No. _____

In The
Supreme Court of the United States

DAVINCI AIRCRAFT, INC.
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents,

ON PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the exception for forfeitures created by the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, § 3, 114 Stat. 202 for property "seized for the purpose of forfeiture" apply to goods seized in violation of the Fourth Amendment?

2. Does the CAFRA exception and the "detention of goods" exception to the Federal Tort Claims Act, 28 U.S.C. § 26801(h) bar the district court from exercising subject matter jurisdiction barring such claims when a Federal government agency's "discretionary action" is based on an allegedly false and fraudulent claim that the goods are "classified" and subject to security controls that would involve criminal liability under the Espionage Act, 18 U.S.C. § 793(d)?

3. Can the district court's denial of a request for leave to file an amended complaint naming additional individual defendants, unknown at the time of filing but named as Does 1-10, invalidate the claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)?

PARTIES TO THE PROCEEDING

DaVinci Aircraft, Inc., Petitioner

United States of America; Michael Christmas, individual and official capacity; Rodney Lewis, individual and official capacity; Joel S. Russell, individual and official capacity; Does 1 through 10 inclusive, Respondents.

RULE 29.6 STATEMENT

DaVinci Aircraft, Inc., has no parent or subsidiary corporation. No publicly held company owns any of its stock.

RELATED CASES

- *DaVinci Aircraft, Inc. v United States of America et al.*, U.S District Court for the Central District of California, No, 2:16-cv-5864, Judgment entered April 25, 2017.
- *DaVinci Aircraft, Inc. v United States of America et al.*, No. 17-55719, U.S .Court of Appeals for the Ninth Circuit, Judgment entered June 12, 2019.

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PETITION FOR A WRIT OF CERTIORARI

DaVinci Aircraft, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Ninth Circuit (June 12, 2019) and is found at Appendix, App. 1. The order of the United States District Court for the Central District of California granting the United States' Motion to Dismiss (April 25, 2017) is found at Appendix, App. 24.

JURISDICTION

Petitioner seeks review of the judgment of the United States Court of Appeals for the Ninth Circuit entered pursuant to 28 USC § 1254(1). The Ninth Circuit's published opinion was filed on June 12, 2019.

The District Court had subject matter pursuant to the Federal Tort Claims Act (FCTA) and pursuant to the U.S. Constitution because the complaint alleged violations of the Petitioner's rights under the FCTA as well as the Fourth and Fifth Amendments to the Constitution.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves interpretation of the following statutes and Constitutional provisions:

1. Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Public Law 106-185.

> (2) Seizures pursuant to this section shall be made pursuant to a warrant obtained in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure, except that a seizure may be made without a warrant if— "(A) a complaint for forfeiture has been filed in the United States district court and the court issued an arrest warrant in rem pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims; "(B) there is probable cause to believe that the property is subject to forfeiture and— "(i) the seizure is made pursuant to a lawful arrest or search; or "(ii) another exception to the Fourth Amendment warrant requirement would apply

2. Espionage Act, 18 U.S.C. § 793(d)

> (d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used

> to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it.

3. Federal Tort Claims Act, 28 U.S.C. § 1346

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

4. Tucker Act, 28 U.S.C. § 1491

> (b)(1) Both the United States Court of Federal Claims and the district courts of the

> United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

5. Fourth Amendment to the United States Constitution

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

6. Fifth Amendment to the United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or

> limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

INTRODUCTION

This case presents the Court with an important issue of jurisdiction related to Section 2680(c) of the Federal Tort Claims Act (FTCA), and the efforts by both this Court and the Congress in the Civil Asset Forfeiture Reform Act of 2000 to deal with exceptions and exceptions to exceptions to the FTCA. Goods in the lawful possession of Petitioner ("DaVinci") were seized by federal agents without warrant following unsuccessful efforts by the Air Force to repurchase them. The Air Force relies on a belated, *post hoc* claim that the goods in question – antennas for the JASSM missile system – which they sold as unclassified surplus "junk" in 2013 were in 2017 now classified and related to national defense.[1] DaVinci maintains that the Air Force's belated claim of classification is entirely a farce, a violation of two

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[1] As noted *infra*, the antennas were originally manufactured as unclassified hardware. Petitioner is unable to find a Federal case in any jurisdiction dealing with the *post hoc* classification of hardware. Accordingly, this would be a case of first impression on the issue.

Presidential Executive Orders, and simply a means to avoid the legitimate procurement process.[2]

The district court relied on what DaVinci believes to be false and fraudulent representations by the Air Force to support an improper application of the Espionage Act (18 U.S.C. 793(d)) used in the seizure of DaVinci's goods. Sustaining the dismissal of the case on jurisdictional grounds, the Ninth Circuit Court of Appeals applied interpretations of the terms "detention" and "forfeiture" that are inconsistent with both prior decisions of this Court and the facts of the instant case. Both the district court and the Ninth Circuit failed to recognize the concurrent jurisdiction of the district court in such cases under the Tucker Act (28 U.S.C. § 1491).

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[2] In particular, Executive Order 13526 (2009) "prescribes a uniform system for classifying, safeguarding, and declassifying national security information" and states in pertinent part (Sec. 1.7) "in no case shall information be classified, continue to be maintained as classified or fail to be declassified in order to (1) conceal violations of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency; (3) restrain competition; or (4) prevent or delay the release of information that does not require protection in the interest of the national security."

STATEMENT OF THE CASE

In March 2013, Lockheed Martin, at the request of the U.S. Air Force, offered for sale to the public ten unclassified JASSM GPS antennas ("antennas") that the Air Force identified as "surplus," "obsolete," and "junk" and which ultimately were purchased by Petitioner DaVinci Aircraft, Inc ("DaVinci").[3] Manufactured as unclassified hardware, the antennas were never subject to the extensive security requirements that would have applied to classified hardware.[4] DaVinci purchased the antennas in July 2013 and subsequently advertised them for resale on the unrestricted surplus parts market.

Prior to January 2017, no government official indicated that the antennas were or had ever been classified hardware or related to national security, and at no time did the Air Force seek to impose the government-mandated requirements for classified hardware on DaVinci despite the fact that they were fully aware that the antennas, subsequently alleged to be "classified hardware" were DaVinci's lawful possession, and not subject to any security controls for

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[3] The antennas were originally manufactured by Ball Aerospace under a subcontract from Lockheed Martin and sold as part of a bulk sale of surplus parts, ultimately to DaVinci on July 31, 2013.

[4] These include Executive Order 12829; Executive Order 13526; *DoD* 5220.22-*M*, "*National Industrial Security Program, Manual for Safeguarding Classified Information,*" and supplemental security guidance for Special Access Program SENIOR RODEO. These mandatory security requirements were not part of the Air Force procurement of the antennas.

well over a year.[5] At no point did any Air Force official contact DaVinci about the now purportedly "classified hardware" in DaVinci's possession.[6]

DaVinci has never maintained approved secure storage, and at no time prior to their seizure did the Air Force seek to move the antennas to secure facilities where they would be protected from potential access by adversaries. Such practice would have been required standard practice had the antennas been classified material.[7]

On September 17, 2013, Air Force Office of Special Investigation (AFOSI) agents came to

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[5] The Air Force never alleged that there was a "mistake" or that the antennas were ever manufactured as classified hardware, contrary to language in the Ninth Circuit's opinion. Compare, *AST/Servo Sys., Inc. v. United States*, 196 Ct. Cl. 150 (1971), where the goods were manufactured as classified hardware and the Government acknowledged a mistake had been made in their sale.

[6] In support of their initial motion to dismiss, the United States (the "Air Force") offered the declaration of Martin D. Hemmingsen stating that "embedded features of the JASSM GPS antennae" are "classified at the SECRET and SECRET//SPECIAL ACCESS REQUIRED level" and that their disclosure could provide adversarial nations with critically protected information." This belated assertion flies in the face of the fact that the Air Force sold these unclassified antennas as "junk" and for over a year failed to make any effort to secure of control this material in accordance with mandated security guidance.

[7] Such actions would be mandatory under the Executive Orders and DoD instructions cited (See fn 2 *supra*), which is one reason Petitioner avers that the Air Force claim of classification was false and fraudulent.

DaVinci's facility for the stated purpose of "inspecting" the antennas and to discuss their purchase.[8] After inspecting the antennas, the agents demanded that DaVinci surrender them without any warrant, court order, or paperwork of any kind. DaVinci refused to surrender the antennas as demanded.[9] The agents then asked DaVinci for a quotation for their purchase price, were informed that the price for the antennas was $125,000 each, and then departed.

Some six months later (April 2014) DaVinci responded to a request from the Air Force Contracting activity at Eglin Air Force Base and provided a price quotation for sale of the antennas in the amount of $75,000 each. What followed were extended contract negotiations with Air Force Contracting Officer Capt. Rodney Lewis, by email and telephone, over the price for the antennas. DaVinci and the Air Force failed to reach an agreement on price for the sale.[10]

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[8] The AFOSI agents did not state that the antennas were classified hardware or required controls as such to prevent national security information from falling into the hands of potential adversaries.

[9] DaVinci's attorney was present and informed the AFOSI agents that they had no legal grounds for taking the antennas.

[10] The district court record on these negotiations which continued over several months is accurate. Apparently, the Air Force which had sold the antennas as surplus "junk" and of no value, now required them as spare parts. At no point was any mention made of their being "sensitive" or classified. Lewis' statement during the negotiations that the antennas were "no good" does not appear to reflect a belief on the part of the Air Force that they were classified hardware in need of protection

Having failed in their contractual effort to repurchase the antennas, the Air Force again sent AFOSI agents to DaVinci's facility in September 2014 demanding that they surrender the antennas under compulsion of law.[11] The agents presented DaVinci with a letter purportedly authorizing the Air Force to take possession of the antennas and threatening criminal action under 18 USC § 793(d) (the Espionage Act).[12] When the AFOSI agents seized the antennas, DaVinci's lawful property, they had no warrant issued by any judge or magistrate as required under the Fourth Amendment. Pursuant to the demands and threats made by the AFOSI agents DaVinci surrendered the antennas.

Following their seizure DaVinci invoiced the Air Force for the antennas. When the invoice was ignored DaVinci notified the Air Force, Office of Special Investigations, of a claim under the Federal Tort Claims Act (FTCA) (March 2015), requesting an Administrative Claim for Damages, which was then properly filed with the Dept. of the Army, Claims Div.,

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from adversary nations.

[11] AFOSI agent Joel Russell stated that the Air Force was authorized to and intended to take possession of the antennas, and at no point was there any indication that the antennas were classified hardware.

[12] This letter, dated September 23, 2014, was signed by Special Agent in Charge of the Air Force Office of Special Investigations Michael Christmas and is referred to at various times in the pleadings as the "Christmas letter." The letter threatened DaVinci with criminal prosecution under the Espionage Act (18 U.S.C. § 793(d)) but did not indicate DaVinci had violated the statute in any way.

Office of Staff Judge Advocate, as directed by the Air Force. While the Government acknowledged receipt of DaVinci's claim, it was never paid.

On August 5, 2016, DaVinci filed its complaint in Federal District Court, Central District of California, against the United States, as well as several known individuals alleging conversion; seizure of property in violation of the Fourth Amendment (*Bivens* action),[13] deprivation of property without due process in violation of the Fifth Amendment, conspiracy and abuse of process, fraud, and negligent misrepresentation.[14]

In support of its abuse of process and conversion claims, DaVinci alleged that the United States and its agents conspired fraudulently and wrongfully to coerce DaVinci to surrender the antennas to the Air Force without due process or just compensation.

The United States filed a motion to dismiss DaVinci's claim pursuant to Federal Rules of Civil Procedure Rule 12(b)(1) and 12(b)(6) on November 28, 2016, and the district court granted the United States' motion, giving DaVinci 21 days in which to file an amended complaint.[15]

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[13] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

[14] DaVinci's initial complaint against the United States included two known individuals – Michael Christmas and Rodney Lewis-- as well as other individuals (Does 1-10) whose identities were not known at the time. The First Amended Complaint (FAC) added another individual whose identity had subsequently become known.

[15] Along with its motion to dismiss, the United States attached

DaVinci filed its First Amended Complaint ("FAC") with the district court, and the United States again moved the district court to dismiss the FAC on jurisdictional grounds under Federal Rules of Civil Procedure Rule 12(b)(1). On April 17, 2017, the district court held oral argument on the motion to dismiss, and DaVinci sought leave from that court further to amend the complaint to add additional individuals whose identities had become known as part of its *Bivens* claim. The district court took the matter under submission and did not grant the leave to amend the FAC to add additional individual defendants.

On April 25, 2017, the district court issued its opinion (App. 24) granting the United States's motion to dismiss. The district court held that the waiver of sovereign immunity provided in 28 U.S.C. § 1346(b)(1) was not applicable due to the bar provided in 28 U.S.C. § 2680(h) that the "detention exception" to this statute was not applicable due to the so-called "forfeiture exception" to the detention exception. Petitioner avers that the district court based its conclusion on misreadings of cases cited in the opinion and in accepting at face value the fraudulent representations by the Air Force that the antennas

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as an exhibit a letter from an Air Force official, Martin Hemmingsen and an attachment which, for the first time (January 2017), asserted that the antennas contained sensitive features that would make them SECRET as well as subject to the Air Force Special Access Program SENIOR RODEO. At no point has the United States ever sought to explain how this hardware, manufactured as unclassified and subsequently sold as surplus "junk" in 2013 suddenly became classified in 2017.

were related to national security and properly seized pursuant to the Espionage Act (18 U.S.C. § 793(d)).[16]

The district court further dismissed DaVinci's claims on constitutional grounds for lack of jurisdiction because DaVinci had "failed to direct the court to a source of jurisdiction" (App. 41). The district court's conclusion is inconsistent with the pleadings in the case.

Relying on the 2014 "Christmas letter" and the 2016 declaration of Air Force official Martin Hemmingsen, filed by the United States in January 2017 as an attachment to their motion to dismiss, the district court noted that it could not review the Air Force's decision to classify the antennas as relating to the national defense because such classification was a discretionary decision, triggering the "discretionary function" bar under 28 U.S.C. § 2680(a).

The district court did not permit discovery in this matter, and did not accept DaVinci's argument that the Air Force's belated Hemmingsen declaration was totally inconsistent with established Government procedures, and at best was a fraudulent farce undertaken some four years after the fact to conceal a failed procurement and unlawful seizure. The district court endorsed the government's engagement in bait and switch, and the Ninth Circuit concurred.

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[16] The district court cites *Kosak v. United States*. 465 U.S. 848 (1984); *Ali v. Fed. Bureau of Prisons*. 552 U.S. 214 (2008); *Foster v. United States*. 522 F.3d 1071 (9th Cir. 2008); and *Gasho v. United States*. 39 F.3d 1420 (9th Cir. 1994). See also *McCarthy v. United States*. 850 F.2d 558 (9th Cir. 1988) and *Smoke Shop LLC v. United States*. 761 F.3d 779 (7th Cir. 2014).

DaVinci appealed the decision of the district court to the Ninth Circuit Court of Appeals (App. 1) on the basis of several errors in district court's opinion, largely related to a misinterpretation of the forfeiture exception to the detention exception to the FTCA and a failure to recognize the prior holding of this Court in *Millbrook v. United States*. 569 U.S. ___ (2013) waiving sovereign immunity for the Government for intentional torts committed by law enforcement officers.[17]

The Ninth Circuit held that DaVinci's claim was barred by section 2680(c) of the FTCA, the "detention exception," and that the exception applied even though the antennas were permanently, rather than temporarily, detained, and applied whether or not the property was seized as a part of a criminal investigation.

The Ninth Circuit further held that because the antennas were not seized "solely" for the purpose of forfeiture, the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) did not re-waive sovereign immunity to allow DaVinci's claim. Further, the Ninth Circuit also held that DaVinci could proceed in the Court of Federal Claims under the Tucker Act through a takings claim under the Fifth Amendment but failed to recognize that this same Act (28 U.S.C. § 1491) provides concurrent jurisdiction to the district courts.

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[17] In denying jurisdiction in the matter, both the district court and the Ninth Circuit also failed to recognize the provision of the Tucker Act (28 U.S.C. § 1491) providing concurrent jurisdiction to the district courts and the Court of Federal Claims in matters involving "a statute or regulation in connection with a procurement or a proposed procurement."

Finally, as DaVinci had also sued individual defendants in their individual capacities, the Ninth Circuit held that because DaVinci voluntarily dismissed the case against three of the named individuals, the *Bivens* claims against the other individual defendants were not part of the appeal and did not exist. The Ninth Circuit thus failed to address the issue of additional individual defendants who the district court refused to allow an amendment to the FAC although the identities of the additional defendants had become known; they therefore remained Does. The Ninth Circuit concluded that the district court properly dismissed the case for lack of subject matter jurisdiction.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT REVIEW OF THE COURT OF APPEALS' DECISION BECAUSE IT IS INCONSISTENT WITH SUPREME COURT PRECEDENTS WITH RESPECT TO THE WAIVER OF SOVEREIGN IMMUNITY, DETENTION AND FORFEITURE EXCEPTIONS TO THE FEDERAL TORT CLAIMS ACT AND DENIES A VALID *BIVENS* CLAIM TO BE HEARD IN FEDERAL DISTRICT COURT

A. Petitioner Has a Right to Have Its Claims Heard in Federal District Court Under Both Statute and Case Law

While there is little disagreement between the parties in this case as to the basic facts, the United States (and also referred to as the "Air Force") repeatedly sought to dismiss Petitioner DaVinci's ("DaVinci") claims in federal district court for lack of jurisdiction. The heart of the jurisdictional dispute lies in the waiver of sovereign immunity provided under the Federal Tort Claims Act ("FTCA").[18] The district court recognized this Court's holding that such waivers need to be expressed in statute, citing *Lane v. Penna.* 518 U.S. 187, 192 (1996).

The district court dismissed DaVinci's claim for conspiracy related to abuse of process for lack of subject matter jurisdiction even though DaVinci set

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[18] The relevant part of the FTCA provides the waiver for "injury or loss of property .. . .caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1).

forth sufficient facts to support causes of action for abuse of process. It is well-settled that, to support a cause of action for abuse of process, a plaintiff must plead two essential elements: that the defendant (1) entertained an ulterior motive in using the process and (2) committed a willful act in a wrongful manner.

DaVinci met this standard. The FAC identifies both the ulterior motive for the Air Force's actions—obtaining the antennas without paying—and willful acts committed in a wrongful manner—namely, the misrepresentations made by Air Force and its agents to DaVinci. On top of that, of course, the Air Force threatened DaVinci with prosecution, surely a wrongful act and an abuse of authority in this context.

The cases identified by the Air Force strongly suggest that the Espionage Act (18 U.S.C. § 793(d)) was only meant to be applied in cases of actual misuse of national security information or defense equipment.[19] This is simply not the case here. The cases cited by the Ninth Circuit involved classified or militarized goods mistakenly sold by the Government. The instant case involves unclassified hardware sold as surplus "junk" with no mention of classification until months after the filing of this suit.

For example, the Ninth Circuit's reliance on *AST/Servo Sys., Inc. v. United States*, 196 Ct. Cl. 150 (1971), is misplaced. In that case, the Government acknowledged a "mistake" in the sale of classified

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[19] See *Dubin v. United States*, 153 Ct. Cl. 550 (1961) [*Dubin I*], *Dubin v. United States*, 176 Ct. Cl. 702 (1966) [*Dubin II*], *AST/Servo Sys., Inc. v. United States*, 196 Ct. Cl. 150 (1971), and *Int'l Air Response v. United States*, 75 Fed. Cl. 604, 605 (2007).

goods which was quickly rectified. Here there is no issue of mistake. The antennas were not classified. Ever. They were not classified in manufacture. They were not classified when the Air Force sold them as surplus. The Air Force "classified" them only in response to this suit, two years after their initial sale.

The Air Force wrongfully threatened DaVinci with prosecution under the Espionage Act (18 U.S.C. § 793(d)), a law that has, among other things, been used to recover goods of grave importance to national security, not to seize items which have been bought and sold among private companies for years prior to the Government's unlawful seizure. Use of the Espionage Act (18 U.S.C. § 793(d)) in the instant case was both fraudulent and only utilized as a way to avoid the legitimate procurement of spare parts the Air Force now wanted. It was an abuse of governmental power.

The district court's dismissal of DaVinci's claim for conversion also constitutes reversible error. That court relied in part on *Aleutco Corp. v. United States,* 244 F.2d 674 (3rd Cir. 1957), where the plaintiff sought damages for conversion by the government of war surplus materials it had purchased and alleged a tortious exercise of dominion over its property by the government. The Third Circuit discussed the jurisdictional issue and held that the FTCA action was within the jurisdiction of the district court.

The Ninth Circuit subsequently approved this principle from *Aleutco* recognizing that a plaintiff could properly bring suit in the district court because his claim sounded in tort, even though it could also

have been brought based on the terms of the conveyance of an easement to the government.

As the Ninth Circuit noted, DaVinci could have brought its claim in a different forum. This fact does not mean, however, that the federal district court lacks jurisdiction. The district court would only lack jurisdiction if "the government's liability depend[ed] wholly upon" the contract implied in law or upon some non-tortious claim. *Love v. United States*, 915 F.2d 1242, 1246 (9th Cir. 1989). The claim asserted here depends on other factors which sound in tort, and therefore the district court has subject matter jurisdiction.

Moreover, the Court of Federal Claims lacks jurisdiction over this case. "Section 1491(a) expressly precludes the Court of Federal Claims from hearing cases 'sounding in tort.'" *Crane v. United States*, 2016 WL 6575093, at *2 (Fed. Cir. Nov., 7, 2016) (citing *Keene Corp. v. United States*, 508 U.S. 200, 214 (1993). "Further, under the Federal Tort Claims Act, jurisdiction over tort claims lies *exclusively* [emphasis added] in the United States district courts. 28 U.S.C. § 1346(b)(1)." *Id*.

The attempt to recast DaVinci's conversion claim as a "takings claim," is wrong as the government's seizure was unauthorized, in which case the district court, not the Court of Federal Claims, would possess jurisdiction. *Kam-Almaz v. United States*, 682 F.3d 1364, 1371 (Fed. Cir. 2012).[20] The FAC must be read in the manner favorable to DaVinci, and thus the

[20] See also *Microsoft Corp. v. ATech Corp*., 855 F. Supp. 308, 311 (C.D. Cal 1994) where the district court finds "…there is in other words, a form of extortion."

proper reading of the FAC is an action in tort for conversion.

Such a claim for conversion is not prohibited by the FTCA's requirement that the property must be "seized for the purpose of forfeiture."[21] The FTCA only prohibits claims for the "detention of any goods," 28 U.S.C. § 2680(c), while the FAC alleges conversion as to the improper taking of the antennas by the Air Force. The FAC states that the Air Force had no intention of ever paying compensation to DaVinci, indicating that they took the antennas for the sole purpose of forfeiture.

Further the Ninth Circuit and the district court are in error in their reliance on *Foster v. United States,* 522 F.3d 1071, 1074 (9th Cir. 2008), in attempting to characterize this case as one arising "out of detention unless 'solely for purposes of forfeiture.'" In *Foster*, the Ninth Circuit held that the government had seized the property for the purpose of criminal investigation, not forfeiture, so the "detention of goods" exception to U.S.C. § 2680(c), applied.[22]

That reasoning and conclusion do not apply here as no criminal investigation whatsoever was involved. The Air Force seized DaVinci's property simply because they wanted it as spare parts—DaVinci engaged in no crime. No taxes or customs duties were

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[21] See *CHoPP Computer Corp. v .United States*, 5 F.3d 1344, 1347 (9th Cir. 1993).

[22] In their ruling the district court also relies on *Shavesteh v. Raty,* 404 F.App 298 (10th Cir. 2010), which is also not applicable. This is yet another criminal case involving a convicted drug dealer and the seizure of illicit drugs.

due, and no fact pattern in any of the cited cases is even remotely analogous.

Having incorrectly concluded that this case "falls within the detention exceptions to the FTCA," the district court considered whether the "detention" of the antennas was "solely for the purposes of forfeiture" in accordance with *Foster* (522 F.3d at 1074) and whether the Air Force may have had the possibility of forfeiture in mind when they seized the antennas, as an improper use of forfeiture proceedings, citing *Diaz v. United States*, 517 F.3d 608, 613 (2nd Cir. 2008) and *Smoke Shop LLC v. United States*, 761 F.3d 779 (7th Cir. 2014). The applicability of these cases is tangential at best.

Despite the fact that there was nothing in the record to support its conclusion and despite that fact the record demonstrated the opposite, the district court concluded that "the JASSM Antennas were not seized solely for the purposes of forfeiture. They were seized because they contained classified information posing a danger to national defense."

The district court's finding is stupefying. When the antennas were seized in September 2014, the Air Force made no claim that the antennas were "classified" or that they contained features affecting national security.[23] Indeed, as noted *supra*, the Air

[23] The single paragraph "Christmas letter" cited 18 U.S.C. § 793(d) as the purported authority for the seizure with no mention that the antennas were classified. Indeed, if in fact the antennas were actually classified at the time of their seizure, they would have been marked and controlled as such. The specific requirements for such control are set forth in *DoD* 5220.22-*M*, "*National Industrial Security Program, Manual for*

Force first asserted that they were classified only in January 2017, more than three years later, when the United States moved to dismiss the complaint. The assertion with respect to classification appears only in the Hemmingsen declaration in support of the United States' motion to dismiss.

By statute, Executive Order, departmental directives, and regulations, the Air Force has specific procedures for the manufacture and control of hardware related to national security and the proper classification thereof.[24] As discussed *supra*, there is no evidence whatsoever that any of these procedures was followed. The antennas were never manufactured, marked or controlled as classified hardware. For some two years after their sale as surplus "junk," the Air Force made no effort to secure or control the antennas, which they belatedly claim were somehow "classified" and needed protection from potential adversaries.

This fact—and it is a fact—is hardly surprising. The Government does not operate in this way when actual matters of national security are involved. The actions of the Air Force in this case are nothing less than a fraudulent farce undertaken to cover their illegitimate conduct, which in itself is a violation of Executive Order 13526.

Safeguarding Classified Information; Department of Defense, DoDI 5205.11, *Air Force Instruction 16-701, Management, Administration and Oversight of Special Access Programs (18 February 2014).*

[24] *Ibid.*

The district courts' treatment of the Espionage Act cases is hardly more edifying. The Ninth Circuit and the district court cite four cases—*Dubin v. United States*, 153 Ct. Cl. 550 (1961) [*Dubin I*], *Dubin v. United States*, 176 Ct. Cl. 702 (1966) [*Dubin II*], *AST/Servo Sys., Inc. v. United States*, 196 Ct. Cl. 150 (1971), and *Int'l Air Response v. United States*, 75 Fed. Cl. 604, 605 (2007)—that teach that the Espionage Act (18 U.S.C. § 793) was only meant to be applied in cases of actual misuse of national security information or classified defense equipment.[25]

Each of these cases involved classified goods mistakenly or inappropriately sold by the Government. When the Air Force threatened DaVinci with prosecution under the Espionage Act (18 U.S.C. § 793(d)), there was no claim of classification at all and no indication of what, if any, criminal activity was involved that might justify invoking this Act..

The district court notes that "plaintiff does not direct the Court to any analogous case which has ever preceded in United States District Court." Here the district court is correct – there is none. *All* of the similar claims cases involving 18 U.S.C. § 793, such as those cited *supra*, involved materials that were classified at the time of seizure. At best, the

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[25] The radar units, power units, and radio receivers in *Dubin I* and *Dubin II* had been marked as "classified" when the Government mistakenly sold them (153 Ct. Cl. at 553); the goods at issue in *AST/Servo* were also classified and had not been demilitarized prior to sale or should have remained classified (196 Ct. Cl. at 153-54). In both cases the Government recognized the error promptly and moved to rectify the problem.

argument, is one of *post hoc* classification of the antennas, for which there is no judicial precedent in any jurisdiction. The case before this Court therefore is a case of first impression.

Attempting to resolve this issue, the district court recognized that "[p]laintff does not allege or argue that the JASSM antennas are *unrelated to national defense*." (emphasis in the original). This double negative makes no sense. There would be no need for DaVinci to make such an argument. Each year the Air Force buys billions of dollars of parts that are related to national defense that are unclassified.[26]

The district court also erred in holding that it lacked subject matter jurisdiction "predicated upon a challenge to Russell's exercise of discretion in classifying the JASSM Antennas," citing 28 U.S.C. § 2680(a) and *Loughlin v. United States*, 286 F.Supp.2d 1, 23 (D.D.C. 2003). Again the district court misstates or misinterprets the facts. Stephen Russell was not the Assistant Secretary of the Air Force, but rather the Director, Special Programs, working in the Department of the Air Force.

DaVinci does not challenge Russell's exercise of discretion with respect to classification, but questions why his letter, dated "July 2014" and "based on an AFOSI request" with respect to the JASSM GPS antennas," was not brought forward until January

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[26] The district court does note that "classification does not appear to be a prerequisite under 18 U.S.C. § 793(d)" but again fails to find where the Air Force made any claim even remotely related to national security at the time of the seizure or alleged possible criminal activity prior to January 2017.

2017, and why the security actions mandated by Executive Order and agency directive never took place.[27]

The district court speaks about the FCTA waiver not being applicable to "claims based upon … [the performance of failure to perform] a discretionary function or duty . . . *whether or not the discretion involved be abused*." (Emphasis in the original). Again the district court is in error; there was no element of discretion involved on the part of the Air Force agents. They wrongly engaged in an effort to classify materiel in response to this lawsuit. The discretionary function exception of 28 U.S.C. § 2680(a), therefore, is not applicable.

B. This Court Should Grant Certiorari In Order to Insist on Proper Application of the Civil Asset Forfeiture Reform Act of 2000

The Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-186, 114 Stat. 202, 18 U.S.C. § 983, established a uniform process for determining if property was subject to forfeiture. The Ninth Circuit gives such short shrift to the applicability of this Act, the failure of the Government to meet its burden to show, by a preponderance of the evidence, that the property in question is subject to forfeiture under 18 U.S.C. § 983(c)), or to show whether the forfeiture was in fact forfeiture or seizure that Petitioner is left scratching its head as to how to understand the lower court's reading of the law. This Court should find that the Civil Asset Forfeiture Reform Act of 2000 requires

government agents to follow its procedures to the letter, allowing complainants adequate opportunity to make their claim and, if they prevail, to recover their property. In this case, no such opportunity was offered and recovery proved impossible because the Government used and used up the antennas.

C. This Court Should Grant Certiorari to Recognize Petitioner's Valid *Bivens* Claim as the District Court Failed to Grant a Request for Leave to File an Amended Complaint Naming Additional Individual Defendants

The seizure of the antennas under threat of criminal prosecution was a violation of DaVinci's Fourth Amendment right against unreasonable seizures of property.[28] DaVinci would not have surrendered the property to the Air Force agents but for the wrongful inducement and coercion of the agents through their misrepresentation of their lawful authority to seize the antennas.

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[28] There is extensive legal scholarship in this area. See, for example, Ahkil Reed Amar, "Fourth Amendment First Principles." 107 HARVARD L. REV. 757 (1994), Anthony G. Amsterdam, "Perspectives on the Fourth Amendment." 58 MINNESOTA L. REV. 349 (1974), Phillip A. Hubbard, MAKING SENSE OF SEARCH AND SEIZURE LAW, A FOURTH AMENDMENT HANDBOOK, (2nd ED.)(2015), WAYNE R. LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (5TH ED.), William J. Stuntz, "Warrants and Fourth Amendment Remedies." 77 VIRGINIA LAW REVIEW 881 (1991), and Silas J. Wasserstrom, and Louis Michael Seidman, "The Fourth Amendment as Constitutional Theory." 77 GEORGETOWN LAW JOURNAL 19 (1988).

In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), this Court recognized a cause of action under the Fourth Amendment for damages. Here this Court held that a valid claim for damages could exist in the event of injury resulting from actions by federal officers in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures.[29]

Several "*Bivens*" cases have been brought before the courts, and this Court has subsequently narrowed the applicability of the original *Bivens* decision. At the same time, in *Millbrook v. United States*, 569 U.S. 50 (2013), this Court held that the Government may be held liable for abuses intentionally carried out by law enforcement officers in the course of their employment, such as the AFOSI agents here.

Most recently, in *Ziglar v. Abbasi*, 582 U.S. ___, 137 S. Ct. 1843 (2017), this Court prescribed a controlling test for whether a case presents a new *Bivens* context:

> The proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new. Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some

[29] Subsequently this Court allowed *Bivens*-type remedies twice more, in *Davis v. Passman,* 442 U.S. 228 (1979) and in *Carlson v. Green,* 446 U.S. 14, (1980). *Bivens* actions have since been expanded beyond the Fourth Amendment context of unreasonable searches or searches without a warrant.

> examples might prove instructive. A case might differ in a meaningful way because of 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. *Ziglar*, 137 S. Ct. at 1859-60.

While *Bivens* claims cannot be made to hold officers responsible for acts of their subordinates, the *Bivens* remedy remains applicable in this case where no allegation is made to hold superiors responsible for the actions of their subordinates and where the claims asserted fall within the *Ziglar* standards.[30]

Bivens and *Ziglar* allow a private right of action for damages against a federal official for violating a federal constitutional right if the constitutional right that was violated is one of the constitutional rights already recognized by the Court. Such rights include the Fourth Amendment right against warrantless search and seizure without probable cause (*Bivens*) and a claim under the Fifth Amendment due process

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[30] In this case, moreover, the Air Force agents were not executing any official policy, nor were they under orders from any higher authority to violate DaVinci's constitutional rights. They did this on their own.

clause (*Davis*).

In addition to the cause of action relating to one of these rights, a successful *Bivens* claim must not arise under "a new *Bivens* context" (*Ziglar*).[31] Further, the claim must involve no "special factors that counsel hesitation in the absence of affirmative action by Congress." In *Ziglar*, the Court left open the possibility that a new *Bivens* context within an existing *Bivens* right may be recognized if there are no special factors counseling hesitation in the absence of affirmative action.[32]

Under *Ziglar*, *Bivens* allows a private right of action for damages against a federal official for violating a federal constitutional right if (A) and either (B)(1) or (B)(2) below are true: (A) The constitutional right that was violated is one of the three constitutional rights already recognized by the Supreme Court. These three rights include the Fourth Amendment right against warrantless search

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[31] To the extent that this presents a new context, it passes the tests suggested by this Court in *Ziglar,* including the low rank of the agents involved and that it did not involve their superiors or any official Air Force policy. Further there is no evidence of any 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.

[32] In *Ziglar*, this Court was dealing with the post-9/11 detention of terrorists captured outside the United States. It is not difficult to distinguish the instant case that does not involve any official policy to avoid the procurement process by having federal agents seize property under color of law with threats of criminal prosecution and a *post-hoc* cover up with false claims of classification in actual violation of established policy, statute, and Executive Order.

and seizure without probable cause (*Bivens*), a Fifth Amendment due process clause (*Davis*), and an Eighth Amendment right (*Carlson*). In addition to the cause of action relating to one of these three rights, a successful *Bivens* claim must have one of the following two features: (B)(1) The claim must not arise under "a new *Bivens* context" (*Ziglar*); or (B)(2) The claim must involve no special factors that counsel hesitation in the absence of affirmative action by Congress.

DaVinci's Fourth Amendment *Bivens* claim involves neither a new context nor implicates any special factors that counsel hesitation in the absence of affirmative action by Congress. In contrast, the Fifth Amendment *Bivens* claim, discussed below, presents a new context, but has no special factors counseling hesitation. Both claims are viable, and the district court erred when it granted the motion to dismiss. The Fourth Amendment Bivens Claim Does not present a new context and no special factors counsel hesitation in the absence of Congressional action.

Thus, the right to Fourth Amendment protection against warrantless searches and seizures is clearly recognized under *Bivens* and this Court continues to follow it. While *Ziglar* defines with greater specificity the circumstances in which *Bivens* remedies are available, this Court notes that the opinion "is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." *Bivens* and its progeny vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward.

Here, the question can certainly be raised as to whether the facts present a "new context" or an existing one under *Bivens*. The facts of this case are sufficiently similar to those originally considered by the Court as not to represent a new context. Even if one might see this case as presenting a "new context," the claims asserted pass the *Ziglar* tests because, as the Court noted, a myriad of special factors can distinguish a given case from one of the contexts recognized by the Court.

The Fifth Amendment prohibits federal officials from depriving any person of property without due process of law. DaVinci asserts a claim for a *Bivens* remedy under the Fifth Amendment. This Court previously accepted a Fifth Amendment due process clause claim in the context of gender discrimination in *Davis*.[33]

The purpose of *Bivens* remedies is to deter federal agents from violating certain constitutional rights as they act within the scope of their employment. *Bivens*

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[33] This Court declined to recognize a *Bivens* right in other due process contexts, such as *United States v. Stanley*, 483 U.S. 669 (1987), refusing to grant a *Bivens* action to serviceman who sued military officers and civilian superiors for secret administration of LSD as part of an Army experiment. This Court also denied military officers relief under *Bivens* for race-discrimination in *Chappell v. Wallace*, 462 U.S. 296 (1983). In each of these cases, the fact that military officers were making the *Bivens* claims played a significant role in the Court's reasoning. This case is distinguishable from *Chappell* and *Stanley* because DaVinci is not a military officer. Like the Fourth Amendment *Bivens* case, the Fifth Amendment case, *Passman*, provides even fewer similarities—none whatsoever, in fact—than the *Bivens* case offers for this case.

remedies are only available against particular offending officers, and cannot be asserted to hold officers responsible for acts of their subordinates. This is not the case in the present matter, where federal agents violated DaVinci's Fourth Amendment rights against unlawful seizures by taking DaVinci's antennas from without a warrant.

Given their deference to the Government's characterization of what happened in this case, both the district court and the Ninth Circuit gave short shrift to DaVinci's *Bivens* claim. The district court granted the motion to dismiss on the grounds that the motion *only* included the United States Government and none of the named or unnamed individual defendants who violated DaVinci's Fourth and Fifth Amendment Constitutional rights.

The district court's interpretation that the motion to dismiss involves only the United States Government, and not the Air Force agents who violated DaVinci's constitutional rights, flies in the face of any coherent understanding of the facts of this case. The United States' motion repeatedly refers to the interests of the Government and its federal employees, stating, for example, that "this court lacks subject matter jurisdiction over any alleged or implied constitutional claims because the United States has not consented to its official being sued in their official capacities." Such statements are not consistent with the decisions of this Court.

As this Court has held, claims for constitutional torts committed by government employees in their official capacities do lie. The United States in no way intended their motion to dismiss not to cover the

named employees who acted as agents of the Government. The Government's motion to dismiss is directed against the First Amended Complaint against [d]efendants United States of America; Michael Christmas . . . , Rodney Lewis . . ., Joel S. Russell . . ., and Does 1 through 10, inclusive (collectively "Defendants") . . . ."

Further, the district court's treatment of the motion to dismiss departs from its prior treatment of the appellant's *Bivens* claim. In the district court's order granting the initial motion to dismiss, the district court, "in the interests of judicial efficiency," evaluated the merits of a prospective *Bivens* claim under a Fifth Amendment *takings* clause argument.

The district court rightly noted that, because "a statutorily defined mechanism" for seeking just compensation for public takings existed under the Tucker Act, (quoting *Anoushiravani v. Fishel*, No. 04-cv-212-MO 2004 WL 1630240, at *9 (D. Or. July 19, 2004)), "an amendment to the pleadings appears futile." In granting the original motion to dismiss, the district court predicted that a *Bivens* Fifth Amendment takings clause suit would be foreclosed by the Tucker Act, and not that the claim was impossible if the motion to dismiss *only* applied to the United States and not the other federal employees in the suit.

Nevertheless, if this case was found to present a new *Bivens* context, no special factors exist to counsel judicial hesitation. In *Ziglar* this Court left open the possibility that a new *Bivens* context within an existing *Bivens* right may be recognized if no special factors counsel hesitation in the absence of

affirmative Congressional action. In clarifying "special factors counseling hesitation," *Ziglar* this Court offers the following:

> This Court has not defined the phrase "special factors counselling hesitation." The necessary inference, though, is that the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed. Thus, to be a 'special factor counselling hesitation,' a factor must cause a court to hesitate before answering that question in the affirmative. *Ziglar*, 137 S. Ct. at 1858-59.

It is important to note that in *Ziglar* this Court was dealing with one more in a series of difficult cases dealing with the post 9/11 detention of terrorists captured outside the United States and various high level "executive policies" adopted by the federal government to deal with their detention.[34] It is not difficult to distinguish the present case from *Ziglar*.

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[34] In *Ziglar* the Court noted that the relevant special factors for a *Bivens*-type remedy should not be extended to the claims challenging the confinement conditions imposed pursuant a formal policy adopted by the Executive in the wake of the September 11, 2001 terrorist attacks. The allegations in *Ziglar* were that this policy high-level policy violated due process and equal protection rights by holding them in restrictive conditions of confinement, and allegations of Fourth and Fifth Amendments violations by subjecting the victims to frequent strip searches. Here this Court noted that the proper balance in

The present case does not involve any official or high-level executive policy to avoid the legitimate procurement process by having federal agents seize property under color of law with threats of criminal prosecution under the Espionage Act (18 U.S.C. § 793(d)). Instead, this case involves an agent-inspired *post-hoc* cover up that used false claims of classification in violation of established policy, statute and Executive Order.

The right to Fourth Amendment protection against warrantless searches and seizures is clearly recognized under *Bivens*. *Ziglar*, which significantly constricts the availability of *Bivens* remedies, notes that the opinion "is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose. *Bivens* does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward. The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.

This Court in *Ziglar* emphasizes that the necessary inference is whether "the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing

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situations like this, between deterring constitutional violations and freeing high officials to make the lawful decisions necessary to protect the Nation in times of great peril, is one for the Congress to make, not the Judiciary.

a damages action to proceed." Given the presence of arguably classified devices and the fact that Air Force agents are involved, there is some argument that a federal court is not ideally suited to weigh the costs and benefits of allowing the action to proceed. At the same time it is the case that this is exactly what federal courts do. Statutes, policies and procedures are in place and it is the role of the courts to consider the facts and rule if actionable violations have taken place.

Claims of "national security" are by definition serious and any use or misuse must be considered seriously. They cannot provide the government a blank check to dodge judicial review, particularly when such a claim is based on false, fraudulent and admittedly *post hoc* claims of "classification." This is a very different national security context than that raised by *Iqbal* and *Ziglar*.

The Fifth Amendment to the Constitution prohibits federal officials from depriving any person of property without due process of law, and here DaVinci also makes claim for a *Bivens* remedy under the Fifth Amendment. This Court has previously acknowledged a due process clause right in the context of gender discrimination that was codified in *Davis* where an administrative assistant sued a Congressman for firing her because she was a woman.

Unlike the Fourth Amendment *Bivens* case, *Davis* provides few similarities—none whatsoever—to the instant case. Accordingly, this case presents a new *Bivens* context. A Fifth Amendment *Bivens* claim may present a "new context" under *Ziglar*, so long as no special factors counsel judicial hesitation. In

several cases, this Court has considered whether *Bivens* claims involving the U.S. military present a special circumstance that should prompt hesitation.[35]

This Court in *Stanley* clarifies that *Bivens* claims against military officers by civilians do not, on that basis alone, provide any reason for a court to hesitate from allowing a *Bivens* remedy. Here, DaVinci is not a military officer and so his *Bivens* claims involve neither a special factor counseling hesitation for the fact that the offending officers were members of the Air Force nor for the *post-hoc* claims that the antennas included classified features or information, discussed *supra*.

Like the Fourth Amendment *Bivens* case, the Fifth Amendment case on record, *Passman*, provides even fewer similarities—none whatsoever, in fact—as the *Bivens* case offers this case in the *Bivens* context. A Fifth Amendment *Bivens* claim may present a "new context" under *Ziglar*. For these reasons the present case likely presents special factors, but none that would cause a court to hesitate before granting a *Bivens* remedy in this current context.

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[35] This Court in *United States v. Stanley*, 483 U.S. 669 (1987) refused to grant a *Bivens* action to U.S. serviceman who sued military officers and civilian superiors for secret administration of LSD as part of an Army experiment. This Court also denied military officers suit under *Bivens* for race-discrimination in *Chappell v. Wallace*, 462 U.S. 296 (1983).

CONCLUSION

For all these reasons, this Court should grant the petition.

Respectfully Submitted,

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