No. _____

IN THE

Supreme Court of the United States

JOSÉ OLIVA,

Petitioner,

v.

MARIO NIVAR, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal police working as security at a Veterans Affairs hospital unreasonably seized seventy-year-old veteran José Oliva, choking and slamming him to the ground without justification. Despite this Court's admonition in *Ziglar* v. *Abbasi* that a constitutional remedy is available for search-and-seizure claims "in this common and recurrent sphere of law enforcement," 137 S. Ct. 1843, 1856–1857 (2017), the Fifth Circuit held that Oliva could not sue the officers for the violation of his constitutional rights because Oliva's case is not factually identical to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. 6a–7a.

The question presented is:

Whether claims against federal police for Fourth Amendment violations committed during standard law enforcement operations fall within an established context for *Bivens*, as the First, Second, Third, Fourth, Sixth, Ninth, and Eleventh Circuits have held, or whether, as the Fifth Circuit holds below, such claims present a new context unless they involve narcotics officers "manacling the plaintiff in front of his family in his home and strip-searching him in violation of the Fourth Amendment." Pet. App. 5a.

PARTIES TO THE PROCEEDINGS

Petitioner is plaintiff José Oliva. Respondents are defendants U.S. Department of Veterans Affairs Police Officers Mario Nivar, Hector Barahona, and Mario Garcia.

RELATED PROCEEDINGS

U.S. District Court for the Western District of Texas:

Oliva v. *United States*,
No. 3:18-CV-15 (Jan. 8, 2019; Aug. 20, 2019)

U.S. Court of Appeals for the Fifth Circuit:

Oliva v. *Nivar*,
No. 19-50795 (Sept. 2, 2020)

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José Oliva petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit, Pet. App. 1a, is reported at 973 F.3d 438. The August 20, 2019 opinion of the United States District Court for the Western District of Texas, Pet. App. 11a, is not reported. The January 8, 2019 opinion of the district court, Pet. App. 25a, is not reported but is available at 2019 WL 136909.

JURISDICTION

The Fifth Circuit entered its opinion below on September 2, 2020. Through its COVID-19-related order dated March 19, 2020, this Court extended the deadline to file a petition for a writ of certiorari to 150 days from the date of the Fifth Circuit's opinion. Oliva timely files this petition and invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV.

STATEMENT

In *Ziglar* v. *Abbasi*, this Court held that although extending a *Bivens* remedy to a "new context" is a "disfavored judicial activity," that caution does not "cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." 137 S. Ct. 1843, 1856–1857 (2017) (internal quotation marks and citations omitted). Until the Fifth Circuit's decision below, the federal circuit courts had uniformly followed both of *Abbasi*'s commands, declining to extend *Bivens* into new contexts but allowing constitutional claims for Fourth Amendment violations committed by federal police during "standard 'law enforcement operation[s.]'" *Jacobs* v. *Alam*, 915 F.3d 1028, 1038 (6th Cir. 2019) (citing *Abbasi*, 137 S. Ct. at 1861); see also, *e.g.*, *Hicks* v. *Ferreyra*, 965 F.3d 302, 311 (4th Cir. 2020) (approving a remedy for "violations of the Fourth Amendment, committed in the course of a routine law-enforcement action" (citing *Abbasi*, 137 S. Ct. at 1860)); note 11, *infra.*

The Fifth Circuit broke from the seven-circuit consensus, holding instead that *Abbasi*'s first command overrides its second and that any deviation from the precise facts of *Bivens* represents a "new context." As a result, the Fifth Circuit's ruling frustrates the uniform "instruction and guidance" that *Bivens* provides in the "common and recurrent sphere of law enforcement." *Abbasi*, 137 S. Ct. at 1857. This case involves a *Bivens* claim asserted in that sphere.

José Oliva is an American military veteran, who served during the deadliest year of the Vietnam War. After returning home, Oliva dedicated himself to a life of public service, spending his career in both state and

federal law enforcement. In 2010, Oliva retired from the Department of Homeland Security and received a gold watch for his decades of service.

On February 16, 2016, federal police working as security at an El Paso, Texas, Veterans Affairs hospital destroyed that watch when they choked, slammed to the ground, and seriously injured Oliva, who was seventy years old at the time. See Pet. App. 2a.

That afternoon, Oliva was visiting the hospital for a scheduled dental appointment. Pet. App. 26a. To enter, he was required to go through a security checkpoint manned by federal police, Mario Nivar, Hector Barahona, and Mario Garcia. *Id.* at 2a. As he had done many times before, Oliva placed his belongings into an inspection bin. When Nivar demanded Oliva's identification, Oliva "calmly explained . . . that it was in the inspection bin with [his] other personal items." *Ibid.* (alterations in original).

Nivar, inexplicably agitated, came around the security checkpoint and approached Oliva with handcuffs drawn. Pet. App. 12a–13a. Nivar then instructed Oliva to walk through the metal detector, at which point Barahona grabbed Oliva and Nivar put him in a chokehold. *Id.* at 12a, 27a. Before slamming Oliva to the ground, the officers wrenched his arm behind his back so violently that it made "a loud popping sound." See *id.* at 27a. The officers then handcuffed Oliva and detained him in a side room before charging him with disorderly conduct—a charge that was later dropped. *Id.* at 13a, 19a, 27a.

Oliva complied with the officers' instructions. Pet. App. 2a. He never resisted or even raised his voice. *Id.* at 13a, 27a. The only justification the officers offered for their use of force came through their submission of "materially identical affidavits" to the district court, which asserted that Oliva "attempted to enter the [hospital] without first clearing security" because he failed to show identification. *Id.* at 2a–3a (alteration in original). But the entire incident was captured on video, which shows that Oliva's entry into the hospital—and his brutal assault—were directed by Nivar.[1]

The officers seriously injured Oliva. He has since undergone two shoulder surgeries and treatment for persistent ear and throat issues. Pet. App. 3a, 27a.

Oliva sued the officers, alleging Fourth Amendment claims under *Bivens*.[2] The officers ultimately moved for summary judgment, asserting qualified immunity. Pet. App. 4a, 14a. The district court held that the officers were not entitled to qualified immunity because they "violated clearly established law * * * when they used excessive force on an unresisting suspect" who "did not commit a crime." *Id.* at 23a, 19a.

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[1] The video is available for this Court's review at the following link: https://tinyurl.com/JoseOliva. D. Ct. Doc. 82, Ex. B; see also Pet. App. 3a ("Security cameras captured the altercation on video, so [the Fifth Circuit] consider[ed] 'the facts in the light depicted by the videotape.'" (citing *Scott* v. *Harris*, 550 U.S. 372, 381 (2007))).

[2] Oliva also sued the United States under the Federal Tort Claims Act, but those claims are not on appeal and have been stayed pending the disposition of this petition. See D. Ct. Doc. 99. The United States has denied any liability for the officers' actions under the FTCA. See D. Ct. Doc. 13.

The officers appealed to the Fifth Circuit. In addition to challenging the district court's denial of qualified immunity, the officers argued that Oliva's case represented a new context for *Bivens* and that the court should not permit Oliva a constitutional remedy for his beating. See Pet. App. 8a n.2. The Fifth Circuit agreed, dismissing Oliva's claims without reaching the issue of qualified immunity. *Id.* at 4a, 10a.

The Fifth Circuit observed that the "understanding of a 'new context' is broad.'" Pet. App. 5a (quoting *Hernandez* v. *Mesa*, 140 S. Ct. 735, 743 (2020)). And because *Abbasi* explained that "even a modest extension [of *Bivens*] is still an extension," 137 S. Ct. at 1864, the panel concluded that a case presents a new context for *Bivens* "even if 'a plaintiff asserts a violation of the same clause of the same amendment *in the same way*.'" Pet. App. 6a (quoting *Cantú* v. *Moody*, 933 F.3d 414, 422 (5th Cir. 2019)). The panel determined that established *Bivens* claims are limited to situations involving the same facts as *Bivens*: narcotics officers "manacling the plaintiff in front of his family in his home and strip-searching him." Pet. App. 5a; see *id.* at 6a–7a. According to the panel, "[v]irtually everything else is a 'new context.'" *Id.* at 5a (quoting *Abbasi*, 137 S. Ct. at 1865).

Applying that understanding of *Abbasi*'s new-context analysis—one not shared by the other seven circuit courts that have addressed the issue, see Section II, *infra*—the Fifth Circuit held that Oliva's case presented a new context because narcotics officers did not violate Oliva's Fourth Amendment rights in front of his family in his home and because Oliva had been placed in a chokehold, rather than strip-searched. Pet. App. 6a–7a.

The Fifth Circuit then concluded that Oliva had no constitutional remedy because "special factors counsel against extending *Bivens*" to cover Oliva's case. Pet. App. 8a. The exclusive "special factor" cited by the panel is the existence of the Federal Tort Claims Act, even though "the FTCA might not give Oliva [what] he seeks" through *Bivens*, which is the vindication of his Fourth Amendment rights. *Id.* at 8a–10a. The panel did not address this Court's holding in *Carlson* v. *Green* that it is "crystal clear that Congress views the FTCA and *Bivens* as parallel, complementary causes of action." 446 U.S. 14, 20 (1980).

REASONS FOR GRANTING THE PETITION

This Court should grant review and reverse the decision below because it disregards *Abbasi* and creates a circuit split that frustrates the uniform availability of constitutional remedies for unreasonable searches and seizures committed by federal police. In *Abbasi*, the Court explained that *Bivens* should not be extended into a "new context" but that the availability of a Fourth Amendment remedy is, nevertheless, "settled law" in the "common and recurrent sphere of law enforcement," where it "vindicate[s] the Constitution" and "provides instruction and guidance to federal law enforcement officers." 137 S. Ct. at 1856–1857; see also Section I, *infra*.

Since *Abbasi*, the appellate courts of the First, Second, Third, Fourth, Sixth, Ninth, and Eleventh Circuits have all recognized the existence of constitutional claims against federal police for violations of the Fourth Amendment. All seven circuit courts have permitted search-and-seizure claims for constitutional violations committed during "standard law enforcement operations" without

regard to factual distinctions from *Bivens*. *Jacobs*, 915 F.3d at 1038; see Section II, *infra*.

With its decision below, the Fifth Circuit disregards *Abbasi* and breaks with its sister circuits. The Fifth Circuit does so by holding that any Fourth Amendment claim not involving the same agency and the same factual circumstances presents a new context for *Bivens*. Thus, unless an individual finds himself handcuffed in his apartment in front of his family by narcotics officers, he has no Fourth Amendment remedy in Texas, Louisiana, or Mississippi.

This Court should grant the petition to review the opinion below and resolve the post-*Abbasi* circuit split the Fifth Circuit has created. Without this Court's review, the circuit split will deepen; the more-than-one-hundred-thousand federal police operating across the United States will lose the uniform instruction and guidance of *Bivens*; and the ability of Americans to defend their Fourth Amendment rights against federal abuse will depend on the state in which those rights are violated.

The decision below presents an appropriate vehicle to address the split because it is focused exclusively on the availability of a search-and-seizure *Bivens* claim against federal police, involves simple facts supported by video evidence, and stands in stark contrast to the decisions of the other circuits that have applied *Abbasi* to permit "garden-variety *Bivens* claims" for Fourth Amendment violations committed by federal police. *Jacobs*, 915 F.3d at 1038.

I. The Fifth Circuit's decision disregards *Abbasi* and rejects a Fourth Amendment remedy in the "common and recurrent sphere of law enforcement."

Since its 1971 decision in *Bivens*, the Court has recognized a damages remedy for Fourth Amendment violations committed by federal police during standard law enforcement operations. See *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971); *Abbasi*, 137 S. Ct. at 1854. In numerous cases, including *Abbasi*, the Court has specifically acknowledged that *Bivens* provides "a damages remedy to compensate persons injured by federal officers who violated the prohibition against unreasonable search and seizures." *Abbasi*, 137 S. Ct. at 1854; see also note 9, *infra*.

Despite its criticism of *Bivens*, *Abbasi* confirmed that "in the search-and-seizure context in which it arose," a constitutional remedy not only exists but is necessary. 137 S. Ct. at 1856. While most circuit courts have applied *Abbasi* by permitting constitutional claims against "line-level agents of a federal criminal law enforcement agency, for violations of the Fourth Amendment, committed in the course of a routine law-enforcement action," the Fifth Circuit has interpreted *Abbasi* to cabin *Bivens* to its specific facts. Compare, *e.g.*, *Hicks*, 965 F.3d at 311, with Pet. App. 6a–7a. The Fifth Circuit's decision conflicts with *Abbasi* and warrants this Court's review.

A. *Bivens* established a Fourth Amendment remedy for unreasonable searches and seizures committed by federal police.

In *Bivens*, agents of the now-defunct Federal Bureau of Narcotics entered the apartment of Webster Bivens

without a warrant and arrested him for alleged narcotics violations. 403 U.S. at 389. The agents, using excessive force, "manacled [Bivens] in front of his wife and children, and threatened to arrest the entire family" before searching their apartment. *Ibid.* The agents then took Bivens to a federal courthouse, where they interrogated, booked, and strip-searched him. *Ibid.* Bivens sued the agents directly under the Fourth Amendment, and the Court allowed his constitutional claims to proceed, holding "[t]hat damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials." *Id.* at 395.

In the decade that followed, the Court recognized a constitutional remedy in two other contexts. See *Carlson*, 446 U.S. 14 (failure to provide medical attention to an inmate in a government prison in violation of the Eighth Amendment); *Davis* v. *Passman*, 442 U.S. 228 (1979) (certain gender discrimination claims in violation of the Fifth Amendment). The Court soon after declined to recognize constitutional remedies in additional contexts. See, *e.g.*, *Bush* v. *Lucas*, 462 U.S. 367 (1983). It continues to do so today. See, *e.g.*, *Hernandez*, 140 S. Ct. 735. But *Bivens* still provides a remedy for Fourth Amendment violations committed by federal police.

The Court explained its current position on constitutional remedies in *Ziglar* v. *Abbasi*, where it stated that, absent an act of Congress, "expanding the *Bivens* remedy is now a 'disfavored' judicial activity." 137 S. Ct. at 1857 (quoting *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009)). *Abbasi* announced that the extension of *Bivens* into a "new context" would only be permitted when there are no "special factors counselling hesitation." *Ibid.* (quoting *Carlson*, 446 U.S. at 18). Thus, the Court affirmed its support for

a two-step judicial inquiry into *Bivens* claims. The first step asks whether a case presents a "new context." If the answer is no, the inquiry stops there, and the plaintiff may proceed with the claim. If the answer is yes, the inquiry continues to the second step, which asks whether there are "special factors counselling hesitation" against expanding *Bivens*. If no such factors exist, the claim may proceed. Otherwise, a constitutional remedy is unavailable. *Ibid.*; *Hernandez*, 140 S. Ct. at 743.

Abbasi explained that a case presents a new context when it is "different in a meaningful way from previous *Bivens* cases decided by this Court." 137 S. Ct. at 1859. Meaningful differences include the: (1) rank of the officers involved; (2) constitutional right at issue; (3) generality or specificity of the official action; (4) extent of judicial guidance as to how an officer should respond to the problem; (5) statutory mandate under which the officer was operating; (6) risk of disruptive intrusion by the Judiciary into the functioning of the other branches; or (7) presence of potential factors previous *Bivens* cases did not consider. *Id.* at 1860.

Applying the two-step framework, *Abbasi* held that claims against high-ranking government officials for policy decisions related to national security in the wake of the September 11 attacks presented a new context for *Bivens*. 137 S. Ct. at 1860. For that reason, the Court considered whether there were "special factors counselling hesitation" against permitting a *Bivens* remedy, including whether extending *Bivens* to a new context would (1) call into question the formulation or implementation of a general policy; (2) interfere with sensitive functions of the Executive Branch, such as national security or military

discipline; or (3) overlap with an alternative method of relief. *Id.* at 1860–1863. *Abbasi* concluded there were factors counseling hesitation and declined to extend *Bivens* into a new context. *Id.* at 1863.[3]

B. *Abbasi* confirmed the availability of a Fourth Amendment *Bivens* remedy against federal police.

While *Abbasi* expressed caution about implied causes of action, the Court was emphatic that its opinion did not "cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." 137 S. Ct. at 1856. The Court explained: "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." *Id.* at 1857.

Consistent with the important interests *Bivens* serves in its original context, the Court has regularly acknowledged Fourth Amendment *Bivens* claims, explicitly stat-

[3] Last term, this Court confirmed *Abbasi*'s analysis in *Hernandez* v. *Mesa*. In that case, the Court concluded that a Customs and Border Protection officer's cross-border shooting of a Mexican teenager presented a "new context" for *Bivens* because the foreign relations implications of the incident constituted a meaningful difference from established *Bivens* claims—i.e., it created a significant "risk of disruptive intrusion by the Judiciary into the functioning of other branches." *Hernandez*, 140 S. Ct. at 744 (quoting *Abbasi*, 137 S. Ct. at 1860). *Hernandez* then found that the potential effect on national security and foreign policy, as well as congressional reluctance to provide a remedy for injuries caused abroad by federal officials, were "special factors" that counseled against extending *Bivens* into the new context. *Id.* at 744–749.

ing that "*Bivens* * * * allow[s] a plaintiff to seek money damages from government officials who have violated his Fourth Amendment rights." *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999); accord *Meshal* v. *Higgenbotham*, 804 F.3d 417, 429 (D.C. Cir. 2015) (Kavanaugh, J., concurring) ("The classic *Bivens* case entails a suit alleging an unreasonable search or seizure by a federal officer in violation of the Fourth Amendment."). The Court has never cabined *Bivens* to its precise facts. Instead, it has generally permitted claims against federal police who violate the Fourth Amendment during "standard law enforcement operations."[4] *Abbasi*, 137 S. Ct. at 1861 (citation and internal quotation marks omitted). The circuit courts have taken the same approach and recognized a constitutional remedy against federal police in a variety of search-and-seizure scenarios.[5]

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[4] See, *e.g.*, *Reichle* v. *Howards*, 566 U.S. 658 (2012) (Secret Service officer making an arrest in a shopping mall); *Groh* v. *Ramirez*, 540 U.S. 551 (2004) (Bureau of Alcohol, Tobacco, and Firearms agent conducting a search in a home); *Saucier* v. *Katz*, 533 U.S. 194 (2001) (military police officer using excessive force on an army base); *Wilson*, 526 U.S. 603 (federal marshals searching a home with a news crew); *Hunter* v. *Bryant*, 502 U.S. 224 (1991) (per curiam) (Secret Service agent making a warrantless arrest in a home); *Anderson* v. *Creighton*, 483 U.S. 635 (1987) (FBI agents searching a home without a warrant); *General Motors Leasing Corp.* v. *United States*, 429 U.S. 338 (1977) (IRS agents seizing property from a business).

[5] See, *e.g.*, *Big Cats of Serenity Springs, Inc.* v. *Rhodes*, 843 F.3d 853 (10th Cir. 2016) (USDA Animal and Plant Health Inspection Service inspectors forcibly entering and inspecting a business); *Jones* v. *Kirchner*, 835 F.3d 74 (D.C. Cir. 2016) (FBI agent failing to announce himself before executing a search warrant); *Gustafson* v. *Adkins*, 803 F.3d 883 (7th Cir. 2015) (VA police officer installing hidden cameras in a women's changing room);

C. The Fifth Circuit's decision disregards *Abbasi*'s admonition that *Bivens* established a Fourth Amendment remedy for unreasonable searches and seizures committed by federal police.

With its decision below, the Fifth Circuit departed from the Court's recognition that *Bivens* extends to search-and-seizure claims against federal police. Specifically, the Fifth Circuit discarded *Abbasi*'s guidance by confining *Bivens* to its facts—"drawing * * * factual distinctions that make no sense under ordinary norms of legal reasoning." Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 Va. L. Rev. 865, 909–910 & n.186 (2019) (collecting cases in which "[t]his seemingly arbitrary practice has endured scathing criticism from jurists").

The Fifth Circuit did not base its decision on the meaningful differences *Abbasi* provides to identify a new context for *Bivens*. See 137 S. Ct. at 1860. Instead, the Fifth Circuit based its decision on inconsequential distinctions: (1) "This case arose in a government hospital, not a private home"; (2) "The VA officers were manning a metal detector, not making a warrantless search for narcotics"; (3) "The dispute that gave rise to Oliva's altercation involved the hospital's ID policy, not a narcotics investigation"; (4) "The VA officers did not manacle Oliva in front

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Webb v. *United States*, 789 F.3d 647 (6th Cir. 2015) (DEA agent fabricating evidence); *Covey* v. *Assessor of Ohio Cnty.*, 777 F.3d 186 (4th Cir. 2015) (DEA agents searching a patio without a warrant); *Hernandez-Cuevas* v. *Taylor*, 723 F.3d 91 (1st Cir. 2013) (FBI agents arresting an individual and holding him for months in pretrial detention without probable cause); see also note 11, *infra* (collecting post-*Abbasi* circuit decisions).

of his family or strip-search him"; and (5) "Contrariwise the narcotics officers did not place Webster Bivens in a chokehold." Pet. App. 6a–7a.

These distinctions go against *Abbasi*'s admonition that the new-context analysis "is not intended to cast doubt on the continued force * * * of *Bivens*" in the "common and recurrent sphere of law enforcement." *Abbasi*, 137 S. Ct. 1856–1857. And each distinction is so specific that, if accepted as sufficient to establish a new context, it would make illusory the "common and recurrent sphere" where *Bivens* remains "settled law." *Id.* at 1857.

This Court has never limited search-and-seizure *Bivens* claims to narcotics investigations, private homes, or situations in which an individual is handcuffed in front of family members. Contra Pet. App. 6a–7a. The Fifth Circuit's crabbed application of *Bivens* runs contrary to this Court's precedent.

To begin with, in the fifty years since *Bivens* was decided, the Court has never restricted the availability of a Fourth Amendment remedy to narcotics investigations or officers. A case in point is *Groh* v. *Ramirez*, where the Court affirmed the availability of a *Bivens* remedy against an agent of the Bureau of Alcohol, Tobacco, and Firearms for his use of a facially invalid warrant to search a home for illegal firearms. 540 U.S. 551, 554–556, 566 (2004).[6] Contra Pet. App. 7a ("Oliva's claim involves * * * different officers from a different agency." (citation and internal quotation

[6] Accord, *e.g.*, *Wilson*, 526 U.S. 603 (federal marshals searching for man who had violated probation); *Hunter*, 502 U.S. 224 (Secret Service agent investigating an assassination plot).

marks omitted)). Moreover, if *Bivens* were restricted to constitutional violations committed by narcotics officers searching for narcotics, *Abbasi* and *Hernandez*—neither of which involved narcotics—could have rested on that simple distinction.[7]

Similarly, the fact that federal police violated Oliva's Fourth Amendment rights in a VA hospital, "not a private home," does not establish a new context. Pet. App. 6a–7a. *Bivens* itself involved Fourth Amendment violations that took place in a home *and* a federal courthouse. *Bivens*, 403 U.S. at 389. The Court has decided several *Bivens* cases that did not involve the search of a home.[8] And as with the Fifth Circuit's narcotics distinction, if *Bivens* were limited to violations committed in a home, *Abbasi* and *Hernandez* could have been decided on that basis.

Finally, the fact that what federal police did to Oliva was worse than what narcotics officers did to Bivens cannot justify denying a remedy to Oliva when one was provided to Bivens. See Pet. App. 7a (observing that, unlike in Oliva's case, in *Bivens* "the narcotics officers did not place Webster Bivens in a chokehold"). The Court's concern in

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[7] If a federal officer's employing agency were dispositive, not only would *Groh* have been wrongly decided, but *Bivens* would have been dead on arrival because the Federal Bureau of Narcotics was dissolved three years before *Bivens*. Reorganization Plan No. 1 of 1968, 33 Fed. Reg. 5611, § 3–4, 82 Stat. 1367, 1368 (abolishing the Bureau of Narcotics in the Department of the Treasury and establishing the Bureau of Narcotics and Dangerous Drugs in the Department of Justice).

[8] See, *e.g.*, *Reichle*, 566 U.S. 658 (shopping mall); *Saucier*, 533 U.S. 194 (army base); *General Motors*, 429 U.S. 338 (business office).

Bivens was "the Fourth Amendment's protection against unreasonable searches and seizures by federal agents," 403 U.S. at 391, not the precise factual circumstances under which those federal agents violated the Constitution.[9]

The Fifth Circuit now only recognizes a *Bivens* remedy for Fourth Amendment violations committed by narcotics officers in private homes and in front of a suspect's family. See Pet. App. 6a–7a.[10] That is inconsistent with *Abbasi* and with the Court's other decisions. It should be reversed.

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[9] The Court has consistently summarized the original context of *Bivens* in general terms. See, *e.g.*, *Hui* v. *Castaneda*, 559 U.S. 799, 803 n.2 (2010) ("In *Bivens* this Court recognized an implied cause of action for damages against federal officers alleged to have violated the petitioner's Fourth Amendment rights." (internal citation omitted)); *Wilkie* v. *Robbins*, 551 U.S. 537, 549 (2007) ("*Bivens* held that the victim of a Fourth Amendment violation by federal officers had a claim for damages." (internal citation omitted)); *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 66 (2001) ("In *Bivens* * * * we held that a victim of a Fourth Amendment violation by federal officers may bring suit for money damages against the officers in federal court."); *United States* v. *Stanley*, 483 U.S. 669, 678 (1987) ("In *Bivens*, we held that a search and seizure that violates the Fourth Amendment can give rise to an action for damages against the offending federal officials even in the absence of a statute authorizing such relief.").

[10] Because the Fifth Circuit determined that Oliva's case presented a new context, it moved to the second part of the two-party inquiry and incorrectly found that special factors counseled hesitation against extending a *Bivens* remedy to Oliva's case. Pet. App. 7a–10a. That error presents this Court with an alternative basis for reversal, but Oliva does not address the issue in this petition because it is unnecessary to decide the question presented.

II. The Fifth Circuit's decision departs from the consensus reached by seven other circuit courts regarding *Abbasi*'s application in the search-and-seizure context.

By applying *Abbasi* in a way that renders every case a new context under *Bivens*, the Fifth Circuit has created a post-*Abbasi* circuit split. On one side of the split is the Fifth Circuit, holding that "[v]irtually everything * * * is a new context" under *Bivens* unless it involves narcotics officers "manacling the plaintiff in front of his family in his home and strip-searching him in violation of the Fourth Amendment." Pet. App. 5a (citing *Bivens*, 403 U.S. at 389–390; *Abbasi*, 137 S. Ct. at 1865) (internal quotation marks omitted); see also *id.* at 6a–7a.

Seven circuit courts are on the other side of the split. The First, Second, Third, Fourth, Sixth, Ninth, and Eleventh Circuits have all permitted search-and-seizure claims against federal police without parsing factual distinctions from *Bivens*.[11] The Fourth and Sixth Circuits

[11] See, *e.g.*, *Pagán-González* v. *Moreno*, 919 F.3d 582 (1st Cir. 2019) (FBI agents fabricating an emergency to search a home and computer); *McLeod* v. *Mickle*, 765 Fed. Appx. 582 (2d Cir. 2019) (summary order) (U.S. Forest Service officer prolonging a traffic stop); *Bryan* v. *United States*, 913 F.3d 356 (3d Cir. 2019) (Customs and Border Protection officer searching the cabin of a cruise ship docked in the U.S. Virgin Islands); *Hicks*, 965 F.3d 302 (U.S. Park Police stopping a motorist without justification); *Jacobs*, 915 F.3d 1028 (federal marshals shooting the resident of a home being searched); *Ioane* v. *Hodges*, 939 F.3d 945 (9th Cir. 2018) (IRS agent forcing a homeowner to use the bathroom in her presence); *Harvey* v. *United States*, 770 Fed. Appx. 949 (11th Cir. 2019) (per curiam) (USPS criminal investigator precluding the plaintiff from accessing his storage unit). But see *Boule* v. *Egbert*, 980 F.3d 1309, 1313–1314 (9th Cir. 2020) (holding that a

have explicitly rejected distinctions like those the Fifth Circuit held represent a new context. See *Hicks*, 965 F.3d at 311–312; *Jacobs*, 915 F.3d at 1038–1039. And all seven federal circuit courts permit claims against federal police who violate the Fourth Amendment while engaged in traditional law enforcement tasks; the Fifth Circuit does not.

The Sixth Circuit's decision in *Jacobs*, for example, involved the U.S. Marshals Service searching a home for a fugitive and shooting the plaintiff. 915 F.3d at 1033–1034. The plaintiff sued under *Bivens*, and the marshals argued—presaging the Fifth Circuit's decision below—that the case presented a new context, "mak[ing] much out of factual differences between *Bivens* * * * and this case."[12]

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claim against a Customs and Border Protection officer presents a new context because "[d]efendant is an agent of the border patrol rather than of the F.B.I." but allowing a *Bivens* remedy because the case involved "a conventional Fourth Amendment claim, indistinguishable from countless such claims brought against federal, state, and local law enforcement officials, except for the fact that [the defendant] is a border patrol agent").

[12] Like the Fifth Circuit, the marshals noted that *Bivens* "involve[d] claims against a different federal agency, based upon a completely different set of facts." Defendants' Br. at 26, *Jacobs* v. *Alam*, 915 F.3d 1028 (6th Cir. 2019) (No. 18-1124), 2018 WL 2331732. Similarly, the marshals attempted to limit the established context of *Bivens* to narcotics investigations: "[T]he specific 'context' of *Bivens* was Federal Bureau of Narcotics agents entering a private residence without a warrant to execute a search for narcotics, and then handcuffing the occupant during the warrantless search." *Ibid.* The marshals argued that the case against them was meaningfully different from *Bivens* because "U.S. Marshals Service deputies * * * had legally entered a residence by consent in the pursuit of a fugitive." *Ibid.* Then, they had "fired at a suspect who intentionally attempted to surprise and frighten them, conspired to plant evidence * * * , arrested him based on false accounts and

Id. at 1038. The Sixth Circuit dispensed with the marshals' distinctions. Noting that in *Abbasi* "the Court took great care to emphasize the 'continued force' and 'necessity[] of *Bivens* in the search-and-seizure context in which it arose,'" *id.* at 1037 (quoting *Abbasi*, 137 S. Ct. at 1856), *Jacobs* held that the plaintiff's Fourth Amendment claims were "run-of-the-mill challenges to 'standard law enforcement operations' that fall well within *Bivens* itself." *Id.* at 1038; see also *id.* at 1038–1039 ("find[ing] plaintiff's garden-variety *Bivens* claims to be viable post-[*Abbasi*]" (citation omitted)).

Similarly, in the Fourth Circuit's *Hicks* decision, a Secret Service agent brought Fourth Amendment claims against U.S. Park Police officers who twice stopped his vehicle without probable cause or reasonable suspicion. *Hicks*, 965 F.3d at 306. The officers argued that the case presented a new context,[13] but the Fourth Circuit concluded that "along every dimension the Supreme Court has identified as relevant to the inquiry, this case appears to represent not an extension of *Bivens* so much as a replay." *Id.* at 311. The Fourth Circuit explained, "[j]ust as in *Bivens*, Hicks seeks to hold accountable line-level agents of a federal criminal law enforcement agency, for violations of the Fourth Amendment, committed in the

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planted evidence, and then participated in a criminal prosecution based upon the false accounts and the planted evidence." *Ibid.*

[13] The police cited as meaningful differences the facts that "Appellants *and* Appellee were law enforcement officers and members of the executive branch of the federal government" and the case against the police "involves a *Terry* stop of a vehicle, which is a *de minimis* constitutional intrusion compared to the warrantless home invasion, arrest and strip-search in *Bivens*." Appellants' Reply Br. at 7–8, *Hicks* v. *Ferreyra*, 965 F.3d 302 (4th Cir. 2020) (No. 19-1697), 2019 WL 5789882.

course of a routine law-enforcement action." *Ibid.* (citing *Abbasi*, 137 S. Ct. at 1860).

The circuit split created by the Fifth Circuit frustrates the uniform availability of redress for Fourth Amendment violations, as well as the "guidance to federal law enforcement officers," for which *Abbasi* deemed *Bivens* both settled and necessary. *Abbasi*, 137 S. Ct. at 1856–1857. Where the Fifth Circuit has held there is no constitutional remedy, except against narcotics officers in very limited circumstances, Pet. App. 5a–7a, the First Circuit has allowed a constitutional remedy for Fourth Amendment claims against FBI agents, *Págan-González* v. *Moreno*, 919 F.3d 582 (1st Cir. 2019); the Second Circuit against a U.S. Forest Service officer, *McLeod* v. *Mickle*, 765 Fed. Appx. 582 (2d Cir. 2019) (summary order); the Third Circuit against a Customs and Border Protection officer, *Bryan* v. *United States*, 913 F.3d 356 (3d Cir. 2019); the Fourth Circuit against U.S. Park Police, *Hicks*, 965 F.3d 302; the Sixth Circuit against federal marshals, *Jacobs*, 915 F.3d 1028; the Ninth Circuit against an IRS agent, *Ioane* v. *Hodges*, 939 F.3d 945 (9th Cir. 2018); and the Eleventh Circuit against a USPS investigator, *Harvey* v. *United States*, 770 Fed. Appx. 949 (11th Cir. 2019) (per curiam).

Unless this Court intervenes, the availability of a Fourth Amendment remedy against federal police depends on where a claim is asserted. That inconsistency undermines not only *Abbasi*, but the Court's pronouncements that it "cannot accept that the search and seizure protections of the Fourth Amendment" depend on geography, *Whren* v. *United States*, 517 U.S. 806, 815 (1996), or the identity of the government actor, *Virginia* v. *Moore*, 553 U.S. 164, 176 (2008). "[T]here is very little to be gained from the standpoint of federalism by preserving differ-

ent rules of liability for federal officers dependent on the State where the injury occurs." *Bivens*, 403 U.S. at 409 (Harlan, J., concurring).

III. The Fifth Circuit's decision frustrates national uniformity, allowing thousands of federal police in Texas, Mississippi, and Louisiana to disregard the Fourth Amendment.

The Fifth Circuit's decision frustrates the dual purposes served by *Bivens* in the search-and-seizure context: to "vindicate the Constitution by allowing some redress for injuries, and * * * provide[] instruction and guidance to federal law enforcement officers." *Abbasi*, 137 S. Ct. 1856–1857. Instead, the Fifth Circuit creates an enormous constitutional vacuum.

Most narrowly understood, the decision below makes VA facilities across the Fifth Circuit Constitution-free zones, where federal police can violate the Fourth Amendment without consequence. In the Fifth Circuit, VA facilities serve more than two million Americans who, like Oliva, served our country.[14] But those facilities have also been plagued with policing issues, including the use of excessive force.[15] By withholding constitutional remedies

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[14] See United States Dep't of Veterans Affairs, *State Summaries: Texas* (Sept. 30, 2017), https://tinyurl.com/VATexas; United States Dep't of Veterans Affairs, *State Summaries: Louisiana* (Sept. 30, 2017), https://tinyurl.com/VALouisiana; United States Dep't of Veterans Affairs, *State Summaries: Mississippi* (Sept. 30, 2017), https://tinyurl.com/VAMississippi.

[15] See Office of Inspector General, United States Dep't of Veterans Affairs, *Inadequate Governance of the VA Police Program at Medical Facilities*, i (Dec. 13, 2018), https://tinyurl.com/VAAudit ("VA did not have adequate and co-

from veterans at VA facilities as a means to push back against these abuses, the Fifth Circuit has decimated the Fourth Amendment rights of American veterans—the very people who fought to preserve those rights for us all.

That would be troubling enough on its own, but the Fifth Circuit's ruling reaches well beyond constitutional violations committed against veterans within VA facilities. The decision below revokes a Fourth Amendment remedy against all federal police—except, *perhaps*, narcotics officers under limited circumstances. Compare Pet. App. 7a (excluding Oliva's claims because they involve a "different agency" than *Bivens*), with note 7, *supra* (explaining that the agency in *Bivens* was disbanded in 1968). More than one hundred thousand federal police operate in the United States today.[16] As of 2008, nearly seventeen thousand policed the Fifth Circuit.[17]

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ordinated governance over its police program to ensure effective management and oversight for its approximately 4,000-strong police officer workforce at its 139 medical facilities."); Jasper Craven, *Abusing Those Who Served*, The Intercept (July 8, 2019), https://tinyurl.com/VAAbuse (last visited Jan. 14, 2021) ("The Intercept has identified dozens of credible allegations that VA cops in every corner of the United States have neglected standard police procedures, violated patients' constitutional rights, or broken the law.").

[16] Connor Brooks, Bureau of Justice Statistics, *Federal Law Enforcement Officers, 2016*, 6–7 tbls. 4 & 6 (Oct. 2019), https://tinyurl.com/FederalPolice. Even if the Fifth Circuit's decision were understood to permit search-and-seizure claims against DEA agents, constitutional claims would still be prohibited against ninety-seven percent of federal law enforcement officers. *Ibid.* (showing that DEA agents represent just three percent of the total 132,110 federal law enforcement officers).

[17] Brian A. Reaves, Bureau of Justice Statistics, *Federal Law Enforcement Officers, 2008*, 11 tbl. 1 (June 2012), https://tinyurl.com/5thCirPolice.

If the decision below is allowed to stand—effectively making the Fourth Amendment inapplicable to the thousands of federal police in Texas, Louisiana, and Mississippi—there will be no remedy in the Fifth Circuit against a VA police officer who installs hidden cameras in a women's changing room, contra *Gustafson* v. *Adkins*, 803 F.3d 883 (7th Cir. 2015); an FBI agent who arrests an individual and holds him for months in pretrial detention without probable cause, contra *Hernandez-Cuevas* v. *Taylor*, 723 F.3d 91 (1st Cir. 2013); a DEA agent who fabricates evidence, contra *Webb* v. *United States*, 789 F.3d 647 (6th Cir. 2015); an IRS agent who forces an innocent person to use the bathroom in her presence, contra *Ioane*, 939 F.3d at 952; a USPS inspector who locks an individual out of his storage unit, contra *Harvey*, 770 Fed. Appx. at 952; and a U.S. Forest Service officer who detains a motorist without cause, contra *McLeod*, 765 Fed. Appx. at 585.

That contradicts both *Abbasi* and the national uniformity of federal law. It is critical for this Court to step in now and resolve the circuit split by reversing the Fifth Circuit's decision.[18]

[18] Not only does the decision below disregard this Court's precedent and create a circuit split, it denies an established constitutional remedy to millions of Americans. As this Court recently explained, "the Westfall Act * * * left open claims for constitutional violations." *Tanzin* v. *Tanvir*, 141 S. Ct. 486, 491 (2020) (citing 28 U.S.C. 2679(b)(2)); see also *Hernandez*, 140 S. Ct. at 748 n.9 (stating the Westfall Act "left *Bivens* where it found it" in 1988); *Abbasi*, 137 S. Ct. at 1856. Through that statute, "damages against federal officials [are] an appropriate form of relief today." *Tanzin*, 141 S. Ct. at 491. That is no longer the case for the millions of people in Texas, Louisiana, and Mississippi.

Further, although the Department of Justice has not been involved in this case on appeal, see note 2, *supra*, this Court should call for the view of the Solicitor General on this issue of national importance.

CONCLUSION

This Court should grant the petition, reaffirm its holding in *Abbasi* that *Bivens* is "settled law * * * in th[e] common and recurrent sphere of law enforcement," 137 S. Ct. at 1857, and reverse the Fifth Circuit's decision below.

Respectfully submitted,

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APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Fifth Circuit, Filed September 2, 2020

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-50795

JOSE L. OLIVA,

Plaintiff-Appellee,

versus

MARIO J. NIVAR; HECTOR BARAHONA;
MARIO GARCIA,

Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Texas
USDC No. 3:18-CV-15
Filed September 2, 2020

Before SMITH, HO, and OLDHAM, *Circuit Judges.*

ANDREW S. OLDHAM, *Circuit Judge*:

The question presented is whether to extend *Bivens* to a new context. The district court said yes. We say no. So we reverse and remand with instructions to dismiss the claims against the federal officers.

Appendix A

I.

On February 16, 2016, Jose Oliva attempted to enter a Veterans Affairs ("VA") hospital in El Paso, Texas. The entrance to the hospital was protected by VA police and metal detectors. While Oliva stood in line for the metal detector, he spoke with one of the officers. Somehow that conversation escalated into a physical altercation. That ended when VA police wrestled Oliva to the ground in a chokehold and arrested him. Oliva exhausted his administrative remedies and then sued the federal officers for damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). He also brought claims against the United States under the Federal Tort Claims Act ("FTCA").

Oliva offered an affidavit with his version of the facts. Oliva stated: "Upon entry into the [hospital], I emptied my pockets and placed all items into an inspection bin as required." VA Officer Nivar asked for identification, and Oliva "calmly explained . . . that it was in the inspection bin with [his] other personal items." Oliva says he complied with all instructions from the VA police. Then, when Oliva tried to walk through the metal detector, three VA police officers (Nivar, Barahona, and Garcia) attacked him without provocation.

The VA police officers offered a very different version of the facts. Officers Nivar, Barahona, and Garcia submitted materially identical affidavits. They stated that Oliva "attempted to enter the [hospital] without first clearing security." The officers further averred that

Oliva did not clear security because he failed to show identification.

Security cameras captured the altercation on video, so we consider "the facts in the light depicted by the videotape." *Scott v. Harris*, 550 U.S. 372, 381 (2007). The video is inconsistent with Oliva's account of the facts in certain respects. For example, the video shows that Oliva did not place "all" of his items in the inspection bin. He's plainly holding something in his hand when he attempts to walk through the metal detector. Moreover, Officer Nivar approaches Oliva with a pair of handcuffs before Oliva attempts to walk through the metal detector. Thus, the video undermines (if not contradicts) Oliva's statement that "[a]t no point before I was attacked, was I told that I was going to be arrested or detained."

After the altercation, Oliva sought medical treatment. Oliva had two shoulder surgeries, and he also sought treatment for post-traumatic stress disorder due to nightmares and anxiety stemming from this event. Relying on *Bivens* for his cause of action against the officers, Oliva sought money damages for violations of, *inter alia*, the Fourth Amendment.[1]

With respect to the Fourth Amendment claim, the district court held that "this case does not present a new *Bivens* context." In the district court's view, this case is

[1] Oliva also claimed that the officers violated his rights under the Fifth Amendment. The district court dismissed that claim at the motion-to-dismiss stage. Nivar did not appeal it.

just like *Bivens* because both cases involved excessive-force, unreasonable-seizure claims. Therefore, the district court held that Oliva has the right to recover damages under *Bivens* if his claims are not barred by qualified immunity. At summary judgment, the district court agreed with Oliva that his claims against the officers are not so barred. The officers timely appealed.

Our review is *de novo. See Garcia de la Paz v. Coy*, 786 F.3d 367, 371 (5th Cir. 2015). Our "jurisdiction over qualified immunity appeals extends to elements of the asserted cause of action that are directly implicated by the defense of qualified immunity, including whether to recognize new *Bivens* claims." *Ibid.* (quotation omitted).

II.

In cases like this one, the Supreme Court has said "the *Bivens* question" is "antecedent" to questions of qualified immunity. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2017). Courts confronting *Bivens* claims generally "must ask two questions. First, do [the plaintiff's] claims fall into one of the three existing *Bivens* actions? Second, if not, should we recognize a new *Bivens* action here?" *Cantú v. Moody*, 933 F.3d 414, 422 (5th Cir. 2019). We say no and no.

A.

Bivens was the product of an "*ancien regime*" that freely implied rights of action. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)). That regime ended long ago. *Id.*

at 1855–56; *see also Sandoval*, 532 U.S. at 287 ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." (quotation omitted)). Today, *Bivens* claims generally are limited to the circumstances of the Supreme Court's trilogy of cases in this area: (1) manacling the plaintiff in front of his family in his home and strip-searching him in violation of the Fourth Amendment, *see Bivens*, 403 U.S. at 389–90; (2) discrimination on the basis of sex by a congressman against a staff person in violation of the Fifth Amendment, *see Davis v. Passman*, 442 U.S. 228 (1979); and (3) failure to provide medical attention to an asthmatic prisoner in federal custody in violation of the Eighth Amendment, *see Carlson v. Green*, 446 U.S. 14 (1980).

Virtually everything else is a "new context." *See Abbasi*, 137 S. Ct. at 1865 (explaining that "the new-context inquiry is easily satisfied"). As the Supreme Court has emphasized, our "understanding of a 'new context' is broad." *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020). That's because "even a modest extension" of the *Bivens* trilogy "is still an extension." *Abbasi*, 137 S. Ct. at 1864. And to put it mildly, extending *Bivens* to new contexts is a "disfavored judicial activity." *Id.* at 1857 (quotation omitted).

The district court contravened these limitations. It said, "[l]ike *Bivens*, this case involves allegations that Defendants . . . violated [Oliva's] Fourth Amendment right to be free of excessive force." That's true but irrelevant. "Courts do not define a *Bivens* cause of action at the level of 'the Fourth Amendment' or even at the level

of 'the unreasonable-searches-and-seizures clause.'" *Cantú*, 933 F.3d at 422. Indeed, it is not enough even if "a plaintiff asserts a violation of the same clause of the same amendment *in the same way*." *Ibid.*

Instead, the question is whether this "case is different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court." *Abbasi*, 137 S. Ct. at 1859. If so, "then the context is new." *Ibid.* As the Supreme Court has explained:

> Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some 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.

Id. at 1859–60.

This case differs from *Bivens* in several meaningful ways. This case arose in a government hospital, not

a private home. *Cf. Bivens*, 403 U.S. at 389. The VA officers were manning a metal detector, not making a warrantless search for narcotics. *Cf. ibid.* Judicial guidance varies across these contexts. *See Cantú*, 933 F.3d at 423 ("'Judicial guidance' differs across the various kinds of Fourth Amendment violations—like seizures by deadly force, searches by wiretap, *Terry* stops, executions of warrants, seizures without legal process ('false arrest'), seizures with wrongful legal process ('malicious prosecution'), etc."). The dispute that gave rise to Oliva's altercation involved the hospital's ID policy, not a narcotics investigation. *Cf. Bivens*, 403 U.S. at 389. The cases thus involve different legal mandates. *Cf. Loumiet v. United States*, 948 F.3d 376, 382 (D.C. Cir. 2020) (Katsas, J.) (contrasting enforcement of federal banking laws with enforcement of federal narcotics laws in new-context analysis). The VA officers did not manacle Oliva in front of his family or strip-search him. *Cf. Bivens*, 403 U.S. at 389. Contrariwise the narcotics officers did not place Webster Bivens in a chokehold. *See ibid.* In short, Oliva's "claim involves different conduct by different officers from a different agency." *Cantú*, 933 F.3d at 423. We could go on, but the point should be clear: the context is new.

B.

That leads to the second question: whether to engage in the "disfavored judicial activity" of recognizing a new *Bivens* action. *Abbasi*, 137 S. Ct. at 1857 (quotation omitted). For decades, the Supreme Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Corr. Servs. Corp. v. Malesko*,

534 U.S. 61, 68 (2001). And it recently reminded us, "for almost 40 years, we have consistently rebuffed requests to add to the claims allowed under *Bivens*." *Hernandez*, 140 S. Ct. at 743.

The Court's reluctance to extend *Bivens* respects the separation of powers. "When evaluating whether to extend *Bivens*, the most important question 'is "who should decide" whether to provide for a damages remedy, Congress or the courts?'" *Id.* at 750 (quoting *Abbasi*, 137 S. Ct. at 1857). The answer to that question is usually Congress. *Ibid.* So if any "special factors" give us "reason to pause before applying *Bivens* in a new context or to a new class of defendants," then we should not extend *Bivens*. *Id*. at 743; *see also Canada v. United States*, 950 F.3d 299, 309 (5th Cir. 2020) ("If any special factors do exist, then courts *must refrain* from creating an implied cause of action in that case." (quotation omitted)).

In this case, special factors counsel against extending *Bivens*.[2] First, Congress has designed an alternative remedial structure. As the *Abbasi* Court observed, "if there is an alternative remedial structure present in

[2] Oliva asserts that the officers forfeited the "special factors" issue by not raising it in their motion for summary judgement. Not so. Because *Bivens* is a judicially crafted remedy, a court asked to extend *Bivens* has a concomitant responsibility to "ask whether there are any special factors that counsel hesitation about granting the extension." *Hernandez*, 140 S. Ct. at 743 (quotation omitted). Moreover, the district court discussed "special factors" arguments at length in its order denying Nivar's motion to dismiss. And Oliva has briefed the issue here. So both the district court and Oliva had ample opportunity to address the issue.

a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." 137 S. Ct. at 1858. Likewise, we have emphasized that "the existence of a statutory scheme for torts committed by federal officers" weighs against inferring a new cause of action. *Cantú*, 933 F.3d at 423. Although an alternative form of relief is not a necessary special factor, it may be a sufficient one. *See Abbasi*, 137 S. Ct. at 1858. "And when alternative methods of relief are available, a *Bivens* remedy usually is not." *Id.* at 1863.

Consider the scheme Congress created here. A person in Oliva's situation first proceeds through the VA's administrative process. *See* 28 U.S.C. § 2675 (conditioning availability of an action for money damages against the United States on administrative exhaustion of the claim). Then he can bring his claims under the FTCA. *See id.* § 2680(h); *Cantú*, 933 F.3d at 423.

Oliva followed that process. He started by filing an administrative complaint with the VA, which the VA denied on July 20, 2017. He then sued the United States under the FTCA, in addition to suing the individual VA officers under *Bivens*. Oliva's own conduct shows there is an alternative remedial scheme for his claims.

Oliva cannot negate this special factor by arguing that the FTCA doesn't cover excessive-force claims. The Supreme Court has been clear that the alternative relief necessary to limit *Bivens* need not provide the exact same kind of relief *Bivens* would. *See, e.g., Minneci v. Pollard*, 565 U.S. 118, 129 (2012) ("State-law [tort] remedies and a potential *Bivens* remedy need not be

perfectly congruent."). That the FTCA might not give Oliva everything he seeks is therefore no reason to extend *Bivens*. *See Hernandez*, 140 S. Ct. at 750 ("Congress's decision not to provide a judicial remedy does not compel us to step into its shoes."); *cf. Sandoval*, 532 U.S. at 286–87 (explaining that if "a cause of action does not exist," then "courts may not create one, no matter how desirable that might be as a policy matter").

Second, the separation of powers is itself a special factor. *See Abbasi*, 137 S. Ct. at 1862. That is, we must consider what Congress has done and what Congress has left undone. With the FTCA, Congress waived the United States' sovereign immunity as to some claims and not others. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 484–85 (2006). Indeed, "[t]he FTCA waives the United States' sovereign immunity for certain intentional torts committed by law enforcement officers." *Millbrook v. United States*, 569 U.S. 50, 54 (2013). Yet Congress did not make individual officers statutorily liable for excessive-force claims. This "silence of Congress is relevant" to the special-factors inquiry. *Abbasi*, 137 S. Ct. at 1862.

These special factors give us "reason to pause" before extending *Bivens*. *Hernandez*, 140 S. Ct. at 743. In such cases, the Supreme Court has consistently "reject[ed] the request" to extend *Bivens*. *Ibid.* We do the same.

* * *

We REVERSE and REMAND with instructions to dismiss the claims against the federal officers.

Appendix B — Order of the United States District Court for the Western District of Texas, El Paso Division, Filed August 20, 2019

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

EP-18-CV-00015-FM

JOSE L. OLIVA,

Plaintiff,

v.

UNITED STATES OF AMERICA; MARIO J. NIVAR; HECTOR BARAHONA; and MARIO GARCIA,

Defendants.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT [ECF No. 80]

Before the court are "Defendants Mario J. Nivar, Hector Barahon [sic], Mario Garcia's Motion for Summary Judgment" ("Motion") [ECF No. 80], filed July 8, 2019 by Mario Nivar ("Nivar"), Hector Barahona ("Barahona"), and Mario Garcia ("Garcia") (collectively, "Officers"); and "Plaintiff's Response to Defendants Nivar, Barahona, and Garcia's Motion for Summary Judgment" ("Response") [ECF No. 82], filed July 15, 2019 by Jose Oliva ("Plaintiff").

Based on the Motion, Response, and applicable law, the Motion is **DENIED.**

I. BACKGROUND

A. Factual Background

On February 16, 2016, Plaintiff visited the Veteran Affairs Health Care System ("VA").[1] To enter the VA, visitors are required to go through a metal detector and run their personal belongings through a similar machine.[2]

Upon Plaintiff getting in the security line, he started to have a conversation with Nivar.[3] Nivar then approached Plaintiff with handcuffs drawn.[4] After more conversation, Nivar pointed towards the metal detector.[5] As Plaintiff approached the metal detector, an altercation occurred

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[1] "Plaintiffs Response to Defendants Nivar, Barahona, and Garcia's Motion for Summary Judgment" ("Resp."), ECF No. 82, filed July 15, 2019; "Affidavit of Jose L. Oliva" ("Oliva Aff.") 1, Ex. A; *see* "Defendants Mario J. Nivar, Hector Barahon [sic], Mario Garcia's Motion for Summary Judgment" ("Mot."), ECF No. 80, filed July 8, 2019, "Affidavit of Mario J. Nivar" ("Nivar Aff.") 1, Ex. 1; *see also* "Defendant Hector Barahona's Affidavit in Support" ("Barahona Aff.") 1, Ex. 2; Defendant Mario Garcia's Affidavit in Support" ("Garcia Aff.") 1, Ex. 3.

[2] Oliva Aff. 2 ¶ 7; *see generally* Mot., "Electronic Exhibit B" ("Video Ex. B"), Ex. B.

[3] Video Ex. B, at 00:25.

[4] *Id.* at 00:53.

[5] *Id.* at 01:00.

between Nivar, Barahona, Garcia, and Plaintiff.[6] Officers then restrained Plaintiff on the ground using a chokehold.[7]

According to Plaintiff, he placed his identification card in the inspection bin.[8] Plaintiff contends Nivar was agitated and asked for his identification despite his explanation that his identification was in the inspection bin.[9] Plaintiff asserts that after this discussion, Nivar instructed him to walk through the metal detector, upon which he was "attacked" and restrained on the ground.[10] Plaintiff claims he did not resist the detention or arrest.[11]

Officers attest that arresting Plaintiff was warranted as he "attempted to enter the facility without first clearing security."[12] Officers claim Plaintiff did not provide his driver's license.[13]

Plaintiff filed suit against Officers and the United States of America, bringing two claims under the Federal Tort Claims Act ("FTCA") 28 U.S.C. § 1346 *et seq* and a

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[6] *Id.* at 01:07.

[7] *Id.* at 01:09.

[8] Oliva Aff. 2 ¶ 5.

[9] *Id.* at 2 ¶ 6.

[10] *Id.* at 2 ¶ 7–8.

[11] *Id* at 2 ¶ 9.

[12] Nivar Aff. 1; Barahona Aff. 1; Garcia Aff. 1.

[13] *Id.*

Fourth Amendment claim under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*[14] *("Bivens").*[15]

B. Parties' Arguments

Officers assert they are entitled to qualified immunity for claims brought under the FTCA.[16] Officers also argue summary judgment is warranted on the *Bivens* claim due to qualified immunity.[17]

Plaintiff ripostes that he has established facts showing Officers violated a constitutional right and the right was clearly established at the time of the altercation.[18] Accordingly, Plaintiff claims that summary judgment is not warranted as genuine issues of material fact remain.[19]

II. LEGAL STANDARD

Summary judgment is proper where the pleadings, discovery, and affidavits demonstrate there is "no genuine dispute as to any material fact and the movant is entitled

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[14] 403 U.S. 388.

[15] "Plaintiff's Original Complaint" ("Compl.") 5, ECF No. 1, filed Jan. 16, 2018.

[16] Mot. 3–4.

[17] *Id.* at 5–6.

[18] Resp. 3.

[19] *Id.*

to judgment as a matter of law."[20] A dispute over a material fact is genuine "when there is evidence sufficient for rational trier of fact to find for the non-moving party."[21] Substantive law defines which facts are material.[22]

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits demonstrating the absence of a genuine issue of material fact.[23] When considering only admissible evidence in the pretrial record,[24] the court will "view all facts in the light most favorable to the non-moving party" and draw all factual inferences in the nonmovant's favor.[25] If the moving party cannot demonstrate the absence of a genuine issue of material fact, summary judgment is inappropriate.[26]

Once the moving party has met its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, set forth specific facts showing

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[20] Fed. R. Civ. P. 56(a).

[21] *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 323 (5th Cir. 2002) (citation omitted).

[22] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[23] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

[24] *Fowler v. Smith*, 68 F.3d 124, 126 (5th Cir. 1995).

[25] *Cheatham v. Allstate Ins. Co.*, 465 F.3d 578, 582 (5th Cir. 2006) (per curiam) (citation omitted).

[26] *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995).

there is a genuine issue for trial.[27] The nonmoving party's burden is not satisfied by the raising of "some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence."[28] The court does not "in the absence of any proof assume that the nonmoving party could or would prove the necessary facts."[29] When reviewing the parties' submissions, the court does not weigh the evidence or determine the credibility of the witnesses."[30] Once the nonmovant has had the opportunity to make this showing, summary judgment will be granted "if no reasonable juror could find for the nonmovant."[31]

III. DISCUSSION

A. Officers Are Not Entitled to Qualified Immunity for Claims under the FTCA

The FTCA permits a plaintiff to sue the United States of America and not an individual employee.[32] Here, Plaintiff asserts FTCA claims against the United States

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[27] *Celotex*, 477 U.S. at 324 (internal quotation marks and citation omitted).

[28] *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (per curiam) (internal quotation marks and citations omitted).

[29] *Id.* at 1075 (emphasis removed).

[30] *Caboni*, 278 F.3d 448, 451 (5th Cir. 2002) (citation omitted).

[31] *Id.*

[32] 28 U.S.C. § 1346(b).

under the FTCA.[33] Critically, Plaintiff does not bring a FTCA claim against Officers.[34] Accordingly, Officers are not entitled to summary judgment on Plaintiff's FTCA claims.

B. Officers Do Not Receive Qualified Immunity for Plaintiff's Bivens Claims

Government officials receive protection "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[35] Courts employ a two-prong analysis to assess whether an officer may assert the privilege of qualified immunity.[36] The first prong is whether the evidence, in the light most favorable to the plaintiff, shows the officer violated the plaintiff's constitutional rights.[37] The second prong is whether the officer's actions were objectively reasonable in light of clearly established law.[38] Both prongs must be satisfied.[39] Courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified

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[33] Compl. 5.

[34] *Id.*

[35] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1850 (2017).

[36] *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

[37] *Id.* at 232.

[38] *Id.*

[39] *Id.*

immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[40] However, analyzing them in order is "often beneficial."[41]

1. Whether Plaintiff's Constitutional Rights Were Violated

The court looks to: (1) if there is a question of material fact as to whether Plaintiff's injury resulted from excessive force; and (2) if that excessive force was objectively unreasonable.[42] The court does not consider the officer's subjective intent.[43] Plaintiff argues that his constitutional right to be free of excessive force was violated when Officers placed Plaintiff in a chokehold.[44] Officers contend Plaintiff attempted to enter the VA without authorization—justifying action.[45]

Courts analyze excessive force claims under the "objective reasonableness standard."[46] This standard does not employ hindsight to find the objective best course of

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[40] *Id.* at 236.

[41] *Id.*

[42] *Cooper v. Brown*, 844 F.3d 517, 522 (5th Cir. 2016); *see also Elizondo v. Green*, 671 F.3d 506, 501 (5th Cir. 2012) (quoting *Collier v. Montgomery*, 569 F.3d 214, 218 (5th Cir. 2009)).

[43] *Graham v. Connor*, 490 U.S. 386, 397 (1989).

[44] Resp. 7.

[45] Mot. 6.

[46] *Graham*, 490 U.S. at 397.

action.[47] Instead, the court considers the totality of the circumstances "from the perspective of a reasonable officer on the scene."[48] In *Graham v. Connor*,[49] the Supreme Court outlined several factors to consider: (1) the severity of the crime; (2) whether the suspect posed an immediate threat to the safety of officers or others; and (3) whether the suspect actively resisted.[50]

A court cannot take the severity of the crime into consideration if the plaintiff did not commit a crime.[51] Here, Plaintiff was charged with disorderly conduct—a misdemeanor.[52] However, the record does not reflect any evidence that Plaintiff was found guilty of disorderly conduct. Being charged with a crime is not equivalent to committing a crime. As Plaintiff was not convicted of a crime, this factor weighs against qualified immunity.

There is also a question of material fact as to whether Plaintiff represented a threat to officer or public safety. Plaintiff attests that he was attempting to comply with Officers' orders and remained nonconfrontational

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[47] *Id.*

[48] *Id.* at 396.

[49] 490 U.S. 386 (1989).

[50] *Id.*

[51] *See Turmon v. Jordan*, 405 F.3d 202, 207 (5th Cir. 2005).

[52] Resp., "United States District Court Violation Notice" 1, Ex. D.

throughout the interaction.[53] According to Officers, Plaintiff attempted to gain unauthorized access to the VA facility without providing identification.[54] Officers seemingly argue failing to present identification can be inferred to present an immediate threat to officer or public safety.[55]

Furthermore, surveillance video of the incident shows Nivar stepping forward towards Plaintiff while displaying handcuffs.[56] Nivar did not handcuff Plaintiff, but instead pointed towards the metal detector.[57] In Plaintiff's affidavit, he states that he was told to approach the detector despite Officers not seeing his identification.[58] Once Plaintiff reached the metal detector, an altercation occurred.[59] During the altercation, Officers restrained Plaintiff through a chokehold.[60] Accordingly, a question of material fact remains as to whether Plaintiff presented a threat to officer or public safety.

Lastly, courts should look to whether the plaintiff resisted arrest.[61] Officers do not assert that Plaintiff

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[53] Oliva Aff. 2 ¶ 9.

[54] Nivar Aff. 1; Barahona Aff. 1; Garcia Aff. 1.

[55] *Id.*

[56] Video Ex. B at 00:53.

[57] *Id.* at 01:00.

[58] Oliva Aff. 2 ¶ 7.

[59] Video Ex. B at 01:07.

[60] *Id.* at 01:09.

[61] *Graham v. Connor*, 490 U.S. 386, 397 (1989).

actively resisted arrest.[62] Therefore, this factor also does not support qualified immunity.

All three of the factors enumerated in *Graham* show questions of material facts exist. Accordingly, when viewed in the light most favorable to the non-moving party, a genuine issue of material fact remains as to whether Plaintiff's constitutional rights were violated.

2. Whether Nivar's Actions Violated Clearly Established Law

The second prong considers whether the officers' conduct violated clearly established law.[63] "If officers of a reasonable competence could disagree on this issue, immunity should be recognized."[64] This analysis is "highly fact-specific."[65] The protection of qualified immunity can be overcome through cases which are "directly on point."[66] If no case is directly on point, precedent must show "beyond debate" that a constitutional violation occurred.[67]

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[62] *See generally* Nivar Aff.; *see also* Barahona Aff.; Garcia Aff.

[63] *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

[64] *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

[65] *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015).

[66] *Darden v. City of Fort Worth*, 880 F.3d 722, 732 (5th Cir. 2018); *see also Ontiveros v. City of Rosenberg*, 564 F.3d 379, 383 n.1 (5th Cir. 2009).

[67] *Darden*, 880 F.3d at 732.

Appendix B

In *Darden v. City of Fort Worth*,[68] the Fifth Circuit held that use of force is excessive where the officer "strikes, punches, or violently slams a suspect who is not resisting arrest."[69] In *Darden*, an officer choked and pulled the plaintiff's hands behind his back, despite the plaintiff "purportedly complying with the officers' orders and not resisting arrest."[70] The Fifth Circuit explained that the law is "clearly established that violently slamming or striking a suspect who is not actively resisting arrest constitutes excessive use of force."[71] While *Darden* is particularly illustrative, the Fifth Circuit has regularly held an officer may not use excessive force when the individual is not resisting arrest or detention.[72]

Here, Plaintiff asserts Officers grappled and brought him to the ground—something the video evidence bears out.[73] Plaintiff also claims Nivar restrained him with a chokehold, despite not resisting the arrest.[74] Officers

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[68] 880 F.3d 722 (5th Cir. 2018).

[69] *Id.* at 732.

[70] *Id.* at 733.

[71] *Id.*at 732.

[72] *Id.* at 733; *see also Cooper v. Brown*, 844 F.3d 517, 524 (5th Cir. 2016) ("Our caselaw makes certain that once an arrestee stops resisting, the degree of force an officer can employ is reduced"); *Newman v. Guedry*, 703 F.3d 757, 763 (5th Cir. 2012); *Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008).

[73] Video Ex. B 01:09–01:47.

[74] Oliva Aff. 2 ¶ 8-9.

challenge these allegations, asserting Plaintiff's actions gave rise to the use of force.[75] When viewing the evidence in the light most favorable to Plaintiff, Officers violated clearly established law as determined by the Fifth Circuit when they used excessive force on an unresisting suspect.[76] Officers notably do not assert that Plaintiff resisted arrest.[77] This is critical as an officer who grapples and chokes a suspect who is not actively resisting violated clearly established law in *Darden*.[78]

When viewing the submitted evidence in the light most favorable to Plaintiff, a question of material fact remains as to whether Plaintiff's Fourth Amendment rights were violated. It is not the courts role to evaluate the evidence or its credibility, only that it is sufficient to allow a juror to reasonably find in favor of the non-moving party.[79] Thus, the protection of qualified immunity is defeated.

IV. CONCLUSION

Defendants Nivar, Barahona, and Garcia are not entitled to qualified immunity on Plaintiff's FTCA claims, as no FTCA claims are filed against them. Additionally,

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[75] Nivar Aff. 1; Barahona Aff. 1; Garcia Aff. 1.

[76] *Darden v. City of Fort Worth*, 880 F.3d 722, 732 (5th Cir. 2018).

[77] *See generally* Nivar Aff.; Barahona Aff.; Garcia Aff.

[78] *Darden*, 880 F.3d at 732.

[79] *Caboni v. General Motors Corp.*, 278 F.3d 448, 451 (5th Cir. 2002).

Plaintiff has provided sufficient evidence to defeat summary judgment as to his *Bivens* claim.

Accordingly, it is **HEREBY ORDERED** that "Defendants Mario J. Nivar, Hector Barahon [sic], Mario Garcia's Motion for Summary Judgment" [ECF No. 80] is **DENIED**.

SO ORDERED.

SIGNED this 20 day of **August, 2019**.

/s/ Frank Montalvo
FRANK MONTALVO
UNITED STATES DISTRICT JUDGE

Appendix C — Order of the United States District Court for the Western District of Texas, El Paso Division, Filed January 8, 2019

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

EP-18-CV-00015-FM

JOSE L. OLIVA,

Plaintiff,

v.

UNITED STATES OF AMERICA; MARIO J. NIVAR; HECTOR BARAHONA; and MARIO GARCIA,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT NIVAR'S MOTION TO DISMISS

Before the court is "Motion to Dismiss the Plaintiff's Original Complaint and Brief in Support, filed by Defendant, Mario J. Nivar" ("Motion") [ECF No. 30], filed October 16, 2018 by Mario Nivar ("Nivar"); and "Plaintiff's Response to Defendant Mario J. Nivar's Motion to Dismiss Plaintiff's Original Complaint and Brief in Support" ("Response") [ECF No. 40], filed November 8, 2018 by Jose Oliva ("Plaintiff"). Based on the Motion, Response, and applicable law, the Motion is **DENIED IN PART** and

Appendix C

GRANTED IN PART.

I. BACKGROUND

A. Factual Background and Procedural History

Plaintiff has alleged the following facts.[1] Plaintiff visited the Veteran Affairs Health Care System ("VA") on February 16, 2016 for a scheduled appointment.[2] The VA is located at 5001 N. Piedras St. in El Paso, Texas.[3] To enter the VA, visitors are required to go through a metal detector and run their personal belongings through a similar machine.[4] As Plaintiff entered the VA, VA Police Officers Mario Garcia, Hector Barahona, and Nivar (collectively, "Defendants") instructed Plaintiff to empty his pockets into an inspection bin and he complied.[5] Nivar requested Plaintiff's identification.[6] Plaintiff explained he could not show his identification, as it was in the inspection bin.[7] Defendants then instructed Plaintiff to walk through the metal detector.[8]

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[1] "Plaintiff's Original Complaint" ("Compl.") 1, ECF No. 1, filed Jan. 16, 2018.

[2] *Id.* at 3 ¶ 10.

[3] *See id.* at 2 ¶ 6.

[4] *Id.* at 3 ¶ 10.

[5] *Id.* at 3 ¶ 11

[6] *Id.* at 3 ¶ 12.

[7] Compl. 3 ¶ 12.

[8] *Id.* at 3 ¶ 13.

As Plaintiff attempted to follow the Defendants' order, Plaintiff alleges Nivar placed him in a chokehold.[9] Barahona restrained Plaintiff's left arm and forced it behind Plaintiff's back.[10] This resulted in a loud popping sound.[11] Plaintiff asserts he never resisted, raised his voice, or attempted to confront Defendants.[12] Defendants pinned Plaintiff to the ground, secured him in handcuffs, and detained him in a side room.[13] Plaintiff was charged with disorderly conduct.[14]

Plaintiff claims to have undergone shoulder surgery, in addition to seeking treatment for difficulty swallowing, ear pain, ear infection, and persistent hoarseness.[15] Plaintiff also alleges to still suffer aggravated symptoms of post-traumatic stress disorder.[16]

On January 16, 2018, Plaintiff filed suit against the United States of America ("Government") and Defendants, bringing claims under the Federal Tort Claims Act

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[9] *Id.* at 3 ¶ 10.

[10] *Id.* at 3 ¶ 14.

[11] *Id*

[12] *Id.* at 4 ¶ 17.

[13] Comp. 4 ¶¶ 15–16.

[14] *Id.* at 4 ¶ 17.

[15] *Id.* at 4 ¶¶ 18–20.

[16] *Id.* at 4 ¶¶ 18–20.

("FTCA"), 18 U.S.C. § 2671 *et. seq.* and *Bivens*.[17] Nivar moves to dismiss Plaintiff's *Bivens* claim pursuant to Federal Rule of Civil Procedure 12(b)(6).[18]

B. Parties' Arguments

Nivar claims Plaintiff must fail as: (1) Plaintiff's claim is an inappropriate extension of *Bivens*; and (2) qualified immunity bars any relief.[19] Nivar argues this is an inappropriate extension of Bivens because it is limited to only a few Constitutional violations by the Supreme Court's holding in *Ziglar v. Abbasi*,[20] and the alleged facts would extend this scope.[21]

In the alternative, he argues this case includes special factors which caution extending *Bivens*.[22] Specifically, Nivar focuses on national security concerns, which previous decisions have held warrant curtailing *Bivens* remedies.[23] As Plaintiff may receive relief under the

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[17] *Id.* at 5 ¶¶ 21–22, 3 ¶ 10.

[18] *See* "Motion to Dismiss the Plaintiff's Original Complaint and Brief in Support, filed by Defendant, Mario J. Nivar" ("Mot."), ECF No. 30, filed Oct. 16, 2018.

[19] Mot. 2 ¶ 2, 9 ¶ 19.

[20] 137 S. Ct. 1843 (2017).

[21] Mot. 3 ¶ 6.

[22] *Id.*

[23] *Id.* at 7 ¶¶ 14–15 (citing to *Hernandez v. Mesa*, 885 F.3d 811, 814 (5th Cir. 2018)).

FTCA, Nivar contends *Bivens* should not be extended to include this specific alleged constitutional violation.[24]

Finally, he claims that the privilege of qualified immunity renders him immune from liability.[25] In support, Nivar argues his actions did not violate clearly established law.[26] Nivar also claims Plaintiff's pleaded facts, while conceivable, do not present a plausible set of circumstances in which excessive force was applied.[27]

Plaintiff asserts his claim of excessive force is not a novel application of *Bivens*.[28] Plaintiff seemingly incorporates this argument for his Fifth Amendment claims, but provides no further detail or specificity.[29] Plaintiff opposes Nivar's argument that the allegations are only conceivable, explaining that officers can act simultaneously to violate an individual's constitutional rights.[30] Finally, Plaintiff argues that Nivar's use of a chokehold was in violation of clearly established law and its use was objectively unreasonable.[31]

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[24] *Id.* at 9 ¶ 18.

[25] *Id.* at 9 ¶ 19.

[26] *Id.* at 10 ¶ 20.

[27] Mot. 12 ¶ 23.

[28] "Plaintiff's Response to Defendant Mario J. Nivar's Motion to Dismiss Plaintiff's Original Complaint and Brief in Support" ("Resp.") 5, ECF No. 40, filed Nov. 8, 2018.

[29] *See generally* Mot.

[30] Resp. 4–5.

[31] *Id.* at 4.

Appendix C

II. APPLICABLE LAW

A. Motion to Dismiss Pursuant to Rule 12(b)(6)

Federal Rule of Civil Procedure Rule 12(b)(6) allows dismissal of a complaint for "failure to state a claim for which relief can be granted."[32] "The central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief."[33] To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face."[34] "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."[35] "[F]acial plausibility" exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[36] Therefore, a complaint is not required to set out "detailed factual allegations," but it must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action."[37] Although the court

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[32] FED. R. CIV. P. 12(b)(6).

[33] *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 313 (5th Cir. 2002) (internal quotation marks and citation omitted); *see also In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007).

[34] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

[35] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[36] *Id.* (citing *Twombly*, 550 U.S. at 556).

[37] *Twombly*, 550 U.S. at 555.

must accept well-pleaded allegations in a complaint as true, it does not afford conclusory allegations similar treatment.[38]

III. DISCUSSION

A. Fourth Amendment Bivens Claim

In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*,[39] the Supreme Court held that individuals could bring an implied cause of action under the Fourth Amendment.[40] There, the plaintiff sought recovery for damages caused when federal narcotics performed a warrantless search and seizure of his home.[41] He further alleged officers used excessive force in effecting the arrest.[42] The Court found the plaintiff could recover against a federal agent acting under color of federal authority where the agent's conduct was unconstitutional.[43] The Court has extended this implied cause of action to alleged violations of the Fifth Amendment[44] and Eighth

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[38] *See Kaiser Aluminum & Chem. Sales, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982) (citing *Associated Builders, Inc. v. Ala. Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974)).

[39] 403 U.S. 388 (1971).

[40] *See id.*

[41] *Id.* at 389–90.

[42] *Id.* at 389.

[43] *Id.* at 411.

[44] *Davis v. Passman*, 442 U.S. 228, 248–49 (1979).

Amendment.[45] However, the Court has since directed that extending *Bivens* claims are a disfavored judicial activity[46] and has "consistently refused to extend Bivens to any new context or new category of defendants."[47] The Fifth Circuit has elaborated that *Bivens* excessive force claims have two distinct categories: (1) claims with special factors; and (2) "garden variety" claims.[48]

Where a *Bivens* claim arises in a new context, a court considers special factors which may counsel hesitation.[49] Absent Congressional directive, courts are "reluctant to intrude" into domains reserved for the legislative and executive branches.[50] Among these Special factors is national security.[51] For instance, in *Hernandez v. Mesa*,[52]

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[45] *Carlson v. Green*, 446 U.S. 14, 19 (1980).

[46] *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (citing to *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)).

[47] *Id.* (citing to *Corectional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001)).

[48] *Hernandez v. Mesa*, 885 F.3d 811, 814 (5th Cir. 2018); *see also De La Paz v. Coy*, 786 F.3d 367, 375 (5th Cir. 2015) ("Consequently, this court's past cases have not decided whether Bivens extends to claims arising from civil immigration apprehensions and detentions, *other than those alleging unconstitutionally excessive force*").

[49] *Abbasi*, 137 S. Ct. at 1857 (citing to *Carlson*, 446 U.S. at 18).

[50] *Id.*

[51] *Id.* at 1861.

[52] 885 F.3d 811 (5th Cir. 2018).

the Fifth Circuit found that national security concerns can defeat *Bivens* claims against Border Patrol Agents.[53] Specifically, these national security concerns involved an international element contained in the job duties and the real danger of terrorism.[54] The Fifth Circuit highlighted how *Bivens* liability may "undermine the Border Patrol's ability to perform duties essential to national security."[55] Despite this, the Fifth Circuit was clear that domestic cases would be different, reasoning that "the defining characteristic of this case is that it is *not* domestic."[56] Therefore, claiming national security concerns has a much less risk of abuse.[57]

Courts also consider whether there are "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong."[58] An additional consideration is whether an alternative remedy exists to limit the availability of a *Bivens* remedy.[59]

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[53] *Id.* at 823.

[54] *See generally id.*

[55] *Id.* at 819.

[56] *Id.*

[57] *Id.*

[58] *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017).

[59] *Id.*

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Like *Bivens*, this case involves allegations that Defendants, including Nivar, violated his Fourth Amendment right to be free of excessive force.[60] *Bivens* also involved a claim of excessive force, as seen where the complaint alleged the officers used unreasonable force during an unlawful arrest.[61] Additionally, the Fifth Circuit's holding that there are "garden variety" *Bivens* excessive force claims[62] show Plaintiff's claim may proceed, absent special considerations.

Nivar asserts this case is a new application of *Bivens*, as VA Police Officers are a new class of defendants.[63] This argument is an overreach. Like the federal officers in *Bivens*, VA Police Officers are federal law enforcement officers.[64] *Bivens* is not contingent on the specific category of federal law enforcement officers involved in the alleged constitutional violation. Rather, *Bivens* looks at whether the official was simply federal law enforcement or a high-level decisionmaker.[65]

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[60] Resp. 5.

[61] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

[62] *Hernandez v. Mesa*, 885 F.3d 811, 814 (5th Cir. 2018).

[63] Mot. 6 ¶ 11.

[64] U.S. Dept. of Veterans Affairs, Office of Security and Law Enforcement, *Our Mission*, https://www.osp.va.gov/OSandLE_Overview.asp (accessed on Jan. 2, 2019) (describing the VA Police's mission: "Deliver professional law enforcement and security services, while maintaining law and order, and the protection of persons and property on VA campuses and building's [sic] under the jurisdiction of the Department of Veterans Affairs.").

[65] *Bivens*, 403 U.S. at 411; *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (2017).

Appendix C

In support of his contention that VA Police Officers should be considered a separate class of defendants, he attempts to draw support from *Abbasi*, where high-level government officials were held to be a new class.[66] *Abbasi* dealt with two groups of defendants: (1) the Attorney General, Federal Bureau of Investigation Director, and the Immigration and Naturalization Service Commissioner; and (2) the federal facilities warden and assistant warden.[67] Neither of those two groups are similar to a VA Police Officer. VA Police Officers simply do not have a similar level of discretion, nor would their behavior be chilled in a similar manner. A VA Police Officer acting in the manner alleged is no different than any other federal law enforcement officer effectuating the law. Therefore, this case does not present a new *Bivens* context.

Nivar further alleges since Plaintiff has the potential for relief under the FTCA, a *Bivens* remedy is not available.[68] This is incorrect. The FTCA is the exclusive remedy of specific claims enumerated by Congress.[69] However, the FTCA expressly does not extend to general constitutional excessive force claims.[70] Excessive force is not a new *Bivens* cause of action, and potential alternative remedial structures do not prevent this claim from moving forward.

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[66] *Abbasi*, 137 S. Ct. at 1858.

[67] *Id.* at 1853.

[68] Mot. 9 ¶ 18.

[69] 18 U.S.C. § 2679.

[70] 18 U.S.C. § 2679(b)(2)(A); *see also Hernandez v. Mesa*, 885 F.3d 811, 830 (5th Cir. 2018).

Lastly, Nivar argues that even if there are no alternative remedial structures, *Bivens* should not be extended if special factors counsel hesitation.[71] Nivar asserts that the principle of Separation of Powers should give this court pause, explicitly national security.[72] In support, Nivar cites to *Hernandez v. Mes*a.[73]

In *Hernandez*, the Fifth Circuit held that *Bivens* did not extend to a Border Patrol agent because of national security concerns.[74] Defendant's reliance on *Hernandez* is misguided. *Hernandez* is careful to acknowledge that in domestic cases, there is a danger for abusing the phrase "national security."[75] *Hernandez* distinguishes itself by focusing on the international nature of defending the border. The Fifth Circuit explained:

> "We hold that this is not a garden variety excessive force case against a federal law enforcement officer. The transnational aspect of the facts presents a "new context" under *Bivens*, and numerous "special factors" counsel against federal courts' interference with the Executive and Legislative branches of the federal government.[76]

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[71] *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

[72] Mot. 7 ¶ 14.

[73] 885 F.3d 811 (5th Cir. 2018).

[74] *Hernandez v. Mesa*, 885 F.3d 811, 819–20 (5th Cir. 2018)

[75] *Id.*

[76] *Id.* at 814.

The present case is purely a domestic matter. No such international element exists here, nor is it even suggested that an international element could exist.

Simply put, policing a VA Hospital entrance is not comparable to patrolling our country's international borders, a controlling fact in *Hernandez*. Border security is an important factor, as the Supreme Court reasoned it is "much more difficult to believe that congressional inaction was inadvertent" due to the national policy focus.[77] As Nivar's argument goes beyond the scope of national security, it is simply too broad. National security does grant federal law enforcement broad powers; yet it is not a magic wand that need only be waved to garner unfettered discretion. Therefore, Nivar's argument that national security is a special factor barring Plaintiff's claim must fail.

A *Bivens* claim for excessive force is not a novel claim, and there are no special considerations which cause these facts to extend *Bivens*. Therefore, Plaintiff has properly pleaded a *Bivens* claim for excessive force in violation of the Fourth Amendment.

B. Fifth Amendment Bivens Claim

Plaintiff also seeks a *Bivens* remedy for violations of his Fifth Amendment rights.[78] Courts have not generally

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[77] *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017).

[78] Compl. 5 ¶ 26.

applied *Bivens* in the context of the Fifth Amendment.[79] Accordingly, Plaintiff's *Bivens* claim for a violation of the Fifth Amendment must fail.

Furthermore, Plaintiff's Fifth Amendment claim is vague and devoid of detail.[80] It is unclear if this claim is meant to cover Plaintiff's detention, Nivar's use of force, or both. Simply claiming Fifth Amendment injuries does not suffice. Even if Plaintiff provided more detail, Plaintiff may not pursue a Fifth Amendment *Bivens* claim, as it falls outside the scope of *Bivens*. Therefore, no *Bivens* remedy is available, and this claim is dismissed.

C. Qualified Immunity

As Plaintiff's Fourth Amendment claim survives the *Bivens* challenge, the court considers whether Nivar is entitled to qualified imniunity.[81] Government officials receive protection "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[82]

Courts employ a two-prong analysis to assess whether an officer may assert the privilege of qualified immunity.[83]

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[79] The lone Fifth Amendment *Bivens* claim was for gender discrimination. *See Davis v Passman*, 442 U.S. 228 (1979).

[80] Compl. 5 ¶ 26.

[81] Mot. 9 ¶ 19.

[82] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

[83] *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

Courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[84] However, analyzing them in order is "often beneficial."[85] The first prong is whether the evidence, in the light most favorable to the plaintiff, shows the officer violated the plaintiff's constitutional rights.[86] The second prong is whether the officer's actions were objectively reasonable in light of clearly established law.[87] Both prongs must be satisfied to defeat qualified immunity.[88]

1. Whether Plaintiff's Constitutional Rights Were Violated

The court looks to whether Plaintiff pleaded facts sufficient to show an injury resulted from excessive force and whether that excessive force was objectively unreasonable.[89] The court does not consider subjective intent in its analysis.[90] In this case, Plaintiff alleged that he

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[84] *Id.* at 236.

[85] *Id.*

[86] *Id.* at 232.

[87] *Id.*

[88] *Id.*

[89] *Cooper v. Brown*, 844 F.3d 517, 522 (5th Cir. 2016); *see also Elizondo v. Green*, 671 F.3d 506, 501 (5th Cir. 2012) (quoting *Collier v. Montgomery*, 569 F.3d 214, 218 (5th Cir. 2009)).

[90] *Graham v. Connor*, 490 U.S. 386, 397 (1989).

was injured,[91] which came about as a result of Defendants applying force towards him.[92]

Courts analyze excessive force claims under the "objective reasonableness standard."[93] As officers deal with rapidly evolving situations, this standard does not employ hindsight to find the objective best course of action.[94] Instead, the court considers the totality of the circumstances "from the perspective of a reasonable officer on the scene."[95] In *Graham v. Connor*,[96] the court outlined several factors to consider: (1) the severity of the crime; (2) whether the suspect posed an immediate threat to the safety of officers or others; and (3) whether the suspect actively resisted.[97]

The severity of the crime cannot be taken into consideration if the plaintiff did not commit a crime.[98] Here, Plaintiff was charged with disorderly conduct—a

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[91] Compl. 4 ¶¶ 18–20. The injuries alleged include: shoulder surgery, difficulty swallowing, ear pain, ear infection, persistent hoarseness, and symptoms of post-traumatic stress disorder.

[92] *Id.* at 3 ¶ 10, 14.

[93] *Graham*, 490 U.S. at 397.

[94] *Id.*

[95] *Id.* at 396.

[96] 490 U.S. 386 (1989).

[97] *Id.*

[98] *See Turmon v. Jordan*, 405 F.3d 202, 207 (5th Cir. 2005).

misdemeanor—although he contends no crime was committed.[99] However, Plaintiff was never convicted of disorderly conduct. As Plaintiff was not convicted of a crime, this factor favors Plaintiff.

Nivar casts Plaintiff's assertion as implausible, implying that, because Defendants acted simultaneously to restrain Plaintiff, there must have been some criminal activity.[100] The pleadings are devoid of allegations to support such a bald assertion. When viewing the pleadings in the light most favorable to the Plaintiff, the alleged events are well within the realm of plausibility. This factor thus favors the Plaintiff.

Similarly, there is nothing to suggest the officers felt there was a threat to an officer or building safety. In his complaint, Plaintiff's asserts he was attempting to comply with Defendants' orders and remained nonconfrontational throughout the interaction.[101] Simply complying with officer commands while remaining nonconfrontational is not a threat to safety. There are no present allegations of resistance. Plaintiff has pleaded that he was not actively resisting,[102] a fact which is plausible. The mere fact that Plaintiff was charged with a crime does not justify assuming the arrest was preceded by wrongdoing.

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[99] Resp. 10; *see also* Compl. 4 ¶ 17.

[100] Mot. 12 ¶ 23.

[101] Compl. 3 ¶¶ 13–14.

[102] *Id.* at 3–4 ¶¶ 13–17.

All three of the factors enumerated in *Graham* favor Plaintiff. Accordingly, Plaintiff has sufficiently pleaded facts to support a claim for a violation of his Fourth Amendment rights.

2. Whether Nivar's Actions Violated Clearly Established Law

The second prong considers whether the officers' conduct violated clearly established law.[103] "If officers of a reasonable competence could disagree on this issue, immunity should be recognized."[104] This analysis is "highly fact-specific."[105] The protection of qualified immunity can be overcome through cases which are "directly on point."[106] If no case is directly on point, precedent must show "beyond debate" that a constitutional violation occurred.[107]

In *Darden v. City of Fort Worth*,[108] the Fifth Circuit held that use of force is excessive where the officer "strikes, punches, or violently slams a suspect who is not resisting arrest."[109] In *Darden*, an officer choked and pulled the

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[103] *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

[104] *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

[105] *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015).

[106] *Darden v. City of Fort Worth*, 880 F.3d 722, 732 (5th Cir. 2018); *see also Ontiveros v. City of Rosenberg*, 564 F.3d 379, 383 n.1 (5th Cir. 2009).

[107] *Darden*, 880 F.3d at 732.

[108] 880 F.3d 722 (5th Cir. 2018).

[109] *Id.* at 732.

plaintiff's hands behind his back, despite the plaintiff "purportedly complying with the officers' orders and not resisting arrest."[110] The Fifth Circuit has further stated the law has "clearly established that violently slamming or striking a suspect who is not actively resisting arrest constitutes excessive use of force."[111] Accordingly, it is clearly established that an officer may not use excessive force when the individual is not resisting.[112]

Here, Plaintiff has alleged he was grappled violently and slammed to the ground.[113] Plaintiff also alleges Nivar restrained him with a chokehold, despite him not resisting the arrest.[114] Accordingly, when viewing the allegations in the light most favorable to the Plaintiff, Nivar's actions violated clearly established law, thereby defeating his defense of qualified immunity.

3. CONCLUSION

Plaintiff has pleaded a plausible *Bivens* claim for excessive force in violation of the Fourth Amendment. No such *Bivens* remedy exists for Plaintiff's ethereal Fifth Amendment claim. Finally, Nivar is not entitled to qualified immunity, as the complaint alleges sufficient

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[110] *Id.* at 733.

[111] *Id.* at 732.

[112] *Id.* at 733.

[113] Compl. 3–4 ¶¶ 14–15.

[114] *Id.* at 3 ¶ 13, 4 ¶ 16.

facts that Plaintiff's Fourth Amendment rights were violated and Nivar's action violated clearly established law. Accordingly, the court enters the following orders:

1. It is **HEREBY ORDERED** that the "Motion to Dismiss the Plaintiff's Original Complaint and Brief in Support, filed by Defendant, Mario J. Nivar" [ECF No. 30] is **GRANTED** as to Plaintiff's Fifth Amendment *Bivens* claims.

2. It is **FURTHER ORDERED** that the "Motion to Dismiss the Plaintiff's Original Complaint and Brief in Support, filed by Defendant, Mario J. Nivar" [ECF No. 30] is **DENIED** as to the Fourth Amendment *Bivens* claim.

SO ORDERED.

SIGNED this 8 day of **January, 2019**.

/s/ Frank Montalvo
FRANK MONTALVO
UNITED STATES DISTRICT JUDGE