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 |

DEFENDANT MARK QUALTER'S REPLY TO PLAINTIFF'S
OPPOSITION TO MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

Individual capacity defendant Mark Qualter moved this Court to dismiss the claims against him pursuant to Rule 12(b)(6) because Plaintiff attempts to extend a *Bivens* damages remedy to a new context and special factors counsel against implying such a remedy. Document Number (DN) 19. Defendant Qualter also moved this Court to dismiss the claims against him based on qualified immunity pursuant to Rule 12(b)(6) or, in the alternative, to grant him summary judgment. *Id.* Plaintiff objects to Defendant Qualter's motion, alleging that Plaintiff states a claim for an implied damages remedy under *Bivens* and that Qualter is not entitled to summary judgment based on qualified immunity pending discovery under Fed. R. Civ. P. 56(d). DN 25. Because special factors counsel against implying a *Bivens* remedy based on the facts of this case, this Court should dismiss the *Bivens* claim against Defendant Qualter. In the alternative, if this Court were to imply a *Bivens* remedy in this new context, the claim against Defendant Qualter should still be dismissed based on the doctrine of qualified immunity. The court need not look beyond the four corners of the complaint to grant Defendant Qualter qualified immunity pursuant to Rule 12(b)(6). However, in the event the court considers

Qualter's motion for summary judgment in the alternative, Plaintiff is not entitled to further discovery because he has not shown that discoverable materials exist that could defeat summary judgment. For each of these reasons, the Court should dismiss the claim against Defendant Qualter or, alternatively, issue summary judgment on his behalf.

## ARGUMENT

### I. PLAINTIFF FAILS TO ESTABLISH WHY THIS COURT SHOULD EXTEND *BIVENS* TO CHALLENGE THE CONSTITUTIONALITY OF TEMPORARY BORDER CHECKPOINTS FOR IMMIGRATION ENFORCEMENT.

Plaintiff should not be permitted to obtain damages against Defendant Qualter in his individual capacity for what really amounts to a challenge to Customs and Border Protection (CBP) policy regarding border patrol checkpoints. Plaintiff admits in his opposition to Defendant Qualter's motion that he takes issue with the "checkpoint practice" of "Border Patrol *agents*." DN 25, 16-17 (emphasis added). Moreover, Plaintiff makes no allegation that Defendant Qualter was responsible for planning or setting up the checkpoint at issue. Nor could he make such an allegation. It is clear here that the gravamen of Plaintiff's complaint is a challenge to the constitutionality of border patrol checkpoints such as the one at issue here. This Court should decline to extend a *Bivens* remedy to such a challenge, and the claims against Defendant Qualter should be dismissed.

#### A. Plaintiff's *Bivens* Claims Involve a New Context.

Under the modern analysis for determining whether to recognize a *Bivens* remedy, this Court must first address whether Plaintiff's allegations present "a new *Bivens* context." *Zigler v. Abbasi,* ___ U.S. ___, 137 S. Ct. 1843, 1859 (2017). In his objection to Defendant Qualter's motion, Plaintiff cites to decisions of district courts and out-of-circuit cases to support his argument that *Bivens* should apply here. As *Abbasi* makes clear, however, "[i]f the case is

different in a meaningful way from previous *Bivens* cases *decided by the Supreme Court*, then the context is new" and a special factors analysis must be performed. *Id.* (emphasis added).[1] *Abbasi* listed non-exclusive examples of such differences:

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

*Id.* at 1860. Such "meaningful" differences may be "small, at least in practical terms." *Id.* at 1865. But "even a modest extension is still an extension." *Id.* at 1864.

Here, contrary to Plaintiff's assertions, the differences are in no way small or modest, and nearly all of the potential factors identified in *Abbasi* materially distinguish this case from *Bivens, Davis,* and *Carlson*. The "new-context inquiry is easily satisfied." *Abbasi*, 137 S. Ct. at 1865. First, Plaintiff's constitutional claims arise in the context of immigration enforcement activities, an area in which the Supreme Court has never affirmatively recognized an implied remedy. Second, these claims challenge the United States' broad authority to enforce the nation's borders through the implementation of policies that apply to all entrants to the United States, not the type of specific officer action at issue in *Bivens*.

Third, the judicial guidance on the constitutional standards governing the actions at issue here is far less particular than the specific, binding guidance available to the officers involved in *Bivens, Davis,* and *Carlson. Cf. Abbasi*, 137 S. Ct. at 1864 ("[T]he judicial guidance available to

[1] *Abbasi* strictly limits the "new context" inquiry to a comparison with the three cases in which the Supreme Court itself affirmatively approved of a *Bivens*-type remedy – *Bivens, Davis,* and *Carlson*. *Id.* at 1859. The analysis does not consider decisions of courts of appeals or district courts recognizing a *Bivens* remedy.

the warden, with respect to his supervisory duties, was less developed."). For example, in the arena of Eighth Amendment denial of medical care, the Supreme Court had determined the applicable judicial standards prior to *Carlson*. *See Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976). By contrast, Defendant Qualter acted pursuant to the statutory and other legal mandates regarding the location and operation of border patrol checkpoints regarding immigration, which have received little attention from any court on any constitutional theory, let alone the Supreme Court or the First Circuit.

Fourth, the recognition of a *Bivens* claim in this context would risk significant and disruptive intrusion by the Judiciary into the functioning of both Congress, which has been very active in establishing criminal punishment for unlawful entry, and the Executive Branch, which must marshal finite resources to carry out those mandates with the use of border checkpoints like the one challenged here by Plaintiff.

Finally, this case involves "special factors" that the Supreme Court has not previously addressed in *Bivens*, *Davis,* or *Carlson* and warrant a finding of a new context. *Abbasi*, 137 S. Ct. at 1860. These special factors include the border security context, in which the judiciary has demonstrated particular deference to the political branches. They also include the separation-of-powers concerns implicated by allowing a *Bivens*-style claim to challenge agency policies in the context of immigration enforcement, an area frequently regulated by Congress.

In his opposition, Plaintiff seeks to minimize these differences by claiming that this case is no different from a "run-of-the-mill" traffic stop. *See* DN 25 at 9. That comparison is entirely divorced from the facts. Plaintiff's detention occurred while passing through a checkpoint set up by CBP within 100 miles of the border and during which officers asked Plaintiff and his fellow passengers whether they were U.S. citizens. DN 1 at 19-20. Indeed, Plaintiff's entire lawsuit

rests on the alleged illegality of this checkpoint. The court should not ignore the relevant facts in considering whether this case presents a new context.

In short, the contextual attributes of this case are not only significant, they span *nearly all* of the differences described as meaningful in *Abbasi*; certainly they are "meaningful enough" to preclude extension of *Bivens* to this context. *Abbasi*, 137 S. Ct. at 1859. As a result, the court should consider whether to expand *Bivens* into this new context.

**B. Alternative Existing Processes Preclude a *Bivens* Remedy in the Case.**

A *Bivens* remedy should not be implied here because alternative existing processes protect the constitutional interests at issue. Plaintiff incorrectly argues that any alternative process available to him must provide complete relief or compensatory damages in order to preclude a *Bivens* remedy. The full landscape of Supreme Court caselaw on this issue supports the argument that *any* sort of "alternative, existing process" can preclude a *Bivens* remedy. *Abbasi,* 137 S. Ct. at 1858, 1876 (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)). That includes "administrative, statutory, equitable, and state law remedies." *Vega v. United States*, 881 F.3d 1146, 1154 (9th Cir. 2018); *see also Abbasi,* 137 S. Ct. at 1865 (alternatives can include "equitable relief" such as "a writ of habeas corpus" or an "injunction requiring the warden to bring his prison into compliance."). So long as a plaintiff has "an avenue for *some* redress," an alternative can preclude a *Bivens* claim. *Correctional Svcs. Corp. v. Malesko,* 534 U.S. 61, 69 (2001); *Air Sunshine, Inc. v. Carl,* 663 F.3d 27, 37 (1st Cir. 2011) (*Bivens* claim was not viable where plaintiff "had other options available" including "claims under the Administrative Procedure Act."). The process need not offer money damages[2] or complete

[2] *See Davis v. Passman,* 442 U.S. 228, 245 (1979) (implying a *Bivens* remedy in a case where "equitable relief" was unavailable); *Malesko*, 534 U.S. at 73-74 (declining to imply a *Bivens*

relief.[3] Even an alternative that provides a particular plaintiff no relief at all can operate to preclude a *Bivens* claim if it sufficiently protects the constitutional interests at issue. Generally speaking, if there is "a forum where the allegedly unconstitutional conduct would come to light," a *Bivens* remedy ought not be implied. *Bagola v. Kindt,* 131 F.3d 632, 642-43 (7th Cir. 1997).

In this case, Plaintiff had, and continues to have, several alternative existing processes available to him to challenge the alleged actions of Defendant Qualter and the constitutionality of border control checkpoints generally. Indeed, he has already availed himself of these alternatives. Specifically, he challenged the legality of the search and seizure during his state court prosecution, and he has filed a claim in this action seeking injunctive relief. Given the availability of these alternative existing processes, this Court should not imply a *Bivens* remedy here and should dismiss the claims against Defendant Qualter.

### C. Other Special Factors Counsel Strongly Against Implying a *Bivens* Remedy Here.

Even in the absence of alternative processes, a *Bivens* remedy is inappropriate if special factors counsel hesitation implying a judicial remedy directly under the Constitution. *See Schweiker v. Chilicky,* 487 U.S. 412, 425 (1988) ("The absence of statutory relief for a constitutional violation … does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation."); *Hernandez v. Mesa,* 885

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remedy for inmates who could have sued for "injunctive relief" or filed "grievances … through the BOP's Administrative Remedy Program").

[3] *See Bush v. Lucas,* 462 U.S. 367, 373 (CSRA precludes a *Bivens* remedy even if it does not offer "complete relief"); *Chappell v. Wallace*, 462 U.S. 296, 303 (1983) (declining to imply a *Bivens* remedy where Congress "provided no damages remedy"); *Minneci v. Pollard*, 565 U.S. 118, 129 ("State-law remedies and a potential *Bivens* remedy need not be perfectly congruent" for the former to preclude the latter.).

F.3d 811, 821 (5th Cir. 2018) ("[T]he absence of a remedy is only significant because the presence of one precludes a *Bivens* extension.").

Here, Plaintiff's constitutional claims should be dismissed because a wide range of special factors "might" make it inappropriate to expand *Bivens* into this new context. *Abbasi*, 137 S. Ct. at 1861; *see Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 280 (1997) (noting that the "*Bivens* line[ ] of cases reflect[s] a sensitivity to varying contests, and courts should consider whether there are 'special factors counseling hesitation.' … before allowing a suit to proceed under [that] theory. The range of concerns to be considered in answering this inquiry is broad.") (citations omitted). It is apparent from Plaintiff's complaint and opposition that his real grievance is with CBP policy choices regarding checkpoints and immigration enforcement. As referenced in the motion to dismiss, nearly a dozen pages of the Complaint are devoted to allegations against CBP and CBP policies. Plaintiff's *Bivens* claim seeks monetary damages against Defendant Qualter personally and "is not 'a proper vehicle for altering an entity's policy.'" *Abbasi*, 137 S. Ct. at 1860 (quoting *Malesko*, 534 U.S. at 74). As the Supreme Court has explained, "injunctive relief [not an individual-capacity damages action] has long been recognized as the proper means for preventing *entities* from acting unconstitutionally." *Malesko*, 534 U.S. at 74; *see also FDIC v. Meyer,* 510 U.S. 471, 485 (1994) (observing that Court implied a cause of action against the officers in *Bivens* in part because direct action against the government was not available). Indeed, Plaintiff seeks injunctive relief in this very action. Nor would the deterrent purpose of *Bivens* be served in this case since Plaintiff has not even alleged that Defendant Qualter ordered or set up the allegedly unlawful checkpoint.

For the foregoing reasons, the Court should not extend *Bivens* in this instance to place personal liability of Defendant Qualter.

II. DEFENDANT QUALTER IS ENTITLED TO QUALIFIED IMMUNITY.

Even if the court were to imply a *Bivens* remedy here, Plaintiff's claim is subject to dismissal because Defendant Qualter is entitled to qualified immunity. A government official named as a defendant in a civil rights action "'is entitled to qualified immunity unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.'" *Hunt v. Massi*, 773 F.3d 361, 367 (1st Cir. 2014) (citation omitted). Qualified immunity "'protects all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (citation omitted). When a defendant invokes qualified immunity, the burden is on the plaintiff to show the inapplicability of the defense. *See Rivera-Corraliza v. Morales*, 794 F.3d 208, 215 (1st Cir. 2015).

In determining whether a defendant has qualified immunity in the context of a motion to dismiss, "[o]n the basis of the pleadings," the court "must decide (1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right was 'clearly established' at the time of the defendant's alleged violation." *Rocket Learning, Inc. v. Rivera-Sanchez*, 715 F.3d 1, 8 (1st Cir. 2013) (citations and internal quotation marks omitted). The "relevant, dispositive inquiry" in determining whether a right is "clearly established" is "whether it would be clear to a reasonable [officer] that his conduct was unlawful in the situation he confronted." *Id.* at 9 (emphasis, citations, and internal quotation marks omitted). To show that the right was "clearly established," the plaintiff must point to controlling authority or a consensus of cases of persuasive authority that broadcasts a clear signal to a reasonable official that certain conduct falls short of the constitutional norm. *McKenney v. Mangino*, 873 F.3d 75, 81 (1st Cir. 2017) (internal quotation marks and citations omitted). "'[C]learly established law' should not be defined 'at a high level of generality.' . . . [T]he

clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548, 552 (2017) (citation omitted). The standard does not require a case on point, but does require "a case where an officer acting under similar circumstances" as the defendant was "held to have violated" the pertinent federal right. *Id.* Plaintiff fails to meet this requirement.

Plaintiff alleges that Defendant Qualter is not entitled to qualified immunity in this action because it is clearly established that checkpoint searches for drug enforcement are unconstitutional. This argument is flawed for several reasons. First, Plaintiff defines the constitutional right at too high a level of generality. The Supreme Court has consistently affirmed that the qualified immunity inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Plaintiff relies heavily on his conclusion that the border patrol checkpoint enacted by U.S. Customs and Border Protection ("CBP") in this action was for the primary purpose of general law enforcement and not immigration. This legal conclusion, however, is not entitled to the presumption of truth in this action. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). Although the New Hampshire Circuit Court concluded that the checkpoint was in violation of the New Hampshire state constitution in the context of Plaintiff's state criminal prosecution, this Court is obviously not bound by a state court decision on an issue of federal law, and the doctrine of issue preclusion does not apply because Defendant Qualter was not a party to the state court proceedings. *Vargas-Colón*, 864 F.3d at 25 ("Issue preclusion … bars parties from re-litigating issues of either fact or law that were adjudicated in an earlier proceeding."). Additionally, it is important to recognize that the Circuit Court specifically stated that "if the defendants in these cases were tried in federal court for federal charges based on the current state of the law the

evidence seized by the CBP officers would be admissible." DN 1-1, 6 (recognizing that if the government could prove the dogs were properly trained and certified, the evidence seized would be admissible in federal court.).

Finally, Plaintiff attempts to portray the facts of this case as identical to those present in the case of *City of Indianapolis v. Edmond,* 531 U.S. 32, 40-42 (2000). However, Plaintiff fails to point out a critical difference between this case and *Edmond*. Specifically, in *Edmond*, the parties stipulated to the fact that the checkpoint in that case was to interdict illegal drugs. *Id*. at 34-35. There has been no such stipulation in this case and CBP has consistently maintained that the primary purpose of the checkpoint that Plaintiff encountered was immigration enforcement. As a result, Plaintiff vastly overstates the implications of *Edmond*. Additionally, in *Edmond,* the court did not reach the issue of whether a checkpoint with a legal primary purpose could also have a secondary purpose of interdicting narcotics. Specifically, the Supreme Court held that "we express no view on the question whether police may expand the scope of a license or sobriety checkpoint seizure in order to detect the presence of drugs in a stopped car. *Id.* at 47 n.2.

Once this Court declines Plaintiff's invitation to accept as true that the checkpoint in this case had a primary purpose other than immigration enforcement, all of Plaintiff's arguments fail. Thus, the claims in this case should be dismissed.

Plaintiff has not plausibly alleged that the checkpoint was for the primary purpose of general law enforcement, much less that a reasonable officer in Qualter's position would have believed the checkpoint was unlawful. Here, as Qualter established in the motion to dismiss, the primary purpose of this checkpoint was immigration enforcement. Plaintiff alleges that the *Edmond* holding should have put Qualter on notice that there is a clearly established prohibition

on checkpoint stops for drug enforcement. Whether that allegation is correct or not, however, is inapplicable here. We are not dealing with a checkpoint for drug enforcement. We are dealing with an immigration checkpoint.

Plaintiff does not allege anywhere in the complaint or the objection to the motion to dismiss that Defendant Qualter had any role in the planning of this checkpoint in any way, or that he had any communication with the Woodstock Police Department prior to the checkpoint taking place. It is undisputed that the checkpoint was set up by CBP within 100 miles of the border and that officers stopped the vehicle Plaintiff was in and asked the passengers about their citizenship.[4] As established in the motion to dismiss, the Supreme Court has routinely held that border patrol checkpoints for immigration enforcement are permissible. Plaintiff has not alleged that Qualter, nor any other agent present at the checkpoint, believed the primary purpose of the checkpoint was anything other than immigration enforcement. Additionally, contrary to Plaintiff's assertion, the fact that Defendant Qualter participated in the checkpoint with the assistance of his canine partner, Marian, does not establish that the primary purpose of the checkpoint was anything other than immigration enforcement. Marian is trained as a *dual detection* canine. Supplemental Declaration of Mark Qualter ("Supp. Qualter Dec."), attached as Exhibit D, ¶¶ 5, 6 and Attachment 1. Marian is trained by CBP to detect concealed humans as

[4] Plaintiff seems to allege in his objection that Qualter unreasonably prolonged the search in this case because he had already confirmed Plaintiff's citizenship. However, this conclusion ignores the facts. As set forth in the motion to dismiss, Qualter ordered a secondary inspection of the vehicle only after his canine alerted to the presence of drugs in the vehicle during the course of the initial immigration investigation. This provided Qualter with reasonable suspicion of the presence of drugs, justifying the secondary inspection. *See Rodriguez v. United States*, 575 U.S. 348 (2015) (police may not extend an otherwise completed traffic stop, absent reasonable suspicion, in order to conduct dog sniff); *United States v. Garcia-Garcia*, 319 F.3d 726 (5th Cir. 2003) (search following dog sniff alert during CBP checkpoint was reasonable). The actions taken by Qualter during the secondary inspection were objectively reasonable and should entitle him to qualified immunity in this action.

well as the odors of several narcotics. *Id.* Plaintiff relies on the fact that Marian is trained to detect narcotics to form the basis of the argument that the primary purpose of the checkpoint was drug enforcement. Such a conclusion simply ignores Marian's training and certification in the detection of concealed humans.

Additionally, the state court decision relied on by the Plaintiff further establishes that no reasonable officer would have known that the checkpoint was unconstitutional. Specifically, the state court order, in addressing the concept of the "reverse silver platter doctrine," wherein evidence that is obtained by federal agents acting lawfully and in conformity with federal authority is admissible in state proceedings, stated "[t]his Court finds that the New Hampshire Supreme Court has never addressed the issue of the 'reverse silver platter doctrine.'" DN 1-1, 11. As the issue had never been addressed by the New Hampshire Supreme Court before, Qualter obviously could not have had notice that his actions in seizing drugs from the Plaintiff and turning them over to the Woodstock Police Department was in any way a violation of Plaintiff's federal constitutional rights. It is also important to note that the state court never found that Defendant Qualter violated the Constitution. In fact, Defendant Qualter was not even a party to the state court litigation. Specifically, the Court, after finding that the primary purpose of the checkpoint was drug enforcement, said that "the *CBP* was aware of this prior to setting up the checkpoints…" *Id.*, 13. (emphasis added). There is no allegation that Qualter was aware that the purpose of the checkpoint was anything other than immigration enforcement, and he has in fact submitted a declaration in which he states his belief that the primary purpose of the checkpoint was immigration enforcement. DN 19-3, 2. Given this, the conduct of Qualter in participating in the checkpoint must be considered to be objectively reasonable, and Qualter should be entitled to qualified immunity.

## III. THE SUMMARY JUDGMENT MOTION SHOULD NOT BE DENIED UNDER RULE 56(d).

Although Defendant Qualter has moved for summary judgment under Rule 56 on the basis of qualified immunity, that motion is only an alternative one. The Court should reach Qualter's summary judgment motion, and the related discovery issues raised by Plaintiff under Rule 56(d), only after passing on Qualter's arguments for dismissal under Rule 12(b)(6). Should the Court decline to dismiss the claim against Defendant Qualter, it should proceed to his Rule 56 motion at that point and grant him summary judgment. Even if the allegations in the complaint are found to withstand a Rule 12 challenge, those actions show beyond all doubt that Defendant Qualter acted consistently with clearly established law in connection with this matter.

Contrary to Plaintiff's assertion, there is no automatic requirement that discovery must take place before summary judgment can be entered. *See Hoffman v. Reali,* 973 F.2d 980, 987 (1st Cir. 1992) ("[A] plaintiff's entitlement to discovery before a ruling on summary judgment is not unlimited and may be cut off when the record shows that the requested discovery will not be likely to produce facts he needs to withstand a summary judgment motion."). This common sense principle is especially important in cases where the defendant has invoked qualified immunity, which is "an *immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985). This threshold immunity question must be resolved *before* permitting any discovery. *See, e.g., Iqbal*, 556 U.S. at 685. Indeed, the Court "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam).

Under Rule 56(d), "if a party opposing summary judgment shows 'that, for specified reasons, it cannot present facts essential to justify its opposition,' the court may grant appropriate relief." *Jones v. Secord*, 684 F.3d 1, 6 (1st Cir. 2012) (quoting Fed. R. Civ. P. 56(d)). However,

the First Circuit has "cautioned that Rule 56(d) relief is not to be granted as a matter of course." *Hicks v. Johnson*, 755 F.3d 738, 743 (1st Cir. 2014). Most importantly, a party seeking relief under Rule 56(d) must submit an affidavit or declaration specifying "that discoverable materials exist that would likely suffice to raise a genuine issue of material fact and, thus, defeat summary judgment." *Resolution Tr. Corp. v. N. Bridge Assocs., Inc.*, 22 F.3d 1198, 1206 (1st Cir. 1994). "[T]he facts that the movant seeks to discover must be foreseeably capable of breathing life into his claim or defense." *Id.* at 1207; *see also Asociacion De Periodistas De Puerto Rico v. Mueller*, 680 F.3d 70, 77 (1st Cir. 2012) ("A basic tenet of [Rule 56(d)] practice is that the party seeking discovery must explain how the facts, if collected, will suffice to defeat the pending summary judgment motion."). Thus, to warrant relief under Rule 56(d) in this case, Plaintiff must demonstrate *with specificity* that the discovery he seeks would create a genuine issue of material fact that Defendant Qualter violated clearly established law such that he might not be entitled to qualified immunity. Plaintiff's Rule 56(d) affidavit falls far short of that test. The affidavit does not explain how the requested discovery could defeat Qualter's entitlement to qualified immunity.[5] Courts have denied relief under Rule 56(d) when the party opposing summary judgment has offered a vague or speculative reason for contending that the sought-after discovery will defeat summary judgment. *See Williams v. Techtronic Indus. of N. Am., Inc.,* 600 F. App'x 1, 1-2 (1st Cir. 2015) (affirming denial of Rule 56(d) relief where party "made only an inadequate bald assertion that the discovery he sought would" influence the outcome of the summary judgment motion); *Serra v. Quantum Servicing Corp.,* No. 11-cv-11843, 2012 WL

[5] It is important to note that, to the extent Plaintiff asserts an inability to test the assertion that Defendant Qualter's canine is trained and certified in the detection of concealed humans, Qualter's declaration attached to this reply clearly establishes that fact is correct. Supp. Qualter Dec., at Attachment 1.

3548037, at *5 (D. Mass. Aug. 15, 2012) (plaintiff "hypothesize[d]" but offered "no plausible basis for a belief that further discovery would lead to material facts that might defeat summary judgment"), *aff'd* 747 F.3d 37 (1st Cir. 2014). Here, although Plaintiff identifies the information he would seek in discovery, he does not indicate how that information might defeat Qualter's entitlement to sovereign immunity. Therefore, this Court should grant summary judgment to Defendant Qualter pursuant to the doctrine of qualified immunity.

## CONCLUSION

For the foregoing reasons, defendant Mark Qualter respectfully requests that the Court dismiss the *Bivens* action against him pursuant to Rule 12(b)(6) because no *Bivens* remedy is available and because he is entitled to qualified immunity. Alternatively, Defendant Qualter is entitled to summary judgment on the issue of qualified immunity.

Respectfully submitted,

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