection and admissions for the public housing (see part 960 of this title) and tenant-based assistance programs (see part 982, subpart E of this title).

(The information requested on site-based waiting lists and deconcentration is applicable only to public housing.)

(c) A statement of financial resources. This statement must address the financial resources that are available to the PHA for the support of Federal public housing and tenant-based assistance programs administered by the PHA during the plan year. The statement must include a listing, by general categories, of the PHA's anticipated resources, such as PHA operating, capital and other anticipated Federal resources available to the PHA, as well as tenant rents and other income available to support public housing or tenant-based assistance. The statement also should include the non-Federal sources of funds supporting each Federal program, and state the planned uses for the resources.

(d) A statement of the PHA's rent determination policies. This statement must describe the PHA's basic discretionary policies that govern rents charged for public housing units, applicable flat rents, and the rental contributions of families receiving tenant-based assistance. For tenant-based assistance, this statement also shall cover any discretionary minimum tenant rents and payment standard policies.

(e) A statement of the PHA's operation and management.

(1) This statement must list the PHA's rules, standards, and policies that govern maintenance and management of housing owned, assisted, or operated by the PHA.

(2) The policies listed in this statement must include a description of any measures necessary for the prevention or eradication of pest infestation. Pest infestation includes cockroach infestation.

(3) This statement must include a description of PHA management organization, and a listing of the programs administered by the PHA.

(4) The information requested on a PHA's rules, standards and policies regarding management and maintenance of housing applies only to public housing. The information requested on PHA program management and listing of administered programs applies to public housing and tenant-based assistance.

(f) A statement of the PHA grievance procedures. This statement describes the grievance and informal hearing and review procedures that the PHA makes available to its residents and applicants. These procedures include public housing grievance procedures and tenant-based assistance informal review procedures for applicants and hearing procedures for participants.

(g) A statement of capital improvements needed. With respect to public housing only, this statement describes the capital improvements necessary to ensure long-term physical and social viability of the PHA's public housing developments, including the capital improvements to be undertaken in the year in question and their estimated costs, and any other information required for participation in the Capital Fund. PHAs also are required to include 5-Year Plans covering large capital items.

(h) A statement of any demolition and/or disposition.

(1) Plan for Demolition/Disposition. With respect to public housing only, a description of any public housing development, or portion of a public housing development, owned by the PHA for which the PHA has applied or will apply for demolition and/or disposition approval under section 18 of the 1937 Act (42 U.S.C. 1437p), and the timetable for demolition and/or disposition. The application and approval process for demolition and/or disposition is a separate process. Approval of the PHA Plan does not constitute approval of these activities.

(2) Interim Plan for Demolition/Disposition.

(i) Before submission of the first Annual Plan, a PHA may submit an interim PHA Annual Plan solely for demolition/disposition. The interim plan must provide:

(A) The required description of the action to be taken;

(B) A certification of consistency with the Consolidated Plan;

(C) A description of how the plan is consistent with the Consolidated Plan;

(D) A relocation plan that includes the availability of units in the area and adequate funding; and

(E) Confirmation that a public hearing was held on the proposed action and that the resident advisory board was consulted.

(ii) Interim plans for demolition/disposition are subject to PHA Plan procedural requirements in this part (see §§ 903.13, 903.15, 903.17, 903.19, 903.21, 903.23, 903.25), with the following exception. If a resident advisory board has not yet been formed, the PHA may seek a waiver of the requirement to consult with the resident advisory board on the grounds that organizations that adequately represent residents for this purpose were consulted.

(iii) The actual application for demolition or disposition may be submitted at the same time as submission of the interim plan or at a later date.

(i) A statement of the public housing developments designated as housing for elderly families or families with disabilities or elderly families and families with disabilities.

(1) With respect to public housing only, this statement identifies any public housing developments owned, assisted, or operated by the PHA, or any portion of these developments, that:

(i) The PHA has designated for occupancy by:

(A) Only elderly families;

(B) Only families with disabilities; or

(C) Elderly families and families with disabilities; and

(ii) The PHA will apply for designation for occupancy by:

(A) Only elderly families;

(B) Only families with disabilities; or

(C) Elderly families and families with disabilities as provided by section 7 of the 1937 Act (42 U.S.C. 1437e).

(2) The designated housing application and approval process is a separate process. Approval of the PHA Plan does not constitute approval of these activities.

(j) A statement of the conversion of public housing to tenant-based assistance.

(1) This statement describes:

(i) Any building or buildings that the PHA is required to convert to tenant-based assistance under section 33 of the 1937 Act (42 U.S.C. 1437z-5);

(ii) The status of any building or buildings that the PHA may be required to convert to tenant-based assistance under section 202 of the Fiscal Year 1996 HUD Appropriations Act (42 U.S.C. 14371 note); or

(iii) The PHA's plans to voluntarily convert under section 22 of the 1937 Act (42 U.S.C. 1437t).

(2) The statement also must include an analysis of the developments or buildings required to be converted under section 33.

(3) For both voluntary and required conversions, the statement must include the amount of assistance received commencing in Federal Fiscal Year 1999 to be used for rental assistance or other housing assistance in connection with such conversion.

(4) The application and approval processes for required or voluntary conversions are separate approval processes. Approval of the PHA Plan does not constitute approval of these activities.

(5) The information required under this paragraph (j) of this section is applicable to public housing and only that tenant-based assistance which is to be included in the conversion plan.

(k) A statement of homeownership programs administered by the PHA.

(1) This statement describes:

(i) Any homeownership programs administered by the PHA under section 8(y) of the 1937 Act (42 U.S.C. 1437f(y));

(ii) Any homeownership programs administered by the PHA under an approved section 5(h) homeownership program (42 U.S.C. 1437c(h));

(iii) An approved HOPE I program (42 U.S.C. 1437aaa); or

(iv) Any homeownership programs for which the PHA has applied to administer or will apply to administer under section 5(h), the HOPE I program, or section 32 of the 1937 Act (42 U.S.C. 1437z-4).

(2) The application and approval process for homeownership under the programs described in paragraph (k) of this section, with the exception of the section 8(y) homeownership program, are separate processes. Approval of the PHA Plan does not constitute approval of these activities.

(l) A statement of the PHA's community service and self-sufficiency programs.

(1) This statement describes:

(i) Any PHA programs relating to services and amenities coordinated, promoted or provided by the PHA for assisted families, including programs provided or offered as a result of the PHA's partnership with other entities;

(ii) Any PHA programs coordinated, promoted or provided by the PHA for the enhancement of the economic and social self-sufficiency of assisted families, including programs provided or offered as a result of the PHA's partnerships with other entities, and activities under section 3 of the Housing and Community Development Act of 1968 and under requirements for the Family Self-Sufficiency Program and others. The description of programs offered shall include the program's size (including required and actual size of the Family Self-Sufficiency program) and means of allocating assistance to households.

(iii) How the PHA will comply with the requirements of section 12(c) and (d) of the 1937 Act (42 U.S.C. 1437j(c) and (d)). These statutory provisions relate to community service by public housing residents and treatment of income changes in public housing and tenant-based assistance recipients resulting from welfare program requirements. PHAs must address any cooperation agreements, as described in section 12(d)(7) of the 1937 Act (42 U.S.C. 1437j(d)(7)), that the PHA has entered into or plans to enter into.

(2) The information required by paragraph (l) of this section is applicable to both public housing and tenant-based assistance, except that the information regarding the PHA's compliance with the community service requirement applies only to public housing.

(m) A statement of the PHA's safety and crime prevention measures.

(1) With respect to public housing only, this statement describes the PHA's plan for safety and crime prevention to ensure the safety of the public housing residents that it serves. The plan for safety and crime prevention must be established in consultation with the police officer or officers in command of the appropriate precinct or police departments. The plan also must provide, on a development-by-development or jurisdiction wide-basis, the measures necessary to ensure the safety of public housing residents.

(2) The statement regarding the PHA's safety and crime prevention plan must include the following information:

(i) A description of the need for measures to ensure the safety of public housing residents;

(ii) A description of any crime prevention activities conducted or to be conducted by the PHA; and

(iii) A description of the coordination between the PHA and the appropriate police precincts for carrying out crime prevention measures and activities.

(3) If the PHA expects to receive drug elimination program grant funds, the PHA must submit, in addition to the information required by paragraph (m)(1) of this section, the plan required by HUD's Public Housing Drug Elimination Program regulations (see part 761 of this title).

(4) If HUD determines at any time that the security needs of a public housing development are not being adequately addressed by the PHA's plan, or that the local police precinct is not assisting the PHA with compliance with its crime prevention measures as described in the Annual Plan, HUD may mediate between the PHA and the local precinct to resolve any issues of conflict.

(n) A statement of the PHA's policies and rules regarding ownership of pets in public housing. This statement describes the PHA's policies and requirements pertaining to the ownership of pets in public housing. The policies must be in accordance with section 31 of the 1937 Act (42 U.S.C. 1437a-3).

(o) Civil rights certification.

(1) The PHA must certify that it will carry out its plan in conformity with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-2000d-4), the Fair Housing Act (42 U.S.C. 3601-19), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and title II of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.). The PHA also must certify that it will affirmatively further fair housing.

(2) The certification is applicable to both the 5-Year Plan and the Annual Plan.

(3) A PHA shall be considered in compliance with the certification requirement to affirmatively further fair housing if the PHA fulfills the requirements of § 903.2(b) and:

(i) Examines its programs or proposed programs;

(ii) Identifies any impediments to fair housing choice within those programs;

(iii) Addresses those impediments in a reasonable fashion in view of the resources available;

(iv) Works with local jurisdictions to implement any of the jurisdiction's initiatives to affirmatively further fair housing that require the PHA's involvement; and

(v) Maintains records reflecting these analyses and actions.

(p) Recent results of PHA's fiscal year audit. This statement provides the results of the most recent fiscal year audit of the PHA conducted under section 5(h)(2) of the 1937 Act (42 U.S.C. 1437c(h)).

(q) A statement of asset management. To the extent not covered by other components of the PHA Annual Plan, this statement describes how the PHA will carry out its asset management functions with respect to the PHA's public housing inventory, including how the PHA will plan for long-term operating, capital investment, rehabilitation, modernization, disposition, and other needs for such inventory.

(r) Additional information to be provided.

(1) For all Annual Plans following submission of the first Annual Plan, a PHA must include a brief statement of the PHA's progress in meeting the mission and goals described in the 5-Year Plan;

(2) A PHA must identify the basic criteria the PHA will use for determining:

(i) A substantial deviation from its 5-Year Plan; and

(ii) A significant amendment or modification to its 5-Year Plan and Annual Plan.

(3) A PHA must include such other information as HUD may request of PHAs, either on an individual or across-the-board basis. HUD will advise the PHA or PHAs of this additional information through advance notice.

31 L.P.R. § 1480. Animals

Wild animals are only possessed so long as they are under control; domesticated or tamed animals are considered as tame or domestic if they retain the habit of returning to the home of the possessor. Civil Code, 1930, § 394

31 L.P.R. § 1063. Movables by nature

Things movable by their nature are such as may be carried from one place to another, whether they move by themselves, if animate, or by means of an estraneous power, if inanimate. (Civil Code, 1930, § 267.)

42 USC § 1437c-1. Public housing agency plans

SUBCHAPTER I - GENERAL PROGRAM OF ASSISTED HOUSING

(a) 5-year plan

(1) In general

Subject to paragraph (3), not less than once every 5 fiscal years, each public housing agency shall submit to the Secretary a plan that includes, with respect to the 5 fiscal years immediately following the date on which the plan is submitted -

(A) a statement of the mission of the public housing agency for serving the needs of low-income and very low-income families in the jurisdiction of the public housing agency during such fiscal years; and

(B) a statement of the goals and objectives of the public housing agency that will enable the public housing agency to serve the needs identified pursuant to subparagraph (A) during those fiscal years.

(2) Statement of goals

The 5-year plan shall include a statement by any public housing agency of the goals, objectives, policies, or programs that will enable the housing authority to serve the needs of child and adult victims of domestic violence, dating violence, sexual assault, or stalking.

(3) Initial plan

The initial 5-year plan submitted by a public housing agency under this subsection shall be submitted for the 5-year period beginning on October 1, 1999, or the first fiscal year thereafter for which the public housing agency initially receives assistance under this chapter.

(b) Annual plan

(1) In general

Effective beginning upon October 1, 1999, each public housing agency shall submit to the Secretary an annual public housing agency plan under this subsection for each fiscal year for which the public housing agency receives assistance under section 1437f(o) or 1437g of this title.

(2) Updates

For each fiscal year after the initial submission of an annual plan under this subsection by a public housing agency, the public housing agency may comply with requirements for submission of a plan under this subsection by submitting an update of the plan for the fiscal year.

(c) Procedures

(1) In general

The Secretary shall establish requirements and procedures for submission and review of plans, including requirements for timing and form of submission, and for the contents of such plans.

(2) Contents

The procedures established under paragraph (1) shall provide that a public housing agency shall -

(A) in developing the plan consult with the resident advisory board established under subsection (e) of this section; and

(B) ensure that the plan under this section is consistent with the applicable comprehensive housing affordability strategy (or any consolidated plan incorporating such strategy) for the jurisdiction in which the public housing agency is located, in accordance with title I of the Cranston-Gonzalez National Affordable Housing Act [42 U.S.C. 12701 et seq.], and contains a certification by the appropriate State or local official that the plan meets the requirements of this paragraph and a description of the manner in which the applicable contents of the public housing agency plan are consistent with the comprehensive housing affordability strategy.

(d) Contents

An annual public housing agency plan under subsection (b) of this section for a public housing agency shall contain the following information relating to the upcoming fiscal year for which the assistance under this chapter is to be made available:

(1) Needs

A statement of the housing needs of low-income and very low-income families residing in the jurisdiction served by the public housing agency, and of other low-income and very low-income families on the waiting list of the agency (including housing needs of elderly families and disabled families), and the means by which the public housing agency intends, to the maximum extent practicable, to address those needs.

(2) Financial resources

A statement of financial resources available to the agency and the planned uses of those resources.

(3) Eligibility, selection, and admissions policies

A statement of the policies governing eligibility, selection, admissions (including any preferences), assignment, and occupancy of families with respect to public housing dwelling units and housing assistance under section 1437f(o) of this title, including -

(A) the procedures for maintaining waiting lists for admissions to public housing projects of the agency, which may include a system of site-based waiting lists under section 1437d(r) of this title; and

(B) the admissions policy under section 1437n(a)(3)(B) of this title for deconcentration of lower-income families.

(4) Rent determination

A statement of the policies of the public housing agency governing rents charged for public housing dwelling units and rental contributions of families assisted under section 1437f(o) of this title.

(5) Operation and management

A statement of the rules, standards, and policies of the public housing agency governing maintenance and management of housing owned, assisted, or operated by the public housing agency (which shall include measures necessary for the prevention or eradication of pest infestation, including by cockroaches), and management of the public housing agency and programs of the public housing agency.

(6) Grievance procedure

A statement of the grievance procedures of the public housing agency.

(7) Capital improvements

With respect to public housing projects owned, assisted, or operated by the public housing agency, a plan describing the capital improvements necessary to ensure long-term physical and social viability of the projects.

(8) Demolition and disposition

With respect to public housing projects owned by the public housing agency -

(A) a description of any housing for which the PHA will apply for demolition or disposition under section 1437p of this title; and

(B) a timetable for the demolition or disposition.

(9) Designation of housing for elderly and disabled families

With respect to public housing projects owned, assisted, or operated by the public housing agency, a description of any projects (or portions thereof) that the public housing agency has designated or will apply for designation for occupancy by elderly and disabled families in accordance with section 1437e of this title.

(10) Conversion of public housing

With respect to public housing owned by a public housing agency -

(A) a description of any building or buildings that the public housing agency is required to convert to tenant-based assistance under section 1437z-5 of this title or that the public housing agency plans to voluntarily convert under section 1437t of this title;

(B) an analysis of the projects or buildings required to be converted under section 1437z-5 of this title; and

(C) a statement of the amount of assistance received under this chapter to be used for rental assistance or other housing assistance in connection with such conversion.

(11) Homeownership

A description of any homeownership programs of the agency under section 1437f(y) of this title or for which the public housing agency has applied or will apply for approval under section 1437z-4 of this title.

(12) Community service and self-sufficiency

A description of -

(A) any programs relating to services and amenities provided or offered to assisted families;

(B) any policies or programs of the public housing agency for the enhancement of the economic and social self-sufficiency of assisted families;

(C) how the public housing agency will comply with the requirements of subsections (c) and (d) of section 1437j of this title (relating to community service and treatment of income changes resulting from welfare program requirements).

(13) Domestic violence, dating violence, sexual assault, or stalking programs

A description of -

(A) any activities, services, or programs provided or offered by an agency, either directly or in partnership with other service providers, to child or adult victims of domestic violence, dating violence, sexual assault, or stalking;

(B) any activities, services, or programs provided or offered by a public housing agency that helps child and adult victims of domestic violence, dating violence, sexual assault, or stalking, to obtain or maintain housing; and

(C) any activities, services, or programs provided or offered by a public housing agency to prevent domestic violence, dating violence, sexual assault, and stalking, or to enhance victim safety in assisted families.

(14) Safety and crime prevention

A plan established by the public housing agency, which shall be subject to the following requirements:

(A) Safety measures

The plan shall provide, on a project-by-project or jurisdiction-wide basis, for measures to ensure the safety of public housing residents.

(B) Establishment

The plan shall be established in consultation with the police officer or officers in command for the appropriate precinct or police department.

(C) Content

The plan shall describe the need for measures to ensure the safety of public housing residents and for crime prevention measures, describe any such activities conducted or to be conducted by the agency, and provide for coordination between the agency and the appropriate police precincts for carrying out such measures and activities.

(D) Secretarial action

If the Secretary determines, at any time, that the security needs of a project are not being adequately addressed by the plan, or that the local police precinct is not complying with the plan, the Secretary may mediate between the public housing agency and the local precinct to resolve any issues of conflict.

(15) Pets

The requirements of the agency, pursuant to section 1437z-3 of this title, relating to pet ownership in public housing.

(16) Civil rights certification

A certification by the public housing agency that the public housing agency will carry out the public housing agency plan in conformity with title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the Fair Housing Act [42 U.S.C. 3601 et seq.], section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], and title II of the Americans with Disabilities Act of 1990 [42 U.S.C. 12131 et seq.], and will affirmatively further fair housing.

(17) Annual audit

The results of the most recent fiscal year audit of the public housing agency under section 1437c(h)(2) of this title.

(18) Asset management

A statement of how the agency will carry out its asset management functions with respect to the public housing inventory of the agency, including how the agency will plan for the long-term operating, capital investment, rehabilitation, modernization, disposition, and other needs for such inventory.

(19) Other

Any other information required by law to be included in a public housing agency plan.

(e) Resident advisory board

(1) In general

Except as provided in paragraph (3), each public housing agency shall establish 1 or more resident advisory boards in accordance with this subsection, the membership of which shall adequately reflect and represent the residents assisted by the public housing agency.

(2) Functions

Each resident advisory board established under this subsection by a public housing agency shall assist and make recommendations regarding the development of the public housing agency plan for the agency. The agency shall consider the recommendations of the resident advisory boards in preparing the final public housing agency plan, and shall include, in the public housing agency plan submitted to the Secretary under this section, a copy of the recommendations and a description of the manner in which the recommendations were addressed.

(3) Waiver

The Secretary may waive the requirements of this subsection with respect to the establishment of resident advisory boards for a public housing agency if the agency demonstrates to the satisfaction of the Secretary that there exist resident councils or other resident organizations of the public housing agency that -

(A) adequately represent the interests of the residents of the public housing agency; and

(B) have the ability to perform the functions described in paragraph (2).

(f) Notice and hearing

(1) In general

In developing a public housing agency plan under this section, the board of directors or similar governing body of a public housing agency shall conduct a public hearing to discuss the public housing agency plan and to invite public comment regarding that plan. The hearing shall be conducted at a location that is convenient to residents.

(2) Availability of information and notice

Not later than 45 days before the date of a hearing conducted under paragraph (1), the public housing agency shall -

(A) make the proposed public housing agency plan and all information relevant to the hearing and proposed plan available for inspection by the public at the principal office of the public housing agency during normal business hours; and

(B) publish a notice informing the public that -

(i) that the information is available as required under subparagraph (A); and

(ii) that a public hearing under paragraph (1) will be conducted.

(3) Adoption of plan

A public housing agency may adopt a public housing agency plan and submit the plan to the Secretary in accordance with this section only after -

(A) conducting a public hearing under paragraph (1);

(B) considering all public comments received; and

(C) making any appropriate changes in the public housing agency plan, in consultation with the resident advisory board.

(4) Advisory board consultation enforcement

Pursuant to a written request made by the resident advisory board for a public housing agency that documents a failure on the part of the agency to provide adequate notice and opportunity for comment under this subsection and a finding by the Secretary of good cause within the time period provided for in subsection (i)(4) of this section, the Secretary may require the public housing agency to adequately remedy such failure before final approval of the public housing agency plan under this section.

(g) Amendments and modifications to plans

(1) In general

Except as provided in paragraph (2), nothing in this section shall preclude a public housing agency, after submitting a plan to the Secretary in accordance with this section, from amending or modifying any policy, rule, regulation, or plan of the public housing agency, except that a significant amendment or modification may not -

(A) be adopted, other than at a duly called meeting of board of directors (or similar governing body) of the public housing agency that is open to the public; and

(B) be implemented, until notification of the amendment or modification is provided to the Secretary and approved in accordance with subsection (i) of this section.

(2) Consistency and notice

Each significant amendment or modification to a public housing agency plan submitted to the Secretary under this section shall -

(A) meet the requirements under subsection (c)(2) of this section (relating to consultation with resident advisory board and consistency with comprehensive housing affordability strategies); and

(B) be subject to the notice and public hearing requirements of subsection (f) of this section.

(h) Submission of plans

(1) Initial submission

Each public housing agency shall submit the initial plan required by this section, and any amendment or modification to the initial plan, to the Secretary at such time and in such form as the Secretary shall require.

(2) Annual submission

Not later than 75 days before the start of the fiscal year of the public housing agency, after submission of the initial plan required by this section in accordance with subparagraph (A), each public housing agency shall annually submit to the Secretary a plan update, including any amendments or modifications to the public housing agency plan.

(i) Review and determination of compliance

(1) Review

Subject to paragraph (2), after submission of the public housing agency plan or any amendment or modification to the plan to the Secretary, to the extent that the Secretary considers such action to be necessary to make determinations under this paragraph, the Secretary shall review the public housing agency plan (including any amendments or modifications thereto) and determine whether the contents of the plan -

(A) set forth the information required by this section and this chapter to be contained in a public housing agency plan;

(B) are consistent with information and data available to the Secretary, including the approved comprehensive housing affordability strategy under title I of the Cranston-Gonzalez National Affordable Housing Act [42 U.S.C. 12701 et seq.] for the jurisdiction in which the public housing agency is located; and

(C) are not prohibited by or inconsistent with any provision of this subchapter or other applicable law.

(2) Elements exempted from review

The Secretary may, by regulation, provide that one or more elements of a public housing agency plan shall be reviewed only if the element is challenged, except that the Secretary shall review the information submitted in each plan pursuant to paragraphs (3)(B), (8), and (15) of subsection (d) of this section.

(3) Disapproval

The Secretary may disapprove a public housing agency plan (or any amendment or modification thereto) only if Secretary determines that the contents of the plan (or amendment or modification) do not comply with the requirements under subparagraph (A) through (C) of paragraph (1).

(4) Determination of compliance

(A) In general

Except as provided in subsection (j)(2) of this section, not later than 75 days after the date on which a public housing agency plan is submitted in accordance with this section, the Secretary shall make the determination under paragraph (1) and provide written notice to the public housing agency if the plan has been disapproved. If the Secretary disapproves the plan, the notice shall state with specificity the reasons for the disapproval.

(B) Failure to provide notice of disapproval

In the case of a plan disapproved, if the Secretary does not provide notice of disapproval under subparagraph (A) before the expiration of the period described in subparagraph (A), the Secretary shall be considered, for purposes of this chapter, to have made a determination that the plan complies with the requirements under this section and the agency shall be considered to have been notified of compliance upon the expiration of such period. The preceding sentence shall not preclude judicial review regarding such compliance pursuant to chapter 7 of title 5 or an action regarding such compliance under section 1983 of this title.

(5) Public availability

A public housing agency shall make the approved plan of the agency available to the general public.

(j) Troubled and at-risk PHAs

(1) In general

The Secretary may require, for each public housing agency that is at risk of being designated as troubled under section 1437d(j)(2) of this title or is designated as troubled under section 1437d(j)(2) of this title, that the public housing agency plan for such agency include such additional information as the Secretary determines to be appropriate, in accordance with such standards as the Secretary may establish or in accordance with such determinations as the Secretary may make on an agency-by-agency basis.

(2) Troubled agencies

The Secretary shall provide explicit written approval or disapproval, in a timely manner, for a public housing agency plan submitted by any public housing agency designated by the Secretary as a troubled public housing agency under section 1437d(j)(2) of this title.

(k) Streamlined plan

In carrying out this section, the Secretary may establish a streamlined public housing agency plan for -

(A) public housing agencies that are determined by the Secretary to be high performing public housing agencies;

(B) public housing agencies with less than 250 public housing units that have not been designated as troubled under section 1437d(j)(2) of this title; and

(C) public housing agencies that only administer tenant-based assistance and that do not own or operate public housing.

(l) Compliance with plan

(1) In general

In providing assistance under this subchapter, a public housing agency shall comply with the rules, standards, and policies established in the public housing agency plan of the public housing agency approved under this section.

(2) Investigation and enforcement

In carrying out this subchapter, the Secretary shall -

(A) provide an appropriate response to any complaint concerning noncompliance by a public housing agency with the applicable public housing agency plan; and

(B) if the Secretary determines, based on a finding of the Secretary or other information available to the Secretary, that a public housing agency is not complying with the applicable public housing agency plan, take such actions as the Secretary determines to be appropriate to ensure such compliance.

(Sept. 1, 1937, ch. 896, title I, Sec. 5A, as added Pub. L. 105-276, title V, Sec. 511(a), Oct. 21, 1998, 112 Stat. 2531; amended Pub. L. 109-162, title VI, Sec. 603, Jan. 5, 2006, 119 Stat. 3040.)