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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

NICOLE SVOBODA'S FIDUCIARY SERVICES, LLC, as conservator for DONAVAN LABELLA, Plaintiff, v. THE UNITED STATES OF AMERICA; JOHN DOE 1; and JOHN DOES 2-10, Defendants.	Case No. 3:21-cv-01664-MO **DEFENDANT JOHN DOE 1'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF**

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MOTION

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant John Doe 1 respectfully moves for an order dismissing all counts of the First Amended Complaint ("FAC") against him. Defendant Doe 1's motion is based upon the following Memorandum in Support.

LR 7-1 CERTIFICATION

Counsel for Defendant Doe 1 certifies that in compliance with Local Rule 7-1(a), the parties conferred on this motion and were unable to resolve the disputes at issue therein.

FACTUAL BACKGROUND

On July 11, 2020, Defendant John Doe 1 was posted at Southwest 3rd Avenue near the public entrance to the Mark O. Hatfield United States Courthouse in Portland, Oregon, to protect the Courthouse from "vandalism, damage, and other destruction." *See* FAC ¶ 10. The U.S. Marshals Service was deployed to Portland at the direction of President Trump's Executive Order, issued on June 26, 2020, instructing the Attorney General to provide "personnel to assist with the protection of Federal monuments, memorials, statues, or property." Exec. Order No. 13,933, 85 FR 40081 (2020) (*hereinafter* "Exec. Order No. 13,933"). On and around July 11, 2020, Portland was "a tense staging ground for nightly battles between protestors [and] police," and the Courthouse was "a nexus for protestors." *See* FAC ¶ 12, n. 1 *citing* Tim Elfrink, *Federal officers severely wounded a Portland protestor. Local leaders blame Trump*, Wash. Post. (July 13, 2020,

5:25 AM), https://www.washingtonpost.com/nation/2020/07/13/portland-protestor-injured-federal/ (*hereinafter* "Washington Post").[1]

Plaintiff Donovan Labella was assembled "on the west side of Southwest 3rd Avenue, directly across the street from the Mark O. Hatfield United States Courthouse" on July 11, 2020. FAC ¶ 9-10. After a "gas grenade" landed in the Plaintiff's "immediate vicinity," he "attempted to kick the gas grenade" and then "bent down, picked up the gas grenade, and under-hand tossed the gas grenade toward the middle of Southwest 3rd Avenue," at the Courthouse and law enforcement officers, including John Doe 1. *See* FAC ¶ 11. Plaintiff was subsequently struck with a "less-lethal" munition allegedly fired by Defendant Doe 1. *See* FAC ¶ 12.

Plaintiff initiated this suit on November 17, 2021, and he filed his FAC on April 22, 2022, specifically naming Defendant John Doe 1. ECF No. 1; ECF No. 33. The instant suit is brought against the United States of America, John Doe 1, and John Does 2-10. *See* FAC. Plaintiff brings four counts, consisting of three Federal Tort Claims Act ("FTCA") claims against the United States of America (Counts I, II and III), and one claim against John Doe 1 and John Does 2-10 in their individual capacity (Count IV) alleging a Fourth Amendment violation under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Count IV against John Doe 1 must be dismissed.

STANDARD OF REVIEW

A complaint that "fail[s] to state a claim upon which relief can be granted must be dismissed." *See* Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain

[1] A printed copy of the Washington Post article is enclosed as Exhibit 1. Plaintiff incorporates into the First Amended Complaint this Washington Post article by reference. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988 (9th Cir. 2018).

sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Mere "labels and conclusions" or "naked assertion[s] devoid of further factual enhancement are insufficient." *Iqbal*, 566 U.S. at 678. Rather, "a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). The Court need not accept legal conclusions or mere conclusory statements as true. *Id.* Finally, in considering a motion to dismiss, the Court may consider the facts alleged in the complaint and any "documents incorporated into the complaint by reference." *J.K.J. v. City of San Diego*, 42 F.4th 990, 997 (9th Cir. 2021) (citations omitted); *see also Khoja*, 899 F.3d 988. Like the allegations in the FAC, the Court should "assume" that the contents of an incorporated document "are true for purposes of a motion to dismiss under Rule 12(b)(6)." *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).

ARGUMENT

Plaintiff's *Bivens* claim (Count IV) against Defendant Doe 1—a Fourth Amendment excessive-force claim—does not state a claim upon which relief can be granted. *Egbert v. Boule*, ___ U.S. ___, ___, 142 S. Ct. 1793, 1804 (2022) ("the Court of Appeals plainly erred when it created causes of action for [plaintiff's] Fourth Amendment excessive force claim"). Count IV presents a new *Bivens* context and special factors preclude it from proceeding as a *Bivens* claim. This claim also fails because Defendant Doe 1 is entitled to qualified immunity in his individual capacity.

I. COUNT IV MUST BE DISMISSED BECAUSE IT PRESENTS A NEW *BIVENS* CONTEXT AND SPECIAL FACTORS PRECLUDE RECOGNIZING A *BIVENS* CLAIM.

Bivens, decided in 1971, was the product of an "ancien regime" that freely implied rights of action. *Ziglar v. Abbasi*, 582 U.S. ___, ___, 137 S. Ct. 1843, 1855 (2017). Since 1971, the Supreme Court has only recognized three specific Bivens claims: (1) law enforcement officers conducting a warrant-less search of the plaintiff's home and strip-searching him in violation of the Fourth Amendment, *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); (2) discrimination on the basis of sex by a Member of Congress against a staff person in violation of the Fifth Amendment, *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, *Carlson v. Green*, 446 U.S. 14 (1980). "Since these cases, the [Supreme] Court has not implied additional causes of action under the Constitution." *Egbert*, 142 S. Ct. at 1802.

"Creating a cause of action is a legislative endeavor." *Egbert*, 142 S. Ct. at 1802. For every *Bivens* claim "separation-of-powers principles are or should be central to the analysis," and the Court must ask whether Congress or the courts should decide whether to provide for a damages remedy. *Abbasi*, 137 S. Ct. at 1857 (citing *Bush v. Lucas*, 462 U.S. 367, 380 (1983)). "The answer will most often be Congress." *Id.* Because the Court's authority to create a cause of action for damages against a federal law enforcement officer "is, at best, uncertain," the Supreme Court has "emphasized that recognizing a cause of action under *Bivens* is a disfavored judicial activity." *Egbert*, 142 S. Ct. at 1803 (citation omitted).

To determine whether to recognize a new, proposed *Bivens* claim, such as Count IV, the Supreme Court prescribes a two-step analysis. *See Hernandez v. Mesa*, 589 U.S. ___, ___, 140 S. Ct. 735, 741-42 (2020). The first question asks whether the claim arises in a context different from

Bivens, *Davis*, or *Carlson*. *Id.* at 743. If a claim is in any way meaningfully different from those three precedent cases, the claim presents a new context. *Id.* When a claim presents a new context, the next question considers whether any special factors counsel hesitation against expanding *Bivens* to that new context. *Id.* Hesitation is required whenever "thoughtful discretion" would cause the court to even "consider" recognizing a new context. *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009). If counseled to hesitate, "a *Bivens* remedy will not be available." *Abbasi*, 137 S. Ct. at 1857 (citing *Carlson*, 446 U.S. at 18).

Most recently, in March 2022, the Supreme Court made clear that "[w]hile our cases describe two steps, those steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy." *Egbert*, 142 S. Ct. at 1803. If a court "cannot predict the 'systemwide' consequences of recognizing" a new *Bivens* cause of action or "if Congress already has provided, or has authorized the Executive to provide, 'an alternative remedial structure,'" these considerations, alone, are reason to deny a new *Bivens* cause of action. *Id.* at 1803-804. (quoting *Abbasi*, 137 S. Ct. at 1858). Importantly, it does not matter whether "existing remedies do not provide complete relief." *Id.* at 1804.

Here, Congress is better positioned to create remedies for an alleged constitutional violation by a Deputy U.S. Marshal using force to protect a federal courthouse during civil unrest at the direction of the President. Plaintiff's excessive force claim presents a new *Bivens* context, and multiple special factors counsel hesitation against allowing the claims for damages against Defendant Doe 1 to proceed. The Court should therefore dismiss Count IV against Defendant Doe 1 for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6).

A. COUNT IV, A FOURTH AMENDMENT EXCESSIVE FORCE CLAIM, PRESENTS A NEW *BIVENS* CONTEXT.

Count IV, as alleged, is meaningfully different from *Bivens*. In *Abbasi*, the Supreme Court provided a non-exhaustive list of factual differences that create a new *Bivens* context: the rank of the officers involved; the constitutional right at issue; 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 the other branches; or the presence of potential factors that previous *Bivens* cases did not consider. *Abbasi*, 137 S. Ct. at 1859-860. Because differences that are "perhaps small, at least in practical terms" create a new *Bivens* context, "the new-context inquiry is easily satisfied." *Id*. at 1865; *see also Cantú v. Moody*, 933 F.3d 414, 422 (5th Cir. 2019) (summarizing Supreme Court cases rejecting new *Bivens* contexts where plaintiff asserted violations of the same clauses and same amendments from *Bivens*, *Davis*, and *Carlson* in the same way as in those cases).

Given this low bar, it is "glaringly obvious that [Plaintiff's] claims involve a new context." *Hernandez*, 140 S. Ct. at 743. *Bivens* included "a claim against FBI agents for handcuffing a man in his own home without a warrant" while investigating alleged narcotics violations. *Abbasi*, 137 S. Ct. at 1860 (characterizing *Bivens*). Count IV, on the other hand, alleges a Deputy U.S. Marshal used excessive force, FAC ¶ 43, while performing "traditional law enforcement activity of protecting property (the Courthouse) from vandalism, damage, and other destruction," FAC ¶ 10, during civil unrest and at the direction of the President.[2] *See* Washington Post; Exec. Order No. 13,933 at Sec. 5. The meaningful differences between these two contexts are many.

[2] *See Hernandez*, 140 S. Ct. at 743 ("A claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case which a damages remedy was previously recognized.").

The location of the alleged constitutional violation is a meaningful difference. The Plaintiff in *Bivens* was detained and subject to an unlawful search within his home. *Bivens*, 403 U.S. at 389. The Plaintiff here was outside in a public area during a large-scale demonstration and civil unrest near a federal courthouse. *See* FAC ¶¶ 10, 11, 12, fn. 1. This Court should conclude like other districts that the differing physical location of the alleged constitutional violations presents a new *Bivens* context. *See Rivera v. Samilo*, 370 F.Supp. 362, 369 (E.D.N.Y. 2019) (finding a new *Bivens* context where the plaintiff's claim arose "from the force allegedly applied in making a lawful street arrest" rather than "a violation of his privacy rights [or] a warrantless invasion of his home"); *see also Robinson v. Pilgram*, No. 20-cv-2965, 2021 WL 5987016, at *12 (D.D.C. Dec. 17, 2021) (summarizing federal district court cases concluding that Fourth Amendment *Bivens* claims constitute new contexts based on settings outside of a private residence).

In a factually-analogous case—previously cited (and apparently adopted) by another court in this District[3]—the U.S. District Court for the District of Columbia dismissed *Bivens* claims involving "government officers' response to a large protest" in July 2020, on or near federal property in response to George Floyd's death. *Black Lives Matter D.C. v. Trump*, 544 F. Supp. 3d 15, 31 (D.D.C. 2021). The court found it "glaringly obvious" that such claims presented a new *Bivens* context "markedly different from entering and searching a private apartment to enforce federal narcotics laws." *Id.* This Court should follow that lead.

The specific law enforcement duties being performed and legal authority for such duties is another meaningful difference from *Bivens*. The Ninth Circuit held that allegations against a Border Patrol Agent using force authorized by executive policy presents a new *Bivens* context. *See*

[3] *See Pettibone v. Biden*, No. 3:20-CV-01464-YY, 2021 WL 6503761, at *9 (D. Or. Sept. 13, 2021) (citing *Black Lives Matter D.C. v. Trump*), *report and recommendation adopted in part*, No. 3:20-CV-1464-YY, 2021 WL 6112595 (D. Or. Dec. 27, 2021).

Quintero Perez v. U.S. et al., 8 F.4th 1095, 1105 (9th Cir. 2021). The allegations in this case are more like *Quintero Perez* than *Bivens*. To wit, the FBI agents in *Bivens* acted without a warrant inside the plaintiff's home while seeking to enforce narcotics laws, *Bivens*, 403 U.S. at 389, whereas Defendant Doe 1, a Deputy U.S. Marshal, was authorized by Executive Order to use force to protect Federal property. *See* FAC ¶ 10, Exec. Order No. 13,933 at Sec. 5. These meaningful differences present a new *Bivens* context.

Another meaningful difference from *Bivens* is the lack of clear judicial guidance surrounding the official conduct at issue—protecting Federal property and courthouses during civil unrest. *See Abbasi*, 137 S. Ct. at 1860 (meaningful differences from *Bivens* include "the extent of judicial guidance for the official conduct"). There is abundant case law clarifying that officers may not enter a private residence without a search warrant, and the exceptions to this rule are limited and similarly well-established. *See, e.g.*, *Kentucky v. King*, 563 U.S. 452 (2011); *Georgia v. Randolph*, 547 U.S. 103 (2006); *Payton v. New York*, 445 U.S. 573 (1980). The same cannot be said for law enforcement officers' use of force in "response to protestors who deface monuments and other property." *See* Washington Post. When confronted with the "danger of riot" or threat to "public safety, peace, or order . . . the power of the state to prevent or punish is obvious." *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940). As the Supreme Court held, "officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 397 (1989). The Ninth Circuit and District of Oregon have similarly recognized the challenges law enforcement officers face when determining the appropriate amount of force during civil unrest. *See Index Newspapers v. U.S. Marshals Service*, 977 F.3d 817, 831 (9th Cir. 2020) ("There is no question the Federal Defendants have a strong interest in protecting

federal property and persons on federal property, and we do not doubt the district court's findings related to the difficult and dangerous situation."); *Don't Shoot Portland v. City of Portland*, 465 F. Supp. 1150, 1154 (D. Or. 2020) ("the Court recognizes the difficulty in drawing an enforceable line that permits police officers to use appropriate means to respond to violence and destruction of property without crossing the line."). This absence of clear judicial guidance on the amount of force to use when protecting a federal courthouse during civil unrest is yet another meaningful difference from the clear judicial guidance against warrantless home searches at issue in *Bivens*.

Taken together, or alone, these meaningful differences demonstrate that Count IV presents a new *Bivens* context. A *Bivens* remedy should be unavailable for this new context because "the Judiciary is at least arguably less equipped than Congress to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Egbert*, 142 S. Ct. at 1803 (quoting *Abbasi*, 137 S. Ct. at 1858).

B. SPECIAL FACTORS COUNSEL HESITATION AGAINST EXTENDING *BIVENS* TO A FOURTH AMENDMENT EXCESSIVE FORCE CLAIM AGAINST A DEPUTY U.S. MARSHAL.

The "Supreme Court has never extended *Bivens* to claims against Marshals for use of excessive force," and this Court should likewise decline to do so. *Cienciva v. Brozowski*, No. 3:20-CV-2045, 2022 WL 2791752 at *11 (M.D. Pa. July 15, 2022). "Implying a damages remedy for excessive force in [Plaintiff's] case is potentially harmful to the duty of the Marshals Service to make judgment calls about the use of force needed to execute" their duties. *Id.* Given this "range of policy considerations," including the potential "impact on governmental operations systemwide," this Court should decline to extend *Bivens* into the new context presented here. *Egbert*, 142 S. Ct. at 1802-803 (citations omitted).

"If there is even a single reason to pause before applying *Bivens* in a new context, a court may not recognize a *Bivens* remedy." *Egbert*, 142 S. Ct. at 1803 (citation omitted). "The only

relevant threshold – that a factor 'counsels hesitation' – is remarkably low." *Arar*, 585 F.3d at 574. "If there are alternative remedial structures in place, 'that alone,' like any special factor, is reason enough to 'limit the power of the Judiciary to infer a new *Bivens* cause of action.'" *Egbert*, 142 S. Ct. at 1804. (citing *Abbasi*, 137 S. Ct. at 1858).

When weighing the special factors analysis "the court must ask only whether it, rather than the political branches, is better equipped to decide whether existing remedies should be augmented by the creation of a new judicial remedy." *Egbert*, 142 S. Ct. at 1804 (citation omitted). If there is even a single "reason to pause before applying *Bivens* in a new context," a court may not recognize a *Bivens* remedy. *Hernandez*, 140 S. Ct. at 743; *see also Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (recognizing separation-of-power concerns as a factor counseling hesitation). When asking "whether a court is competent to authorize a damages action not just against [John Doe 1] but against [Deputy U.S. Marshals] generally … [t]he answer, plainly, is no." *Egbert*, 142 S. Ct. at 1806. Additional special factors also counsel hesitation.

i. Alternative remedial structures are already in place.

"[A] court may not fashion a *Bivens* remedy if Congress already has provided or authorized the Executive to provide, an alternative remedial structure." *Egbert*, 142 S. Ct. at 1804 (citation omitted). Alternative remedial structures that preclude a *Bivens* remedy include a statutory requirement that an agency "control, direct, and supervise" its employees as well as a regulation requiring an agency to receive and investigate "alleged violations of the standards for enforcement activities." *Egbert*, 142 S. Ct. at 1806. These remedial structures exist in this case.

The Director of the U.S. Marshals is statutorily required to "supervise and direct the United States Marshals Service in the performance of its duties." 28 U.S.C. § 561(g); *see also Cienciva*, 2022 WL 2791752 at *10. The Director likewise "shall direct and supervise . . . [i]nvestigations

of alleged improper conduct on the part of U.S. Marshals Service personnel." 28 C.F.R. § 0.111(n); *see also Cienciva*, 2022 WL 2791752 at *10. The Inspector General of the Department of Justice is similarly authorized to "investigate allegations of criminal wrongdoing or administrative misconduct by an employee of the Department of Justice, or may, in the discretion of the Inspector General, refer such allegations to the Office of Professional Responsibility or the internal affairs office of the appropriate component of the Department of Justice," including the U.S. Marshals Service. 5 U.S.C. § 8E(b)(2).

These existing remedial structures have already been applied to this case. According to the Washington Post article incorporated in the FAC, the U.S. Marshals Service are investigating the events at issue in this case. *See* Washington Post; *see also Hernandez*, 140 S. Ct. at 744-47 (declining to authorize a *Bivens* remedy, in part, because the defendant's misconduct had already been investigated by the Executive Branch).

It is not the role of the court to weigh the effectiveness of the remedy provided to the Plaintiff by these alternative remedial schemes, and it is not necessary that a *Bivens* alternative remedial structure "afford rights to participation or appeal." *Egbert,* 142 S. Ct. at 1806. "So long as Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a *Bivens* remedy." *Id.* at 1807.

Notwithstanding, Congress created an express cause action in the Federal Tort Claims Act ("FTCA") for the Plaintiff to pursue a remedy for his alleged damages. The FTCA allows plaintiffs to seek monetary damages against the United States for injuries caused by any employee of the Government while acting within the scope of his employment. 28 U.S.C. §§ 2674, 2675. In the wake of *Egbert*, courts have repeatedly recognized the FTCA as an alternative remedial process

precluding a *Bivens* remedy. *See Adams v. Martinez*, No. 15-cv-02629, 2022 WL 3645976 (D. Colo. Aug. 24, 2022); *Johnson v. Santiago*, No. 20-CV-6345, 2022 WL 3643591 (E.D.N.Y. Aug. 24, 2022); *K.O. v. Sessions*, 41 F.4th 664, 665 (D.C. Cir. 2022) (Silberman, J., concurring) ("[I]t seems obvious to me that a coinciding damages remedy authorized by the FTCA is *a fortiori* a special factor precluding a Bivens remedy and therefore that part of *Carlson's* language should be ignored. This seems especially clear since courts are not supposed to supplement Congress's remedial structure with a *Bivens* claim simply because, in the courts' view, Congress did not do enough."); *Davis v. Greer*, No. 21-C-0995, 2022 WL 2460782 (N.D. Ill. July 6, 2022); *Dotson v. Fed. Bureau of Prisons*, No. 2:21CV00147, 2022 WL 3138706 (E.D. Ark. June 21, 2022). This Court should follow that lead, particularly so given that Plaintiff simultaneously pursues a remedy under the FTCA. FAC ¶¶ 18-39.

Should Plaintiff obtain a judgment on any of his FTCA claims, it "shall constitute a complete bar to any action by the claimant, by reason of same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676. Once that bar is triggered, "he generally cannot proceed with a suit against an individual based on the same underlying facts." *Simmons v. Himmelreich*, 578 U.S. 621, 625 (2016). Plaintiff is pursuing the *Bivens* excessive force claim against Defendant Doe 1 (Count IV) "on the same underlying facts" as his FTCA battery (Count I), negligence (Count II), and intentional infliction of emotional distress (Count III) claims against the United States. *Compare* FAC ¶¶ 19, 27, 33 with FAC ¶ 42. Thus, "Congress has provided alternative remedies" for Plaintiff "that independently foreclose a *Bivens* action here." *Egbert*, 142 S. Ct. at 1806.

Finally, Congress created the Civil Service Reform Act of 1978 (CSRA) to deter misconduct of Federal employees, such as Deputy U.S. Marshals, through employment penalties.

Pub. L. No. 95-454, 92 Stat. 1111. The CSRA is an "integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Farkas v. Williams*, 823 F.3d 1212, 1215 (9th Cir. 2016). This "deliberately crafted statutory remedial system," *Id.* at 1214, is a deterrent against Deputy U.S. Marshals committing constitutional violations. Because Congress "created a remedial process that it finds sufficient to secure an adequate level deterrence, the courts cannot second-guess that calibration by superimposing a *Bivens* remedy." *Egbert*, 142 S. Ct. at 1807.

Given that Congress and the Executive have created several remedial processes for investigating alleged Deputy U.S. Marshal misconduct, affording the Plaintiff a remedy for his alleged damages, and deterring Deputy U.S. Marshals from committing constitutional violations, these alternative, statutorily-created remedies foreclose a judicially-created *Bivens* action against John Doe 1.

ii. Separation-of-powers concerns are a special factor counseling against extending *Bivens* to this new context.

The "separation-of-powers concerns" also weigh against creating a *Bivens* remedy. *Wilkie*, 551 U.S. at 550. *Egbert* instructs that "even a single sound reason to defer to Congress is enough to require a court to refrain from creating" a *Bivens* remedy; and "in most every case" Congress should decide whether to provide for a damages remedy. *Egbert*, 142 S. Ct. at 1803 (citations omitted). "Under the proper approach, a court must ask more broadly if there is any reason to think that judicial intrusion into a given field might be harmful or inappropriate." *Egbert*, 142 S. Ct. at 1805 (citations omitted). Just as Congress is better positioned to create a remedy in the border-security context, *Id.* at 1804, Congress is likewise better positioned to create a remedy in the context of securing federal property and courthouses.

Regulating the conduct of federal agents tasked to protect federal property and courthouses via a judicially created cause of action would unquestionably risk undermining the security of federal buildings and courthouses and improperly infringe upon the other branches. *Egbert*, 142 S. Ct. at 1804. Importantly, another court in this District has held that "Congress is the more appropriate body" to decide whether to allow to proceed any damages claims for actions taken during the unrest near the Courthouse in July 2020. *See Clark v. Wolf*, No. 3:20-cv-01436, 2020 WL 326738 (D. Or. Feb. 3, 2022). The Court cannot predict the "systemwide" consequences of recognizing a *Bivens* cause of action against officers acting at the express instruction of the President to protect federal courthouses, and Congress is better qualified to ascertain the appropriate damages remedy in such cases. These separation-of-powers concerns foreclose a *Bivens* remedy.

II. DEFENDANT DOE 1, IN HIS INDIVIDUAL CAPACITY, IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE COUNT IV DOES NOT ALLEGE A CLEARLY ESTABLISHED CONSTITUTIONAL VIOLATION.

"The doctrine of qualified immunity protects government officials '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." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citing *Harlow v. Fitzgerald*, 757 U.S. 800, 818 (1982)). "The relevant inquiry requires us to ask two questions: (1) whether the facts, taken in the light most favorable to the non-moving party, show that the officials' conduct violated a constitutional right, and (2) whether the law at the time of the challenged conduct clearly established that the conduct was unlawful." *Felarca v. Birgeneau*, 891 F.3d 809, 815 (9th Cir. 2018). These questions can be answered in any order. *Pearson*, 555 U.S. at 236. This is a "demanding standard" that "protects all but the plainly

incompetent or those who knowingly violate the law." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

"A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 471 (2011) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "In other words, existing precedent must have placed the statutory or constitutional question beyond debate." *O'Doan v. Sanford*, 991 F.3d 1027, 1036 (9th Cir. 2021) (citing *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). The right at issue must be defined "in a concrete, particularized manner." *Birgeneau*, 891 F.3d at 822. "The proponent of a purported right has the 'burden to show that the particular right in question . . . was clearly established' for qualified-immunity purposes." *al-Kidd*, 563 U.S. at 471 (2011) (citing *Creighton*, 483 U.S. at 640 (1987)).

Plaintiff alleges that while he was assembled outside of the Mark O. Hatfield Courthouse, an officer "threw a gas grenade in [his] immediate vicinity," and Plaintiff "bent down, picked up the gas grenade, and under-hand tossed the gas grenade back toward the middle of Southwest 3rd Avenue" in the direction of the federal officers, including Defendant Doe 1. *See* FAC at ¶¶ 10-11. After lobbing the grenade towards the federal officers, Plaintiff alleges that he was struck in the face with "less-lethal" impact munition. *See* FAC at ¶ 12. These allegations fail to demonstrate a violation of a clearly established right.

The Ninth Circuit held that there is no clearly established right to have officers refrain from striking "[protestor's] torsos or extremities for the purpose of moving a crowd actively obstructing officers from carrying out lawful orders in a challenging environment" after "several warnings to disperse have been given." *Birgeneau*, 891 F.3d at 822-23. The same is true here; there is no clear

right to be free from officer use of force while intermingling with a violent crowd and refusing to follow police order—in the form of a "gas grenade"—to disperse. *See Wise v. City of Portland*, 539 F. Suppl. 3d 1132, 1141 (D. Or. 2021) (the use of tear gas during the July 2020 protests was a dispersal order and the protestors were "not 'entitled to ignore those orders.'").

At the time of the event at issue in July 2020, "Portland ha[d] become a tense staging ground for nightly battles between protestors, [and] police." *See* Washington Post. As the Ninth Circuit recognized: "Most of the [Portland] protests have been peaceful, but some have become violent. There have been incidents of vandalism, destruction of property, looting, arson, and assault, particularly late at night." *Index Newspapers LLC*, 977 F.3d at 821. Against the backdrop of these nightly battles, Plaintiff "between 9:00 and 10:00 pm" admittedly refused to follow police dispersal orders, even going so far as to toss a gas grenade back at the officers. *See* FAC at ¶ 10-11.

The Supreme Court has made clear that the state has the power to "prevent and punish" when there is "danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order." *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940); *see also Colten v. Kentucky*, 407 U.S. 104, 109 (1942) (holding that police officer was entitled to clear roadside crowded with bystanders on belief that the crowd increased the risk of a car accident). Even accepting Plaintiff's allegation in the FAC as true that he did not directly engage in violence, "[t]he community's interest in peace and order on its streets must prevail when, as here, [Plaintiff] is part of a group, some of whom are engaged in violent acts" and he engages in "knowingly disobeying the order of a peace officer." *City of Portland v. Chicharro*, 53 Or. App. 483, 488 (1981); *see also Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107, 120 (D.C. Cir. 1977) ("It is the tenor of the demonstration as a whole that determines whether the police may

intervene; and if it is substantially infected with violence or obstruction the police may act to control it as a unit.").

Accordingly, Plaintiff cannot show that Defendant Doe 1's conduct violated a clearly established constitutionally protected right. Defendant Doe 1 is therefore entitled to qualified immunity on Count IV.

CONCLUSION

For all these reasons, the Court should grant this motion and dismiss Count IV in its entirety against Defendant Doe 1 in his individual capacity, with prejudice.

Respectfully submitted this 9th day of September, 2022.

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