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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CAREY L. JOHNSON,

Plaintiff,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants.

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

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

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

There were two principal aspects of the individually-named defendants' motion to dismiss. First, relying on *Abbasi v. Ziglar*, 137 S.Ct 1843 (decided June 19, 2017) and especially *Hernandez v. Mesa*, 140 S. Ct. 735 (decided February 25, 2020), all sixteen Customs and Border Protection officer defendants in this case moved to dismiss the *Bivens* claims against them. The argument: Johnson's claims sought to extend the "disfavored" *Bivens* remedy into a meaningfully different context, and "special factors" – particularly, national/border security and separation of powers concerns – counselled against allowing those claims to proceed.

In addition, even if this were not the case, the allegations of Plaintiff Carey L Johnson's Second Amended Complaint (SAC) also failed to overcome certain individual defendants' qualified immunity. The reasons: the facts alleged in Johnson's SAC – as distinct from the legal conclusions passing themselves off as "factual" allegations, contra *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) – did not plausibly establish that certain defendants personally participated in any supposed constitutional violation, or that the law regarding any such alleged violation was "clearly established."

In Response, Johnson's brief commits a series of legal and logical errors. Thus, Johnson's Response (1) ignores the relevant differences between *Bivens* and the present case, asserting that his case "resembles *Bivens* in all material respects," because both involve claims of Fourth Amendment violations against "American citizens on American soil" (*see, e.g.*, Response at 2:7-10, 12:13-15); (2) misapprehends what *Hernandez v. Mesa* actually says, portraying its reach as limited to cross-border shootings occurring away from Ports of Entry, and its bases as resting principally on foreign relations concerns (*see, e.g.*, Response at 2:1-6, 17:22, , 19 – 20, 20 – 21), rather than on the border/national security and separation of powers concerns equally or more prominent in the reasoning of that opinion; (3) relies on cases that were decided before *Abbasi* (June 19, 2017) and particularly *Hernandez* (February 25, 2020)[1] – Supreme Court cases which transformed the *Bivens* legal

[1] *See, e.g.*, Response at 12:13-28 ("Courts throughout the country have applied *Bivens* to Fourth Amendment violations by customs or border patrol agents" – but then citing cases

landscape; this includes Johnson repeatedly quoting a district court case from this district, *Castellanos v. United States*, __ F.Supp. 3d__, 2020 WL 619336 (S.D. Cal, February 10, 2020), which (a) not only was decided before *Hernandez*, but which also (b) *relies on reasoning explicitly repudiated in the Hernandez opinion itself*; (4) fails to identify *facts* that could make certain defendants liable for any supposed constitutional violation, as distinct from the repetition of *legal conclusions* masquerading as factual allegations; and (5) trots out high-altitude generalities about the law against "[the use of] excessive force and [the] seizing [of] property without due process of law" being "clearly established," (*see* Response at 2:21 – 3:1), without taking into account the need to [i] cite a case or other authority that [ii] governs the circumstances alleged here, at the requisite level of specificity.

Johnson's Response is thus unavailing, and Defendants' motion should be granted.

Meaningful Differences from Bivens = New Context; Special Factors, esp. Border/National Security, per Hernandez: There is no dispute about the relevant legal tests. According to the Supreme Court, federal courts should not imply a damages action against a federal official if (1) the complaint presents a new *Bivens* context, as compared to the three previous *Bivens* cases previously decided by the Supreme Court, and (2) special factors counseling hesitation are present. *Abbasi*, 137 S. Ct. at 1857-63; *Hernandez*, 140 S. Ct. at 743.

Here, the context of this case is new: it is meaningfully different from *Bivens* itself.

> A case might differ in a meaningful way because [of, among other things,] *the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches, or the presence of special factors that previous Bivens cases did not consider.*

Abbasi, 137 S. Ct. at 1860 (emphases added). Further, "a modest extension is still an extension"; and even where the differences are practically-speaking small, "[g]iven th[e

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that were all decided years before *Abbasi* and *Hernandez*, and therefore fail even to perform the required analysis).

Supreme] Court's expressed caution about extending the *Bivens* remedy . . . the new-context inquiry is easily satisfied." *Id.* at 1864-65.

Here, the individually-named defendants pointed to the differences in (1) the statutory or other legal mandates under which the CBP officers were operating, as between *Bivens* and the present case; and (2) the risk of disruptive intrusion by the judiciary into the functioning of other branches – here, in particular, the disruption necessarily caused by the judiciary's creating a cause of action that Congress has failed to create, in a field (border and national security) where the legislative and executive branches have greater interest and competence *in weighing the competing considerations* involved in creating such a damages remedy. *See, e.g.*, *Hernandez*, 140 S.Ct. at 743.

In particular, the CBP officer defendants pointed to how they operated under statutes and regulations (i) authorizing them to inspect all entrants into the United States, and (ii) making all entrants liable to such inspection. https://www.cbp.gov/travel/cbp-search-authority (citing 19 C.F.R. 162.6, itself relying on 19 U.S.C. § 1467). There was no similar legal mandate or mandates in *Bivens*. Johnson's Response ignores this difference. In addition, while the Fourth Amendment might be considered at its zenith in a person's own home – as in *Bivens* – the Fourth Amendment calculus is "qualitatively different" at the Ports of Entry to this country. *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) ("the Fourth Amendment's balance of reasonableness is qualitatively different at the international border."). A Port of Entry is just not a person's home. *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 376 (1971) (plurality opinion) ("a port of entry is not a traveler's home"). At the border, not the individual entrant's Fourth Amendment rights, but the right of the sovereign – the United States – to protect itself is at its zenith. *Flores-Montano, United States v. Flores-Montano*, 541 U.S. 149, 152 (2004) (the "Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border."). Johnson's Response fails even to confront, let alone overcome, these differences between *Bivens* and the present case.

Instead, according to Johnson, if a case involves Fourth Amendment rights claimed by "an American citizen on American soil," it "resembles *Bivens* in all material respects." Response 12:13-14. But this simplistic equation – "Fourth Amendment + American citizen + American soil = *Bivens*" – obfuscates crucial differences. In particular, (i) the "American soil" beneath one's house or apartment is just not the same as (ii) the "American soil" at the primary inspection booth at the San Ysidro or Otay Mesa Ports of Entry – just feet over the international border, clogged with cars, pedestrians, and commercial traffic, in their thousands, all seeking entry from Mexico into the United States, and all having to submit to the required customs and immigration inspection. The equation is not even right on its own legal terms. Thus, a district court in Colorado, after *Hernandez*, held that a *U.S. citizen* who filed suit against immigration agents for a search and seizure occurring *in Colorado* that allegedly *violated the Fourth Amendment* – so, "Fourth Amendment + American citizen + American soil" – was nonetheless seeking an extension of *Bivens*. The reasons: immigration officers (and thus a new class of defendants) were enforcing the immigration rather than criminal laws (and thus operated under a different legal mandate), so the context was new, as compared to *Bivens*, on two counts. *See Medina v. Danaher*, 2020 WL 1333094, *3-4 (D. Col., March 23, 2020) (also finding special factors counseled against extending *Bivens*). So Johnson's mantra – "Fourth Amendment + American citizen + American soil = *Bivens*" – is not only logically fallacious, because it trades on a huge imprecision in the phrase "American soil." It is legally incorrect as well.

Next, there are also "special factors" that go both to this case being meaningfully different from *Bivens*, and to counseling against the Court implying a damages remedy where Congress has failed to do so. The "special factors" most important to the present case are the implications for national and border security of implying a *Bivens*-type cause of action, and the related concerns for respecting the separation of powers. Both these factors were extensively discussed and relied on in *Hernandez*. 140 S. Ct. at 745-47. They are also applicable here. It is the executive and Congress who are charged with enforcing and creating the laws governing customs and immigration and other matters at the border,

with all their national security implications. And it is Congress that is better equipped, as opposed to the judiciary, to weigh the competing considerations involved in creating a private right of action against CBP officers in such circumstances. *See id.* at 749.

In this respect, Johnson's Response fails to deal forthrightly with the *Hernandez* opinion. According to Johnson, *Hernandez* is a "limited exception" (Response at 13: 11-12) confined to the specific factual circumstances of the case – a cross-border shooting occurring on the border but away from a Port of Entry – and its "special factors" analysis hinges primarily on concerns about foreign relations. But the notion that *Hernandez* rests on foreign relations concerns alone, or even primarily, is incorrect: foreign relations was one aspect of *Hernandez's* "special factors" analysis, to be sure, but not the only aspect nor even the most important one. At least as important were the discussions of border and national security, and specifically CBP's role in this, *id.* at 746, as well as the separation of powers concerns that those issues of border and national security raised.

And Johnson's Response not only misreads *Hernandez*. It also raises arguments that are independently meritless. Thus, to distinguish (and discount) the border and national security concerns discussed in *Hernandez*, Johnson asserts that it somehow makes a difference, in terms of border or national security concerns, that the Border Patrol agent in *Hernandez* was *not* operating at a Port of Entry, while the CBP officers here *were*. In particular, Johnson asserts that no national security concerns are implicated by CBP officers' inspection of entrants to the county at a Port of Entry.[2] But this assertion cannot withstand the most basic scrutiny. If there were no border or national security issues presented by the thousands upon thousands of entrants queuing up daily at this country's Ports of Entry, Congress and the executive would just do away with the inspection requirement altogether. And just one afternoon in the federal courthouse in San Diego,

[2] To quote Johnson's Response directly, "[T]**he national security concern**s that was [sic] simply one *part* of the *Hernandez* "special factors" analysis **is not present at an established border crossing**," because "[p]ersons crossing the border *at* border crossings are presumptively . . . people with legitimate reasons for crossing the border."

during a criminal calendar, would quickly disabuse anyone of Johnson's ill-conceived belief that there can be no concerns about border or national security at a Port of Entry, because entrants have – according to Johnson's Response – "presumptively" legitimate reasons to enter there.[3] In any case, the Supreme Court in *Hernandez* made no such distinction between Port of Entry (POE) cases, and non-POE cases. It wrote instead that "regulating the conduct of agents at the border *unquestionably* has national security implications," full stop. 140 S. Ct. at 747 (emphasis added). Of course it does – which is why this Court should not imply a cause of action, where Congress has not.

Finally, Johnson's Response also asks and therefore answers the wrong question, as well as relying on cases decided before *Hernandez* or *Abbasi*. Thus, Johnson's Response argues that there can be no separation of powers concerns because the judiciary is uniquely qualified to decide what the Fourth Amendment means. *See* Response at 23:5-10. But that is just not the question that the Supreme Court requires courts to ask, when deciding whether to imply/create a *Bivens*-type remedy. The question is rather who is better equipped to weigh all the competing concerns relevant to creating a cause of action: "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 (emphasis added). Most often Congress, not the courts, should decide whether and how to provide a damages remedy. *See Abbasi*, 137 S. Ct. at 1857. This is because "[w]hen an issue involves a host of considerations that must be weighed and appraised, it should be committed to those who write the laws rather than those who interpret them." *Id.* (internal quotations and citations omitted). And this proper deference to Congress is particularly the case where the competing considerations

[3] The particular national security concerns *Hernandez* identifies are: illegal entry, drug smuggling, and transnational criminal enterprises. 140 S. Ct. at 746. But these are the weekly, indeed, the daily grist for federal criminal calendars all along the Southwest border – and many if not most of these cases arise from Ports of Entry.

necessarily implicate national and border security concerns, as *Hernandez* explicitly recognizes. *See Hernandez*, 140 S. Ct. at 745-47, 749-50.

Additionally, Johnson's Response relies on cases that predate both *Abbasi* and especially *Hernandez (see, e.g.*, Response at 12:13-28) – one might even call them relics of the *ancien regime* now overthrown by the Supreme Court itself. The response to Johnson's reliance on those outdated cases is simply this: that was then, this is now. Cases such as *Abbasi* and *Hernandez* changed, even transformed, how courts must analyze the question whether to imply a *Bivens*-type claim. Thus, relying on cases that do not take into account the Supreme Court's most recent and authoritative teaching cannot resolve the issues presented by this case, now, after those Supreme Court cases, particularly *Hernandez*.

Demonstrating both these errors – asking the wrong question, and relying on authority overtaken by recent Supreme Court decisions – Johnson repeatedly quotes an opinion from another court in this district, *Castellanos*. The court in *Castellanos* rejected the argument that a *Bivens*-type claim should not be implied as against CBP officers operating at a Port of Entry. But not only does *Castellanos* predate *Hernandez*, and thus fail to take into account its teaching. In addition, the very points Johnson's Response extracts from *Castellanos* are points that the Supreme Court in *Hernandez* explicitly raised – and then just as explicitly repudiated. Thus, Johnson's Response quotes the reasoning of the district court in *Castellanos* as culminating in this: "**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."** Response at 16 (quoting *Castellanos*, bolded as in Johnson's Response).

But this is just the same red herring – the same switching of the subject – that the Supreme Court raised and rejected in *Hernandez*. As *Hernandez* says, this objection "misses the point. The question is not whether national security requires [or justifies] such conduct [i.e., a cross-border shooting in *Hernandez*, or alleged excessive force in *Castellanos*, or here] – of course, it does not – but whether the Judiciary should alter the

framework established by the political branches for addressing [such] cases . . . ." 140 S. Ct. at 746. It is a question of who should decide whether to create a damages remedy, Congress, or the courts. *Id.* at 749-50. But "[s]ince regulating the conduct of agents at the border *unquestionably has national security implications*, the risk of undermining border security provides reason to hesitate before extending *Bivens* into this field." *Id.* at 747 (emphasis added).[4]

Qualified immunity: Certain of the 16 individually-named defendants also brought qualified immunity motions to dismiss. These can be broken down into four groups: (1) Murillo, who is alleged to have written a false report about Johnson, SAC, ¶ 92; (2) Andrade, who is alleged to have become aggressive and abusive toward Johnson and threatened to take his car, *after* Johnson admittedly used the SENTRI lane without a SENTRI pass, SAC, ¶ 93 (also alleging failure to consider request for accommodation), SAC, ¶¶ 41-42; (3) Ferguson, who is alleged to have detained Johnson and impounded his car, *after* Johnson admittedly used the SENTRI lane without a SENTRI pass, SAC, ¶ 94; *see also* SAC, ¶¶ 51-53; (4) Fierro, Delgado, Clarke, and McCulloch, who are alleged to have responded to Johnson's request for assistance "with heckling and disbelief" and to have impounded his car, again *after* Johnson admittedly used the SENTRI lane without a SENTRI pass, SAC, ¶ 96.

The problem with the "false report" allegation against Murillo is that writing a false report, *without more*, simply isn't a constitutional violation, let alone a clearly established one. Johnson cites a number of cases where a false report was actionable. But in those cases there was some mechanism (e.g., submitting the false report to a prosecutor) identified as connecting the false report to a Fourth Amendment harm – criminal charges, arrest, prosecution. Here, other than boilerplate legalese, Johnson's complaint fails to connect up

[4] Thus, Johnson's reliance on *Castellanos* for the proposition that creating a *Bivens*-type remedy in border security contexts does not implicate national security (*see* Response at 22:18 – 23:4) is also "unquestionably" – the Supreme Court's word in *Hernandez*, not the defendants' word – wrong.

Murillo's supposedly false report to some mechanism, some person, some causal chain, amounting (or even leading) to some Fourth Amendment violation or harm.

As for Andrade: Johnson's Response cites no authority clearly establishing that it is a constitutional violation to become aggressive and abusive toward someone and threaten to take their car for (an admitted) SENTRI lane violation, or even to fail to consider a request for disability accommodation – the SAC's actual allegations. So Johnson's Response belatedly re-writes his complaint to read that she too must have "memorialized her interaction with Johnson," which memo again, utterly mysteriously, somehow or other led to Johnson's Fourth Amendment rights being violated. *See* Response at 29:5-10. But this move too fails, for the same reason the allegations against Murillo fail: there are no plausible factual claims, as distinct from legal conclusions couched as allegations of fact (in a motion Response, no less), which would connect up Andrade's supposedly false reporting to some Fourth Amendment violation or harm regarding Johnson.

As for Ferguson: the problem here is one of identifying authority that clearly establishes that it is unconstitutional to detain someone and impound their car, after they have violated border crossing rules and instructions, in this case, for use of the SENTRI lane. Johnson's own complaint alleges he entered the country through the SENTRI lane, repeatedly. SAC, ¶¶ 35, 39, 45, 63. But nowhere does he allege he ever had a SENTRI pass. So he was, admittedly, using the SENTRI lane without a SENTRI pass. To get round this obstacle, Johnson alleges that someone told him that officers *would have discretion* to allow him to continue on, despite not having a SENTRI pass. (SAC, ¶ 36: "Plaintiff was told that . . . each time he needed to cross the border . . . the agent on duty would have discretion about whether or not to grant his request . . . ."). But even this allegation doesn't overcome the basic problem, that Johnson admittedly broke the rules at the POE, and that consequences for his doing so might ensue: because for an officer to have discretion on this point would also mean that the officer might decide *not* to allow Johnson to continue on, but instead (possibly) to detain him to investigate, and to impose the established penalties for violating the rules at the POE. Discretion, to be discretion, doesn't work in one direction

only, after all. More important, even if all this is disputable, that's why qualified immunity nonetheless applies: Johnson has to provide authority that [i] corresponds to the factual circumstances alleged here, at a sufficiently-detailed level of specificity, that [ii] clearly establishes that what Officer Ferguson did was constitutionally out of bounds – here, detain Johnson and impound his car, after Johnson admittedly violated the applicable rules for entry at the POE. Johnson has cited no such authority.

Finally, as to Fierro, Delgado, Clarke, and McCulloch: they are alleged to have responded to Johnson's request for assistance "with heckling and disbelief" and to have impounded his car, again *after* Johnson admittedly used the SENTRI lane without a SENTRI pass. SAC, ¶ 96; *see also* SAC, ¶ 63 (Johnson "tried to get expedited crossing using the Sentri lane"). In his Response, Johnson likens this alleged failure to credit Johnson's self-declared medical emergency to a police beating: the officer's disbelief caused "harm as much as if they had taken their batons and beaten Johnson." Response at 30:17-19. But allegedly heckling and disbelieving someone who claims they are in distress, while they are sitting in their car with their daughter (and therefore not in apparent distress at all),[5] isn't nearly the same as physically assaulting them. Nor, more importantly, are the cases Johnson cites on all fours with his complaint's allegations against these CBP officers.

For all these reasons, the individually-named defendants' motion should be granted.

DATED: April 13, 2020

Respectfully submitted,

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[5] Note that on Johnson's own allegations, he was apparently well enough to "lock[] his doors and roll[] up his windows," then "proceed[] to call an ambulance on his cell phone," then roll down his windows and hand his cell phone to the officers, and then finally to "unlock[] his car and get[] out." SAC, ¶¶ 65-67. These allegations don't square with obvious medical distress, or remotely resemble a police assault.