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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CAREY L. JOHNSON,

Plaintiff,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants.

Case No.: **18-cv-2178-BEN-MSB**

MOTION TO DISMISS *BIVENS* CLAIMS AGAINST 16 INDIVIDUALLY-NAMED DEFENDANTS FROM SECOND AMENDED COMPLAINT; OR, IN THE ALTERNATIVE, TO DISMISS *BIVENS* CLAIMS AGAINST CERTAIN DEFENDANTS ON GROUNDS OF QUALIFIED IMMUNITY

Hearing Date: Monday, April 20. 2020
Hearing Time: 10:30 a.m.
Before: Hon. Roger T. Benitez
Courtroom: 5A, Edward J. Schwartz Courthouse

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Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), the individual Customs and Border Protection officer defendants in this case[1] move to dismiss Plaintiff Carey L. Johnson's *Bivens* claims from his Second Amended Complaint (SAC) (ECF 29). Or, in the alternative, Defendants Murillo, Andrade, Ferguson, Fierro, Delgado, Clarke and McCulloch move to dismiss the *Bivens* claims against them on grounds of qualified immunity.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Like many at the Ports of Entry, Plaintiff Carey L. Johnson doesn't like to wait in the regular vehicle lanes when he crosses the border from Mexico (where he lives) into the United States (where he receives treatment at the VA). According to him, he has a VA disability rating that ought to entitle him to pass through Ports of Entry in an expedited manner, regardless of CBP's actual, published requirements for such expedited entry. And so Johnson repeatedly drove across the border at Ports of Entry through the SENTRI lanes – the lanes for expedited travel for pre-screened, trusted travelers – even though Johnson never applied for nor received a SENTRI pass. After receiving repeated warnings against using the SENTRI lanes in this fashion, Johnson was detained, fined, and had his Mercedes Benz impounded, twice, for SENTRI lane violations. And when Johnson did not comply with instructions at the border on other occasions, he was at various times removed from his car, or he was taken in an emergency vehicle to local hospitals for claimed medical emergencies, or both. Finally, when at the pedestrian entrance Johnson again had issues with the instructions he received, the situation escalated such that Johnson was handcuffed

[1] There are 16 such defendants. In particular, the individually-named Customs and Border Protection (CBP) officers are: Teresa Andrade, Noel Angeles, James Calapan, Esther Calderon, Raul Cano, Quintin Clarke, John Delgado, Thomas Ferguson, Carlos Fierro, Kevin Guisinger, Hector Ibarra, Chantelle McCulloch, Rolenio Murillo, Alphonso Stephenson, Walter Thomas, and Sean Zeeck.

and detained – but, when he had calmed down and allowed the inspection to proceed, he was later released.

All these incidents and more were the subjects of Johnson's original Complaint, his First Amended Complaint, and now his Second Amended Complaint.[2] In particular, all the iterations of Johnson's complaint have alleged five different FTCA/common law torts against the United States – for assault and battery, false arrest, negligence, conversion, and intentional infliction of emotional distress. These comprise causes of action Three through Seven of Johnson's complaint(s). Further, all these FTCA claims are based on the actions of the individual CBP officers who happened to be working at the Ports of Entry when Johnson decided to cross, in whatever fashion he happened to choose that day. Those FTCA claims are proceeding apace. So too is Johnson's Second Cause of Action, brought under the Rehabilitation Act.

Not content with these FTCA and Rehabilitation Act claims, however, Johnson's SAC has now named 16 individual CBP officers as defendants, targeting their personal assets in *Bivens* actions against each one of them.

These *Bivens* claims should be dismissed. As the Supreme Court's recent decision in *Hernandez v. Mesa* makes clear, these claims against CBP officers manning the country's Ports of Entry seek an expansion of the "disfavored" *Bivens* remedy into a meaningfully different context, and "special factors" counsel against recognizing these claims. In short, if Johnson has a remedy for the incidents he complains of, he needs to find it against the United States under the FTCA, or under the Rehabilitation Act. His request for a remedy Congress has not provided, against 16 CBP officers sued in their individual capacities for their official activities at the border's Ports of Entry, should be rejected.

In addition, even if this were not the case, the allegations of Johnson's SAC also fail to overcome certain individual defendants' qualified immunity, because the facts alleged in Johnson's SAC do not plausibly establish that those defendants personally participated in

[2] Almost all these incidents are recorded on video, in whole or in part.

any supposed constitutional violation, or that the law regarding any such alleged violation was "clearly established."

II. STATEMENT OF FACTS

Johnson is a U.S. citizen; due to health reasons, however, he maintains a home in Mexico. SAC, ¶ 29. In particular, Johnson is a U.S. military veteran with a disability, who although he resides in Mexico "must cross the U.S./Mexico border to meet with care providers and conduct business." SAC, ¶¶ 30-31.

There is a way for frequent and trusted border-crossers to expedite their crossing from Mexico into the United States: SENTRI, or Secure Electronic Network for Travelers Rapid Inspection. This is a program that prescreens participants so that these highly-trusted travelers can use the expedited lanes at Ports of Entry, *see* SAC, ¶ 32, thereby saving both themselves and CBP time and effort. *See also* https://www.cbp.gov/travel/trusted-traveler-programs/sentri.

Nowhere, however, does Johnson allege that he ever possessed or obtained a SENTRI pass, or that he even attempted to obtain one.

According to Johnson, despite lack of SENTRI participation, he should be entitled to expedited crossing, simply by virtue of his disability: "the only . . . procedure [known to him] for requesting accommodation for emergency, medical or disability issues into the United States at the US/Mexico border in San Diego is to approach the SENTRI gate and request permission to proceed to secondary inspection to obtain approval for expedited crossing." SAC, ¶ 33. In other words, despite not having a SENTRI pass, Johnson believes that he should be able to drive up to the border in the SENTRI lane, greet whoever happens to be assigned to the SENTRI primary inspection booth at that moment, show them some documents (e.g., his VA identification card with disability designation and his passport), and receive exemption from what SENTRI otherwise requires. *See id.*, ¶ 35.

Johnson tried this, a number of times. Thus, Johnson alleges that on September 22, 2016, "he was told [by one CBP officer, Officer Murillo] that the proper procedure was the one he already was employing; that is, to approach the agents at the Sentri gate and present his

ID card supporting his disability, along with his passport, and that he should be allowed to go through after being sent to secondary inspection." SAC, ¶ 35.[3] "Plaintiff was told that he would have to do this each time he needed to cross the border, and that the agent on duty would have discretion about whether or not to grant his request for disability accommodation." SAC, ¶ 36.

But when Johnson twice tried this "proper procedure" the next day, September 23, 2016, on other CBP officers, it didn't work – because apparently it wasn't the "proper procedure" at all.[4] On his first such effort to go through SENTRI in this fashion on that day, Johnson was sitting in his car at secondary, and claims his Fourth Amendment rights were violated because CBP supervisory officer Teresa Andrade "became aggressive and abusive" to him. SAC, ¶¶ 41-42 ("Defendant Teresa Andrade, appeared and immediately became aggressive and abusive towards Plaintiff, *and threatened to take Plaintiff's car for Sentri lane violations*, and then abruptly left, without considering Plaintiff's request. [] 42. Defendant Andrade's threatening and abusive behavior toward Plaintiff caused or contributed to subsequent unlawful searches and seizures of Plaintiff, and Defendant Andrade's

[3] Officer Murillo has been named as an individual *Bivens* defendant, for allegedly writing a report containing falsehoods about Johnson. (Johnson's complaint misspells the name of the officer as Marillo; it is actually Rolenio Murillo.) According to Johnson, this report in some unspecified way caused Johnson's Fourth Amendment rights to be violated. *See* ¶¶ 37-38 (Murillo "wrote a report about his interaction with Plaintiff that contained false or materially misleading information. Specifically, Defendant Marillo claimed in his report that Plaintiff was aggressive, belligerent, and a rule violator. [] 38. Defendant Marillo's falsified report caused or contributed to subsequent unlawful searches and seizures of Plaintiff, and Defendant Marillo's misconduct played a meaningful and integral role in the deprivation of Plaintiff's constitutional rights under the Fourth Amendment."). *See also* SAC, ¶ 92.

[4] In truth, CBP's description of SENTRI makes no such exceptions as Johnson claims. *See* https://www.cbp.gov/travel/trusted-traveler-programs/sentri. This Court may take judicial notice of the requirements for SENTRI participation, as indicated on CBP's official government website. *Gerritsen v. Warner Bros. Entm't Inc.*, 112 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015) (Courts routinely take judicial notice of "[p]ublic records and government documents available from reliable sources on the Internet[.]").

misconduct played a meaningful and integral role in the deprivation of Plaintiff's constitutional rights under the Fourth Amendment.") (emphasis added). *See also* SAC, ¶ 93 (stating gravamen of *Bivens* cause of action, i.e., becoming abusive and aggressive, *threatening "to take his car for alleged Sentri violations*," and failing to consider request for accommodation) (emphasis added).[5]

Johnson also alleges that during this particular time in secondary yet another CBP officer – Officer Ferguson – told him to present his VA disability award letter, and all would be well. *See* SAC, ¶¶ 43-44.

But when on September 23, 2016, Johnson came back over the border again through the SENTRI lane, again without a SENTRI pass, he was again sent to secondary – where officers including Ferguson detained Johnson. "After 3 hours [the officers] told [Johnson] he could go, but that they were going to impound his car, and that he could only get his car back if he paid a fine of $5,000.00. . . . . The receipt [Johnson] was given when the money was taken from him that day falsely [sic] identified the $5,000 as a fine for Sentri lane violations." SAC, ¶¶ 51-53. In this fashion, Johnson alleges Officer Ferguson violated Johnson's Fourth Amendment rights. *See* SAC, ¶ 94 (paragraph stating gravamen of *Bivens* cause of action, i.e., detaining Johnson and threatening to impound his car).

Johnson's SAC also complains of an incident occurring on October 31, 2016. According to Johnson, he was "using the regular lanes, and began having an episode of severe anxiety attacks while crossing the border." SAC, ¶ 59. Then, "[t]wo or more CBP agents, including Defendant Hector Ibarra and Defendant N. Angeles, physically abused Plaintiff by dragging him from his car, putting Tasers to his chest, wrenching his arms behind his back and piling up on top of him." SAC, ¶ 60. *See also* SAC, ¶ 95 (paragraph stating gravamen of *Bivens*

[5] Just by the allegations of his own complaint, then, Johnson was on notice by at least the morning of September 23, 2016 – on his first attempt to use the SENTRI lane to cross that day, despite having no SENTRI pass – that continued efforts in this vein might result in the seizure or impoundment of his car. By necessary implication, he was also on notice that his efforts to cross through the SENTRI lane without a SENTRI pass were neither authorized nor permissible.

cause of action.) Eventually, "An ambulance . . . arrived and transported Plaintiff to the Scripps Hospital Chula Vista Emergency Room." SAC, ¶ 62

Johnson then revisited the SENTRI lane, again without a SENTRI pass, the very next day. Thus, "On November 1, 2016, [Johnson] was having severe emotional distress and was trying to reach the VA clinic in San Diego to seek help for his problem. [Johnson] had his daughter in the car with him, and *he tried to get expedited crossing using the Sentri lane* . . . ." SAC, ¶ 63 (emphasis added). But according to Johnson, his attempt failed yet again. And to make matters worse, he was met with incredulity and no assistance from the CBP officers on duty: "Plaintiff's request for assistance was met with heckling and disbelief on the part of the agents—including Defendant Carlos Fierro, Defendant John Delgado, Defendant Quintin Clarke, and Defendant Chantelle McCulloch—who appeared not to believe he was having a crisis" and who would not call an ambulance at Johnson's request. SAC, ¶ 64. In response, Johnson "locked his doors and rolled up his windows," and "proceeded [on his own] to call an ambulance on his cell phone." SAC, ¶¶ 65-66. "After the CBP agents—including Defendant Carlos Fierro, Defendant John Delgado, Defendant Quintin Clarke, and Defendant Chantelle McCulloch—talked [Johnson] into unlocking his car and getting out, they verbally abused him, accused him of having a fake Department of Defense ID card, and threatened to have his privileges revoked." SAC, ¶ 67. According to Johnson, the CBP officers also threatened to put his daughter in foster care. SAC, ¶¶ 68-69. But the gist of Johnson's constitutional complaint seems to be not any of these actions or statements, but rather the seizing of Johnson's Mercedes Benz, for having committed another SENTRI lane violation. *See* SAC, ¶ 72 (vehicle had been seized for SENTRI lane violations); *see also* SAC, ¶ 96 (paragraph stating gravamen of *Bivens* cause of action: "Defendants Clarke, Fierro, Delgado, McCulloch, and John Does I-X violated Plaintiff's constitutional rights on November 1, 2016, when they seized Plaintiff's black 2009 Mercedes Benz E350 without probable cause when Plaintiff was taken from the border to the VA Medical Center in San Diego by ambulance.").

Then on or about December 1, 2017, Johnson "was crossing the border in the regular walk-through lanes, and upon presenting his passport, was told that he would need to go to secondary for additional screening." SAC, ¶ 83. Johnson alleges he was made to wait for "an extraordinary amount of time," and "when he questioned why he was being detained, he was thrown to the ground, roughed up, and handcuffed, before eventually being released and allowed to cross, with no explanation given as to why he had been singled out." SAC, ¶ 83. *See also* SAC, ¶ 97 (paragraph stating gravamen of *Bivens* cause of action). According to Johnson, the CBP officers involved in this incident included Defendants Stephenson, Calapan, Guisinger, Cano, Thomas, Calderon, and Zeeck. *Id.*

In sum, Johnson has named 16 CBP officers as defendants, in their individual capacities, for allegedly violating his Fourth Amendment rights (SAC, ¶ 90) at the U.S. border's Ports of Entry by allegedly (1) writing a false report about him (Murillo), SAC, ¶ 92; (2) becoming aggressive and abusive toward him and threatening to take his car, *after* Johnson admittedly used the SENTRI lane without a SENTRI pass (Andrade), SAC, ¶ 93; (3) detaining him and impounding his car, *after* Johnson admittedly used the SENTRI lane without a SENTRI pass (Ferguson), SAC, ¶ 94; (4) forcibly taking him out of his car (Ibarra and Angeles), SAC, ¶ 95; (5) meeting his request for assistance "with heckling and disbelief" and impounding his car, *after* Johnson again admittedly used the SENTRI lane without a SENTRI pass (Fierro, Delgado, Clarke, and McCulloch Clarke), SAC, ¶ 96; and (6) assaulting and wrongfully detaining Johnson, after Johnson questioned why he was being detained in secondary for additional screening (Stephenson, Calapan, Guisinger, Cano, Thomas, Calderon, and Zeeck). SAC, ¶ 97.

Importantly, each and every one of these incidents occurred not only at the border in a general sense, but at specific Ports of Entry. There, Congress has charged CBP with enforcing the immigration and customs and other laws while inspecting tens of thousands of entrants, legal and illegal, citizens and non-citizens, as they come from Mexico into the United States each day. *See* https://www.gsa.gov/about-us/regions/welcome-to-the-pacific-rim-region-9/land-ports-of-entry/san-ysidro-land-port-of-entry; *see also* Fact Sheet found

at https://www.gsa.gov/about-us/regions/welcome-to-the-pacific-rim-region-9/land-ports-of-entry/otay-mesa-land-port-of-entry; *compare U.S. v. Cotterman*, 709 F.3d 952, 956 (9th Cir. 2013) ("Every day more than a million people cross American borders . . . ."). As CBP's official website puts CBP's authority, and its responsibility:

> A U.S. Customs and Border Protection (CBP) officer's border search authority is derived from federal statutes and regulations, including 19 C.F.R. 162.6, which states that, "*All persons*, baggage and merchandise *arriving in the Customs territory of the United States from places outside thereof are liable to inspection by a CBP officer*." Unless exempt by diplomatic status, *all persons entering the United States, including U.S. citizens, are subject to examination and search by CBP officers.*"

https://www.cbp.gov/travel/cbp-search-authority (emphasis added).

Equally important, all of these incidents and the individual officers involved are at the root of the five different FTCA claims that Johnson has against the United States, under the FTCA. And Johnson has available these alternative claims for relief under the FTCA – not to mention his claim under the Rehabilitation Act – even if his *Bivens* claims against these 16 individual defendants are found wanting, as they should be.

III. ARGUMENT

To withstand a motion to dismiss for failure to state a claim under Rule 12(b)(6), a complaint "must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. at 555, 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. at 678.

In deciding a motion to dismiss under Rule 12(b)(6), the Court "must accept as true all of the *factual* allegations contained in the complaint." *See Bell Atl. Corp. v. Twombly*, 550 U.S. at 572 (quoting *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508 n.1 (2002)) (emphasis added). The Court need not, however, "accept as true a legal conclusion couched as a factual

allegation." *Ashcroft v. Iqbal*, 556 U.S. at 678. *See also Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) ("The court need not, however, accept as true allegations that contradict matters properly subject to judicial notice or by exhibit.")

A. The Court Should Decline to Imply a *Bivens* Remedy

In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 389-97 (1971), the Supreme Court implied a direct cause of action under the Fourth Amendment against federal narcotics agents who, without a warrant, searched plaintiff's home "stem to stern," "manacled [him] . . . in front of his wife and children," and then "interrogated, booked, and subjected [him] to a visual strip search."

Since deciding *Bivens*, however, the Court has allowed an implied cause of action under the Constitution on only two occasions,[6] and "has refused to do so for the past 30 years." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854-55, 1857 (2017). *See also Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) ("[I]n most instances we have found a *Bivens* remedy unjustified."). The Court's consistent refusal to authorize expansions of *Bivens* is purposeful: it regards *Bivens* as the product of an "ancien regime," when "the Court followed a different approach to recognizing implied causes of action than it follows now." *Abbasi*, 137 S. Ct. at 1855.

Thus, a *Bivens* remedy is "not an automatic entitlement." *Wilkie*, 551 U.S. at 550. To the contrary, "expanding the *Bivens* remedy is now considered a 'disfavored' judicial activity," and "most often," Congress, not the courts, should decide whether and how to provide a damages remedy. *Abbasi*, 137 S. Ct. at 1857. This is because "[w]hen an issue involves a host of considerations that must be weighed and appraised, it should be committed to those who write the laws rather than those who interpret them." *Id.* (internal

[6] *See Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment claim for failing to provide proper medical care), and *Davis v. Passman*, 442 U.S. 228 (1979) (Fifth Amendment claim for firing a Congressional administrative assistant because she was a woman).

quotations and citations omitted); *see also id.* ("when a party seeks to assert an implied cause of action . . . separation-of-powers principles are or should be central to the analysis").

The Supreme Court's current teaching on *Bivens* thus instructs that courts should not imply a damages action against a federal official when (1) the complaint presents a new *Bivens* context, and (2) special factors counseling hesitation are present. *Id*. at 1857-60; *Wilkie*, 551 U.S. at 550-62.

As if to underscore these points, the Supreme Court most recently decided *Hernandez v. Mesa*, 140 S.Ct. 735 (Feb. 25, 2020) – a case that implicated several important separation of powers concerns attached to enforcing laws at the border with Mexico, just as in the present case. In *Hernandez v. Mesa*, the Supreme Court declined to imply a *Bivens* remedy for the parents of a 15-year old Mexican national who, in a "tragic case" and under disputed factual circumstances, was shot and killed in Mexico, by a Border Patrol agent located in the United States. *Id.*, at 739-40.

Holding first that "The *Bivens* claims in this case assuredly arise in a new context," *id.*, at 743, the Court dispensed with the counter-argument that it could not be a new context if the claimed constitutional rights were the same as in prior cases approving a *Bivens* remedy: "that argument rests on a basic misunderstanding of what our cases mean by a new context. A claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized." *Id*. Instead, meaningful differences from prior cases – and thus new contexts – can arise from such concerns as "whether 'the risk of disruptive intrusion by the Judiciary into the functioning of other branches' is significant." *Id.*, at 744. This was the principal meaningful difference the *Hernandez v. Mesa* Court relied on, in deciding that the claim in *Hernandez v. Mesa* arose in a context different from prior *Bivens* claims approved by the Supreme Court. *Id.*, at 743-44. It is equally present here, since this case too arises from the actions of federal officers seeking to enforce the customs and immigration and other laws at the Ports of Entry on the border with Mexico.

The Supreme Court in *Hernandez v. Mesa* then held that there were more than sufficient "special factors" counseling hesitation against implying a *Bivens* remedy: in particular, the effect that implying a *Bivens* cause of action in such circumstances would have on foreign relations, on national security, and on respect for the separation of powers. *Id.*, at 744-50. Those "special factors" – especially national security and respect for the separation of powers – also counsel hesitation here.

There are several important lessons for the present case in *Hernandez v. Mesa*. For one, by resolving availability of a *Bivens* remedy, on a motion to dismiss, *id.*, at 753 (Ginsburg dissent), and even though "Petitioners and Agent Mesa disagree about what Hernandez and his friends were doing at the time of shooting," *id.*, at 739, the Supreme Court demonstrated that factual disputes are no bar to a ruling disallowing a *Bivens* claim. And in remarking that "our watchword is caution," the Supreme Court also confirmed that "counseling hesitation" is a low bar. *Id.*, at 742.

And with regard to the "special factors" analysis in particular, *Hernandez v. Mesa* recognized the need to "ensur[e] that agents assigned the difficult and important task of policing the border are held to standards and judged by procedures that . . . do not undermine the agents' effectiveness and morale." *Id.*, at 745. The *Hernandez v. Mesa* decision emphasized that separation-of-powers concerns grow especially acute in the context of border security. *See id.*, at 746 ("One of the ways in which the Executive protects this country is by attempting to control the movement of people and goods across the border, and that is a daunting task."); *id.* ("[T]he conduct of agents positioned at the border has a clear and strong connection to national security, as the Fifth Circuit understood."); *id.*, at 747 ("[R]egulating the conduct of agents at the border unquestionably has national security implications," and "the risk of undermining border security provides reason to hesitate before extending *Bivens* into this field."). Finally, *Hernandez v. Mesa* further reiterates that "[t]he absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply the courts should award money damages[.]" *Id.*, at 750 (quoting *Schweiker*, 487 U.S. at 4).

Thus, *Hernandez v. Mesa*, in particular and most recently, provides numerous reasons to dismiss the *Bivens* claims in the present case.[7] Just as in *Hernandez v. Mesa*, the context here is new – i.e., it is meaningfully different from prior *Bivens* cases decided by the Supreme Court – and special factors counsel hesitation.

1. This Case Presents a New *Bivens* Context

The Supreme Court has instructed that "[i]f the case is different in a meaningful way from previous *Bivens* cases [approved by the Supreme Court], the context is new." *Abbasi*, 137 S. Ct. at 1859. The Supreme Court has provided the following non-exhaustive list of how a complaint could constitute an expansion of *Bivens*:

> A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; *the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches, or the presence of special factors that previous Bivens cases did not consider*.

Id. at 1860 (emphases added).[8] The Supreme Court has directed that "a modest extension is still an extension." *Id,* at 1864. And as discussed above, it is not enough that the same

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[7] A court in this district has previously rejected the argument that *Bivens* claims against CBP officers at the Ports of Entry should not be created/recognized by the courts. *See Castellanos v. United States*, __ F.Supp. 3d__, 2020 WL 619336 (S.D. Cal, February 10, 2020). But even assuming that *Castellanos* was rightly decided, it is persuasive authority only. More important, it preceded the Supreme Court's decision in *Hernandez v. Mesa*, which was issued February 25, 2020. Since *Hernandez v. Mesa* shifted the landscape considerably, this Court can and should – indeed must – revisit the issue, post-*Hernandez v. Mesa*.

[8] Notably, *Abbasi* itself stated that "special factors" figure in both parts of the analysis – (i) whether the case arises in a new context, or whether there are meaningful differences between the case under examination and prior *Bivens* cases approved by the Supreme Court (i.e., "*the presence of special factors that previous Bivens cases did not consider*"), 137 S.Ct. at 1860; and (ii) whether there are "special factors counselling hesitation" before implying a *Bivens* remedy. *Id.*, at 1857. So too, in *Hernandez- Mesa* the Supreme Court considered separation of powers concerns both when it decided (i) that the case arose in a new context, *Hernandez v. Mesa*, 140 S.Ct. at 744 (in new context analysis, citing "the risk

constitutional right is at issue, as the context can nonetheless be a new one, despite involvement of the same constitutional right.

Here, Johnson's SAC seeks to expand *Bivens* beyond contexts in which *the Supreme Court* has previously approved implying a *Bivens* remedy. "If the case is different in a meaningful way from previous *Bivens* cases *decided by this Court*, then the context is new." *Abbasi*, 137 S.Ct. at 1859 (emphasis added). To begin with, the allegations in Johnson's case are nothing like those in *Carlson*, 446 U.S. at 24 (Eighth Amendment claim for failing to provide proper medical care) or *Davis*, 442 U.S. at 230-49 (Fifth Amendment claim for firing Congressional assistant because she was a woman). So those cases are, on their face, wholly inapplicable.

Which leaves *Bivens* itself – and yet the allegations in Johnson's case are different from *Bivens*, in several meaningful ways. In particular, the "statutory or other legal mandate" under which CBP officers operate at the Ports of Entry are quite different from that under which the federal narcotics agents were operating in *Bivens*. In *Bivens*, the case involved a garden-variety search and seizure for drugs, (i) where the Fourth Amendment's strictures regarding warrantless searches governed the federal narcotics agents' conduct, and (ii) where the plaintiff was in his own home. Here, at the Ports of Entry, there is meaningfully different legal regime. Most important, CBP officers operate under statutory and regulatory mandates that authorize them to inspect persons and their property upon entering the country – all persons. Indeed, the officers are *required* to conduct such inspections. And entrants are required to comply with them. *See* https://www.cbp.gov/travel/cbp-search-authority (citing C.F.R. 162.6 (*all* persons are liable

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of disruptive intrusion by the Judiciary into the functioning of other branches"), and (ii) that special factors counselled hesitation against implying a *Bivens* remedy. *Id.*, at 747; *id.*, at 749 ("this case features multiple factors that counsel hesitation about extending *Bivens*, but they can all be condensed to one concern—respect for the separation of powers.").

to inspection on entering country)); *see also* 19 U.S. Code § 1467 (congressional statute authorizing customs officers to inspect, examine, and search persons, baggage etc.).

That distinction makes a world of difference, for it clearly implicates separation of power concerns regarding the Executive's and the Congress's control of customs and immigration and other law enforcement at the U.S. border's Ports of Entry. To put it bluntly, for the courts to create a *Bivens* remedy, in the absence of Congressional action doing so, necessarily risks working at cross-purposes to – even undermining – Congress's and the Executive's efforts to control the border, particularly at the Ports of Entry to this country, and thus to protect the nation's security.

On the other side, the Fourth Amendment's particular contours for individuals are just not the same at Ports of Entry as in their homes, or even on the street in public. As one case puts it, "a port of entry is not a traveler's home." *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971) (plurality opinion). There is, after all, a border search exception to the Fourth Amendment, for example, allowing inspection without so much as reasonable suspicion, let alone probable cause, but merely on someone seeking to enter the country. Generally, "searches made at the border . . . are reasonable simply by virtue of the fact that they occur at the border . . . ." *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

"It is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity." *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004). "By reason of that authority, it is entitled to require that whoever seeks entry must establish the right to enter and to bring into the country whatever he may carry." *Torres v. Puerto Rico*, 442 U.S. 465, 472-73 (1979). In other words, the "Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border." *Flores-Montano*, 541 U.S. at 152. For these sorts of reasons, the Supreme Court has specifically recognized that "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985).

In sum, this case is meaningfully different from *Bivens*, not to mention *Davis* and *Carlson*. The Court, therefore, should find that Johnson's SAC seeks to expand *Bivens* beyond those cases that the Supreme Court has approved implying a Bivens cause of action. *See Abbasi*, 137 S.Ct. at 1865 ("The differences between this claim and the one at issue in *Carlson* are perhaps small, at least in practical terms. Given this Court's expressed caution about extending the *Bivens* remedy, however, the new-context inquiry is easily satisfied.").

Second, recognizing or creating a *Bivens* remedy in this case – against CBP officers conducting inspections of entrants to the United States at specific Ports of Entry – poses a risk of disruptive intrusion by the courts into the domain of the other branches. This was the new context most important in *Hernandez v. Mesa*, and it is equally applicable here. But it is also the "special factor" that most counsels against implying a *Bivens* cause of action against CBP officers at this country's Ports of Entry.

2. Special Factors Counsel Hesitation Against Implying a *Bivens* Remedy

Where, as here, a plaintiff's complaint presents a new *Bivens* context, courts must apply a "special factors" analysis, which "concentrate on whether the Judiciary is well suited absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Abbasi*, 137 S. Ct. at 1857-58. "[I]f there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy. . . , the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III." *Id.* at 1858.[9] In addition, "special factors are to be "taken together." *Chappell v. Wallace*, 462 U.S. 296, 304 (1983).

Here, as already indicated, Johnson's complaint implicates special factors that counsel hesitation. In particular, implying a *Bivens* damages action over CBP officers at the border's Ports of Entry would interfere with Congress's and the Executive's control over

[9] This – Article III's limits on the subject matter jurisdiction of the federal courts – is why this motion is both a motion to dismiss for failure to state a claim under Fed. R. Civ. P 12(b)(6), and a motion for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

customs, immigration, and border law enforcement, as the Supreme Court's decision in *Hernandez v. Mesa* indicates. And as *Hernandez v. Mesa* teaches, this interference has national security and separation of powers implications (as well as implications for foreign relations). It would also impose substantial costs on the Government, including adversely affecting the ability to recruit and retain CBP employees.

a. National and Border Security and Separation of Powers

It is widely recognized that border security "is critically important to the national security of the United States," Exec. Order, Border Security and Immigration Enforcement Improvements, 2017 WL 359824 (Jan. 25, 2017), and that "[t]he Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence." *Hernandez v. Mesa*, 885 F.3d 811, 818–19 (5th Cir. 2018) (quoting *Doe v. Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012)). In particular, the land Ports of Entry are a key component of the border security system established by Congress, and clearly part of a "substantial, comprehensive, and intricate remedial scheme in the context of immigration,"[10] as well as in the context of customs. *See, e.g.*, pt. II, subch. II, ch. 12, Title 8, U.S. Code ("Admission Qualifications for Aliens; Control of Citizens and Aliens"), pt. IV ("Inspection, Apprehension, Examination, Exclusion, and Removal"); 8 U.S.C. § 1365a (Integrated entry and exit data system), § 1365b (Biometric entry and exit data system), § 1357 (Powers of immigration officers and employees); subch. IV, ch. 1, Title 6 (Directorate of Border and Transportation Security); 6 U.S.C. § 240 (Border Enforcement Security Task Force) ("enhancing border security and reducing drug trafficking and smuggling, violence, and kidnapping along and across the international borders of the United States"); ch. 5, Title 19 (Smuggling); pt. F, subch. II, Title 21 (Import and Export); 19 U.S. Code § 1467 (Special inspection, examination, and search), in ch. 4 (Tariff Act of 1930), Title 19 (Customs Duties).

[10] *Mirmehdi v. United States*, 662 F.3d 1073, 1080 (9th Cir. 2011) (quoting *Arar v. Ashcroft*, 585 F.3d 559, 572 (2nd Cir. 2009)).

But enforcing these statutes and regulations at the Ports of Entry is not easy – it is high-volume, continuous, and important work. At the San Ysidro and Otay Mesa Ports of Entry (the Ports of Entry identified in Johnson's SAC, *see, e.g.*, SAC ¶¶ 72 and 75; and SAC, ¶¶ 34 and 35), CBP officers process millions of cars and pedestrians annually, and tens of thousands daily. Thus, San Ysidro is the "Busiest Land Port of Entry in [the] Western Hemisphere," where 70,000 northbound vehicles are processed and 20,000 northbound pedestrians cross each day. *See* https://www.gsa.gov/about-us/regions/welcome-to-the-pacific-rim-region-9/land-ports-of-entry/san-ysidro-land-port-of-entry. Similarly, "The Otay Mesa LPOE is the busiest commercial port in California, processing nearly 1 million commercial trucks, 3.6 million pedestrians and 6.6 million privately owned vehicles annually," coming to a dollar value of over $18 billion in exports and $34 billion in imports. *See* the Fact Sheet found at https://www.gsa.gov/about-us/regions/welcome-to-the-pacific-rim-region-9/land-ports-of-entry/otay-mesa-land-port-of-entry.[11]

In the face of all this volume, CBP officers have the duty of "preventing the entry of ineligible aliens, including criminals, terrorists, and drug traffickers, among others." CBP, Immigration Inspection Program, https://www.cbp.gov/border-security/ports-entry/overview. *See also About CBP*, U.S. Dept. of Homeland Sec. https://www.cbp.gov/about (last visited March 13, 2020); 5 U.S.C. § 8331(31) (the duties of a CBP officer "include activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry."). CBP officers must also inspect entrants to be sure they are permitted to enter, with their baggage and other merchandise. *See* 19 C.F.R. 162.6; 19 U.S. Code § 1467.

[11] "Under Federal Rule of Evidence 201, [a court] may take judicial notice of the records of state agencies and other undisputed matters of public record." *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 (9th Cir. 2004) (citations omitted). Courts routinely take judicial notice of "[p]ublic records and government documents available from reliable sources on the Internet[.]" *Gerritsen v. Warner Bros. Entm't Inc.*, 112 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015).

Just as in *Hernandez v. Mesa*, then, whether to recognize or create an implied cause of action against CBP officers, in their individual capacities, "implicates an element of national security." 140 S.Ct. at 746. As the Court recognized: "One of the ways in which the Executive protects this country is by attempting to control the movement of people and goods across the border, and that is a daunting task." *Id.* And while there are undoubted benefits to the extensive movement of people and goods across borders, there are also problems, including attempted illegal entry, drug smuggling, and transnational criminal organizations at work. *Id.* In the face of all this, "On the United States' side, the responsibility for attempting to prevent the illegal entry of dangerous persons and goods rests primarily with the U.S. Customs and Border Protection Agency." *Id.* (citing 6 U.S.C. Section 211(c)(5)). And "[f]or these reasons, the conduct of agents positioned at the border has a clear and strong connection to national security." *Id.*

Here, it might be responded that it fails to advance national security to use excessive force on a U.S. citizen entering the country, as alleged in parts of Johnson's SAC. But as the Supreme Court recognized, this objection "misses the point. The question is not whether national security requires such conduct – of course, it does not – but whether the Judiciary should alter the framework established by the political branches for addressing [such] cases . . . ." *Id.* It is a question of who should decide, Congress, or the courts. *Id.*, at 750. But "[s]ince regulating the conduct of agents at the border unquestionably has national security implications, the risk of undermining border security provides reason to hesitate before extending *Bivens* into this field." *Id.*, at 747 (*citing Abbasi*, 582 U.S. at __ (slip op at 19) ("Judicial inquiry into the national-security realm raises concerns for the separation of powers") (internal quotation marks and citation omitted).

In sum, it falls – or should fall – to Congress to weigh the relevant benefits and burdens, costs and benefits, of creating a private right of action against individual CBP officers responsible for this important work.

And as if this were not enough, there are other "special factors" that counsel against recognizing or creating a *Bivens* claim against CBP officers at the Ports of Entry.

b. In Addition, Congress' Legislation on Customs and Immigration Enforcement – and the Existence of FTCA Claims – Counsels Hesitation Against Implying a *Bivens* Remedy

A special factor counseling hesitation exists when "Congress has legislated pervasively on a particular topic but has not authorized the sort of suit that a plaintiff seeks to bring under *Bivens*." *Klay v. Panetta*, 758 F.3d 369, 376 (D.C. Cir. 2014). That special factor is present here. Congress has legislated extensively on customs and immigration enforcement, as indicated above. But in doing so, it has not authorized a private damages action against individual CBP officers for alleged constitutional violations.

For example, Congress is responsible for establishing the rules of immigration and the relevant processes thereof. U.S. CONST. art. I, § 8. "[O]ver no conceivable subject is the legislative power of Congress more complete that it is over the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). This is important for two reasons: one, the admission of aliens and immigration matters are constitutionally committed to Congress. And two, the fact that Congress legislates extensively in the immigration context is important in assessing whether courts are well suited to hear new categories of *Bivens* claims. Congressional "failure to provide a damages remedy" like the one requested by Johnson is "relevant and telling" in an area where Congress has otherwise been active, and it counsels against recognizing a new implied constitutional cause of action. *Ziglar v. Abbasi*, 137 S. Ct. at 1849. *See also Chappell v. Wallace*, 462 U.S. at 304; *Klay v. Panetta*, 758 F.3d 369, 376 (D.C. Cir. 2014) ("If Congress has legislated pervasively on a particular topic but has not authorized the sort of suit that a plaintiff seeks to bring under *Bivens*, respect for the separation of powers demands that courts hesitate to imply a remedy.").

Although Congress has not authorized a private damages cause of action against CBP officers at the Ports of Entry in any of its legislation on customs or immigration, it *has* provided for a limited waiver of sovereign immunity for suits against the United States under the Federal Tort Claims Act ("FTCA"). Courts have recognized that the possible availability of a FTCA damages claim is another special factor counseling hesitation against

implying a *Bivens* claim. *See Schwarz v. Meinberg*, 761 F. App'x 732, 734-35 (9th Cir. 2019) (affirming district court's refusal to entertain a *Bivens* claim challenging prison conditions because plaintiff "could have sought a remedy . . . under the Federal Tort Claims Act"); *Turkmen v. Ashcroft*, 2018 WL 4026734, *9 (E.D.N.Y. 2018) ("Because plaintiffs could have brought their claims under the FTCA and been awarded damages for their injuries if they prevailed, [*Abbasi*] counsels that their *Bivens* claims should be dismissed.").

In sum, although Congress has legislated extensively on customs and immigration enforcement, it has not provided for a private damages action against individual CBP officers for constitutional torts in any of these laws. But Congress did provide for a damages action against the United States, for tortious conduct by its employees, through the FTCA. These Congressional actions constitute another special factor counseling hesitation against allowing an implied *Bivens* action to proceed against CBP officers at this country's Ports of Entry.

c. Johnson's *Bivens* Claims Over CBP Line Officers at the Ports of Entry Would Impose Substantial Costs on the Government

The Supreme Court has also instructed that "the decision to recognize a damages remedy requires an assessment of the impact of government operations systemwide," including "the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself. . . ." *Abbasi*, 137 S. Ct. at 1858. And "[w]hen an issue involves a host of considerations that must be weighed and appraised, it should be committed to those who write the laws rather than those who interpret them." *Id.* at 1857.

Here, the decision to authorize private damages actions against the personal assets of individual CBP employees manning the country's Ports of Entry presents numerous costs and consequences that Congress, not the courts, should weigh and balance.

As noted above, CBP officers are charged with inspecting entrants, enforcing the customs and immigration laws, and doing so expeditiously, all the while maintaining order,

safety, and security and ease of transportation – in an extremely high volume environment where they are required to make quick decisions amidst many unknowns.

But as the Supreme Court has cautioned, individual-capacity lawsuits against federal employees impose "substantial costs" on both the government and the individual employees. *Abbasi*, 137 S. Ct. at 1856. These costs include: (1) "the time and administrative costs attendant upon intrusions resulting from the discovery and trial process," *id.*; and (2) the diversion "of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government." *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009); *see also Filarsky v. Delia*, 566 U.S. 377, 389-90 (2012) (recognizing "the harmful distractions from carrying out the work of the government that can often accompany damages suits"); *Schwarz*, 761 F. App'x at 735 (affirming the district court's denial of a *Bivens* remedy against prison officials because doing so "would substantially affect government operations and unduly burden BOP officials who must defend against this suit in their personal capacities."). Here, the sheer volume of crossings at the border's Ports of Entry counsels strongly against implying a non-statutory/*Bivens* cause of action against individual CBP officers, in their personal capacities, for their official acts at the Ports of Entry. If Congress chooses to do so, that is one thing: but it is another for courts to imply such a cause of action in this border/national security context.

Another significant cost that the Supreme Court has identified as a special factor counseling hesitation is the impact that authorizing a *Bivens* claim would have on the government's ability to recruit and retain competent and qualified employees. *See Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988) (declining to allow a *Bivens* suit because "personal liability for official acts" would "undoubtedly lead to new difficulties and expense in recruiting administrators for the programs Congress has established."). This special factor counsels strongly in favor of hesitation here. CBP employees already work in an environment that is both high volume and unpredictable. They might rationally decide against accepting or continuing in the job if they also have to stake personal assets on their ability to avoid lawsuits brought by disgruntled entrants into the United States. *Accord*

Wilkie, 551 U.S. at 562 (listing "the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties" as a special factor supporting the denial of a *Bivens* remedy); *see generally id*. at 561 (declining to allow a *Bivens* claim because "a general *Bivens* cure would be worse than the disease").

All these special factors lead to the conclusion that it is Congress, and not the courts, that should balance the competing costs and benefits, and decide whether to authorize private damages actions against the personal assets of individual CBP officers manning this country's Ports of Entry. Although Congress has legislated extensively on customs, immigration, and the border, it has not authorized a private cause of action against individual CBP officers. This Court should not act where Congress has not. *Accord Abbasi*, 137 S. Ct. at 1858 ("If there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts must refrain from creating the remedy in order to protect the role of Congress…."); *Hernandez v. Mesa*, 140 S.Ct. at 750 ("When evaluating whether to extend *Bivens*, the most important question 'is "who should decide" whether to provide for a damages remedy, Congress or the courts?' . . . The correct 'answer most often will be Congress.' . . . That is undoubtedly the answer here.") (citations omitted).

For all these reasons, this Court should dismiss the *Bivens* claims in Johnson's SAC against all 16 individually-named CBP officer defendants.

B. Certain Defendants are Entitled to Qualified Immunity

Even if the Court were to allow Johnson's *Bivens* claims to proceed in general, and this despite the Supreme Court's most recent holding in *Hernandez v. Mesa*, qualified immunity nonetheless shields certain of the individual CBP officers from liability. The reason: the facts alleged in Johnson's SAC do not establish that these CBP officers violated a clearly established constitutional right. In particular, the allegations against Officers Murillo, Andrade, Ferguson, Fierro, Delgado, Clarke and McCulloch fail even at the pleading stage, for the following reasons:

- Johnson's SAC does not plausibly allege, with *factual* allegations, that Officer Murillo's supposedly false reporting constituted a Fourth Amendment violation. *See* SAC, ¶ 92. Instead, the allegations are mere legal conclusions, entitled to no weight.
- Johnson's SAC does not identify any clearly established constitutional right that would be violated by Officer Andrade's becoming "aggressive and abusive" to him, or by her merely threatening to impound his car for a SENTRI lane violation. *See* SAC, ¶ 93.
- Johnson's SAC does not identify any clearly established constitutional right that would be violated by detaining him and impounding his car for SENTRI lane violations, in the claims against CBP officers Ferguson, Fierro, Delgado, Clarke and McCulloch. *See* SAC, ¶¶ 94 and 96.

1. Federal Officers are Immune from Suit Unless Their Conduct Violates a Clearly Established Constitutional Right about which a Reasonable Person Would Have Known

Federal law enforcement officers are immune from suit unless their conduct violates a clearly established constitutional right about which a reasonable person would have known. *See generally Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982). Thus, qualified immunity gives federal employees the benefit of the doubt unless established law clearly prohibited their action. *See Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986) (qualified immunity provides "ample room for mistaken judgments" and protects all government officials except "the plainly incompetent or those who knowingly violate the law.").

Unlike other defenses, qualified immunity protects not only against liability, but against litigation itself, including discovery and trial. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (qualified immunity protects officials from "expensive and time consuming preparation to defend the suit on its merits" and from "unwarranted demands customarily imposed upon those defending a long drawn out lawsuit."); *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (qualified immunity "cannot be effectively vindicated after the trial has

occurred"); *Harlow*, 457 U.S. at 818 ("Until this threshold immunity question is resolved, discovery should not be allowed."). This is because litigation against public officials imposes substantial social costs, including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. *See also Filarsky v. Delia*, 566 U.S. 377, 389-90 (2012) (qualified immunity helps "to avoid unwarranted timidity in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits") (internal quotation omitted).

Because litigation exacts these costs whether or not liability is ultimately found, the Supreme Court "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *see also Scott v. Harris*, 550 U.S. 372, 376 n.2 (2007) (Because "[q]ualified immunity is an *immunity from suit* rather than a mere defense to liability, . . . it is effectively lost if a case is erroneously permitted to go to trial.") (emphasis in original) (internal quotations omitted). *Accord Reza v. Pearce*, 806 F.3d 497, 507-08 (9th Cir. 2015) (affirming granting of motion to dismiss on qualified immunity grounds).

The Supreme Court has articulated a two-part test to determine whether qualified immunity applies. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). First, courts must determine whether the officer's conduct violated a constitutional right. *Id*. If no constitutional right was violated, then "there is no necessity for further inquiries concerning qualified immunity." *Id*. But "if a violation could be made out on a favorable view of the parties' submissions," then "the next, sequential step is to ask whether the right was clearly established." *Id.*[12] "The plaintiff bears the burden of showing that the right was clearly established." *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002).

[12] More recently, the Supreme Court has given courts permission "to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis

Here, qualified immunity protects CBP officers and Defendants Murillo, Andrade, Ferguson, Fierro, Delgado, Clarke and McCulloch. First, Johnson's Second Amended Complaint does not allege that Officer Murillo personally participated in a constitutional violation. Second, with respect to Defendants Murillo, Andrade, Ferguson, Fierro, Delgado, Clarke and McCulloch, any constitutional violation arguably alleged was not clearly established law.

a. The Facts Alleged in Johnson's SAC Do Not Plausibly Establish that Officer Murillo Personally Participated in a Constitutional Violation

In *Iqbal*, the Supreme Court held that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." 556 U.S. at 678 (internal quotation omitted). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id*.; *see also id*. at 679 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."). Similarly, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a plausible claim for relief. *Id*.

In evaluating whether a complaint states a plausible claim for relief, courts must distinguish between complaints that allege facts establishing a "possible" entitlement to relief (which do not survive a motion to dismiss) and complaints that allege facts establishing a "plausible" entitlement to relief (which may survive a motion to dismiss). *Id*. at 678 ("Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief."). A claim has "facial plausibility" when the complaint "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. And the court may "draw on its judicial experience and common sense" in distinguishing between the plausible and the merely possible. *Id*. at 679.

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should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 227 (2009).

Where, as here, a plaintiff seeks to bring a private damages action against a federal employee, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676.

Here, the facts alleged in Johnson's SAC do not plausibly establish that Officer Murillo personally participated in any constitutional violation. The gravamen of Johnson's claim against Officer Murillo is that he wrote a report that falsely stated that Johnson was aggressive, belligerent, and a rules violator (where Johnson had, by his own allegations, just encountered Murillo in the SENTRI lane, despite Johnson's not having a SENTRI pass – a rules violation on its face). And Johnson's SAC claims, in conclusory fashion, that those falsehoods in Murillo's report somehow or other led to Johnson's Fourth Amendment rights being violated. *See* SAC, ¶ 92.

But these are "mere conclusory statements" (and, therefore, are entitled to no weight under *Iqbal*, 556 U.S. at 679) because they do not allege any specific action that Murillo took that violated any of Johnson's Fourth Amendment rights. There is no case – or counsel is unaware of any – stating that a Fourth Amendment right is violated, just for having put an allegedly false statement in a report, without more. Nor does Johnson's SAC plausibly explain how Murillo's supposed falsehoods actually resulted in any Fourth Amendment violation. Johnson never alleges who took what action, *based on or caused by* the claimed falsehoods in Murillo's report, where that action supposedly violated Johnson's Fourth Amendment rights.[13] Nor does Johnson plead a Fourth Amendment violation on Murillo's part specifically. *Iqbal*, 556 U.S. at 676 ("[A] plaintiff must plead that each Government-

[13] Johnson's claim against Murillo is thus wholly unlike the claim involved in *Lanuza v. Love*, 899 F. 3d 1019, 1021-23 (9th Cir. 2018). The "narrow and egregious facts" there that allowed a *Bivens* claim to proceed were that an INS attorney forged a form and submitted it to an immigration court. The effect of that forged form, on its face, was to make the alien – an otherwise lawful permanent resident – ineligible for cancellation of removal. In short, the INS attorney's forgery and submission of fabricated evidence in *Lanuza* had the direct and immediate effect of harming the *Bivens* plaintiff in his immigration proceeding. Here, the mechanism supposedly connecting (1) the alleged falsehoods in Murillo's report with (2) some bad Fourth Amendment consequence to Johnson, is left completely unspecified.

official defendant, through the official's own individual actions, has violated the Constitution."). Johnson, therefore, cannot satisfy the first prong of the qualified immunity analysis with respect to Officer Murillo. *See Saucier*, 533 U.S. at 201 (the "initial inquiry" in the qualified immunity analysis is whether "*the officer's conduct* violated a constitutional right.") (emphasis added); *Iqbal*, 556 U.S. at 676 ("Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, *through the official's own individual actions*, has violated the Constitution.") (emphasis added); *Ammons v. Washington Dept. of Social and Health Services*, 648 F.3d 1020, 1037 (9th Cir. 2011) ("Fundamental to the principle of qualified immunity is the notion that an individual will not be held constitutionally liable – cannot even be subject to suit – for anything *but his own actions*.") (emphasis in original).

b. Any Constitutional Right was not Clearly Established

Even if Johnson's SAC alleged a plausible violation of a constitutional right vis a vis CBP Officers Murillo, Andrade, Ferguson, Fierro, Delgado, Clarke and McCulloch, qualified immunity would still protect them, because any such right was not clearly established. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 614, 618 (1999) (holding that the presence of media during execution of warrant violated Fourth Amendment, but granting qualified immunity because the right to exclude media was not clearly established). Although Johnson's SAC conclusorily alleges that these CBP officers violated Johnson's Fourth Amendment rights, there is no case authority clearly establishing such *rights in the specific circumstances he claims*. *See Cousins v. Lockyer*, 568 F.3d 1063, 1070 (9th Cir. 2009) ("our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense.") (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) ("We have repeatedly told courts . . . not to define clearly established law at a high level of generality."). "Clearly established" means a case on point, even directly on point, not just some broad, generalized statement about the Fourth Amendment being

violated somehow or other, by someone or other.[14] As the Ninth Circuit has recently held, to satisfy the "clearly established law" requirement, there must be a case on point with the case at bar. *Emmons v. City of Escondido*, 931 F.3d 1172, 1175 (9th Cir. 2019) (granting qualified immunity following reversal and remand by the Supreme Court: "we are unable to find a case so precisely on point with this one as to satisfy the Court's demand for specificity. [The officer defendant] is therefore entitled to qualified immunity."); *see also S.B. v. Cty. of San Diego*, 864 F.3d 1010, 1015 (9th Cir. 2017) ("[W]e acknowledge the Supreme Court's recent frustration with failures to heed its holdings. The Supreme Court has "repeatedly told courts – and the Ninth Circuit in particular – not to define clearly established law at a high level of generality. . . . We hear the Supreme Court loud and clear.").

Thus, there is no case law – or counsel has found none – clearly establishing that:

- It violates the Fourth Amendment to include alleged falsehoods about being aggressive and belligerent and a rule violator in a CBP officer's report about an encounter with a border entrant at a Port of Entry. This is particularly so where by Johnson's own admission and allegations, Johnson *had* violated the rules – he attempted to enter the United States from Mexico through the SENTRI lane, although he did not have a SENTRI pass. (Murillo)
- It violates the Fourth Amendment to be aggressive and abusive and threaten to seize a border entrant's car at a Port of Entry for alleged violations of SENTRI rules and requirements. And this is particularly so where the entrant had admittedly violated SENTRI rules, by using the SENTRI lane without a SENTRI pass. (Andrade)

[14] Or worse, that the defendant's actions "caused or contributed to *subsequent* unlawful searches and seizures of Plaintiff [by whom being left unspecified], and Defendant Andrade's misconduct played a meaningful and integral role in the deprivation of Plaintiff's constitutional rights under the Fourth Amendment." *See, e.g.*, SAC, ¶ 42 (re CBP officer Andrade) (emphasis added).

- It violates the Fourth Amendment to detain an entrant and to impound their car at a Port of Entry for alleged violations of SENTRI rules and requirements. Again, this is particularly so where the border entrant had admittedly violated SENTRI rules at least twice, by using the SENTRI lane without a SENTRI pass. (Ferguson, Fierro, Delgado, Clarke and McCulloch)

This lack of authority clearly establishing the supposed constitutional violations underlying Johnson's *Bivens* claims entitles CBP officers Murillo, Andrade, Ferguson, Fierro, Delgado, Clarke and McCulloch to qualified immunity. The *Bivens* claims against them must therefore be dismissed. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.").

IV. CONCLUSION

For the foregoing reasons, the Court should dismiss Carey L. Johnson's Second Amended Complaint's Bivens claims against all 16 individually-named CBP officer defendants. Or, in the alternative, the Court should dismiss the *Bivens* claims against Defendants (and CBP officers) Murillo, Andrade, Ferguson, Fierro, Delgado, Clarke, and McCulloch, on qualified immunity grounds.

DATED: March 16, 2020

Respectfully submitted,

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s/*Kyle W. Hoffman*
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