UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

JESSE DREWNIAK, Plaintiff, v. U.S. CUSTOMS AND BORDER PROTECTION, U.S. BORDER PATROL, MARK A. QUALTER, U.S. Border Patrol Agent, and ROBERT N. GARCIA, Chief Patrol Agent of Swanton Sector of U.S. Border Patrol, Defendants.	)	Civil No.1:20-cv-00852

PLAINTIFF'S SUR-REPLY IN OPPOSITION TO DEFENDANT QUALTER'S MOTION TO DISMISS, AND OPPOSITION TO SUMMARY JUDGMENT PENDING DISCOVERY UNDER RULE 56(d)

INTRODUCTION

This case alleges that Defendant Qualter violated clearly established Fourth Amendment law prohibiting traffic checkpoints for the primary purpose of drug interdiction. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 40-42 (2000). On August 26, 2017, Defendant Qualter stopped Plaintiff Jesse Drewniak and his companions under the guise of a border checkpoint despite knowing they were U.S. citizens, subjected them to a lengthy detention while he rooted through the vehicle, and shouted at them "WHERE'S THE FUCKING DOPE." Compl. ¶¶ 4, 76. Mr. Drewniak now seeks redress for the unlawful seizure under *Bivens v. Six Unknown Named Agents of FBI*, in a claim that lies within the core "search-and-seizure context in which [*Bivens*] arose." *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017).

In his reply in support of dismissal, Defendant Qualter fails to take all allegations in the complaint as true, fails to engage with applicable case law, and continues to rely on factual assertions outside of the complaint that are untested in discovery. Reply (DN 41). Indeed, Defendant Qualter's Reply includes yet another extrinsic declaration that has not been vetted in discovery. *See* DN 41-1. Defendant Qualter's motion to dismiss for failure to state a claim should be denied, and his alternative request for summary judgment should be deferred pending discovery.

I. Defendant Qualter Fails to Take the Allegations in the Complaint as True.

Both of Defendant Qualter's arguments for dismissal conflict with the Plaintiff's well-pleaded allegation that the checkpoint seizure was for the primary purpose of drug enforcement. *See* Reply at 3-4, 6-7, 8-10. Starting with his argument against *Bivens* liability, Defendant Qualter argues that this case presents a "new context," and that "special factors" counsel against extending *Bivens*, because, according to him, this case implicates border enforcement, not drug interdiction. Reply at 3-4, 6-7. As to qualified immunity, Defendant Qualter argues that the precedent in *City*

of Indianapolis v. Edmond is inapplicable, again because, according to him, the checkpoint was not primarily for the purpose of drug interdiction. *See* Reply at 8-10 (citing 531 U.S. 32, 41-42 (2000)). Because these arguments conflict with the well-pleaded allegations in the complaint, they must be rejected, and renewed (if at all) at summary judgment after the opportunity for discovery.

As an initial matter, "allegations of the complaint are generally to be taken as true for purposes of a motion to dismiss." *Arturet-Velez v. R.J. Reynolds Tobacco Co.*, 429 F.3d 10, 14 (1st Cir. 2005). Despite this well-established rule, Defendant Qualter argues that the Court should "decline[] Plaintiff's invitation to accept as true that the checkpoints . . . had a primary purpose other than immigration enforcement," Reply at 10, claiming that this allegation is a "legal conclusion" that "is not entitled to the presumption of truth," *id.* at 9 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The primary purpose of a checkpoint, however, is an issue of fact that must be evaluated at "an evidentiary hearing," and for which discovery is necessary. *United States v. Soto-Zuniga*, 837 F.3d 992 (9th Cir. 2016) (ordering discovery regarding the primary purpose of a CBP checkpoint); *United States v. Fraire*, 575 F.3d 929, 933 (9th Cir. 2009) (referring to the "primary purpose" as a "finding" supported by testimony given in evidentiary hearing). As explained in *Soto-Zuniga*, the "constitutionality" of CBP's checkpoint in San Clemente "turns on whether its 'primary purpose' is to control immigration, as has been contended by the government, or rather is to interdict drug trafficking and other 'ordinary criminal wrongdoing.'" 837 F.3d at 999–1000. This important inquiry is a factual one. *See id.*

Because the primary purpose inquiry is a question of fact, allegations on this topic must be taken as true at the motion-to-dismiss stage, so long as the well-pleaded allegations make out a plausible claim. *See Arturet-Velez*, 429 F.3d at 14. That is precisely the case here, in which the complaint alleges numerous subsidiary facts demonstrating the plausibility that Defendant Qualter

stopped Mr. Drewniak for the primary purpose of drug enforcement. *See, e.g.*, Comp. ¶¶ 2, 39, 68, 76, 85. Even after learning that Mr. Drewniak and the other occupants were United States citizens, Defendant Qualter ordered the driver to pull over so he could search the vehicle for drugs. Compl. ¶ 68. Qualter's canine had never detected a concealed person at a checkpoint, *id.* ¶ 85, and when Defendant Qualter was unable to find drugs in the vehicle after the canine's alert, he yelled "WHERE'S THE FUCKING DOPE"[1]—further supporting that the entire purpose of the search was for drugs. Compl ¶ 76. The seizure occurred at a traffic checkpoint 90 miles inland from the border, and featured cooperation with local law enforcement for the purpose of prosecuting drug offenses. Compl. ¶¶ 2, 3, 39, 41 (describing that when "alleged contraband was found, Border Patrol surrendered it to the Woodstock Police Department, which "then charged these individuals in state court for violating state drug laws"). Consistent with these allegations, the New Hampshire court reviewing a motion to suppress found that the "primary purpose" of the checkpoint was "detection and seizure of drugs."[2] Compl. ¶ 87 (citing Ex. A at 11-12). Defendant Qualter is correct that "[t]he court should not ignore the relevant facts in considering whether this case presents a new context." Reply at 5. The problem for Defendant is that, at this stage, "the relevant facts" are the well-pleaded allegations in the complaint. These allegations must be taken as true.

Defendant Qualter's arguments regarding the availability of a *Bivens* remedy are at odds

[1] Mr. Drewniak is nearly certain that this statement was made by Agent Qualter—who did not verbally identify himself at the checkpoint—which is why the Complaint alleges it "on information and belief." Compl. ¶¶ 4, 76.

[2] Defendant argues that this Court is not "bound" by the state court finding regarding the primary purpose of the Woodstock checkpoint, stating that "issue preclusion does not apply because Defendant Qualter was not a party to the state court proceedings." Reply at 9. Plaintiff, however, is not asking the Court to apply issue preclusion, but merely asks the Court to accept the well-pleaded allegations in the complaint as true, as it must at the Rule 12(b)(6) stage.

Defendant also claims that the state court found the evidence seized would have been admissible in federal court, but omits the critical qualifier. Reply at 9-10. The full sentence reads: "*Ignoring for the moment the issue of the primary purpose of the checkpoints*, this Court recognizes 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." Order, ECF No. 1-1 at 5-6 (emphasis added). Because the court later found that drug enforcement was the "primary purpose" of the checkpoint, the checkpoints were unconstitutional under the United States Constitution. *See id.* at 11-12 (stating "[t]his Court finds that while the stated purpose of the checkpoints in this matter was screening for immigration violations the primary purpose of the action was detection and seizure of drugs").

with Plaintiff's allegations that the primary purpose of the checkpoint was drug enforcement. For instance, Defendant Qualter argues that the case presents a "new context" outside of the core of *Bivens* because it (1) "arise[s] in the context of immigration enforcement," *id.* at 3; (2) "challenge[s] the United States' broad authority to enforce the nation's borders," *id.*; (3) implicates the specific context of "border patrol checkpoints regarding immigrants," *id.* at 4; (4) interferes with Border Patrol's enforcement of laws against "unlawful entry" into the United States, *id.*; and (5) involves the "special factor[]" of "the border security context," *id.* And he argues that special factors counsel against implying a *Bivens* remedy because the Plaintiff's "real grievance is with CBP policy choices regarding checkpoints and *immigration enforcement*." Reply at 7 (emphasis added). Yet all of these arguments conflict with the central allegation in the complaint that the challenged conduct involves drug enforcement—not immigration or border enforcement. *See supra* at pp. 2-3. As such, these arguments must be rejected.

Similarly, Defendant Qualter's argument for qualified immunity also rests on the assumption that "[w]e are not dealing with a checkpoint for drug enforcement. We are dealing with an immigration checkpoint." Reply at 11-12. For example, he cites to his declaration that he "belie[ved] that the primary purpose of the checkpoint was immigration enforcement," *id.* at 12, and that his canine is "trained as a *dual detection* canine" to detect both drugs and concealed humans, *id.* at 11. At the Rule 12(b)(6) stage, however, Defendant Qualter is barred from relying on such extraneous facts and must accept the facts as alleged in the complaint.

Once the allegations in the complaint are accepted as true, Defendant Qualter is left with the solitary fact that his employing agency is tasked with border enforcement. In such cases, the border or national security "label" must not "become a talisman used to ward off inconvenient claims" or to cover up "a multitude of sins." *Abbasi*, 137 S. Ct. at 1862 (quoting *Mitchell v.*

Forsyth, 472 U.S. 511, 523 (1985)). Because this case presents a run-of-the-mill Fourth Amendment violation by a law enforcement officer engaging in drug enforcement, the *Bivens* remedy is available, and Defendant Qualter is not entitled to qualified immunity.

II. Defendant's Remaining Arguments Against *Bivens* Liability Ignore Post-*Abbasi* Precedent.

Defendant makes several additional arguments that the *Bivens* remedy is unavailable because this case presents a "new context" and "special factors" counsel against extension. Reply at 2-7. Yet these arguments ignore the numerous cases holding that run-of-the-mill Fourth Amendment violations by immigration officials remain eligible for *Bivens*'s implied damages remedy. *See* Pl.'s Opp. at 8-17 (citing, *e.g.*, *Prado v. Perez*, 451 F. Supp. 3d 306, 315 (S.D.N.Y. 2020); *Castellanos v. United States*, 438 F. Supp. 3d 1120, 1129-30 (S.D. Cal. 2020)). Defendant makes no effort to distinguish these cases, but instead attempts to wave them away as "decisions of district courts and out-of-circuit cases" that cannot establish a "new context." Reply at 2-3 & n.1 (citing *Abbasi*, 137 S. Ct. at 1859). The import of these cases, however, is that they were decided after *Abbasi* and are thus illustrative in applying *Abbasi*'s "new context" and "special circumstances" framework.[3] These cases support applying a *Bivens* remedy here.

For instance, *Castellanos* and *Prado* confirm that there is no "new context" merely because it is an immigration officer (as opposed to another law enforcement officer) who allegedly violated the Fourth Amendment. *Prado*, 451 F. Supp. 3d at 315 (holding that an immigration officer's "allegedly unconstitutional arrest and search" did not create a new context outside of *Bivens*);

[3] *See also Lehal v. Cent. Falls Det. Facility Corp.*, No. 13cv3923 (DF), 2019 WL 1447261, at *11 (S.D.N.Y. Mar. 15, 2019) (allowing a *Bivens* claim alleging excessive force against U.S. Marshal defendants); *Jacobs v. Alum*, 915 F.3d 1028, 1038 (6th Cir. 2019) (allowing a *Bivens* claim against U.S. Marshal defendants for excessive force and unlawful arrest); *Bueno Diaz v. Mercurio*, 442 F. Supp. 3d 701, 709 (S.D.N.Y. 2020) (allowing *Bivens* claim against U.S. Drug Enforcement Administration agent); *Lanuza v. Love*, 899 F.3d 1019, 1033 (9th Cir. 2018) (allowing *Bivens* claim against government immigration attorney for falsification of document).

Castellanos, 438 F. Supp. 3d at1129-30 (in a case challenging a border search by a CBP officer, holding that "[o]n balance, the context in which force and seizure were employed against Plaintiff" supports finding no "new *Bivens* context"). As in *Prado* and *Castellanos*, this case alleges a routine Fourth Amendment violation related to drug interdiction. *See supra* Section I. The case thus presents no "new context," and, accordingly, no need to assess whether "special factors counsel[] hesitation" in extending a *Bivens* remedy to a new context. *See Abbasi*, 137 S. Ct. at 1857-58.

Even assuming Defendant could establish that this case arises in a "new context," additional cases applying *Abbasi* confirm that no special factors counsel "hesitation" in applying *Bivens*. *See, e.g.*, Pl.'s Opp. at 14-15 (citing *Boule v. Egbert*, 980 F.3d 1309, 1314-15 (9th Cir. 2020); *Hicks v. Ferreyra*, 965 F.3d 302, 311-12). Defendant has offered no response regarding *Boule* or *Hicks*, two post-*Abbasi* decisions that support a *Bivens* remedy in cases, like this one, involving line law-enforcement officers' clearly established violation of the Fourth Amendment. *See* Pl.'s Opp. at 14-15. As in *Boule*, the claim against Defendant Qualter "is a conventional Fourth Amendment claim, indistinguishable from countless such claims brought against federal, state, and local law enforcement officials, except for the fact that [Qualter] is a border patrol agent. *Boule*, 980 F.3d at 1314-15 ("The fact that [defendant] is a border patrol agent, standing alone, does not preclude a *Bivens* action"). And as in *Hicks*, the plaintiff in this case "seeks to hold accountable line-level agents of a federal criminal law enforcement agency, for violations of the Fourth Amendment, committed in the course of a routine [traffic stop]." *Hicks*, 965 F.3d at 311.

Contrary to Defendant's additional claim, moreover, no "alternative existing processes" prevent *Bivens* liability. Reply at 6. As an initial matter, the Court should be skeptical of Defendant Qualter's argument that the claim for injunctive relief prevents a *Bivens* remedy, given Defendant's simultaneous effort to dismiss that injunctive claim. *See Himmelreich v. Fed. Bureau*

of Prisons, No. 4:10CV2404, 2019 WL 4694217, at *11 (N.D. Ohio Sept. 25, 2019). As *Himmelreich* explained, it is "unpersuasive" for a Defendant to argue that "habeas corpus provides an adequate remedial structure for a prisoner's complaint about conditions of confinement while also admitting that the viability of such a petition is, at best, 'arguable.'" *Id.*[4]

The only other "alternative process" identified by Defendant Qualter is the motion to suppress in state court, but (even combined with the request for injunctive relief), this procedure is not the type of "adequate remedial mechanisms for constitutional violations" that forecloses a *Bivens* remedy.[5] *See Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). Although the alternative remedy need not be identical to *Bivens*, courts have asked whether the alternative provides "roughly similar incentives" for defendants and "roughly similar compensation to victims of violations." *Minneci v. Pollard*, 565 U.S. 118, 626 (2012). Consistent with this standard, "alternative existing processes" have typically involved specialized avenues for relief, such as state tort law, civil-service regulations, the Social Security scheme, or the comprehensive system of military justice. *See, e.g.*, *Minneci*, 565 U.S. at 127–30 (state tort law against private prison employees); *Wilkie v. Robbins*, 551 U.S. 537, 553–54 (2007) (trespass claim and administrative remedies); *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 72–73 (2001) (state tort law against private operator of halfway house); *Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988) (Social Security statutory scheme); *Bush v. Lucas*, 462 U.S. 367, 385–88 (1983) (civil-service regulations); *Chappell v. Wallace*, 462 U.S. 296, 303 (1983) ("comprehensive internal system of justice to regulate military life"). Unlike such examples, this case presents nothing more than the

[4] *See also Morales v. Chadbourne*, 793 F.3d 208, 213 (1st Cir. 2015) (allowing a plaintiff to proceed on a Fourth Amendment claim against an ICE seeking damages "under *Bivens*, . . . as well as injunctive relief to prevent defendants from subjecting her to unlawful immigration detention again in the future").

[5] By failing to raise it in reply, Defendant appears to have given up on the argument that the Federal Tort Claims Act qualifies as an "alternative existing process" that could foreclose *Bivens* relief. *See* Pl.'s Opp. at 15.

types of relief—a motion to suppress or claim for injunctive relief—that could be pursued in many garden-variety Fourth Amendment violations. Moreover, it can hardly be said that the suppression order in state court qualified as an "alternative existing process" when the Defendants repeatedly flouted this order by continuing checkpoints for drug interdiction through the use of canines, Compl. ¶¶ 48-51, and insist that the order does not bind Defendant Qualter, Reply at 9.[6]

Finally, Defendant Qualter reasserts his claim that *Bivens* is inapplicable when the "gravamen" of the claims relates to a broader agency practice. Reply at 7. But unlike the cases cited by Defendant Qualter, Plaintiff's claim is properly directed to Defendant Qualter's *own* conduct in stopping a known U.S. citizen for the purpose of detecting drugs, holding him for a lengthy period of time, and, ultimately, shouting at him "WHERE'S THE FUCKING DOPE." *See* Compl. ¶ 4; Pl.'s Opp. at 11-12. Although Plaintiff identifies broader systemic deficiencies with CBP's checkpoint practices, such systemic violations may present an even more "dire need for deterrence, validating *Bivens*'s purpose." *Lanuza v. Love*, 899 F.3d 1019, 1033 (9th Cir. 2018); *see also* Pl.'s Opp. at 11-12 (citing, *e.g.*, *Abbasi*, 137 S. Ct. at 1860; *Campbell v. City of Yonkers*, No. 19-cv-2117(VB), 2020 WL 5548784, at *2 (S.D.N.Y. Sept. 16, 2020)).

III. Defendant Qualter's Remaining Arguments for Qualified Immunity Fail.

Once the Plaintiff's well-pleaded allegations are taken as true, *see supra* Section I, Defendant Qualter offers few remaining arguments for qualified immunity. *See* Reply at 9-12. Each of the remaining arguments is unpersuasive.

First, Defendant Qualter suggests that the rule in *Edmond* is clearly established only when

[6] Defendant also relies on the discussion in *Abbasi* that the availability of an injunction or other equitable relief weighed against *Bivens* liability. *Abbasi*, 137 S. Ct. at 1865. But in *Abbasi*, these alternative avenues were part of a larger set of factors—including the Prison Litigation Reform Act "suggesting that Congress does not want a damages remedy," the possibility of habeas relief requiring immediate "less-restrictive conditions," and the presence of a new constitutional right not implicated in the Court's prior *Bivens* cases—all of which together counseled hesitation in extending the *Bivens* remedy. *Id*. Defendant identifies no similar confluence of factors in this case.

the Defendant stipulates to the checkpoint's primary purpose. Reply at 10 (arguing this case differs from *Edmond* because CBP has not stipulated that the primary purpose was for drug interdiction). But "such an exacting degree of precision is not required to thwart a qualified immunity defense." *McKenney v. Mangino*, 873 F.3d 75, 82 (1st Cir. 2017). Indeed, there is no requirement even to have a "case directly on point." *Id.* (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). Nevertheless, this case does present a prior Supreme Court case "on point": *City of Indianapolis v. Edmond* holds that traffic checkpoints for the primary purpose of drug interdiction violate the Fourth Amendment. 531 U.S. at 41-42. In the light of this "pre-existing law," the "unlawfulness" of Defendant Qualter's checkpoint seizure of Mr. Drewniak for the primary purpose of drug enforcement should have been "apparent" to any reasonable law enforcement officer. *See Hope v. Pelzer*, 536 U.S. 730, 749, 741 (2002) (internal citation omitted).

Defendant Qualter's final argument regarding the "reverse silver platter doctrine" is neither persuasive nor relevant. Reply at 12. The "reverse silver platter doctrine" involves the suppression of evidence shared between different law enforcement entities, but does not govern whether there was an underlying constitutional violation. Whether or not Defendant Qualter could have believed that handing evidence "over to the state" might overcome a motion to suppress, (Ex. A at 10, DN 1-1), does not ameliorate the harm to Mr. Drewniak from the underlying unconstitutional search and seizure.

IV. The Summary Judgment Motion Must Be Deferred Pending Discovery.

Finally, Plaintiff respectfully requests that the Court deny Defendant Qualter's parallel motion for summary judgment on qualified immunity, pending discovery. *See* Fed. R. Civ. P. 56(d). As demonstrated in the prior Declaration of Attorney Emma Bond, Qualter's argument that the Plaintiff has not demonstrated the necessary discovery "with specificity" fails. Bond Decl.

¶¶ 7-11 (DN 25-1). Attorney Bond's supplemental declaration, attached to this motion, describes recent updates in discovery, including requests for production on a number of topics relevant to the primary purpose of the checkpoints and to Defendant Qualter's role in the seizure. *See* Supp. Bond Decl. ¶¶ 7-8, 11-12. Although Defendant Qualter asks the Court to cut discovery short in light of his arguments on qualified immunity, this Court has already explained that discovery on a claim of qualified immunity may be necessary "especially," as is the case here, "when the immunity is raised in a motion for summary judgment." *Drewniak v. U.S. CBP*, No. 20-CV-852-LM, 2021 WL 260399, at *3 (D.N.H. Jan. 26, 2021). As this Court explained:

> It would be unfair to allow Qualter to argue that he reasonably relied on the legal opinion of others without giving Drewniak the opportunity to explore the opinions he claims to have relied on. *Devers*, 2013 WL 3821759, at *2; *see Estate of Sorrells v. City of Dallas*, 192 F.R.D. 203, 207 (N.D. Tex. 2000) (identifying a "troubling trend in civil rights cases" whereby officials seek summary judgment based on qualified immunity while simultaneously moving to stay discovery in light of the qualified immunity defense, which "unfairly blindsides plaintiffs by forcing them to respond to evidence before they have an opportunity to conduct discovery").

Id. For the same reasons, the Court should allow Plaintiff to pursue discovery, including depositions, regarding the Defendants' declarations before adjudicating the motion for summary judgment on the basis of qualified immunity. *See* Bond Decl. ¶¶ 7-11; Supp. Bond Decl. ¶¶ 7-13.

CONCLUSION

For these reasons, the Court should deny Defendant Mark Qualter's motion to dismiss and premature motion for summary judgment and allow the case to proceed to discovery.

Respectfully submitted,

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By and through his attorneys affiliated with the American Civil Liberties Union of New Hampshire Foundation, the American Civil Liberties Union of Maine Foundation, and the ACLU Foundation of Vermont,

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