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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Carey L. Johnson, Plaintiff, vs. United States of America, et al, Defendants.	No. 3:18-cv-02178-BEN-MSB PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS *BIVENS* CLAIMS AGAINST 16 INDIVIDUALLY NAMED DEFENDANTS Hearing on April 20, 2020, 10:30 a.m.

Defendants' motion to dismiss rests primarily on the Supreme Court's recent decision in *Hernandez v. Mesa*, -- U.S. --, 140 S. Ct. 735 (2020), where the

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Court held that a cross-border shooting of a Mexican national arose in a "new context" for purposes of an implied remedy under *Bivens*. *Id*. at 744. As such, the Court concluded that "special factors, most specifically "the potential effect on foreign relations," counseled against extending *Bivens* in this context. *Id.* Thus, the Court refused to extend *Bivens* to this cross-border shooting.

This case stands in stark contrast to *Hernandez*. Here, federal agents engaged in unconstitutional conduct against an American citizen, on American soil. Hardly a "new context," this is the very core of a *Bivens* claim. *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing an implied cause of action against federal agents for unconstitutional search and seizure in the U.S.); *Chavez v. United States*, 683 F.3d 1102, 1111–12 (9th Cir. 2012) (*Bivens* claim against Border Patrol officer who made unlawful searches of shuttle vehicles owned by plaintiff). *Hernandez* provides no basis to dismiss Plaintiff Carey Johnson's claims that the named border patrol agents violated his Fourth Amendment rights. Further, the Individual Defendants[1] claim of qualified immunity must fail, as it is well settled that federal agents cannot use

1 The Individual Defendants are Border Patrol agents Quintin Clarke, Teresa Andrade, Rolenio Murillo, Thomas Ferguson, Hector Ibarra, Noel Angeles, Carlos Fierro, John Delgado, Chantelle McCulloch, Alphonso Stephenson, Jr., James Calapan, Kevin Guisinger, Raul Cano, Walter Thomas, Esther Calderon, and Sean Zeeck.

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excessive force or seize private property without due process of law. Mr. Johnson respectfully requests this Court to deny Defendants' motion to dismiss in its entirety.

1. Introduction

Defendants' introduction is as offensive as it is factually incorrect and improper. Carey Johnson is an American citizen. *Second Amended Complaint* ("SAC"), at ¶ 29. He is far more than that. He is a veteran of the United States armed forces. *Id.* at ¶ 30. He became disabled as a result of his service, and now splits his time between Mexico and the United States to manage his disability. *Id.* at ¶¶ 30-31. Contrary to the unsupported motives that the Defendants have chosen to attribute to Mr. Johnson, he wants nothing more than to be able to cross into the country of his citizenship without exacerbating his service-related disability and for purposes of this case, without being subjected to unconstitutional force, unconstitutional takings, and unconstitutional arrests.

Defendants bring this motion under both Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). For purposes of Rule 12(b)(6), this Court must accept all material allegations in the complaint as true, as well as all reasonable inferences that can be drawn from these allegations (a well-establish rule that Defendants breached no sooner than the second paragraph of their motion). *See* *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

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The same rule applies to Defendants' motion challenging jurisdiction under Rule 12(b)(1). "A party mounting a Rule 12(b)(1) challenge to the court's jurisdiction may do so either on the face of the pleadings or by presenting extrinsic evidence for the court's consideration." *Cholakyan v. Mercedes-Benz USA, LLC*, 2012 WL 12861143, *slip op.* at 16 (C.D. Cal. Jan. 12, 2012); *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) ("Rule 12(b)(1) jurisdictional attacks can be either facial or factual"). Where a defendant does not rely on extrinsic evidence, as Defendants do not here, this Court, as in Rule 12(b)(6) motions, "must accept the allegations of the complaint as true." *Id.*

2. Factual Background

Mr. Johnson is a United States citizen. *SAC* ¶ 29. He is also a military veteran. *Id.* at ¶ 30. He resides in California, but also has a home in Mexico. *Id.* at ¶ 29. He is a disabled veteran and spends time in Mexico to manage his disability. *Id.* at ¶¶ 29, 31. This dual residence requires him to cross the border often, returning to California to manage his disability and otherwise conduct his personal affairs and business. *Id.* at ¶ 31.

A "normal" border crossing can exacerbate Mr. Johnson's disability. Thus, on September 22, 2016, Mr. Johnson, when crossing through the Otay Mesa

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Border Crossing,[2] approached an officer at the "Sentri" gate[3] to determine the best way to obtain disability accommodation when crossing the border. *Id*. at ¶ 34. A supervisory Customs & Border Patrol agent, Agent Alvino, advised Mr. Johnson to speak with an agent at the Otay Mesa main gate about formalizing his request for accommodation. *Id*.

Johnson followed Agent Alvino's instruction. At the Otay Mesa main gate, Johnson spoke with CBP Agent Rolenio Murillo.[4] *Id*. at ¶ 35. After explaining his situation, Agent Murillo advised Mr. Johnson that he was following the proper protocol: he should approach agents at the Sentri gate, present his passport and disability ID card, at which point he would be sent to secondary inspection. *Id*. at ¶ 35. Each time, the agent on duty at the Sentri gate would have discretion as to whether to grant or deny Johnson's request for accommodation. *Id*. at ¶ 36.

The very next day, September 23, 2016, Johnson approached the Sentri gate at the Otay Mesa crossing and proceeded to follow Agent Murillo's instructions to a "t." *Id*. at ¶ 39. He presented his passport and disability ID card and indicated

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2 This Court may judicially notice that the Otay Border Crossing is one of three ports of entry in the San Diego—Tijuana metropolitan region, the others being San Ysidro and Tecate.

3 Secure Electronic Network for Travelers Rapid Inspection.

4 In Plaintiff's Second Amended Complaint, Defendant Murillo's name was inadvertently misspelled as "Marillo."

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that he needed to be sent directly to secondary inspection to accommodate his disability. *Id.*

This approach did not compromise CBP's border concerns. Johnson did not seek to obtain the security-clearance advantages of Sentri entry, as he was still required to proceed to secondary inspection. Similarly, it did not require any additional resources by the CBP, as it utilized existing systems and infrastructure.

Given Agent Murillo's advice, Johnson expected to be passed along to secondary inspection. Instead, two agents began to taunt Johnson about his disability, claiming (falsely) that he was not disabled. *Id.* at ¶ 40. Soon thereafter, these agents' supervisor approached Johnson, refusing to accommodate Johnson's disability but, instead, threatening to seize Johnson's car for a "Sentri lane violation." *Id.*

CBP Agent Ferguson then told Johnson that his Veteran's Administration disability card was not enough, but that the CBP needed to see his actual VA disability award determination letter. *Id.* at ¶¶ 43-44.

Johnson retrieved this letter from his Mexico home and returned to the crossing. *Id.* at ¶ 45. He was then referred to secondary inspection. *Id.* There, he provided his disability determination letter, Department of Defense ID, and passport to a supervisor. *Id.* at ¶ 47. In return, this supervisor claimed that Johnson

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was not disabled, that there was "nothing wrong" with him, and refused to accommodate Mr. Johnson's disability. *Id*.

Johnson requested a written denial of his request for accommodation, so that he could formally pursue the request. *Id*. at ¶ 48. Instead, ten agents surrounded his car, taking him into custody. *Id*. The agents handcuffed Mr. Johnson and left him shackled on a bench for three hours. *Id*. at ¶¶ 49-50.

Following the lengthy delay, the agents freed Johnson, but advised him that they were impounding his car, which he could recover only upon paying a fine of $5,000.00. *Id*. at ¶ 51. Plaintiff paid the fine, fearful that his failure to do so would result in even worse consequences. *Id*. at ¶ 52. The receipt suggested that the fine was for a "Sentri lane violation." *Id*. at ¶ 53.

When Plaintiff crossed the border on September 25, 2016 and October 21, 2016, statements and conduct of the CBP officers indicated that Mr. Johnson had been "flagged" as a Sentri lane violator. *Id*. at ¶¶ 54-56. In fact, on October 21, 2016, the agent searched Johnson's trunk and questioned his parentage of his minor daughter, who was accompanying him. All this even though Johnson was crossing through a normal entry lane. *Id*. at ¶ 57.

In light of these experiences crossing the border, when Johnson crossed the border on October 31, 2016, using regular lanes, he experienced a severe anxiety attack. *Id*. at ¶¶ 58-59.

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At least two CBP agents, including Defendants Hector Ibarra and N. Angeles, drug Johnson from his car, put Tasers to his chest and piled on top of him, wrenching his arms behind is back. *Id.* at ¶ 60. When the agents finally got off of Johnson, he could not feel his legs and his anxiety even more exacerbated. *Id*. at ¶ 61. An ambulance transported Johnson to a nearby San Diego emergency room. *Id*. at ¶ 62.

After being released from the emergency room, Johnson returned to his home in Mexico. However, his anxiety continued, so he sought to reach the VA clinic in San Diego the next day. *Id*. at ¶ 63. Traveling with his daughter, he went through the Sentri lane due to the nature of his disability and intensity of the symptoms he was experiencing. *Id.*

CBP agents, including Defendants Fierro, Delgado, Clarke, and McCulloch, did not believe that Johnson was in crisis and heckled him. *Id*. at ¶ 64. They refused his request to summon an ambulance. *Id*. Fearful of a repeat of the prior day's events, Johnson locked his car doors and rolled up the windows. *Id*. at ¶ 65.

Ultimately, Johnson voluntarily left his vehicle, but the verbal harassment by Defendants Fierro, Delgado, Clarke, and McCulloch continued. *Id*. at ¶ 67. The agents also threatened to call California social services to assume custody of Johnson's daughter if Johnson insisted on going by ambulance. *Id*. at ¶ 68. The

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ambulance driver—summoned by Johnson, not the agents—intervened, and obtained permission for Johnson's daughter to accompany them in the ambulance. *Id*. at ¶ 69.

After spending several days in the hospital, Johnson returned to the border crossing to retrieve his keys, which included his house key. *Id*. at ¶¶ 70-71. The agents would not return his keys. *Id*. at ¶ 72. Further, they advised Johnson that his vehicle was being seized for a Sentri lane violation and would be forfeited unless he paid a fine of $10,000. *Id*. at ¶ 73. Unable to afford this lump sum payment, Johnson had to drive a rental vehicle for approximately a year. Thereafter, he purchased another car, but was required to continue making car and insurance payments on the seized vehicle. *Id*. at ¶ 74.

Meanwhile, Johnson discontinued using any vehicle lanes—Sentri or otherwise—when crossing into the United States. Advised that pedestrian lanes at the San Ysidro Border had a special lane for people with disabilities or requiring medical assistance, he began using this lane. *Id*. at ¶ 75. Initially, this worked, but soon, CPB agents began calling a supervisor each time. *Id*. at ¶ 76. Each crossing became more difficult, once again, increasing Mr. Johnson's anxiety. *Id*.

On December 1 and 7, 2016, US border agents and government-contracted private security asked Mexican police to arrest Mr. Johnson. *Id*. at ¶ 78.

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Mr. Johnson retained an attorney to obtain a disability accommodation for him. Initially, border crossings appeared to occur with less drama. *Id*. at ¶ 79. However, on December 1, 2017, as Mr. Johnson was crossing through regular walk-through lanes, an agent directed Johnson to secondary inspection. *Id*. at ¶ 83. After left sitting for an extraordinary amount of time, when Johnson questioned the delay, CBP agents, including Defendants Stephenson, Calapan, Guisinger, Cano, Thomas, Calderon, and Zeeck, threw Johnson to the ground, assaulted him, and then handcuffed and detained him. *Id*. Ultimately, the CBP permitted Johnson to proceed, but not before Johnson sustained bruises, sprains, scarring, and physical pain due to the attack. *Id*. at ¶¶ 83-84.

On January 5, 2018, CBP approved accommodations for Johnson's border crossing at the pedestrian lanes of the San Ysidro border crossing. *Id*. at ¶ 86.

In his second amended complaint, Mr. Johnson alleges eight separate causes of action. For purposes of the present motion, the only relevant cause of action is the first, alleging that the individual Customs & Border Patrol agents violated Mr. Johnson's rights under the Fourth Amendment to the United States Constitution, giving rise to a private right of action under *Bivens v. Six Unknown Named Agents of Federal Narcotics Bureau*, 403 U.S. 388 (1971). The Individual Defendants maintain that their wrongful conduct is not cognizable under *Bivens*

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or, alternatively, that they have qualified immunity for their unprovoked attacks on Johnson. As set forth herein, none of these contentions have merit.

3. Argument

A. There is nothing "new" about requiring federal officers, interacting with American citizens on American soil, to comply with the United States Constitution and statutes; as such, *Bivens* squarely applies to Mr. Johnson's complaint.

(1) This case does not involve any "expansion" of *Bivens*, falling squarely within *Bivens'* ruling that federal agents acting on American soil can be liable for Fourth Amendment violations.

Mr. Johnson's claims against the individual CBP agents for their Fourth Amendment violations are brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). A review of *Bivens* demonstrates its application to the case at hand. In *Bivens*, agents of the Federal Bureau of Narcotics—federal agents, just as are the Customs & Border Patrol agents here—entered Mr. Bivens' Brooklyn apartment and arrested him for narcotics violations. They manacled him in the presence of his wife and children, threatening to arrest the entire family. He was later strip searched.

Bivens then brought a complaint against the officers, accusing them of violating his Fourth Amendment rights against unreasonable seizure, the same

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amendment that underlies Plaintiff's complaint here. The Supreme Court held that the district court erred in dismissing Mr. Bivens' complaint.

> That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty…. **The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts**…. Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.

Id. at 395-96 (emphasis added; citations omitted). This case resembles *Bivens* in all material respects: federal agents, acting in the United States, allegedly violating a person's Fourth Amendment rights. Courts throughout the country have applied *Bivens* to Fourth Amendment violations by customs or border patrol agents. *See* *Chavez v. United States*, 683 F.3d 1102, 1110 (9th Cir. 2012) (a border patrol agent conducting a roving patrol near the border "violates the Fourth Amendment if she stops a vehicle in the absence of an objectively 'reasonable suspicion' ..."); *Morales v. Chadbourne*, 793 F.3d 208 (1st Cir. 2015) (Bivens claim against ICE agent for wrongfully detaining a U.S. citizen); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006) (recognizing Fourth Amendment Bivens claim against a border agent for excessive force and

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unreasonable arrest and detention); *Perez v. United States*, 103 F.Supp.3d 1180 (S.D.Cal. 2015).

To find for the Defendants in the present matter would be to essentially overrule *Bivens*. Yet, notably, in the very case Defendants rely upon, *Hernandez v. Mesa*, -- U.S. --, 140 S. Ct. 735 (2020), the Supreme Court declined to do just that. Although Justices Thomas and Gorsuch urged reconsideration of *Bivens*, none of the other seven justices agreed. Thus, while disputing the application of *Bivens* to the unique facts before it, the Court reaffirmed the *Bivens* remedy.

Nor does this present matter fall within the limited exception created by the *Hernandez* Court. In *Hernandez*, the decedent, 15-year old Mexican national Sergio Adrián Hernández Güereca, was with a group of friends in a culvert that separated the United States from Mexico in the El Paso vicinity. A couple of the teenagers ran across the culvert into the American side. A Border Patrol agent, Jesus Mesa, detained one of the teenagers, and Hernandez ran back to the Mexican side. Mesa shot and killed Hernandez. What Hernandez and his friends were doing at the time of the shooting were unresolved questions of fact.

Hernandez's mother brought a *Bivens* action against Officer Mesa. Following a lengthy procedural history that needs not be detailed here, including a prior trip to the Supreme Court, *see id.* at 739-41, the Supreme Court took

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certiorari to review whether *Bivens* should be expanded to include cross border shootings.

The *Hernandez* Court set forth the analysis a court should consider when asked to expand *Bivens*, an analysis that Defendants rely on throughout their motion to dismiss. However, Defendants ignore the threshold question before even considering this analysis: does the case ask for an "expansion" of *Bivens*? The *Hernandez* Court explained that the very reason for its analysis was "that **expansion** of *Bivens* is a disfavored' judicial activity." *Id*. at 742 (bold added). Its analysis was only necessary "[w]hen asked to extend *Bivens*…." *Id*. at 743.

"Some differences, of course, will be so trivial that they will not suffice to create a new *Bivens* context." *Ziglar v. Abbasi*, -- U.S. --, 137 S. Ct. 1843, 1865 (2017). So it is here. *Hernandez* has no application if this matter does not involve an "expansion" of *Bivens*. And it does not. Both cases involve alleged violations of the Fourth Amendment by federal law enforcement officers on American soil. Without any expansion of the parameters of *Bivens*, Mr. Johnson's claims fall squarely within its remedial objectives. This Court need go no further to deny Defendants' motion.

(2) *Hernandez v. Mesa*'s "*Bivens* expansion" rubric affirms that these federal agents should answer for their Fourth Amendment violations.

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Even should the present situation be considered an expansion of *Bivens*, Defendants are not entitled to relief. "When asked to extend *Bivens*—which, as set forth above, this case does not—the Court "engage[s] in a two-step inquiry." *Hernandez*, 140 S.Ct. at 743.

> We first inquire whether the request involves a claim that arises in a "new context" or involves a "new category of defendants." When we find that a claim arises in a new context, we proceed to the second step and ask whether there are any special factors that counsel hesitation about granting the extension.

Id. (quotations and citations omitted). This matter does not arise in a "new context," nor are there any special factors that should immunize these particular federal agents from liability for Fourth Amendment violations.

(a) Mr. Johnson's claims do not arise in a "new context."

A context is "new" "if it is "different in a meaningful way from previous *Bivens* cases decided by this Court." *Id*. at 743 (quoting *Abbasi*, 137 S.Ct., at 1859). "[A] case can present a new context for *Bivens* purposes if it implicates a different constitutional right; if judicial precedents provide a less meaningful guide for official conduct; or if there are potential special factors that were not considered in previous Bivens cases." *Abbasi*, 137 S. Ct. at 1864.

Here, the constitutional right at issue is the very right that was the foundation of *Bivens* itself—the Fourth Amendment. And this right is not

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fundamentally different when a Border Patrol or Customs officer interacts with a car at the border or a drunk driver inland.

In *Castellanos v. United States*, -- F.Supp.3d --, 2020 WL 619336 (S.D. Cal. Feb. 10, 2020), this Court held that any differences between other federal agents' interactions and these border crossing officers were not material:

> Here, the present case has parallels to the Supreme Court's original *Bivens* case in that both are predicated on the Fourth Amendment. Plaintiff Jesus Castellanos seeks damages for the alleged use of excessive force and his unlawful detention/false arrest. But clearly, Border Patrol agents operate under different statutory and legal mandates than the FBI agents involved in the original *Bivens* case. There are also differences between immigration and customs enforcement issues at the border that are absent in traditional law enforcement contexts. And, importantly, the incident occurred at the secondary inspection site at the Calexico Port of Entry, on the international border where levels of force, detention and control are more readily employed, and reasonably so, than in a traditional law enforcement setting.
>
> But the differences beg the question, however, as to whether they *fundamentally* differ from the standard law enforcement contact in which an individual is subject to physical force, detained, or otherwise controlled. **Both border enforcement and traditional law enforcement are cabined by existing Constitutional standards**….. **Standard border detention in secondary at the international border will no more excuse or justify excessive force than a traditional arrest for drunk driving or any other criminal wrongdoing**….

Id., slip op. at 5-6 (italics in original; bold added). "But the consistent standard for all of these applications of force, whether at the international border or otherwise, is the fundamental Constitutional mandate: reasonable force at all times and in all

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relevant contexts. On balance, the context in which force and seizure were employed against Plaintiff tips in favor of the court concluding **the circumstances of this case do not comprise a new *Bivens* context**." *Id.* at 6 (emphasis added).

The reasonableness requirements of the Fourth Amendment are the same at an international border or elsewhere. Thus, judicial precedents provide more than an adequate guide for the conduct of border officers interacting with persons crossing the border at established border crossings.

There are no other indicators that this matter presents a "new context." The *Hernandez* Court noted that "[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." *Hernandez*, 140 S.Ct. at 743. However, these special factors must be significant. For example, in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), the Supreme Court declined to create a *Bivens* remedy under the Eighth Amendment, where the suit was against a private prison operator rather than federal officials. *Id.* at 71-74. In *Hernandez*, the "special factor" that reflected the "new context" was the fact that the shooting occurred *across an international border*. "There is a world of difference between those claims and petitioners' cross-border shooting claims, where the risk of disruptive intrusion by the Judiciary into the functioning of other branches is significant." *Hernandez*, 140 S.Ct. at 744 (quotation omitted).

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The Defendants, law enforcement officers, interacted with an American citizen at an established border crossing. This is a plain vanilla law enforcement interaction that can readily be evaluated under Fourth Amendment standards. It does not arise in a "new context."

(b) There are no "special factors" which would authorize federal agents to contravene the United States Constitution without recourse.

In *Abbasi*, the Supreme Court noted that it had "not defined the phrase 'special factors counselling hesitation.'" *Abbasi*, 137 S.Ct. at 1857. But it elaborated:

> The necessary inference … is that the inquiry must 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. Thus, to be a "special factor counselling hesitation," a factor must cause a court to hesitate before answering that question in the affirmative.

Id. at 1857-58.

As a threshold matter, there is no question that the judiciary is the *best suited* to address applications of the Fourth Amendment. It regularly does so in all manner of cases, *including* those involving the actions of Border Patrol and Customs officers. *See, e.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (Fourth Amendment precluded Border Patrol from conducting roving-patrol vehicle stops without reasonable suspicion); *United States v. Ortiz*, 422

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U.S. 891, 896 (1975) (Fourth Amendment precluded Border Patrol from conducting automobile searches at checkpoints absent reasonable suspicion); *Chavez*, 683 F.3d at 1111 (finding that Border Patrol officer did not have qualified immunity for conducting illegal searches of shuttle owned by plaintiff). Indeed, construing the Fourth Amendment is a task that uniquely belongs to the judiciary. The judiciary's special role in construing and applying the Fourth Amendment, standing alone, precludes any finding that there are "special factors" precluding courts from enforcing Fourth Amendment violations through *Bivens*.

Hernandez provides an illustration of the type of "special factor" that would warrant caution in applying *Bivens*. There, the victim had been shot and died in Mexico. The international implications of this incident were immediately self-evident; "[t]he shooting quickly became an international incident, with the United States and Mexico disagreeing about how the matter should be handled." *Hernandez*, 140 S.Ct. at 740. This was one of the critical special factors. "The first [special factor] is the potential effect on foreign relations." *Id*. at 744. "The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Jesner v. Arab Bank, PLC*, -- U.S. --, 138 S. Ct. 1386, 1403 (2018). "Indeed, we have said that 'matters relating 'to the conduct of foreign relations ... are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or

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interference." *Hernandez*, 140 S.Ct. at 744 (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981)). "A cross-border shooting is by definition an international incident; it involves an event that occurs simultaneously in two countries and affects both countries' interests. Such an incident may lead to a disagreement between those countries, as happened in this case." *Id.*

Here, in contrast, this matter does not implicate international relations in any manner. This was an interaction by American law enforcement officers, acting on American soil, at an established border crossing, dealing with an American citizen. No country other than the United States had any interest in the interaction between Johnson and the CBP officers.

Hernandez also suggested that "national security" was another "special factor" that was part of its overall calculus in declining to extend *Bivens* in that matter. *Hernandez* did not involve conduct by an agent stationed at a contained border crossing, but one patrolling the border away from established border crossings. In that regard, the Supreme Court noted that "the conduct of agents positioned at the border has a clear and strong connection to national security…." *Hernandez*, 140 S.Ct. at 746. By definition, the people that these Border Patrol agents encounter crossing the border ***away from an established border crossing*** have no valid reason for crossing the border away from an established crossing. As these agents, such as Agent Mesa in *Hernandez*, patrol the unregulated border,

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virtually anyone they observe crossing the border is a potential threat to our national security.

Contrast that with a Border Patrol agent at an established border crossing, such as San Ysidro or Otay Mesa. By definition, people approaching the border through a border crossing have voluntarily subjected themselves to the necessary border inspection. Unlike persons crossing the border away from an established checkpoint, the vast, vast majority of people crossing the border at an established checkpoint are those who are welcome and wanted in the United States. Many, if not most, will include American citizens such as Carey Johnson returning to the United States. Others will be foreign nationals (predominantly Mexican, presumably), with legitimate business in the United States. Indeed, as of February 2020, the United States Census Bureau reported that Mexico was the United States' biggest trading partner.[5]

In *Castellanos,* this Court noted that "national security" is not a "genuine special factor" for border crossing interactions.

> But, contrary to Defendant's assertion, the court does not view extending Bivens in this instance and the purported implications regarding national security concerns as a genuine special factor. As the Abbasi court cautioned, "national security concerns must not become a talisman used to ward off inconvenient claims." *Abbasi*, 137 S. Ct. at 1861. This court does not think Border Patrol officers

5 https://www.census.gov/foreign-trade/Press-Release/current_press_release/ft900.pdf (at page 36).

> will be deterred from responding adequately and without hesitation if faced with Bivens liability any more so than any other federal officer.

Castellanos, slip op. at 6.

Thus, the national security concerns that was simply one *part* of the *Hernandez* "special factors" analysis is not present at an established border crossing. The Fourth Amendment does not intrude on the ability of these officers to perform their jobs at the border crossings, as the Fourth Amendment requires nothing more than reasonableness under the circumstances. Persons crossing the border away from border crossings are presumptively breaking the law and potential threats to national security. Persons crossing the border *at* border crossings are presumptively the opposite—people with legitimate reasons for crossing the border. There is no need to eliminate the well-established *Bivens* remedy for these agents.[6]

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6 In its discussion in this regard, the *Hernandez* Court specifically noted that not even the federal civil rights damages statute, 42 U.S.C. § 1983, would apply to cross border shootings, even if the shooter was a state actor rather than federal agent. *Hernandez*, 140 S.Ct. at 747 ("Section1983's express limitation is especially significant…."). Here, in contrast, had the CBP agents at issue been state actors, section 1983 would have applied to their conduct within the territorial jurisdiction of the United States regarding conduct against an American citizen.

The Court specifically noted a "pattern of congressional action" in "refraining from authorizing damages for injury inflicted abroad by Government officers…." *Id.* at 749. Again, this matter does not involve damages "inflicted abroad."

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The *Hernandez* Court concluded: "In sum, 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**." *Hernandez*, 140 S.Ct. at 749 (emphasis added). But construction and application of the Fourth Amendment is uniquely the province of the third branch of our government, the Judiciary. Refusing to recognize a *Bivens* remedy here would not constitute "respect" for separations of powers, but a wrongful abdication of one of the key functions of the Judiciary.

(c) A *Bivens'* remedy in this matter does not impugn any other existing statute.

The Defendants contend that a *Bivens* remedy against CBP officers in established border crossings impugn other statutes, precluding the remedy. *Motion to Dismiss*, at 19-20. *First*, it contends that it interferes with Congress' primary authority regarding immigration and alienage. *Id*. But CBP agents at these border crossings are not making or interpreting any federal immigration or alienage statute. Their mission is to ensure that people crossing the border are in compliance with these statutes; a *Bivens* remedy ensures nothing more than that a CPB agent act reasonably when enforcing these statutes, just as other federal law enforcement agents must act reasonably when enforcing federal narcotics law or federal firearms laws or any and all other penal statutes.

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Defendants also suggest that the presence of a *possible* remedy under the Federal Tort Claims Act precludes seeking a *Bivens* remedy. *Motion to Dismiss*, at 20. If the mere possibility of an FTCA remedy were to preclude a *Bivens* remedy, the Government asks this Court to do what the United States Supreme Court has repeatedly refused to do, effectively overrule *Bivens* in its entirety. The two cases cited by Defendants, the Ninth Circuit's unpublished decision in *Schwarz v. Meinberg*, 761 Fed. Appx. 732, 735 (9th Cir.), cert. denied, 140 S. Ct. 468 (2019), and the unpublished district court decision in *Turkmen v. Ashcroft*, 2018 WL 4026734 (E.D.N.Y. Aug. 13, 2018), both involved circumstances which involved "new contexts" and "special factors" for application of *Bivens*. As noted above, this does not apply here.

(d) There are no "substantial costs" on the Government for complying with the United States Constitution.

Defendants contend that the "substantial costs" of *Bivens* claims further countenances refusing to apply a *Bivens* remedy here. While Plaintiff asserts that the Government's claims are grossly overstated, this Court need not consider this. In fact, the Governments' asserted "substantial costs" are no different than any other agency or government employee would encounter with respect to defense of *Bivens* claims. Further, given the availability in *Bivens* actions of the same defenses available under section 1983, such as absolute and qualified immunity,

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CBP employees, like any defendant, would be protected from adverse judgments except in cases of violations of clearly established law (such as occurred here). In short, once again, Defendants ask this Court to implicitly overrule *Bivens*.

At least twice in its motion the Defendants raise the specter of judgments to be collected against the personal assets of the government employees, and it raises this claim in its "substantial costs" argument. But Defendants fail to advise this Court that it would be the *Government's own decision* whether to put their agents' personal assets at risk, as the Government always has the authority to indemnify the employee and, further, to settle or compromise any claim against an employee:

> (1) The Department of Justice may indemnify the defendant Department of Justice employee for any verdict, judgment, or other monetary award which is rendered against such employee, provided that the conduct giving rise to the verdict, judgment, or award was taken within the scope of employment and that such indemnification is in the interest of the United States, as determined by the Attorney General or his designee.
>
> (2) The Department of Justice may settle or compromise a personal damages claim against a Department of Justice employee by the payment of available funds, at any time, provided the alleged conduct giving rise to the personal damages claim was taken within the scope of employment and that such settlement or compromise is in the interest of the United States, as determined by the Attorney General or his designee.

28 C.F.R. § 50.15(c). Defendants' "substantial costs" factor is meritless.

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B. None of the Individual Defendants are entitled to qualified immunity.

Individual defendants in both section 1983 and *Bivens* actions may seek to invoke the defense of qualified immunity. "Qualified immunity balances 'the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.'" *Ioane v. Hodges*, 939 F.3d 945, 950–51 (9th Cir. 2018) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). A federal employee is entitled to qualified immunity unless "(1) the facts, construed in the light most favorable to the plaintiff, demonstrate that the officer's conduct violated a constitutional right, and (2) the right was clearly established at the time of the asserted violation." *Id*. Mr. Johnson's allegations in his second amended complaint demonstrate that none of the officers are entitled to qualified immunity.

(1) Officer Murillo

Officer Murillo was one of the first officers with whom Mr. Johnson dealt with respect to his request for disability accommodation, and it was Officer Murillo's conduct that precipitated many of the subsequent events in this matter. With respect to Officer Murillo, Plaintiff alleged:

> 35. At the Otay Mesa Gate Plaintiff was informed by CBP agent, Defendant R. Marillo [sic] that the proper procedure was that 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.
>
> * * *
>
> 37. Defendant Marillo [sic] later wrote a report about his interaction with Plaintiff that contained false or materially misleading information. Specifically, Defendant Marillo [sic] claimed in his report that Plaintiff was aggressive, belligerent, and a rule violator.
>
> 38. Defendant Marillo's [sic] falsified report caused or contributed to subsequent unlawful searches and seizures of Plaintiff, and Defendant Marillo's [sic] misconduct played a meaningful and integral role in the deprivation of Plaintiff's constitutional rights under the Fourth Amendment.

SAC, at 8.

The Ninth Circuit has repeatedly held that the filing of a false report can deprive an individual of her or his constitutional rights. *See* *Blankenhorn v. City of Orange*, 485 F.3d 463, 482 (9th Cir. 2007) ("A police officer who maliciously or recklessly makes false reports to the prosecutor may be held liable for damages incurred as a proximate result of those reports"); *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1126–27 (9th Cir.2002) (finding that a coroner who "deliberately lied about the autopsy in the autopsy report" could be held liable under § 1983); *Barlow v. Ground*, 943 F.2d 1132, 1136-137(9th Cir. 1991) (police officers may be held liable under § 1983 "if they made false reports to the prosecutor, omitted material information from the reports, or otherwise prevented the prosecutor from exercising independent judgment"). A false report that results

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in "constitutional harm" can provide the basis for a section 1983 or *Bivens* claim. *Reno v. Nielson*, 2019 WL 6883791, *slip op.* at 8 (D. Haw. Dec. 17, 2019).

Here, Plaintiff alleged that Officer Murillo made false statements in his reports. *SAC* ¶ 37. These false statements later led to unconstitutional detentions, property seizures, and assaults. *Id*. at ¶ 38. Officer Murillo is not entitled to qualified immunity at this stage.

(2) Officer Andrade

Mr. Johnson alleged with respect to Officer Andrade:

> 41. These agents soon left and their supervisor, believed to be 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 misconduct played a meaningful and integral role in the deprivation of Plaintiff's constitutional rights under the Fourth Amendment.

SAC, at 9.

The same analysis as for Officer Murillo applies here. Defendant Andrade engaged in conduct that led to numerous subsequent breaches of Johnson's constitutional rights. It is well established that an officer is responsible for the consequences of her or his wrongful conduct. *Cf. Reno, supra* (officer responsible for "constitutional harm" that flows from conduct); *Kennedy v. City of Ridgefield,*

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439 F.3d 1055, 1066 (9th Cir. 2006) ("[i]t is beyond dispute that in September 1998, it was clearly established that state officials could be held liable where they affirmatively and with deliberate indifference placed an individual in danger she would not otherwise have faced"). Further, the reasonable inference from these allegations—inferences that discovery will subsequently confirm—is that Andrade memorialized her interaction with Johnson, in a manner that falsely portrayed Johnson's request for disability accommodation. As with Murillo, Andrade is not entitled to qualified immunity at this stage.

(3) Officers Fierro, Delgado, Clarke and McCulloch

Mr. Johnson alleged the following unconstitutional conduct as to Officers Ferguson, Fierro, Delgado, Clarke, and McCulloch:

> 64. 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. Plaintiff asked them to call an ambulance, and they refused.
>
> 65. Based on the physical abuse Plaintiff had experienced the prior day, he was afraid to interact directly with the CBP agents, so he locked his doors and rolled up his windows out of fear of being beat up again.
>
> * * *
>
> 67. After the CBP agents—including Defendant Carlos Fierro, Defendant John Delgado, Defendant Quintin Clarke, and Defendant

> Chantelle McCulloch—talked Plaintiff 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.
>
> 68. The agents further informed Plaintiff that if he insisted on taking an ambulance to the hospital that they would be required to call CPS and put his daughter into foster care since he could not care for her and she would not be allowed to accompany him in the ambulance.

SAC, at 11-12.

These allegations clearly state a constitutional violation. Mr. Johnson was in the midst of an active anxiety attack, a result of his military-related disability. While Johnson was in the midst of this medical crisis, Fierro, Delgado, Clarke, and McCulloch refused to seek medical assistance for this individual, even though Johnson was in a position where he was unable to help himself. *Cf.* *Wood v. Ostrander*, 879 F.2d 583, 587 (9th Cir. 1989). In fact, they actively and intentionally exacerbated the medical condition, causing harm as much as if they had taken their batons and beaten Johnson. That law enforcement agents should not exacerbate an injured person's injuries is a well-established and, frankly, common sense rule. "No reasonable officer would intentionally inflict plain or exacerbate a known injury to an injured suspect. The duty not to do so is clearly established." *Bailey v. Oakdale Police Dep't*, 2008 WL 298864, *slip op.* at 15 (E.D. Cal. Feb. 1, 2008).

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Officers Clarke, Fierro, Delgado, and McCulloch also violated Mr. Johnson's Fifth and Fourteenth Amendment rights when, on November 1, 2016, when they seized Plaintiff's black 2009 Mercedes Benz E350 without due process of law. *See SAC*, ¶ 96. Mr. Johnson was doing nothing more than seeking an accommodation for his disability, which he had a statutory right to do. Indeed, although it took CBP over two years to do so, it ultimately granted Johnson the accommodation that he was entitled to. It was well established that the taking of property without due process of law constitutes a violation of the Fifth and Fourteenth Amendments. These officers are not entitled to qualified immunity.

(4) Officer Ferguson

On September 23, 2016, Officer Ferguson placed Mr. Johnson in handcuffs, and then sat him on a bench, not free to leave, for three full hours. Notwithstanding Ferguson's claim that he was not "arresting" Johnson, leaving him in handcuffs on a bench for hours is the very definition of an arrest. "In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement' of the degree associated with formal arrest." *Dyer v. Hornbeck*, 706 F.3d 1134, 1138 (9th Cir. 2013) (quoting *Stansbury*, 511 U.S. at 322); *see also Washington v. Lambert*, 98 F.3d 1181, 1187 (9th Cir.1996) ("Under ordinary circumstances, when the police

have only reasonable suspicion to make an investigatory stop, drawing weapons and using handcuffs and other restraints will violate the Fourth Amendment").

Leaving Johnson in handcuffs, certainly not free to move, constituted an arrest, and one certainly made without probable cause. The right to be free from arrest without probable cause has been established since the enactment of our Constitution. Thus, Officer Ferguson is not entitled to qualified immunity.

4. Conclusion

For the reasons set forth herein, Plaintiff Carey Johnson respectfully requests that this Court deny Defendants' Partial Motion to Dismiss Plaintiffs' Second Amended Complaint.

RESPECTFULLY SUBMITTED: April 6, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2020, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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