UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

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| JESSE DREWNIAK,<br><br>Plaintiff,<br><br>v.<br><br>U.S. CUSTOMS AND BORDER PROTECTION, et al.,<br><br>Defendants. | ) | No. 1:20-cv-852-LM |

INDIVIDUAL CAPACITY DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

## I. INTRODUCTION

Defendants, United States Border Patrol Agents Jeremy Forkey and Mark Qualter, sued in their individual capacities, submit this memorandum in support of their motion to dismiss the personal liability damage claims against them, described in Count One of the Complaint.

For the reasons described below, the Court should dismiss Count One pursuant to Rule 12(b)(6), because the complaint seeks to extend a damages remedy to a new context and special factors counsel against implying a remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The Court should also dismiss the damages claims against Agents Forkey and Qualter for failure to state a claim, or in the alternative grant them summary judgment, because they are entitled to qualified immunity.

Finally, Agent Forkey is also entitled to summary judgment on the basis of qualified immunity because he did not personally participate in any of the alleged acts of constitutional violations. The facts establish that he was not present at the border patrol checkpoint that is the

subject of this action, but was, instead, nearly 100 miles away, in an entirely different state on the day of the checkpoint.

## II. LEGAL STANDARD OF REVIEW UNDER RULE 12(b)(6)

Under Rule 12(b)(6), this Court may dismiss all or part of a complaint that does not allege "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). While engaging in this analysis, a court should accept as true all well-pled allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2009). At the same time, though, a court need not accept "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements[.]" *Iqbal*, 556 U.S. at 678. If, after drawing on its "judicial experience and common sense," the court finds that it cannot "infer more than the mere possibility of misconduct, the complaint has alleged--but it has not 'show[n]'--'that the pleader is entitled to relief,'" and the court should dismiss the complaint under Rule 12(b)(6). *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

## III. LEGAL STANDARD UNDER RULE 56.

Pursuant to Federal Rule of Civil Procedure 56(c), a summary judgment motion should be granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits, show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "Genuine," in the context of Rule 56(c), "means that the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party." *Rodriguez-Pinto v. Tirado-Delgado*, 982 F.2d 34, 38 (1st Cir. 1993) (quoting *United States v. One Parcel of Real Property*, 960 F.2d 200, 204 (1st Cir. 1992)).

"Material," in the context of Rule 56(c), means that the fact has "the potential to affect the outcome of the suit under the applicable law." *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993).

Courts faced with a motion for summary judgment should read the record "in the light most flattering to the nonmovant and indulg[e] all reasonable inferences in that party's favor." *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 581 (1st Cir. 1994). The moving party has the initial burden of demonstrating the absence of an issue of material fact necessitating a trial. *Trans-Spec Truck Serv., Inc. v. Caterpillar Inc.*, 524 F.3d 315, 328 (1st Cir. 2008). If the moving party carries the burden, the party opposing the motion must present affirmative evidence showing that a factual dispute exists. *Id.*

## IV. SPECIFIC ALLEGATIONS OF CONSTITUTIONAL VIOLATIONS

The plaintiff alleges that on August 26, 2017, he was a passenger in a vehicle traveling on I-93 South in near Woodstock, New Hampshire, when the vehicle approached a temporary border checkpoint operated by United States Border Patrol. Document Number (DN) 1 at 19. While the vehicle was waiting for primary inspection at the checkpoint, a Border Patrol agent approached the vehicle with his canine partner. *Id*. at 20. Because the canine alerted to the vehicle, the agent directed the vehicle to a secondary inspection area. *Id*. At the secondary inspection area the plaintiff, another passenger and the driver exited the vehicle, while Agent Qualter and the canine inspected the interior of the vehicle. *Id*. at 21. An agent shouted an obscenity at the plaintiff, asking where the drugs were.[1] The plaintiff retrieved a container with

[1] The Complaint does not definitely impute the statement to Agent Qualter, but says it was he "on information and belief," a hedge the Complaint uses more than once. DN 1 at 21. Another court has commented, "[T]he preamble 'on information and belief' is a device frequently used by lawyers to signal that they rely on second-hand information to make a good-faith allegation of fact (internal citations omitted). This practice is permissible when pleading is governed by

a small quantity of hash oil inside the passenger compartment. *Id.* Agent Qualter turned over the hash oil to a Woodstock Police officer, who, along with other members of his department, was present at the checkpoint. *Id.*

The plaintiff was charged with a violation of state drug laws for possession of the hash oil. DN 1 at 22. At a suppression hearing in state court, the plaintiff and others separately charged with drug possession as a result of checkpoint inspections, argued that the checkpoint was unconstitutional because its primary purpose was drug interdiction or enforcement, rather than immigration enforcement. *Id*. at 22-23. The state court judge agreed, basing his decision in large part on the cooperation between local law enforcement and Border Patrol for checkpoint operations. *Id*. at 23-24. As part of his decision he ruled that Border Patrol agents should not have turned over drug evidence to local officers for use in state prosecutions. *Id*. A free air dog sniff is not a search under the federal constitution, but it is a search under the New Hampshire state constitution and requires probable cause. *Id*. at 24.

The plaintiff alleges that Customs and Border Protection ("CBP") and Border Patrol have a practice and/or custom of conducting unconstitutional border checkpoints. DN 1 at 29. In Count One, he alleges that Agent Qualter "erected a warrantless checkpoint in August 2017 for the primary purpose of drug interdiction, and searched and seized Mr. Drewniak as part of this unconstitutional checkpoint." *Id*. He names Agent Forkey as participating in the search, based on Border Patrol "records." *Id*. at 2.

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Fed.R.Civ.P. 8(a), as is the situation here . . . [i]t does, however, signal that the allegations against [the defendant] are tenuous at best" (internal citation omitted). Raub v. Bowen, 960 F. Supp. 2d 602, 615 (E.D. Va. 2013).

## V. THIS COURT SHOULD REJECT THE PLAINTIFF'S INVITATION TO EXTEND *BIVENS* TO CHALLENGE THE CONSTITUTIONALITY OF TEMPORARY BORDER CHECKPOINTS

The plaintiff attempts to bring a judicially-implied cause of action under *Bivens* against Agents Forkey and Qualter, seeking to recover from their personal assets for policy decisions of the United States Border Patrol; Supreme Court precedent supports no such claim. *Zigler v. Abbasi*, ___ U.S. ___, 137 S. Ct. 1843, 1861 (2017). This case presents a new context because Plaintiff's claims bear little resemblance to the three *Bivens* claims the Supreme Court has approved in the past. And the Supreme Court has been exceedingly skeptical of any invitation to invent new *Bivens* claims, as the plaintiff invites this Court to do. *Id.* at 1860. Simply put, "a *Bivens* action is not 'a proper vehicle for altering an entity's policy,'" and this Court should leave to Congress the decision whether to authorize a damages action. *Id.* (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)).

The Supreme Court has clearly and deliberately limited *Bivens* actions. *See, e.g., Abbasi*, 137 S. Ct. at 1861. "It is not necessarily a judicial function to establish whole categories of cases in which federal officers must defend against personal liability claims in the complex sphere of litigation, with all of its burdens on some and benefits to others." *Id.* at 1858. Rather, when 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 - (quoting *Bush v. Lucas*, 462 U.S. 367, 380 (1983)) (internal quotations omitted). As the Supreme Court's "precedents now instruct," Congress is in a "better position" than the Judiciary "to consider if 'the public interest would be served' by imposing a 'new substantive legal liability.'" *Id.* at 1857-58 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 426-27 (1988)).

Congress has *never* provided a statutory damages remedy for claims that the acts of individual federal officers or entities were unconstitutional. It was not until 1971 that the Supreme Court recognized an implied right of action for money damages against federal law enforcement officials in their personal capacities for a violation of the Constitution. *Bivens*, 403 U.S. at 389.

In the nearly 50 years since *Bivens* was decided, the Supreme Court has authorized an implied cause of action under the Constitution on only two other occasions, and has otherwise "consistently refused to extend *Bivens* to any new context or new category of defendants." 137 S. Ct. at 1857 (citing cases). In recent years, "the Court has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Id.* (quoting *Iqbal*, 556 U.S. at 675). It is so disfavored, in the Court's view, that "it is possible that the analysis in the Court's three *Bivens* cases [*Bivens*, *Davis v. Passman*, 442 U.S. 228 (1979) and *Carlson v. Green*, 446 U.S. 14 (1980)] might have been different if they were decided today." *Abbasi*, 137 S. Ct. at 1856. At bottom, "[t]he question is 'who should decide' whether to provide for a damages remedy, Congress or the courts?'" *Id.* at 1857 (quoting *Bush*, 462 U.S. at 380). "The answer most often will be Congress." *Id.*

When a plaintiff invokes *Bivens*, the "first question a court must ask" is whether "the case presents a new *Bivens* context." *Abassi*, 137 S. Ct. at 1859, 1864. The "new context" inquiry restricts the established causes of action within narrow boundaries, such that "[i]f the case is different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court," the context is new. *Id.* at 1859-60. The three Supreme Court cases comprising the universe of established *Bivens* contexts are *Bivens* itself, which recognized a cause of action under the Fourth Amendment against law enforcement officers for "handcuffing a man in his own home

without a warrant;" *Davis*, 442 U.S. at 228, a Fifth Amendment gender discrimination claim "against a congressman for firing his female secretary;] and *Carlson*, 466 U.S. at 14, an Eighth Amendment claim against prison officials for failing to provide an inmate with medical care. *See Abbasi*, 137 S. Ct. at 1860. Furthermore, the Court explained that a case may meaningfully differ from *Bivens*, *Davis*, or *Carlson* (thus making for a new context) even where the difference appears "small, at least in practical terms." *Id.* at 1864, 1865.

Once the court is satisfied that a claim constitutes a new *Bivens* context, it must then apply the two-step inquiry from *Wilkie v. Robbins*, 551 U.S. 537 (2007). The first question in the *Wilkie* test is whether there is "any alternative, existing process for protecting" a plaintiff's interests. *Id.* at 550. If an alternative process is available, the implication is that Congress "expected the Judiciary to stay its *Bivens* hand" and not infer an additional damages remedy. *Id.* at 554; *see also Abbasi*, 137 S. Ct. at 1863. It is immaterial whether the existing scheme remedies the precise harm claimed by the potential *Bivens* plaintiff; if some alternative process exists, "a *Bivens* remedy usually does not." *Abbasi*, 137 S. Ct. at 1863; *see also United States v. Stanley*, 483 U.S. 669, 683 (1987) ("[I]t is irrelevant to a 'special factors' analysis whether the laws currently on the books afford [plaintiff] an 'adequate' federal remedy for his injuries"). Even if there is no alternative process available to a plaintiff, the second prong of the *Wilkie* analysis may still foreclose a *Bivens* expansion if there are any "special factors counseling hesitation." At this second step, "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." *Abbasi*, 137 S. Ct. at 1857-58. As detailed below, Plaintiff's *Bivens* claims presents a new context, and implicates special factors that counsel against the expansion of *Bivens*.

A. The Plaintiff's Claim Involves a New Context

Of the three *Bivens* cases previously decided by the Supreme Court, this case bears the closest resemblance to *Bivens* itself, which also involved a constitutional claim under the Fourth Amendment. There are, however, important differences such that this case plainly presents a new context. In the original *Bivens* case, narcotics agents purportedly forced their way into the plaintiff's residence without a warrant or other apparent legal authority, handcuffed him in front of his wife and children, "searched the apartment from stem to stern," and threatened to arrest the entire family. 403 U.S. at 389. Whereas *Bivens* involved a group of federal agents acting on their own without the benefit of any judicial or supervisory review, the claims in this case are set within the context of an organized Border Patrol checkpoint, sanctioned by agency policy. DN 1, 1-19 (discussing CBP checkpoint policy).

Moreover, this case involves other "special factors" that the Supreme Court has not previously addressed in *Bivens*, *Davis*, or *Carlson* and that warrant a finding of new context. *Abbasi*, 137 S. Ct. at 1860. These special factors include the border security context, in which the judiciary – including the Supreme Court - has demonstrated particular deference to the political branches.

In considering the plaintiff's claim, this Court *must* address the threshold issue of whether to imply a remedy at all. *Hernandez v. Mesa*, ___ U.S. ___, 137 S. Ct. 2003, 2006 (2017). That, in turn, involves asking: (1) whether "alternative, existing process[es]" protect the right at issue; and (2) whether any other "special factors counsel[] hesitation" in implying a damages remedy. *Abbasi*, 137 S. Ct. at 1858 (quoting *Wilkie*, 551 U.S. at 550). As shown below, the answer to both questions is yes-- the plaintiff has alternative avenues to obtain relief *and* there are "special factors" counseling against recognizing the *Bivens* remedy the plaintiff requests.

B. The Court Should Not Expand into this New Context.

Because these claims would extend *Bivens* into a new context, the Court must next consider whether to expand *Bivens* and recognize a new implied cause of action under the Constitution. *Abbasi*, 137 S. Ct. at 1860. That is a case-specific inquiry, and a wide range of considerations may render the extension of *Bivens* inadvisable in a particular instance. *Id.* at 1860-63. Two basic questions must be answered in this analysis: (1) whether Congress has provided "*any* alternative, existing process for protecting" a plaintiff's interests; and (2) even in the absence of such processes, whether any other "special factors counsel[] hesitation" in implying a *Bivens* remedy. *Wilkie*, 551 U.S. at 550 (emphasis added). Because Plaintiff has alternative means of safeguarding his constitutional interests and there are special factors which make implying a *Bivens* remedy inappropriate under the specific circumstances of this case, the Court should decline to expand *Bivens* into this new context.

1. Plaintiff has access to an alternative existing process.

The availability of alternative processes, by itself, often precludes a *Bivens* remedy, *Abbasi*, 137 S. Ct. at 1865, and the same holds true here. Such alternative processes may include, among other things, a writ of habeas corpus, injunction, or "some other form of equitable relief." *Id.*

The Court should decline to imply a *Bivens* remedy in this case because the plaintiff has "available to [him] 'other alternative forms of judicial relief,'" including claims for injunctive relief and "when alternative methods of relief are available, a *Bivens* remedy usually is not." *Abbasi*, 137 S. Ct. at 1863 (quoting *Minneci v. Pollard*, 565 U.S. 118, 124 (2012)). "Under this rationale, the Supreme Court has declined to extend *Bivens* where Congress has provided at least a partial remedy via statute . . . as well as where other causes of action provide redress." *Liff v.*

*Office of Inspector Gen. for U.S. Dep't of Labor*, 881 F.3d 912, 918 (D.C. Cir. 2018) (internal citations omitted). The fact that a constitutional tort claim might offer "other or different relief" from existing avenues of redress does not mean that the Court should create a *Bivens*-type remedy. *Gonzalez v. Velez*, 864 F.3d 45, 55 (1st Cir. 2017). Indeed, where a plaintiff has an alternative process, the Court has "*consistently* rejected invitations to extend *Bivens*." *Malesko*, 534 U.S. at 70 (emphasis added).

Thus, the availability of an avenue to pursue injunctive relief is "of central importance" in deciding whether to imply a *Bivens* remedy. *Abbasi*, 137 S. Ct. at 1862; *see also Malesko*, 534 U.S. at 74 (explaining plaintiff was not "in search of a remedy as in *Bivens* and *Davis*" and refusing to imply one in part because plaintiff could seek an injunction).

Not only are other equitable remedies available to the plaintiff, he is actively pursuing them: The second count of the complaint is a claim for declaratory and injunctive relief. Indeed, Plaintiff's central grievance appears to be with the ongoing use of CBP checkpoints in the region, and the complaint expresses concern that Plaintiff could again be subject to an allegedly unlawful checkpoint in the future. Plaintiff's *Bivens* claim, however, would be unable to provide the type of prospective relief that Plaintiff seeks. Rather, his constitutional interests are more appropriately addressed by a claim for injunctive relief against the government.

Plaintiff also had the opportunity to contest the legality of the search and seizure of his person during his state court prosecution. Indeed, according to the Complaint, this very issue was litigated during the course of the state court proceedings and the Plaintiff was afforded relief when the court granted his motion to suppress and the charges against him were dismissed. Of course, the federal government is not bound by the state judge's assessment of federal constitutional law. Nevertheless, Plaintiff had a process available to him in his state prosecution

to safeguard his constitutional interests and prevent any further harm resulting from the allegedly unlawful search.

Finally, Plaintiff could pursue a claim under the Federal Tort Claims Act, which authorizes claims against the United States for the negligent or wrongful act or omission of federal employees acting within the scope of employment. *See* 28 U.S.C. § 1346(b)(1).

Because Plaintiff had alternative processes available to him to protect his constitutional interests, a *Bivens* remedy is not appropriate.

2. Special factors counsel hesitation in implying a *Bivens* remedy because *Bivens* is not an appropriate vehicle for challenging official government policy.

Even in the absence of alternative processes, special factors counsel hesitation in implying a *Bivens* claim here. First, although this case seeks personal liability damages for constitutional violations, at its essence it is a challenge to the policy and practices of the United States Customs and Border Protection and the Border Patrol. A substantial portion of the Complaint -- about a dozen pages -- takes direct aim at the agency, for example:

> The August 2017 checkpoint was pretextual where Border Patrol used the ruse of immigration enforcement to engage in general crime control. (DN 1, ¶ 6)
>
> CBP is the largest and best-funded law enforcement agency in the country. (*Id.*, ¶ 29)
>
> Over the years, Border Patrol has assume an increasing role in drug enforcement. (*Id.*, ¶ 30)
>
> Border Patrol's northern border sectors, including the Swanton sector, are responsible for a much larger percentage of Border Patrol's drug seizures. (*Id.*, ¶ 39)
>
> CBP and Border Patrol have a practice and custom of conducting unconstitutional Border Patrol checkpoints in northern New England. (*Id.*, ¶ 37)
>
> Border Patrol knew from the outset that its primary purpose would be to catch people for drug offenses. (*Id.*, ¶ 43)

> [U]nnecessary checkpoints continue. (*Id.*, ¶ *54)*
>
> [T]he August 2017 Border Patrol checkpoint violated the Fourth Amendment for two independent reasons – namely, the checkpoint (i) was for the purpose of drug interdiction, and (ii) unreasonably seized the plaintiff without a warrant or suspicion because the checkpoint's effectiveness (if any) at minimizing illegal entry from the border was outweighed by the degree of intrusion on his individual rights. (*Id.*, ¶ 110)

The Complaint also recites a litany of immaterial and inflammatory allegations about CBP -- "racial profiling [in Montana]," DN 1, ¶ 57, "CBP flew military-grade drones over protests in Minneapolis," *id.* , ¶ 30 n.2, "CBP deployed agents to Washington, D.C.," *id*., "CBP agents have been stationed as federal paramilitary forces in Portland, Oregon." *Id*.

The gravamen of the Complaint is a constitutional challenge to USBP policy, regarding where, when, and how to perform immigration checkpoints. Without being privy to any federal law enforcement intelligence regarding immigration violations, Plaintiff reasons backwards that because the checkpoint was allegedly not successful, CBP had necessarily lied about its purposes in erecting the checkpoint.

Implying a *Bivens* claim in this context creates serious risks of judicial intrusion into executive area policy. A *Bivens* action seeks damages against individual officers for their personal participation in alleged constitutional violations and is meant to deter the officer. Rather than focusing on the individual officers' actions, the Complaint erroneously imputes CBP and Border Patrol decisions to Agents Forkey and Qualter, claiming that they "erected a warrantless checkpoint in August 2017 for the primary purpose of drug interdiction . . . ." DN 1 at 29. That allegation does not meet the plausibility standards of *Iqbal*, because nowhere does the Complaint state any facts showing that Agents Forkey or Qualter "erected" the checkpoint or guided its "primary purpose." Rather, the checkpoint was a concerted agency effort by CBP.

Plaintiff's claim is, fundamentally, a challenge to CBP policy. As the Supreme Court has observed this cannot provide the grounds for a *Bivens* personal liability claim:

> If deterring the conduct of a policy-making entity was the purpose of *Bivens*, then *Meyer* [*vs. FDIC*, 510 U.S. 471 (1994)] would have implied a damages remedy against the Federal Deposit Insurance Corporation; it was after all an agency policy that led to Meyer's constitutional deprivation. But *Bivens* from its inception has been based not on that premise, but on the deterrence of individual officers who commit unconstitutional acts.

*Malesko*, 534 U.S. at 71 (citations omitted). *Bivens* remedies "have never [been] considered a proper vehicle for altering an entity's policy." *Id.* at 74. Rather, "*injunctive* relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Id.* (emphasis added). Especially where there is the potential for injunctive relief in an official capacity action, courts should be urged not to recognize *Bivens* suits that amount to an end run around the sovereignty of the United States. Nor should a plaintiff, by pleading artifice, be able to evade the Supreme Court's clear holding that special factors preclude suits against agencies in order to challenge agency policies. *See Meyer*, 510 U.S. at 486 ("An extension of *Bivens* to agencies of the Federal Government is not supported by the logic of *Bivens* itself.").

A federal agent should not have to choose between risking personal liability by abiding by whatever practice sitting officials have adopted (but with which courts may ultimately disagree), or exposing himself to official discipline for insubordination or dereliction of duty. *See, e.g., Arar v. Ashcroft*, 585 F.3d 559, 580 (2009) ("In the small number of contexts in which courts have implied a *Bivens* remedy, it has often been easy to identify both the line between constitutional and unconstitutional conduct, and the alternative course which officers should have pursued."). The Court has repeatedly cautioned against recognizing *Bivens* claims that would allow the specter of personal capacity litigation to influence the work of federal employees in this manner. *See Abbasi*, 137 S. Ct. at 1861 ("The risk of personal damages liability is more likely to

cause an official to second-guess difficult but necessary decisions concerning national-security policy."); *Wilkie*, 551 U.S. at 562 (refusing to recognize a new *Bivens* remedy because "'Congress is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act on the public's behalf'" and "can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees") (quoting *Bush*, 462 U.S. at 389, and citing *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).

Moreover, in *Abassi*, the Supreme Court confirmed that individual capacity constitutional lawsuits challenging "agency policy" raise serious separation of powers issues and practical concerns. *See Abbasi*, 137 S. Ct. at 1860. These stem from the fact that claims "call[ing] into question the formulation and implementation of a general policy" can "require inquiry and discovery into the whole course of the discussions and deliberations that led to the policies." *Id.* For example, Plaintiff's claim would necessarily lead to discovery regarding CBP's decisions regarding why and how to set up immigration checkpoints, and could lead to intrusive judicial review of immigration enforcement—an area traditionally left to the discretion of the executive branch.

The Supreme Court's recent decision in *Hernandez*, 140 S. Ct. at 735 illustrates this concern. In *Hernandez*, the Court emphasized that the immigration and border control context is a special factor because it implicates national security, explaining:

> Since 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. See *Abbasi*, 582 U.S., at ——, 137 S.Ct. at 1861 ("Judicial inquiry into the national-security realm raises 'concerns for the separation of powers' " (quoting *Christopher v. Harbury*, 536 U.S. 403, 417, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002))).

*Id. at* 746–47.

Because the Complaint seeks to extend a damages remedy to a new context and special factors counsel against implying a remedy under *Bivens*, the Court should dismiss Count One of the Complaint.

## VI. IN THE ALTERNATIVE, THE COURT SHOULD DISMISS THE CLAIMS AGAINST FORKEY AND QUALTER BECAUSE THEY ENTITLED TO QUALIFIED IMMUNITY.

### A. Qualified Immunity

Qualified immunity shields public officials from liability "insofar as their conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The Supreme Court has provided a two-part inquiry for the analysis of a qualified immunity defense. *See, e.g.*, *Pearson*, 555 U.S. at 232. A court first asks whether the facts alleged, viewed in the light most favorable to the plaintiff, establish that the official's conduct violated a constitutional right. *Id.* (citing *Saucier v. Katz*, 533 U.S. 194 (2001)). Next, the court must consider whether the constitutional right at issue was "clearly established" at the time of the alleged violation. *Id*. Courts may "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 236. To determine whether qualified immunity applies, the Court considers whether a public official has violated a constitutionally protected right and whether the particular right that the official violated was clearly established at the time of the violation. Whether a right is "clearly established" entails assessing "(1) 'the clarity of the law at the time of the alleged civil rights violation' and (2) whether, on the facts of the case, 'a reasonable defendant would have understood that his conduct violated the Plaintiffs' constitutional rights.'"[2] *Estrada v. Rhode*

[2] After *Pearson*, the analysis no longer has to be conducted in this strict procedural order.

*Island*, 594 F.3d 56, 63 (1st Cir. 2010) (quoting *Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009)). "'[T]o overcome qualified immunity, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "Thus, if a reasonable official would not have understood that his conduct violated Plaintiffs' constitutional rights, we must grant him qualified immunity." *Id.* This analysis is fact specific. *Id.*

"The purpose of qualified immunity is to protect reasonable, if mistaken, decision making by government officials, and it does not matter whether the mistake is related to broad principle or specific application." *Lopez-Quinones v. Puerto Rico National Guard*, 526 F.3d 23, 27 (1st Cir. 2008) (internal citation omitted). The shield provided to government officials by qualified immunity is broad: it protects from suit "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The aim of the qualified immunity doctrine is "to avoid the chilling effect of second-guessing where the officers, acting in the heat of events, made a defensible (albeit imperfect) judgment." *Statchen v. Palmer*, 623 F.3d 15, 18 (1st Cir. 2010). Because the doctrine serves as "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." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original). Thus, to overcome a qualified immunity defense, the plaintiff must show not only that the defendants violated his Constitutional rights, but that the violation "cannot in any way, shape, or form be justified" under the pertinent facts. *Morelli v. Webster*, 552 F.3d 12, 24 (1st Cir. 2009). Further, a plaintiff bringing a *Bivens* action must establish "that *each* Government-official defendant, through the official's *own individual* actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676 (emphasis added).

B. Statement of Additional Material Facts.

The Beecher Falls, Vermont, Border Patrol Station (Beecher Falls Station), which is under the oversight of Chief Patrol Agent Robert N. Garcia, is responsible for patrolling and conducting immigration enforcement activities in the State of New Hampshire. Declaration of Robert N. Garcia ("Garcia Dec."), attached as Exhibit A, ¶ 3. CBP's Swanton Sector includes eight Border Patrol stations and 295 miles of United States and Canadian border in the states of New York, Vermont, and New Hampshire. *Id.*, ¶ 2. Within the Swanton Sector, temporary immigration checkpoints are used to carry out the Border Patrol's operational mission of immigration enforcement. *Id.*, ¶ 4. Checkpoints along the northern border are often located on interstate highways and roadways that serve as main thoroughfares from the border to major cities in the interior such as Boston and New York City. *Id.*

Typically, border patrol checkpoints include both a primary inspection area and a secondary inspection area. Garcia Dec., ¶ 5. Vehicles that enter the checkpoint are processed through the primary inspection area where they are asked brief questions about their immigration status, and the vehicle may be subject to a free-air canine sniff by Border Patrol canines. *Id.* All U.S. Border Patrol canines undergo rigorous training and receive certification as dual detection canines that are able to identify the presence of concealed humans and narcotics. *Id.* During the checkpoint in question, Agent Qualter was accompanied by his canine, Marian, who was trained and certified as a dual detection canine. Declaration of Mark Qualter ("Qualter Dec."), attached as Exhibit B, ¶ 6.

Certain vehicles and individuals will be selected to undergo a more thorough secondary inspection following the primary inspection. Garcia Dec., ¶ 6. Referral for secondary inspection occurs when Border Patrol agents seek to conduct a full immigration inspection or for a potential

violation of some other law, including customs, narcotics or other criminal violations. *Id.* During a secondary inspection, Border Patrol agents have the authority to: (a) ask questions; (b) request to inspect immigration documents; (c) make plain view observations; (d) conduct searches of a person or a vehicle; (e) perform exterior canine sniffs of a vehicle; (f) press down on the trunk of the vehicle; (g) tap exterior fuel tanks; and/or (h) take any other actions necessary to confirm or dispel violations of the law. *Id.*

From August 25-27, 2017, CBP conducted immigration checkpoints in Woodstock, New Hampshire ("Woodstock Checkpoint). Garcia Dec., ¶ 8. The operational plans for these checkpoints were reviewed by CBP headquarters and management, and also underwent review and approval by CBP's legal department. Qualter Dec., ¶ 4. On August 26, 2017, Plaintiff was a passenger in a vehicle that was stopped at the Woodstock Checkpoint. DN 1, ¶ 4. During the August 26, 2017 checkpoint, Agents Forkey and Qualter had two very different roles.

Agent Forkey was never physically at the checkpoint on August 26, 2017. Declaration of Jeremy Forkey ("Forkey Dec."), attached as Exhibit C, ¶ 3. To the contrary, he was actually about 100 miles away at the Border Patrol Station in Beecher Falls, Vermont. *Id.* Forkey was assigned to remain at the station during the checkpoint because he was responsible for processing agency forms and entering information regarding any seizures that occurred into an agency database. *Id.*, ¶ 4. Specifically, when a CBP seizure occurs, the seizing officer must complete an agency form known as an I-44, which contains all of the details of the seizure. *Id.*, ¶ 5. However, the agents at a temporary border checkpoint, such as the one on August 26, 2017, do not have access to computer-generated I-44 forms. *Id.* Therefore, the agents at the Woodstock Checkpoint would sent Agent Forkey texts, emails, or faxes sent from a local police department with the narrative and other particulars of the seizure. *Id.* Agent Forkey would then prepare the

I-44 form with the information provided by the field agents, sign the form as the approving officer, and enter the appropriate information into CBP's seized asset database. *Id.* When the field agents returned to the Beecher Falls station, they would sign the I-44 and it would be appropriately filed. *Id.* Agent Forkey's signature on the I-44 was in no way an authorization to conduct the seizure or an indication that he participated in the seizure in any way. *Id.* Instead, it was a post-seizure recognition that the seizure occurred and that the I-44 was appropriately completed. *Id.* To the extent that Plaintiff believes Agent Forkey was personally present during the checkpoint on August 26 2017, he is mistaken. *Id.*

Agent Qualter was present at the August 26, 2017 checkpoint in Woodstock. Qualter Dec., ¶ 2. Although Agent Qualter was not involved with selecting the time or place of the checkpoint, he did review the operations plan for the checkpoint, which he knew to have undergone legal sufficiency review by the Office of the Assistant Chief Counsel, Boston, and additionally to have been reviewed and approved by both Swanton Sector management and USBP Headquarters. *Id.,* ¶ 4. Agent Qualter understood the purpose of the checkpoint to be immigration enforcement, and had no reason to believe that the checkpoint was in anyway unlawful or unauthorized. *Id.*

Although Agent Qualter has no present recollection of his interaction with Plaintiff on August 26, 2017, based on his training and usual practice and procedure, he understands how these checkpoints generally operate. Qualter Dec., ¶ 5. Specifically, Agent Qualter knows that the checkpoint in Woodstock is set up such that traffic is funneled into two lanes approaching the checkpoint, known as primary traffic. *Id.,* ¶ 6. The primary traffic is subjected to a free-air sniff by a trained canine team. The free air sniff of Mr. Drewniak's vehicle was done by Agent Qualter and his canine partner, Marian. *Id.* When Marian alerts to the presence of concealed

humans and/or narcotics, he will snap his head to the left in an attempt to locate more of the scent he has detected. *Id.* Once Marian alerts on something during the primary inspection, Agent Qualter will notify the secondary agent at the checkpoint that the vehicle requires further screening. *Id.*

During secondary screening, a vehicle's occupants are questioned by the secondary agent for the purposes of confirming or dispelling citizenship. Qualter Dec., ¶ 8. No questions are asked about controlled substances. *Id.* During this secondary inspection, a second search is done by the same canine that originally alerted on the vehicle. *Id.* Again, Agent Qualter does not specifically recall his interaction with Plaintiff on August 26, 2017, but he is certain that if Plaintiff had been uncooperative or if there were anything out of the ordinary about the encounter, Agent Qualter would have noted it in the narrative section of the I-44. *Id.*, ¶ 10. The I-44 for this encounter does not reflect any such information. *Id.* and at Attachment 1.

D. Agents Forkey and Qualter are Entitled to Qualified Immunity.

1. The individual defendants are entitled to qualified immunity because Plaintiff has failed to state a claim upon which relief can be granted.

Even assuming Plaintiff's allegations are true, Agents Forkey and Qualter are entitled to qualified immunity in this action, and this Court should therefore dismiss the *Bivens* claims filed against them. As set forth above, to overcome a qualified immunity defense, the plaintiff must show not only that the defendants violated his constitutional rights, but that the violation "cannot in any way, shape or form be justified" under the pertinent facts. *Morelli*, 552 F.3d at 24. Plaintiff has not done that in this case, and the Court should therefore dismiss the claims against Agents Forkey and Qualter.

Congress has entrusted the USBP with broad search and seizure powers. 8 U.S.C. § 1357. In particular, a Border Patrol agent is authorized without a warrant to "board and search for aliens" in "any vehicle" as long as the vehicle is "within a reasonable distance from any external boundary of the United States." *Id.* Federal regulations define "external boundary" to include "the land boundaries and the territorial sea of the United States extending 12 nautical miles from the baselines of the United States determined in accordance with international law." 8 C.F.R. § 287.1(a)(1). "Reasonable distance" is defined as "within 100 air miles from any external boundary of the United States or any shorter distance … fixed by the Chief Patrol Agent" 8 C.F.R. § 287.1(a)(2). Plaintiff makes no allegation in his Complaint that defendants were acting outside of their jurisdictional authority on the date he was stopped at the checkpoint, and indeed admits that the checkpoint in question was erected within 100 miles of the Canadian border. DN 1-1 at 3 ("There is no dispute that the checkpoints in these matters were within that zone.").

Immigration checkpoints serve as a critical enforcement tool used by USBP to identify and apprehend aliens who are not lawfully present in the United States. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976) (upholding validity of immigration checkpoint and recognizing "that maintenance of a traffic-checkpoint program in the interior is necessary because the flow of illegal aliens cannot be controlled effectively at the border."). The purpose of an immigration checkpoint is to verify the immigration and naturalization status of the passengers of vehicles passing through a checkpoint. For this reason, the Supreme Court has held that "stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant." *Id.* At the

checkpoint, occupants of vehicles are asked questions regarding their citizenship status. Qualter Dec., ¶ 8.

At an immigration checkpoint, Border Patrol agents may conduct a warrantless, suspicion-less canine sniff of the exterior of any vehicle. *See Edmond*, 531 U.S. at 40 (explaining that an exterior canine sniff of a vehicle is permissible, in part, because it does not require entry into the vehicle). Such "free air" sniffs typically occur at the pre-primary and primary inspection areas of the checkpoint. Referrals of vehicles for secondary inspection for a non-immigration purpose require articulable suspicion or "a minimal showing of suspicion" of criminal wrongdoing. *United States v. Taylor*, 934 F.2d 218, 221 (9th Cir. 1991). Given that an exterior canine sniff is not considered a "search" for Fourth Amendment purposes, Border Patrol agents may conduct the sniff even without probable cause or consent. *See generally United States v. Place*, 462 U.S. 696 (1983). Probable cause or consent, however, is required for a canine to conduct a sniff on the interior of the vehicle. *See generally United States v. Ortiz*, 422 U.S. 891 (1975). If an exterior canine sniff results in a positive alert, this fact is sufficient to establish probable cause to conduct an interior search. *United States v. Dovali-Avila*, 895 F.2d 206 (5th Cir. 1990) (Border Patrol canine "trained to take a particular position or stance" only when detecting drugs or concealed humans); *United States v. Outlaw*, 134 F. Supp. 2d 807 (W.D. Tex. 2001), *aff'd*, 319 F.3d 701 (5th Cir. 2003) (Border Patrol need only prove that the canine unit was trained and certified).

In this case, Plaintiff asserts that the actions of Agents Forkey and Qualter were unconstitutional because he alleges that the primary purpose of the checkpoint was something other than immigration enforcement. Although the constitutional protections against unreasonable searches and seizures are clearly established, as set forth above the Supreme Court

has ruled that immigration checkpoints are permissible. Any question regarding the primary purpose of a checkpoint is only determined after a fact-intensive analysis. By virtue of the fact that such a determination requires a court to consider, review, and weigh evidence, such a constitutional standard cannot be considered "clearly established." Moreover, Agents Forkey and Qualter's conduct would be considered objectively reasonable because Plaintiff has not plausibly alleged that they believed the immigration purpose of the checkpoint was pretext to assist local law enforcement in drug enforcement, or that Agents Forkey and Qualter had any involvement in the decision to erect the checkpoint. Indeed, the Complaint states that the agents in fact asked everyone in the vehicle if they were U.S. citizens.

Simply stated, Plaintiff does not and cannot establish that Agents Forkey and Qualter took any action against him that violated his constitutional rights. "[B]are assertions" that "amount to nothing more than a formulaic recitation of the elements of a constitutional discrimination claim" are insufficient to state a claim of a constitutional violation, and do not defeat a claim of qualified immunity. *Iqbal*, 129 S. Ct. at 678, 680-81.

At its core, Plaintiff's complaint does not appear to challenge the specific conduct of the individually named defendants as constitutional violations, but rather to allege that the primary purpose of the checkpoint was for drug enforcement, not immigration enforcement, and therefore the checkpoint itself was unconstitutional. The proper avenue to challenge the legality of the checkpoint, however, is through a request for an injunction, which Plaintiff has included in his Complaint. Plaintiff is simply unable to show that Agents Forkey and Qualter had direct, personal participation in the planning of the checkpoint, or some sufficient causal connection between their conduct and the alleged constitutional violation. Agents Forkey and Qualter are

therefore entitled to qualified immunity in this action. As a result, the Court should dismiss the *Bivens* claims against Agents Forkey and Qualter.

2. In the alternative, the agents are entitled to summary judgment on the basis of qualified immunity.

Agent Qualter believed that the primary purpose of the checkpoint was immigration enforcement, and knew that the operations plan for this checkpoint underwent legal sufficiency review by the Office of the Assistant Chief Counsel, Boston, and additionally was reviewed and approved by both Swanton Sector management and USBP Headquarters. Qualter Dec., ¶ 4. Agent Qualter was simply performing the job he was required to do, and complying with an operational plan that went through several layers of agency review and approval for legal sufficiency. A reasonable person would have no reason to believe that following the operations plan, after it had undergone several layers of review for legal sufficiency, would violate Mr. Drewniak's clearly established constitutional rights. Thus, Agent Qualter is entitled to summary judgment as he is entitled to qualified immunity in this action.

As set forth above, when Agent Qualter's canine, Marian, alerts to the presence of concealed humans or controlled substances, he will snap his head to the left and attempt to locate more of the scent he has identified. Qualter Dec., ¶ 6. At this point, Agent Qualter notifies the secondary agent at the checkpoint that a secondary inspection is necessary. *Id.* During a secondary inspection of a vehicle at an immigration checkpoint, Border Patrol agents may also conduct a further canine sniff of the exterior of the vehicle. S*ee United States v. Ventura*, 447 F.3d 375 (5th Cir. 2006) (Border Patrol canines are trained to simultaneously detect hidden people and drugs at checkpoints). On the day in question, Agent Qualter was only doing what he was legally entitled to do. By following clearly established CBP protocols, which have been

upheld in numerous courts, it cannot be said that Agent Qualter could have reasonably believed he was violating any clearly established constitutional rights of Mr. Drewniak.

Further, especially as it relates to Agent Forkey who was nowhere near the checkpoint on the day in question, Forkey Dec., ¶ 3, a *Bivens* action lies against a defendant only when the plaintiff can show the defendant's personal involvement in the constitutional violation. *See, e.g., id.* 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."). Agent Forkey was nowhere near the checkpoint on the day that Plaintiff was stopped, and had no personal involvement in his search and the ultimate seizure of narcotics. Forkey Dec., ¶¶ 3, 7. Thus, it cannot be established that Agent Forkey, through his own actions, violated the clearly established constitutional rights of Mr. Drewniak at any time. Therefore, he is entitled to summary judgment on the basis of qualified immunity.

3. Agent Forkey is also entitled to summary judgment on the basis of qualified immunity because he was not physically present at the checkpoint and had no interaction with the plaintiff.

Plaintiff claims that "Border Patrol records indicate that the agents directly involved in this search and seizure were Defendants Mark A. Qualter and Jeremy Forkey." DN 1, ¶ 4. However, as set forth above, this assertion is simply incorrect, and Agent Forkey was never at the checkpoint in Woodstock on August 26, 2017. Forkey Dec., ¶ 3. Additionally, Forkey was not personally involved in the determination of where the checkpoint in question would be placed. *See* Undisputed Material Facts, *supra*. During the August 26, 2017 Woodstock Checkpoint, Forkey was assigned to remain at the Beecher Falls station, a location nearly 100 miles from the checkpoint. *Id.* When CBP agents seize property from individuals, they must complete an I-44 form containing the details of the seizure. *Id.* Agents at the site of a

checkpoint rarely have access to computers to complete the I-44, however. *Id.* As a result, Forkey was assigned to remain at the Beecher Falls, Vermont, station, responsible for preparing the I-44 form, tracking any seizures that might occur at the checkpoint and entering the relevant information into CBP's seized asset database. *Id.*

When the seizing agent returned to the Beecher Falls station, they would sign and file the I-44 form. Undisputed Material Facts, *supra*. Agent Forkey's signature on the I-44 form was not in any way an authorization to conduct the seizure or an indication that he participated in the seizure in any way. *Id.* All actions taken by Agent Forkey with respect to this, and any other seizures made during the August 26, 2017 checkpoint was done post-seizure. *Id.*

This Court should grant summary judgment to Agent Forkey based on the fact that he was nowhere near the immigration checkpoint in Woodstock, New Hampshire on August 26, 2017. Although Plaintiff alleges that Forkey was "directly involved" in the seizure that is the subject of this action, the facts prove otherwise, as set forth in his attached declaration. At the time of the seizure, Forkey was in fact nearly 100 miles away, in a different state, at the Beecher Falls CBP station, where he completed paperwork relative to the seizure of Plaintiff's property after the seizure had been completed. Given these facts, the Court should enter summary judgment in favor of Agent Forkey and dismiss the claims against him.

## VII. CONCLUSION

For the foregoing reasons, defendants Jeremy Forkey and Mark Qualter respectfully request that the Court dismiss the *Bivens* actions against them pursuant to Rule 12(b)(6) because no *Bivens* remedy is available and because they are each entitled to the defense of qualified immunity. Alternatively, Forkey and Qualter are entitled to summary judgment on the issue of

qualified immunity. Finally, Agent Forkey is entitled to summary judgment because he was not physically at checkpoint and did not interact with Plaintiff.

Respectfully submitted,

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