IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

GERARDO SERRANO, on behalf of Himself and all others similarly situated,	§	
Plaintiff,	§	
v.	§	Civil No. 2:17-CV-00048-AM-CW
U.S. CUSTOMS and BORDER PROTECTION, UNITED STATES of AMERICA, KEVIN McALEENAN, JUAN ESPINOSA, and John Doe 1-X.,	§	
Defendants.	§	

MOTION TO DISMISS OF DEFENDANT JUAN ESPINOZA[1]

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendant Juan Espinoza (the "Individual Defendant") moves to dismiss Plaintiff Gerardo Serrano's ("Plaintiff") *Bivens* claim for failure to state any claims upon which relief can be granted. (Dkt. # 1 at 15). Plaintiff's claim against the Individual Defendant should be dismissed because he has not stated a valid *Bivens* claim, and the Individual Defendant is entitled to qualified immunity against Plaintiff's claim. For the reasons stated below, the Individual Defendant respectfully requests that the Court grant this Motion.

[1] The John Doe defendants have not been identified by Plaintiff, nor have they been served. Because this motion raises threshold defenses relating to Plaintiff's ability to state a *Bivens* claim against Defendant Juan Espinaoza, it is likely that a ruling for Espinoza would also entitle the unidentified John Doe Defendants to a judgment in their favor.

MEMORANDUM IN SUPPORT

I. STATEMENT OF FACTS

For purposes of this Motion only, the Individual Defendant assumes that the allegations in Plaintiff's Complaint are true. The relevant allegations are as follows:

Plaintiff is an adult United States citizen and a resident of Tyner, Kentucky. (Dkt. # 1 at 4). Defendant Juan Espinoza is a paralegal specialist for United States Customs and Border Protection ("CBP") and is sued in his individual capacity. *Id*.

On September 21, 2015, Plaintiff attempted to travel into Mexico through the border station in Eagle Pass, Texas. (*Id*.). Driving a 2014 Ford F-250 pickup truck, Plaintiff approached the border and began taking photos of the border crossing using his smartphone. (*Id*.) Two border agents stopped Plaintiff's vehicle before he crossed into Mexico. (*Id*.) The two border agents searched Plaintiff's truck and located five .380 caliber bullets and a .380 caliber magazine in the truck's center console. (*Id*. at 8). Plaintiff was released three hours later, but his truck was seized because it is illegal to carry munitions into Mexico under 19 U.S.C. § 1595a(d) and 22 U.S.C. § 401.[2] (*Id*. at 9).

On or about October 1, 2015, CBP sent Plaintiff a notice of seizure, informing Plaintiff that CBP intended to forfeit the truck, bullets, and magazines seized at the border station. (*Id*. at 10). Plaintiff alleges in his complaint that the notice "stated that CBP intended to forfeit the truck, bullets and magazine seized on September 21, 2015, and asserted that this property was subject to

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[2] Section 1595a(d) mandates the seizure of merchandise exported from the United States, as well as property used to facilitate such exportation, contrary to law. As 15 C.F.R. § 30.2(a)(1)(iv)(C) mandates the filing of Electronic Export Information (EEI) with CBP for any good subject to the International Traffic in Arms Regulations (ITAR), Plaintiff was required to file EEI with the Agency. When Plaintiff failed to indicate to the CBP that he was exporting ammunition to Mexico, Plaintiff violated § 30.2(a)(1)(iv)(C) and seizure was appropriate under § 1595a(d).

civil forfeiture because Plaintiff had attempted to export 'munitions of war' from the United States." (*Id*. at 11). According to Plaintiff's Complaint, in addition to assigning Plaintiff a case number, the notices explained the administrative scheme for Plaintiff to follow if he wished to challenge the seizure in Court. (*Id*.). Plaintiff was informed he could "request to have this matter referred to the U.S. Attorney," and that "the case will be referred promptly to the appropriate U.S. Attorney for the institution of judicial proceedings." (*Id*.). According to Plaintiff, the notice stated that, "if Plaintiff wished to have the case referred to a U.S. Attorney, he was required to post bond equal to ten percent of the value of the seized property." (*Id*.). The notice identified Defendant Juan Espinoza as the CBP employee responsible for processing forfeiture or release of Plaintiff's seized property. (*Id*. at 5). Ultimately, CBP returned Plaintiff's truck to him on or about October 16, 2017. (**Exhibit A,** 10/16/17 e-mail to Plaintiff's Counsel).

II. NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff filed this action on September 6, 2017 alleging that the Individual Defendant's prolonged seizure of his truck violated his Fourth and Fifth Amendment rights and seeks relief under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403, U.S. 388 (1971). (Dkt. # 1 at 15-16). Plaintiff allegedly brings his individual claim for the return of his truck under Federal Rule of Criminal Procedure 41(g). (*Id*. at 3). On November 15, 2017, this Court allowed Defendants until on or before December 13, 2017 to respond Plaintiff's Complaint. (Dkt. # 47). The Individual Defendant denies Plaintiff's allegations and submits that his claim should be dismissed because he has not stated a viable *Bivens* claim, and he is entitled to qualified immunity on all of Plaintiff's claims.

III. STANDARD OF REVIEW

A motion under Federal Rule of Civil Procedure 12(b)(6) asks a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). To survive a motion to dismiss, a plaintiff must plead sufficient facts to state a claim for relief that is facially plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has facial plausibility when a plaintiff pleads factual content that allows the court to draw the reasonable inference that a defendant is liable for the misconduct alleged. *Iqbal*, 566 U.S. at 678. While a plaintiff's factual allegations need not establish probable liability, they must establish more than a "sheer possibility" a defendant acted unlawfully. *Iqbal*, 566 U.S. at 679). In considering a motion to dismiss, a district court must limit itself to the contents of the pleadings and attached documents. Fed. R. Civ. P. 12(b)(6); *Garcia v. Wells Fargo Bank*, No. SA-17-CV-747-XR, 2017 WL 4448243, at *2 (W.D. Tex. October 5, 2017). Plaintiff's claim should be dismissed because he has not pleaded sufficient facts stating any violation of his Constitutional rights, and no *Bivens* claim is available in this new context. Even if he has stated actionable claims for relief under the Constitution, the Individual Defendant is entitled to qualified immunity on all of Plaintiff's claims.

IV. ARGUMENT

Plaintiff's claim against the Individual Defendant should be dismissed because he has not stated a viable *Bivens* claim under existing law. Because he cannot identify any Supreme Court authorities that recognize a *Bivens* claim under the facts in this case, his *Bivens* claim necessarily arises in a new context beyond the three previously recognized by the Supreme Court. Before allowing this new claim to proceed, the Court must consider whether an alternate remedial scheme exists that militates against recognizing a new *Bivens* remedy in this case, and whether other

"special factors counsel hesitation" in extending *Bivens* liability. *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1857-58, 1860, 1863, 1865 (2017). Plaintiff's *Bivens* claim should be dismissed because an alternate remedial scheme exists for addressing his claims relating to the return of his truck, and special factors counsel against recognizing a new *Bivens* remedy in this case. Even if Plaintiff could identify a valid *Bivens* claim under existing law, the Individual Defendant is entitled to qualified immunity because he did not violate any of Plaintiff's constitutional rights.

A. The Court Should Not Recognize Any New *Bivens* Claims In This Case

In an attempt to sue the Individual Defendant, Plaintiff wrongly presumes the existence of a judicially created damages remedy like that allowed in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403, U.S. 388 (1971). *Bivens* established that, in limited circumstances, "the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *De La Paz v. Coy*, 786 F.3d 367, 372 (5th Cir. 2015). But *Bivens* actions are not "automatic entitlement[s]." *Willkie v. Robbins*, 551 U.S. 537, 500 (2007). "[B]ecause *Bivens* suits implicate grave separation of powers concerns, 'a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.'" *De La Paz*, 786 F.3d at 372–73. And unlike the congressionally created remedy against state officials authorized by 42 U.S.C. § 1983, judicially created *Bivens* actions against federal employees are "disfavored" and only apply in "limited settings." *Ashcroft*, 556 U.S. at 675–76.

In fact, other than *Bivens*, there are only two instances in which the Supreme Court approved an "implied" damages remedy under the Constitution itself. *Ziglar v. Abassi*, 137 S.Ct. 1843, 1855 (2017); *see, e.g.*, *Davis v. Passman*, 442 U.S. 288 (1979) (affording a damages remedy for gender discrimination pursuant to the Fifth Amendment's Due Process Clause); *Carlson v.*

Green, 446 U.S. 14, 100 (1980) (affording a damages remedy for violation of the Eighth Amendment's Cruel and Unusual Punishments Clause). More specifically, for the past thirty years, the Court has consistently reversed appellate decisions attempting to create new causes of action for damages, and has "refused to extend *Bivens* to any new context or new category of defendants." *See Ziglar*, 137 S.Ct. at 1857 (collecting cases). Lower courts are, therefore, cautioned before "extending *Bivens* remedies into ***any*** new context" and such a remedy is barred if there are "special factors counseling hesitation in the absence of affirmative action by Congress." *Ziglar*, 137 S.Ct. at 1857 (emphasis added).

Importantly, in light of the Supreme Court's recent decision in *Ziglar*, courts must examine every type of *Bivens* claim beyond the three specific kinds the Supreme Court ***itself*** (not any Circuit or District Court) has already recognized in *Bivens*, *Davis*, and *Carlson*. *See Ziglar*, 137 S.Ct. at 1855, 1859 ("The proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by ***this Court***, then the context is new") (emphasis added).

Against that backdrop, Plaintiff cannot simply presume the existence of a judicially created damages remedy like that allowed in *Bivens*. Instead, pursuant to *Ziglar*, Plaintiff must show his claim does not arise in a "new context" as compared to previously decided Supreme Court decisions interpreting *Bivens* actions. If the case arises in a new context, Plaintiff must show that: (1) no alternate remedial scheme exists that militates against recognizing a new *Bivens* remedy in this case; and (2) that no "special factors counseling hesitation" exist in this case which would prevent this Court from recognizing a new remedy in the absence of action by Congress. Plaintiff cannot meet any of these requirements.

1. *Plaintiff has not shown his Bivens action is similar to any previously decided Supreme Court Bivens decision.*

Recently, the Supreme Court set forth the proper test for determining whether a case presents a new *Bivens* context:

> The proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new. Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. A case might differ in a meaningful way because of the rank of officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

Ziglar, 137 S.C.t at 1860–61.

Stated otherwise, if a claim is different in "a meaningful way" from *Bivens* cases previously decided by the United States Supreme Court, the claim is "new" and a court must exercise caution before implying a new cause of action. *Id*. Here, Plaintiff claims the prolonged seizure of his truck without judicial process violates the Fourth and Fifth Amendment. (Dkt. # 1 at 2). Significantly, however, Plaintiff has not identified any Supreme Court authority recognizing a *Bivens* remedy in the asset forfeiture context. As a consequence, Plaintiff's *Bivens* claim arises in a "new context" pursuant to *Ziglar*. *Ziglar*, 137 S.Ct. at 1860–61. But even further, Plaintiff fails to cite to ***any*** case law interpreting ***any*** *Bivens* actions. Relying on *Krimstock v. Kelly*, 306 F.3d 40 (2d. Cir. 2002) and *United States v. $23,407.69 in U.S. Currency*, 715 F.2d 162 (5th Cir. 1983), Plaintiff argues that due process requires a prompt post-seizure hearing to challenge the seizure and retention of property. (Dkt. # 1 at 15). Under that reasoning, Plaintiff asks this Court to imply a *Bivens* remedy in his favor.

The Court should decline Plaintiff's invitation. First, *Ziglar* dictates that "[t]he proper test for determining whether a case presents a new *Bivens* context is" whether "the case is different in a meaningful way from previous *Bivens* cases decided by this Court" – ***not*** the Courts of Appeals. *Ziglar*, 137 S.Ct. at 1849, 1859-60. Neither *Krimstock* nor *$23,407.69 in U.S. Currency* are Supreme Court cases. Thus, they cannot form the basis of a new *Bivens* remedy.

Furthermore, *Krimstock* did not involve a *Bivens* action. Instead, *Krimstock* involved an interpretation of the Due Process clause in a 42 U.S.C. § 1983 action. Section 1983 applies only to state actors, and (according to Plaintiff) the Individual Defendant was/is a federal government employee. (Dkt. # 1 at 4-6). *Affiliated Professional Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999). Civil rights claims against federal employees in their individual capacity may be brought only pursuant to *Bivens*. *Id*. Unlike § 1983 claims, *Bivens* remedies are not congressionally created but are instead judicially implied in very limited situations. As such, Plaintiff's reliance on *Krimstock* does not support his *Bivens* claim. *See Ziglar*, 137 S.Ct. at 1857 (finding that *Bivens* actions are disfavored, implied remedies). Indeed, Congress did not create an analogous statute to § 1983 for federal officers. The Supreme Court in *Ziglar*, emphasized that the two are not co-extensively available, nor does the availability of a § 1983 claim in an analogous context appear relevant to the *Bivens* analysis. *Id*. at 1855-57.

Similarly, *$23,407.69 in U.S. Currency* involved two federal statutes—21 U.S.C. § 881 and 19 U.S.C. § 1604—the latter which expressly provided for a remedy in the United States District Courts.[3] 19 U.S.C. § 1604. Importantly, *$23,407.69 in U.S. Currency* did not involve a

[3] 19 U.S.C. §§ 1603 and 1604 states that the "... officer [] report promptly such seizure or violation to the United States Attorney for the district in which such ... seizure was made." Section 1604: "It shall be the duty of every United States Attorney immediately to inquire into the facts of cases reported to him by customs officers and the laws applicable thereto, and if it appears probable that any fine, penalty, or forfeiture has been incurred by reason of such violation, for the recovery

Bivens action because the federal statute in that case already provided a remedy. *See* 19 U.S.C. §1604. Therefore, there was no need for the court to imply a damages remedy. Consequently, Plaintiff's reliance on *$23,407.69 in U.S. Currency* does not support his request for an implied damages remedy under *Bivens*.

Finally, relying on *United States v. Place*, 462 U.S. 696 (1983), Plaintiff reasons the seizure of his property is an unreasonably prolonged seizure. (Dkt. # 1 at 16). Because of that, Plaintiff asks this Court to imply a damages remedy under *Bivens*. (*Id*.). But much like *Krimstock* and *$23,407.69 in U.S. Currency*, *Place* did not involve a *Bivens* action. *Place* addressed whether a prolonged seizure of a defendant's baggage exceeded the permissible limits of a *Terry*-type investigative stop in an exclusionary rule context. *Place*, 462 U.S. at 697-98. Here, the issue is not whether there was an impermissible *Terry* stop, but whether a *Bivens* action can be heard by this Court. Plaintiff's reliance on *Place*, therefore, does not support his *Bivens* claim. Accordingly, Plaintiff's *Bivens* claim arises in a new context. For the reasons discussed below, the Court should not recognize a new remedy in this case, and it should dismiss Plaintiff's *Bivens* claim.

2. *Plaintiff's Bivens Claim Should Be Dismissed Because An Alternate Remedial Scheme Exists That Militates Against Recognizing A New Remedy In This Case*

There is an alternate, remedial process for protecting Plaintiff's rights that prevents this Court from recognizing a new *Bivens* remedy. *See De La Paz*, 786 F.3d at 375-80 (engaging in the two-step analysis required by *Wilkie* in the context of civil immigration enforcement proceedings). The constitutional violation alleged by Plaintiff is that the Individual Defendant violated his Fourth and Fifth Amendment right to due process by failing to provide any kind of

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of which institution of proceedings in the United States District Court is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted without delay, for the recovery of such fine, penalty, or forfeiture in such case...."

post-seizure judicial process to Plaintiff. This is incorrect. After CBP Officers lawfully seized Plaintiff's vehicle, bullets, and magazine under 19 U.S.C. § 1595a(d) and 22 U.S.C. § 401, Plaintiff was provided with an alternate remedial scheme to challenge the seizure of his property.[4] CBP issued Plaintiff a Non-CAFRA Notice of Seizure and Information to Claimants on October 1, 2015, outlining that Plaintiff could file an administrative petition under 19 U.S.C. § 1618 seeking remission, submit an offer in compromise under 19 U.S.C. § 1617, abandon the property, or request a referral to the United States Attorney's Office for the institution of judicial forfeiture proceedings. (**Exhibit B,** October 1, 2015 Notice of Seizure). Plaintiff admits in his Complaint that the October 1, 2015 Notice of Seizure explained the administrative scheme for Plaintiff to follow if he wished to challenge the seizure in Court. (Dkt. # 1 at 11). Plaintiff acknowledged that the Notice explained that he could "request to have this matter referred to the U.S. Attorney" and that "the case will be referred promptly to the appropriate U.S. Attorney for the institution of judicial proceedings." (*Id*.). According to Plaintiff, the notice stated that, "if Plaintiff wished to have the case referred to a U.S. Attorney, he was required to post bond equal to ten percent of the value of the seized property." (*Id*.). The notice identified Defendant Juan Espinoza as the CBP employee responsible for processing forfeiture or release of Plaintiff's seized property. (*Id*. at 5). Moreover, Plaintiff brought his individual claim for the return of his seized property under Federal Rule of Criminal Procedure 41(g). (*Id.* at 3). The existence of the CBP's administrative scheme and Plaintiff's ability to move for the return of his property under Rule 41(g) indicate that there are alternate, remedial processes that are sufficient to deny Plaintiff a *Bivens* remedy. *Ziglar*, 137 S.Ct. at 1858 ("if there is an alternative remedial structure present in a certain case, that alone may

[4] As outlined in 18 U.S.C. § 983(i), forfeiture proceedings under 19 U.S.C. § 1595a and 22 § 401 are exempt from the processing timeline outlined in the Civil Asset Forfeiture Reform Act ("CAFRA").

limit the power of the Judiciary to infer a new *Bivens* cause of action"); *Wilkie*, 551 U.S. at 551-54 (stating that an opportunity to defend oneself from criminal charges and to pursue appeals may constitute a sufficient, alternate process militating against a *Bivens* remedy, but ultimately deciding the case at step two of the analysis).

Moreover, the absence of a monetary award under CBP's remedial scheme and/or FED.R.CRIM.P. Rule 41(g) does not alter the outcome in this case. *See De La Paz*, 786 F.3d at 377 ("The absence of monetary damages in the alternative remedial scheme is not *ipso facto* a basis for a *Bivens* claim"). Here, Plaintiff was able to obtain the return of his truck less than two months after he filed this claim pursuant to Rule 41(g). This Court should not imply a *Bivens* remedy because Plaintiff had remedies available to "defend and make good on his position." *Wilkie*, 551 U.S. at 552; *see also*, *Mitchell v. Forsyth*, 472 U.S. 511, 522-23 (1985) ("the judicial process is largely self-correcting: procedural rules, appeals, and the possibility of collateral challenges obviate the need for damages actions to prevent unjust results"). Therefore, the facts presented here demonstrate the existence of alternate remedial schemes that allow Plaintiff to challenge the seizure of his property.

3. Special Factors Counsel Against Recognizing Plaintiff's New Claim.

This case also presents special factors that militate against creating a new *Bivens* remedy. In *Ziglar*, the Supreme Court described the "special factors" analysis as an "inquiry [that] must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weight the costs and benefits of allowing a damages action to proceed." *Ziglar*, 137 S.Ct. at 1857. "[I]t is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation. When

determining whether traditional equitable powers suffice to give necessary constitutional protection – or whether, in addition, a damages remedy is necessary – there are a number of economic and governmental concerns to consider." *Ziglar*, 137 S.Ct. at 1856. "When a party seeks to assert an implied cause of action under the Constitution itself . . . separation-of-powers principles are or should be central to the analysis. The question is 'who should decide' whether to provide for a damages remedy, Congress or the courts? The answer most often will be Congress." *Id*. at 1857.

The "special factor" most frequently found to preclude the recognition of a *Bivens* claim in forfeiture actions is the existence of a comprehensive statutory scheme as discussed above. Even where those alternative remedies provide less than complete relief to an injured Plaintiff, they nonetheless may constitute a "special factor" counseling against a judicially created cause of action against federal officials for constitutional torts. "[C]ourts must withhold their power to fashion remedies when Congress has put in place a comprehensive system to administer public rights, has 'not inadvertently' omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve *Bivens* remedies." *Wilson v. Libby*, 535 F 3d 697, 706 (D.C. Cir. 2008) (quotation and citations omitted); *see also*, *Rankin v. United States*, 556 Fed. Appx. 305, 311 (5th Cir. 2014) (finding that because CAFRA provides a comprehensive scheme for protecting property interests, no *Bivens* claim is available).

Here, the policy implications of inferring as "blunt and powerful [an] instrument" as a *Bivens* remedy against federal employees in their individual capacity should counsel this Court against creating a damages remedy. *See Benzman v. Whitman*, 523 F.3d 119, 125 (2d Cir. 2008). Implying a cause of action for money damages entails the paralyzing risk of liability, which threatens to chill a federal employee's vigorous performance of his or her duties. *See United States*

v. Stanley, 483 U.S. 669, 682-86 (1987). Thus, the Supreme Court has often counseled against implying a damages remedy in deference to the judgment of Congress and the Executive, who are in a far better position to evaluate the impact of a new species of litigation and can tailor remedies to the problem perceived so as to "lessen[] the risk of raising a tide of suits threatening legitimate [government] initiative[s]." *Wilkie*, 551 U.S. at 562 (quoting *Bush v. Lucas*, 462 U.S. 367, 389 (1983)).

Such deference applies with added force here, where Plaintiff challenges a seizure in an area "that has received careful attention from Congress." *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). Seizing money and property from criminals allows law enforcement to preserve evidence throughout its investigation and prevents the dissipation of assets that could otherwise go to making victims whole. Recognizing a new *Bivens* remedy in this case would weaken the strong governmental interest in stopping criminal organizations from exporting the fruits of their criminal enterprises into Mexico because border agents may hesitate before acting for fear of personal liability. *See De La Paz*, 786 F.3d at 379 (citing the following as a special factor in declining to recognize a *Bivens* remedy in the immigration context: "Faced with a threat to his checkbook from suits based on evolving and uncertain law, the officer may too readily shirk his duty"). Implication of a *Bivens* remedy in such cases may impede one of law enforcement's most "powerful weapon[s]," *United States v. All Funds on Deposit in Any Accounts Maintained at Merrill Lynch, Pierce, Fenner & Smith*, 801 F. Supp. 984, 989 (E.D.N.Y. 1992), for preventing crime through the crippling of criminal enterprises. Just as the Supreme Court concluded in *Wilkie*, here "any damages remedy for actions by Government employees who push[ed] too hard for the Government's benefit may come better, if at all, through legislation." *Wilkie*, 551 U.S. at 562.

In addition, the seizure at issue occurred on the U.S./Mexico border. Stopping the flow of ammunitions into Mexico implicates the Executive's power in protecting our borders and promoting our foreign relationships by stemming the flow of arms into Mexico. The Fifth Circuit has stated that under the Constitution, the Executive Branch has "'inherent power as sovereign to control and conduct relations with foreign nations.'" *De La Paz*, 786 F.3d at 379 (citation omitted). Creating a new *Bivens* remedy in this case would significantly impair the Executive Branch's power to control the borders and promote our relationship with Mexico.

In light of the special factors discussed above, the Court should decline to recognize a new *Bivens* remedy in this case.

B. The Individual Defendant Is Entitled To Qualified Immunity

Even if Plaintiff had a viable *Bivens* remedy available, all of his claims should still be dismissed because the Individual Defendant is entitled to qualified immunity. Government officials are entitled to qualified immunity from liability for civil damages so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In assessing a qualified immunity defense, a Court must determine "whether the plaintiff has alleged a violation of a clearly established constitutional or statutory right." *Michalik v. Hermann*, 422 F.3d 252, 257-258 (5th Cir. 2005). "A right is clearly established if its contours are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id*. at 258 (citation omitted). "If the allegations do not establish the violation of a constitutional right, the officer is entitled to qualified immunity." *Price v. Roark*, 256 F.3d 364, 369 (5th Cir. 2001).

If the plaintiff has alleged a violation of a clearly established right, the Court must also "determine whether the official's conduct was objectively reasonable under the law at the time of

the incident." *Michalik*, 422 F.3d at 258 (citation omitted). "If an officer makes a reasonable mistake as to what the law requires, the officer is entitled to immunity." *Price*, 256 F.3d at 369.

Although qualified immunity is "an affirmative defense that must be pleaded by a defendant official," *Harlow*, 457 U.S. at 815, "***[t]he plaintiff bears the burden of proving that a government official is not entitled to qualified immunity***." *Michalik*, 422 F.3d at 258 (emphasis added). Qualified immunity "is intended to give government officials a right ***not merely to avoid standing trial, but also to avoid the burdens of 'such pretrial matters as discovery***.'" *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (*en banc*) (emphasis added; citation omitted). "Until th[e] threshold immunity question is resolved**, *discovery should not be allowed***."[5] *Harlow*, 457 U.S. at 818 (emphasis added).

Here, the Individual Defendant is entitled to qualified immunity because Plaintiff has not sufficiently pled any violation of his constitutional rights. *See Price*, 256 F.3d at 369 ("[i]f the allegations do not establish the violation of a constitutional right, the officer is entitled to qualified immunity"). Plaintiff's *Bivens* claims are limited to the Individual Defendant's failure to provide Plaintiff with a post-seizure hearing. However, "there is no constitutional basis for a claim that respondent's interest in the care, or in the money put up to secure the bond, entitles him to a speedy answer to his remission petition." *United States v. Von Neumann*, 474 U.S. 242, 249-50 (1986). Seizures under § 1595a(d) are comparable to those described in 19 U.S.C. § 1947. *United States v. Davis*, 648 F.3d 84, 97 (2d Cir. 2011). In *Von Neumann*, the Customs Service seized a 1974

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[5] A defendant claiming qualified immunity is entitled to have that issue resolved prior to the commencement of discovery. *Mitchell v. Forsyth*, 472 U.S. 511, 526-527 (1985); *Vander Zee v. Reno*, 73 F.3d 1365, 1368-1369 (5th Cir. 1996). Orders denying motions to dismiss or motions for summary judgment asserting official immunity defenses are immediately appealable as "final decision[s]" under 28 U.S.C. § 1291. *Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391, 1394-1397 (5th Cir. 1996); *Mitchell*, 472 U.S. at 530.

Jaguar Panther for failure to declare under § 1947. Von Neumann filed a petition for remission of the vehicle prior to the initiation of forfeiture proceedings and later contested the constitutional validity of the post-seizure remedies. In finding no violation of Von Neumann's rights to due process, the Court noted:

> Remission proceedings are not necessary to a forfeiture determination, and therefore are not constitutionally required. Thus there is no constitutional basis for a claim that respondent's interest in the care, or in the money put up to secure the bond, entitles him to a speedy answer to his remission petition.

Von Neumann, 474 U.S. at 250. As the Supreme Court further noted, a "forfeiture proceeding, without more, provides the post-seizure hearing required by due process." *Id*. at 249. Therefore, the Supreme Court has clearly articulated that these types of hearings are not constitutionally-required for seizures under Title 19. Additionally, the pickup truck at issue has been returned to Plaintiff. Plaintiff alleges no facts showing that the Individual Defendant's actions were "objectively unreasonable under the law at the time of the incident" so as to deny qualified immunity.

V. CONCLUSION

For the foregoing reasons, the Individual Defendant respectfully requests that the Court grant this Motion, and that it dismiss all of Plaintiff's claims against him.

Dated: December 13, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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IN THE UNITED STATES DISTRICT COURT
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GERARDO SERRANO, on behalf of Himself and all others similarly situated,	§	
Plaintiff,	§	
v.	§	Civil No. 2:17-CV-00048-AM-CW
U.S. CUSTOMS and BORDER PROTECTION, UNITED STATES of AMERICA, KEVIN McALEENAN, JUAN ESPINOSA, and John Doe 1-X.,	§	
Defendants.	§	

ORDER

On this day the Court considered the Motion to Dismiss of Defendant Juan Espinoza (the "Individual Defendant"). After reviewing the parties submissions, the applicable law, and the record in this case, the Court grants Defendants Motion for each of the reasons set forth therein. Accordingly, all of Plaintiff's claims against Defendant Juan Espinoza are dismissed with prejudice because he has stated no actionable claims.

It is so Ordered.

Signed this _____ day of _____, 201____.

_____
UNITED STATES DISTRICT JUDGE