UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

JESSE DREWNIAK, Plaintiff, v. U.S. CUSTOMS AND BORDER PROTECTION, U.S. BORDER PATROL, MARK A. QUALTER, U.S. Border Patrol Agent, and ROBERT N. GARCIA, Chief Patrol Agent of Swanton Sector of U.S. Border Patrol, Defendants.	)	Civil No. 20-cv-852-LM

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

INTRODUCTION

On August 26, 2017, Defendant Mark Qualter, a Border Patrol agent, performed an unconstitutional search and seizure of Plaintiff Jesse Drewniak as part of a traffic checkpoint. Defendant Qualter turned over the resulting evidence to local police, who initiated civil violation proceedings against Mr. Drewniak and others who were caught up in the checkpoint. The state court suppressed the evidence, finding that the checkpoint was unconstitutional and undertaken for the primary purpose of drug interdiction. *See* Compl. Ex. A, ECF No. 1-1. Mr. Drewniak now pursues damages against Defendant Qualter for the constitutional violation, pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).[1]

In seeking to dismiss this claim under Rule 12(b)(6), Defendant Qualter does not dispute that, as in "*Bivens* itself," the allegations "involved a constitutional claim under the Fourth Amendment." Def.'s Mot. at 8, ECF No. 19-1. Nevertheless, Defendant Qualter argues that the claim must be dismissed because it arises in a "new context" relating to border security. *Id.* Yet the exact problem with Defendant Qualter's conduct is that it was not about border security; rather, this search and seizure of Mr. Drewniak was undertaken for the primary purpose of drug interdiction, approximately 90 driving miles from the border. The Supreme Court has held that checkpoints for the primary purpose of drug interdiction violate the Fourth Amendment. *City of Indianapolis v. Edmond*, 531 U.S. 32, 40-42 (2000). In other words, the conduct at issue does not involve a "new" border context, but falls comfortably within the existing *Bivens* framework for standard law enforcement operations that violate the Fourth Amendment. To the extent Defendant

[1] The motion was also filed on behalf of Border Patrol Agent Jeremy Forkey, who has since been voluntarily dismissed from the case, in light of the representations in Mr. Forkey's declaration. *See* Forkey Decl., ECF No. 19-4 (Nov. 13, 2020). Accordingly, this filing focuses exclusively on the remaining individual capacity defendant, Border Patrol Agent Qualter.

Qualter requests a broader *Bivens* exception for any conduct by an employee of Customs and Border Protection, this position is wholly unsupported by the law.

Defendant Qualter's alternative request for Rule 12(b)(6) dismissal based on qualified immunity also misses the mark. Under clearly established law, traffic checkpoints for the primary purpose of drug interdiction violate the Fourth Amendment. *Edmond*, 531 U.S. at 40-42. According to the well-pleaded allegations in the complaint, as well as the state court opinion attached as an exhibit to the complaint, Defendant Qualter's checkpoint search and seizure of Mr. Drewniak was for the primary purpose of detecting drugs. Defendant Qualter used a drug-sniffing canine to stop and search Mr. Drewniak. There was no immigration-related reason for the search; indeed, during his time as a Border Patrol agent, Defendant Qualter's canine had never before detected an immigration-related violation (*i.e.*, a concealed human). At the Rule 12(b)(6) stage, the Court must take these allegations as true and disregard the "extrinsic materials," including multiple declarations, submitted by Defendant Qualter. *See, e.g.*, *Piascik-Lambeth v. Textron Auto. Co.*, No. 00-258-JD, 2000 DNH 264, 2000 WL 1875873, at *5 (D.N.H. Dec. 22, 2020). In light of the clear precedent in *Edmond* and the well-pleaded complaint, the Court should deny Defendant Qualter's Rule 12(b)(6) arguments regarding qualified immunity.

Finally, Defendant Qualter's motion for summary judgment on qualified immunity grounds is premature and should be summarily denied given the procedural posture of the case, in which no answer has yet been filed and discovery has yet to commence.[2] Defendant Qualter's summary judgment submission relies on self-serving declarations, as well as internal agency documents and procedures that have not been produced to the Plaintiff. The First Circuit Court of Appeals has made clear that summary judgment is inappropriate where the parties have had

[2] Although Rule 26(d)(2) allows for early delivery of Rule 34 requests for production, those requests are not deemed to be served until the date of the Rule 26(f) conference, which has yet to occur.

insufficient opportunity to engage in discovery. *See Velez v. Awning Windows, Inc.*, 375 F.3d 35, 39 (1st Cir. 2004); *Carmona v. Toledo*, 215 F.3d 124, 133 (1st Cir. 2000). This is precisely the case here. Accordingly, Plaintiff requests that the Court deny the parallel summary judgment motion under Rule 56(d) to give him the opportunity to complete discovery before the Court engages in any assessment of evidence.

BACKGROUND

I. Mr. Drewniak Is Stopped and Searched for Drugs at a Border Patrol Checkpoint[3]

On August 26, 2017, Mr. Drewniak and two friends were driving home from a fishing trip in the White Mountains. Compl. ¶ 4. Without any individualized suspicion, he and his friends were stopped as part of a dragnet checkpoint operated by Border Patrol agents. Compl. ¶ 3. There was no immigration-related reason for stopping and searching Mr. Drewniak, who quickly disclosed that he is a United States citizen. *See* Compl. ¶ 4. Nevertheless, Defendant Mark Qualter subjected Mr. Drewniak to a lengthy and invasive search and seizure, because of a signal by his drug-sniffing dog. Compl. ¶¶ 4, 68-78.

After Defendant Qualter pulled over Mr. Drewniak and his friends for secondary inspection, Defendant Qualter's drug-sniffing dog could not locate any controlled substances in the vehicle despite fifteen minutes of circling the vehicle and entering the vehicle to search small nooks and crannies. Compl. ¶¶ 72-75. Defendant Qualter opened the trunk and passenger doors to allow his canine to enter the vehicle to thoroughly search the entire interior, including the center console and other locations where no person could possibly have been concealed. Compl. ¶¶ 73-74. After becoming frustrated with being unable to locate any controlled substances, Defendant

[3] The following facts are drawn from the complaint.

Qualter shouted in Mr. Drewniak's face "WHERE'S THE FUCKING DOPE?"[4] Compl. ¶¶ 4, 76. After Mr. Drewniak revealed that there was a Tupperware container with a small quantity of hash oil in the vehicle, Defendant Qualter yelled at Mr. Drewniak to "GET IT FOR ME!" *See* Compl. ¶ 77. Mr. Drewniak gave the container to Defendant Qualter, who took it into a mobile trailer for approximately five minutes "to test the substance." Compl. ¶ 78. Defendant Qualter then passed along the container to an officer of the Woodstock Police Department, which filed violation-level charges against Mr. Drewniak. Compl. ¶¶ 78-80.

II. State Court Proceeding

Using the evidence obtained from Border Patrol, the Woodstock Police Department filed a violation-level drug charge against Mr. Drewniak and dozens of other people who had been caught up in the checkpoint. Compl. ¶ 83. Mr. Drewniak and others filed a motion to suppress all evidence, alleging violations of the Fourth Amendment to the U.S. Constitution and provisions of the state Constitution. Compl. ¶ 84. At the suppression hearing, the court considered testimony from Defendant Qualter (among others) about the purposes of the checkpoint. Defendant Qualter conceded that Border Patrol "found no concealed humans during the August 2017 checkpoint." Compl. ¶ 85. Despite insisting that the drug-sniffing dogs were used "'to detect concealed humans,'" Defendant Qualter admitted "that his dog had *never* detected a concealed human throughout his years of service as a Border Patrol agent." *Id.*

After the hearing, the New Hampshire Circuit Court found that the August 2017 checkpoint was unconstitutional. Compl. ¶ 86; *see also* Compl. Ex. A (Order, *New Hampshire v. McCarthy*,

[4] Defendants appear to criticize Plaintiff for making allegations "on information and belief." Def.'s Mot. at 3 n.1. This critique is unfounded. Mr. Drewniak clearly recalls that a Border Patrol agent shouted at him "WHERE IS THE FUCKING DOPE"—a traumatic experience he is not likely to forget. He used the "information and belief" moniker to indicate that he believed (but was not certain) that the agent who yelled this at him was Defendant Qualter, and not another agent. This level of certainty suffices at the pleading stage, particularly when there is no suggestion that any other agent was physically involved in searching Mr. Drewniak.

Docket No. 469-2017-CR-01888, *et al*. (May 1, 2018)). The court rejected the Border Patrol's pretextual arguments that the drug-sniffing dogs were present to detect concealed humans, stating "CBP Officer Qualter testified that he has never located a 'concealed human' in his seventeen years of service." Compl. Ex A at 11-13. Instead, the court found that the primary purpose of the checkpoint was "detection and seizure of drugs" in violation of *City of Indianapolis v. Edmund*, 532 U.S. 32 (2000). Compl. ¶ 87; Compl. Ex. A, at 11-12. As the court explained, CBP collaborated with the Woodstock Police Department so that the local police "would take possession of any drugs seized below the federal guidelines for prosecution in federal court and bring charges in [state] court based on that evidence." *Id.* at 13.

After the court granted the motion to suppress, the state dismissed the charge against Mr. Drewniak. Compl. ¶ 25.

DISCUSSION

Defendant Qualter seeks judgment in his favor on two alternative grounds: (1) he argues that the complaint fails to state a claim that an implied damages remedy is available under *Bivens*; and (2) he seeks dismissal, or, alternatively, summary judgment, based upon entitlement to qualified immunity. As an initial matter, the motion for summary judgment is premature and should be denied under Rule 56(d) because the absence of any opportunity for discovery prevents the Plaintiff from meaningfully opposing the extraneous facts submitted by Defendant Qualter.

Applying the appropriate Rule 12(b)(6) standard, moreover, each of Defendant Qualter's arguments are unpersuasive. Taking all well-pleaded facts as true, Mr. Drewniak has stated a claim for a violation of clearly established Fourth Amendment law for which *Bivens* provides a remedy.

I. Standard for Motion to Dismiss

When reviewing motions to dismiss under Rule 12(b)(6), the Court "accept[s] the truth of all well-pleaded facts and draw all reasonable inferences therefrom in the pleader's favor." *Garcia-Catalan v. United States*, 734 F.3d 100, 103 (1st Cir. 2013) (quoting *Grajales v. P.R. Ports Auth.*, 682 F.3d 40, 44 (1st Cir. 2012)). To avoid dismissal, a complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* (quoting Fed. R. Civ. P. 8(a)(2)). Rule 12(b)(6) presents a "threshold inquiry" that evaluates whether a complaint contains "sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Rios-Campbell v. U.S. Dep't of Commerce*, 927 F.3d 21, 24 (1st Cir. 2019) (citations and quotation marks omitted). In conducting this analysis, the Court is barred from considering Defendants' declarations and their "Statement of Additional Material Facts," *see* Def.'s Mot. at 17-20, which are extraneous to the complaint. *See Freeman v. Town of Hudson*, 714 F.3d 29, 35-36 (1st Cir. 2013) (excluding consideration of extraneous documents at the Rule 12(b)(6) stage).[5]

II. Mr. Drewniak States a Claim for an Implied Damages Remedy under *Bivens*

Mr. Drewniak's Fourth Amendment claim fits comfortably within the Supreme Court's existing *Bivens* precedent. As discussed below, the Court has reaffirmed the applicability of *Bivens*, and this case presents no "new context" that would meaningfully expand *Bivens*. In the alternative, even assuming the case presents some minor expansion, no special factors counsel any hesitation in applying an implied *Bivens* remedy here.

[5] *See, e.g.*, *Ramirez v. DeCoster*, No. 2:11-cv-00294-JAW, 2012 WL 2367179, at *12 (D. Me. June 21, 2012) ("[T]he Defendants' decision to load the motion to dismiss record with thirty attached documents is contrary to the spirit of the Rules. The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the allegations in the complaint, not an opportunity to file a motion for summary judgment before discovery."); *Freeman*, 714 F.3d at 35-36 ("On a motion to dismiss, a court ordinarily may only consider facts alleged in the complaint and exhibits attached thereto, or else convert the motion into one for summary judgment," noting narrow exceptions that are inapplicable here—namely, documents the authenticity of which are not disputed by the parties, official public records, documents central to plaintiff's claim, and documents incorporated by reference in the complaint).

A. The Supreme Court Has Reaffirmed the "Powerful Reasons" to Retain *Bivens* in the Search-and-Seizure Context in which It Arose

The Supreme Court has consistently reaffirmed the necessity of *Bivens* and subsequent cases in which it has previously identified an implied damages remedy. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856-57 (2017). In *Bivens*, the Supreme Court provided a damages remedy for a violation of the Fourth Amendment by federal officers who unlawfully searched the plaintiff's home for drugs without a warrant or probable cause. *Bivens*, 403 U.S. at 390-91. To remedy this constitutional violation, the Court "held that the Fourth Amendment implicitly authorized a court to order federal agents to pay damages to a person injured by the agents' violation of the Amendment's constitutional strictures." *Minneci v. Pollard*, 565 U.S. 118, 123 (2012) (explaining *Bivens*).

After *Bivens*, the Supreme Court recognized an implied cause of action in two other contexts. In *Davis v. Passman*, the Court held that a plaintiff may advance an implied cause of action for an alleged Fifth Amendment Due Process Clause violation, where an administrative assistant sued a Congressman for firing her because she was a woman. 442 U.S. 228 (1979). The Court also allowed an implied cause of action for damages against federal jailers for an alleged violation of the Eighth Amendment's Cruel and Unusual Punishment Clause. *Carlson v. Green*, 446 U.S. 14 (1980). Since the trio of cases in *Bivens*, *Davis*, and *Carlson*, however, the Supreme Court has declined to extend the implied damages remedy to new contexts when "special factors counsel against the extension." *Abbasi*, 137 S. Ct. at 1855.

Despite recognizing that the analysis in *Bivens* and its progeny might have been different if they were decided today, the Supreme Court has nonetheless reaffirmed "the continued force" and "necessity" of *Bivens* "in the search-and-seizure context in which it arose." *Id.* at 1856–57. "To be sure, no congressional enactment has disapproved of" *Bivens* or the two other cases in

which the Supreme Court has implied a damages remedy. *Id.* Instead, Congress has expressly granted an exemption from the Federal Tort Claims Act for *Bivens* suits. *Hui v. Castaneda,* 559 U.S. 799, 807 (2010). As the Supreme Court recently reiterated, not only does *Bivens* "vindicate the Constitution by allowing some redress for injuries," it also "provides instruction and guidance to federal law enforcement officers going forward." *Abbasi,* 137 S. Ct. at 1856-57. In the search-and-seizure context specifically, the "settled law of *Bivens* . . . , and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere." *Id.* Thus, nothing in recent Supreme Court precedent supports "restricting the core of *Bivens*." *Jacobs v. Alam*, 915 F.3d 1028, 1037 (6th Cir. 2019).

This case falls comfortably within the *Bivens* context. As in *Bivens*, the complaint alleges that a federal law enforcement officer[6] unlawfully stopped and searched the plaintiff without a warrant or any reasonable suspicion. *See* Compl. ¶¶ 3, 64, 110. Like the law enforcement officers in *Bivens* who allegedly violated the Fourth Amendment for the purpose of detecting drugs, Defendant Qualter seized and searched Mr. Drewniak in violation of the Fourth Amendment for the purpose of finding drugs.[1] Compl. ¶¶ 6, 66-79. This case presents a Fourth Amendment violation in the context of "standard law enforcement operations," and thus states a *Bivens* claim for an implied damages remedy. *Jacobs*, 915 F.3d at 1038.

B. The Case Does Not Present a "New" Context

Contrary to Defendant Qualter's argument, this case presents no meaningfully "new context" that would justify departing from *Bivens*. The proper test for determining whether a case presents a new *Bivens* context is to ask whether "the case is different in a meaningful way from

[6] Mr. Drewniak respectfully requests, pursuant to Federal Rule of Evidence 201, that this Court take judicial notice that CBP is one of the "world's largest law enforcement agencies." U.S. Customs and Border Protection, About CBP, (Dec. 14, 2020), available at https://www.cbp.gov/about (last visited Dec. 20, 2020).

previous *Bivens* cases decided by [the Supreme] Court." *Abbasi*, 137 S. Ct. at 1859. Considerations that might present a "meaningful" difference include:

> [T]he 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.

None of these considerations creates a materially "new" context in this case. Defendant Qualter is a Border Patrol agent—a line officer, just like the officers in *Bivens. See* Compl. ¶¶ 1, 16. As in *Bivens*, moreover, this case involves alleged violations of the Fourth Amendment, specifically, an unreasonable search and seizure for purposes of drug enforcement—a fact that "weighs heavily in favor of finding that [his] claims arise in the *Bivens* context, rather than in a new context." *Prado v. Perez*, 451 F. Supp. 3d 306, 315 (S.D.N.Y. 2020) (quoting *Lehal v. Cent. Falls Det. Facility Corp.*, No. 13 Civ. 3923, 2019 WL 1447261, at *11 (S.D.N.Y. Mar. 15, 2019)) (internal quotation marks omitted).

Nor do the remaining factors create a "new context." Mr. Drewniak's claims are "run-of-the-mill challenges to 'standard law enforcement operations' that fall well within *Bivens* itself." *Jacobs*, 915 F.3d at 1038. Any law enforcement officer would be subject to a similar analysis. "Indeed, courts regularly apply *Bivens* to Fourth Amendment claims arising from police traffic stops like this one."[7] *Hicks v. Ferreyra*, 965 F.3d 302, 311–12 (4th Cir. 2020). To apply a different

[7] *See, e.g.*, *Schultz v. Braga*, 455 F.3d 470, 479 (4th Cir. 2006) (permitting *Bivens* claim for officer's excessive force during traffic stop); *McLeod v. Mickle*, 765 F. App'x 582, 584-85 (2d Cir. 2019) (cognizable *Bivens* claim for Fourth Amendment violation during traffic stop by federal officer that is "prolonged beyond the time reasonably required to complete [the] mission"); *Martin v. Malhoyt*, 830 F.2d 237, 263 (D.C. Cir. 1987) (permitting *Bivens* claims against U.S. Park Police officers for Fourth Amendment violations during the course of a traffic stop).

standard simply because the defendant officer is employed by CBP instead of the FBI would not only elevate form over substance, but would also hold CBP "to a lower standard of conduct than the FBI must adhere to in an identical set of circumstances without any compelling reason to do so." *Prado*, 451 F. Supp. 3d at 316. Consistent with this view, a prior case has also allowed a *Bivens* claim against CBP officials for an unconstitutional border checkpoint.[8] *Jasinski v. Adams*, 781 F.2d 843, 845 (11th Cir. 1986).

Comparing this case to other post-*Abbasi* cases confirms that there is no "new context." Even in a case involving an alleged Fourth Amendment violation by a Border Patrol agent directly "on the international border," another court found that "[o]n balance, the context in which force and seizure were employed . . . tips in favor of the court concluding the circumstances of this case do not comprise a new *Bivens* context." *Castellanos v. United States*, 438 F. Supp. 3d 1120, 1129–30 (S.D. Cal. 2020). As that court explained, "[b]oth border enforcement and traditional law enforcement are cabined by existing Constitutional standards." *Id.* (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-882 (1975)). Applying the same analysis here, this case—which involves an interior checkpoint for the purposes of drug interdiction—is even closer to the original *Bivens* case than the fact pattern in *Castellanos*.

Defendant Qualter nonetheless attempts to identify a "new context" simply by emphasizing "factual differences between *Bivens* . . . and this case." *Jacobs*, 915 F.3d at 1038; *see* Def.'s Mot. at 8 (listing specific facts about "the original *Bivens* case"). Yet, that approach fails to articulate "why this case 'differ[s] in a meaningful way'" from *Bivens*. *Id.* (citing *Abbasi*, 198 S. Ct. at 1859-60). Other courts have rejected similar attempts to evade damages liability based upon minor

[8] The *Jasinski* case was appealed to the Supreme Court, which remanded for consideration of qualified immunity, but did not second-guess the availability of *Bivens* in that context. *Adams v. Jasinski*, 473 U.S. 901, 901 (1985) (remanding for reconsideration of qualified immunity, and not addressing any concerns with a *Bivens* remedy).

factual differences that provide no meaningful reason to depart from *Bivens*. *See, e.g.*, *Bueno Diaz v. Mercurio*, 442 F. Supp. 3d 701, 709 (S.D.N.Y. 2020) (rejecting the argument that "the location of Plaintiff's arrest . . . constitutes a meaningful difference from *Bivens*").

Defendant Qualter also contends that the alleged constitutional infirmities with broader "CBP checkpoint policy" create a new context. Def.'s Mot. at 8. Although he cites no precedent for this argument, he presumably relies on *Abbasi*, in which the Supreme Court rejected an implied damages remedy against the U.S. Attorney General and other executive officers, who had adopted "high-level executive policy . . . in the wake of a major terrorist attack on American soil." *Abbasi*, 137 S. Ct. at 1860. But this case is a far cry from the damages claims in *Abbasi*. Here, unlike in *Abbasi*, the sole *Bivens* claim is against a line officer. And, as is proper in a *Bivens* claim,[9] the allegations against Defendant Qualter rest exclusively on his own actions and seek compensation for the damage that he caused to Mr. Drewniak. Specifically, in violation of clearly established law prohibiting traffic checkpoints for the primary purpose of drug detection, *Edmond*, 531 U.S. at 40-42, Defendant Qualter subjected Mr. Drewniak to an invasive search and lengthy seizure at a checkpoint for the purpose of detecting drugs. *See generally* Compl. ¶¶ 3-4; 68-80.

The fact that constitutional violations may be common or encouraged by a broader unconstitutional policy in a government agency—and thus potentially susceptible to prospective injunctive relief—does not undermine a *Bivens* remedy for the unique past harms arising from an officer's constitutional violations. *See, e.g.*, *Campbell v. City of Yonkers*, No. 19 CV 2117 (VB), 2020 WL 5548784, at *2 (S.D.N.Y. Sept. 16, 2020) (allowing a *Bivens* remedy against FBI agent

[9] *Sash v. United States*, 674 F. Supp. 2d 531, 542 (S.D.N.Y. 2009) (stating "a *Bivens* action lies against a defendant only when the plaintiff can show the defendant's personal involvement in the constitutional violation."); *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) ("Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.").

for excessive force in the midst of alleged "serious systemic deficiencies"). Indeed, to the extent the unconstitutional behavior is common, a *Bivens* remedy may be all the more necessary. *See Lanuza v. Love*, 899 F.3d 1019, 1033 (9th Cir. 2018). As one court explained, "a *Bivens* action here will produce widespread litigation only if ICE attorneys routinely submit false evidence, which no party argues is the case. And if this problem is indeed widespread, it demonstrates a dire need for deterrence, validating *Bivens's* purpose." *Id.*

In a final effort to demonstrate a "new context," Defendant Qualter claims that this case implicates "the border security context, in which the judiciary . . . has demonstrated particular deference to the political branches." Def.'s Mot. at 8. But—even setting aside the fact that the checkpoint took place approximately 90 driving miles from the Canadian border, Compl. ¶ 60—the absence of any genuine border-enforcement rationale is precisely the problem with Defendant Qualter's conduct. Although performed under the guise of immigration enforcement, Defendant Qualter's search and seizure of Mr. Drewniak was actually for the primary purpose of drug enforcement. *See* Compl. ¶¶ 2, 43, 65, 100, 105 (alleging that the purpose of Defendant Qualter and Border Patrol in conducting checkpoints was to engage in drug interdiction); Compl. Ex. A at 11-13 (state court finding that the primary purpose of the checkpoint searches and seizures was to search for drugs). Construing these well-pleaded allegations in the light most favorable to Mr. Drewniak—as the Court must at this stage in the proceeding, *Marrero-Mendez*, 830 F.3d at 41—the case presents no "new" border context. To the contrary, drug enforcement falls under the ambit of "general crime control." *Edmond*, 531 U.S. at 40-43. It is thus unsurprising that Defendant Qualter provides no specific argument showing precisely *how* border security would be implicated by this case involving an impermissible search for drugs 90 driving miles from any border. *See* Def.'s Mot. at 8. The Supreme Court has warned against such broadside arguments: "national-

security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'"[10] *Abbasi*, 137 S. Ct. at 1862 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985)).

Finally, to the extent that Defendant Qualter argues for a new context merely because he was employed by an agency other than the FBI, that argument has already been rejected by numerous courts and is contradicted by the Supreme Court's decision in *Hernandez v. Mesa*, 140 S. Ct. 735 (2020). If status as a Border Patrol agent alone created a new context, surely the Supreme Court would have said so in *Hernandez* (which involved claims against a Border Patrol agent), instead of focusing specifically on the "cross-border shooting" as supplying the basis for that finding. *See id.* at 744 (stating "[t]here is a world of difference between [*Bivens* and *Davis*] and petitioners' cross-border shooting claims"). Indeed, "[e]very federal law enforcement agency exists under different statutory authority and is responsible for the enforcement of some subsection of federal law." *Prado*, 451 F. Supp. 3d at 315. "Despite that fact, *Bivens* actions have been sustained against federal law enforcement officers beyond FBI agents, including ICE [and Border Patrol] agents." *Id.* (citing cases); *see, e.g.*, *Morales v. Chadbourne*, 793 F.3d 208 (1st Cir. 2015) (*Bivens* claim against ICE agent for wrongfully detaining a U.S. citizen); *Chavez v. United States*,

[10] The location of the checkpoint approximately 90 driving miles inland from the border distinguishes this case from other examples in which courts have found a new context for purposes of *Bivens* liability. In *Johnson v. United States*, for example, the court declined to imply a *Bivens* remedy to plaintiff's claims alleging violations of his constitutional rights at ports of entry—in short, right on the border between the United States and Mexico. No. 3:18-CV-2178-BEN-MSB, 2020 WL 3976995, at *4 (S.D. Cal. July 14, 2020). The court acknowledged that the allegation specifically involving ports of entry was different than a prior case in which the Ninth Circuit had "allowed a *Bivens* claim against immigration officers," in which the allegations "involved officers acting entirely within the United States and away from the border." *Id.* (citing *Chavez v. United States*, 683 F.3d 1102, 1110 (9th Cir. 2012)).

Other cases are also distinguishable because they involve enforcement of the Immigration and Nationality Act or removal proceedings, as opposed to this case involving enforcement of the drug laws. *See, e.g.*, *Tun-Cos v. Perotte*, 922 F.3d 514, 523 (4th Cir. 2019) (case presented a "new context" by asserting allegations against ICE agents enforcing the Immigration and Nationality Act, given that "[i]mmigration enforcement is by its nature addressed toward noncitizens, which raises a host of considerations and concerns that are simply absent in the majority of traditional law enforcement contexts"); *Medina v. Danaher*, 445 F. Supp. 3d 1367, 1371–72 (D. Colo. 2020) (plaintiff seeking "to impose individual liability on an ICE [deportation] officer for enforcing the federal immigration laws").

683 F.3d 1102 (9th Cir. 2012) (holding that a *Bivens* action could be sustained against Border Patrol agents); *Argueta v. ICE*, No. 08 Civ. 1652, 2009 WL 1307236, at *17–19 (D.N.J. May 7, 2009) (sustaining a *Bivens* action against an ICE agent); *Oliva v. United States*, No. EP-18-CV-00015-FM, 2019 WL 136909, at *4 (W.D. Tex. Jan. 8, 2019) (stating "*Bivens* is not contingent on the specific category of federal law enforcement officers involved in the alleged constitutional violation"); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006) (recognizing Fourth Amendment *Bivens* claim against a border agent for excessive force and unreasonable arrest and detention); *see also Franco-de Jerez v. Burgos*, 876 F.2d 1038, 1044 (1st Cir. 1989) (allowing case to proceed against immigration officer on *Bivens* claim where noncitizen was held incommunicado for ten days).

For these reasons, the well-pleaded allegations in the complaint demonstrate that this case falls within a core *Bivens* framework, and thus should be permitted to proceed, with no reason to inquire into the "special factors" analysis.

C. To the Extent this Case Presents any New Context, No Special Factors Counsel against Allowing an Implied Damages Remedy Here

In the alternative, to the extent the Court finds that this case presents any new context, no special factors counsel hesitation against extending the *Bivens* remedy. *See* Def.'s Mot. at 9-15. At bottom, the special-factors inquiry examines "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Abbasi*, 137 S. Ct. at 1858. In this case, the judiciary is well-suited to resolve alleged Fourth Amendment violations by line-officers engaged in general crime control, far from any border. *Cf. Boule v. Egbert*, 980 F.3d 1309, 1314-15 (9th Cir. 2020) (in a *Bivens* case against a Border Patrol agent, finding a new *Bivens* context but no special factors counseling hesitation). "Just as in *Bivens*, [the plaintiff] seeks to hold accountable line-level agents of a federal

criminal law enforcement agency, for violations of the Fourth Amendment, committed in the course of a routine law-enforcement action." *Hicks*, 965 F.3d at 311–12. Accordingly, this case presents no reason to hesitate in concluding that "the Judiciary is well suited" to evaluate the wisdom of a *Bivens* damages remedy. *Boule*, 980 F.3d at 1313 (quoting *Abbasi*, 137 S. Ct. at 1857).

Defendant Qualter nevertheless contends that the availability of alternative relief forecloses a *Bivens* remedy, citing the Federal Tort Claims Act and the possibility of equitable relief. Def.'s Mot. at 9-10. But this case is not like others in which Congress has provided a detailed and alternative scheme for relief. *See, e.g.*, *Schweiker v. Chilicky*, 487 U.S. 412, 429 (1998) (Social Security statutory scheme provided alternative means for relief); *Bush v. Lucas*, 462 U.S. 367, 385–88 (1983) (civil-service regulations provided alternative means for relief).[11] Defendant Qualter's suggestion that the Federal Tort Claims Act forecloses *Bivens* relief, Def.'s Mot. at 10, is also wrong. "[T]he Supreme Court has expressly held that the FTCA and *Bivens* exist as alternate paths, and that the existence of the FTCA does not have any bearing on the option of bringing a *Bivens* claim."[12] *Elhady v. Pew*, 370 F. Supp. 3d 757, 769 (E.D. Mich. 2019) (citing *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)).

Defendant Qualter's arguments regarding the alternative availability of equitable relief are no more persuasive. Def.'s Mot. at 9-11. Indeed, this argument is particularly audacious where the Official Capacity Defendants—represented by the same counsel—have concurrently filed a separate Motion to Dismiss seeking dismissal of Mr. Drewniak's injunctive relief claim on

[11] Defendant Qualter does not suggest that Mr. Drewniak has an alternative state tort remedy here, distinguishing the case from *Minneci*, *Wilkie*, and *Malesko*. *See Minneci*, 565 U.S. at 127–30 (state tort law provided alternative means for relief); *Wilkie v. Robbins*, 551 U.S. 537, 553–54 (2007) (state tort law and administrative remedies provided alternative means for relief); *Malesko*, 534 U.S. at 72–73 (state tort law provided alternative means for relief).

[12] "An FTCA claim is simply not 'a substitute for a *Bivens* action.'" *Linlor*, 263 F. Supp. 3d at 621 (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)). "Indeed, the Supreme Court has explicitly refused to recognize the FTCA as a substitute for a Bivens action." *Boule*, 980 F.3d at 1316-17 (citing *Carlson*, 446 U.S. at 19–20 (recognizing a *Bivens* remedy even where the plaintiff may have been eligible to recover under the FTCA)).

standing grounds. *See* Defs.' 12(b)(1) Mot., ECF No. 20. In any event, the argument is unpersuasive. Although the claim for injunctive relief would redress the *ongoing* harm suffered by Mr. Drewniak, it would not remedy the prior harm he has already suffered from Defendant Qualter's unconstitutional conduct.[13] *See Butz v. Economou*, 438 U.S. 478, 504-05 (1978) ("Injunctive or declaratory relief is useless to a person who has already been injured.") (internal quotation and citation omitted)). Unlike *Abbasi*, which involved *Bivens* claims against the policy decisions of high-level executive officials, *see* Def.'s Mot. at 9-10 (citing *Abbasi*, 137 S. Ct. at 1863), Plaintiff requests relief against a line officer for specific past conduct that caused him harm. Indeed, consistent with *Abbasi*, Plaintiff has pursued no damages relief against policy-makers and has instead confined any challenges to policy to his parallel request for injunctive relief. Compl. at 28-30. The damages claim against Defendant Qualter, by contrast, invokes the traditional deterrence rationale in *Bivens*. Deterring officers from using dragnet checkpoints to search people and vehicles for drugs is necessary to enforce the core Fourth Amendment protections clearly established in *Edmond*, 531 U.S. at 34.

Defendant Qualter's argument that Mr. Drewniak sufficiently "had the opportunity to contest the legality of the search and seizure of his person during his state court prosecution" is also to no avail. Def.'s Mot. at 10. Border Patrol agents have already shown an unwillingness to change their practices following the state court's May 1, 2018 suppression order concluding that the checkpoints violated the Fourth Amendment. *See* Compl. Ex. A, ECF No. 1-1, at p. 12 citing

[13] Picking and choosing among the allegations in the complaint, Defendant Qualter also argues that the "gravamen of the Complaint is a constitutional challenge to USBP policy[.]" Def.'s Mot. at 11-13. Defendant Qualter focuses on the statement in Claim 1 that he "erected a warrantless checkpoint," omitting the parallel claims that he "searched and seized Mr. Drewniak" and caused him harm. Def.'s Mot. at 12 (citing Compl. at 29). As drafted, the claim against Defendant Qualter properly seeks relief against Defendant Qualter's own actions in stopping Mr. Drewniak's vehicle, searching him and his vehicle for drugs, and shouting in his face to hand over the "dope." To the extent the Court finds the claim lacks clarity in focusing on Defendant Qualter's own actions, it should allow Plaintiff to amend given the early stage in the case.

Edmond, 532 U.S. at 32 (2000)). This order has not advanced the deterrence rationale in *Bivens*; to the contrary, the agents' checkpoint practice has continued to include the use of canines, and has accelerated, with five checkpoints occurring in Woodstock since May 2018. Compl. ¶¶ 48-49. And most importantly for the damages claim, the state court order provides no compensation to Mr. Drewniak for the harms he suffered from Mr. Qualter's past constitutional violation.

Finally, Defendant Qualter suggests that the "immigration and border control context is a special factor," once again ignoring that the checkpoint occurred approximately 90 driving miles from the border. Def.'s Mot. at 14 (citing *Hernandez*, 140 S. Ct. at 746-47). Again, this argument ignores that, as alleged in the complaint and found by the state court, Defendant Qualter's actions were not undertaken within the ambit of immigration or border control, but rather for general crime control. *See generally* Compl. ¶¶ 3-4; *id.* Ex. A at 12-13. Indeed, contrary to the statute regarding searches by border patrol agents, Defendant Qualter was not performing searches only "for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States," 8 U.S.C. § 1357(a)(3), but rather for the purpose of detecting drugs. Accordingly, Defendant Qualter cannot now rely on that statutory authority and the intended "border control" context to evade accountability for his *ultra vires* search for the primary purpose of drug enforcement.

II. Defendant Qualter Is Not Eligible for Qualified Immunity

In the alternative, Defendant Qualter seeks dismissal under Rule 12(b)(6) based upon a claim of qualified immunity. Def.'s Mot. at 15-26. Perhaps recognizing the weaknesses in his argument in light of the well-pleaded allegations in the complaint, Defendant Qualter also submits additional facts outside the complaint and asks the Court to grant summary judgment—before any answer has been filed and before any opportunity for discovery. Def.'s Mot. at 15-26. As explained above, this Court is barred from considering such extrinsic information in the context of a Rule

12(b)(6) motion. And, as discussed below, the request for summary judgment is premature and should be denied pursuant to Rule 56(d).

Applying the appropriate Rule 12(b)(6) standard and taking all well-pleaded allegations as true, the motion to dismiss must be denied. As alleged in the complaint, Defendant Qualter performed an invasive checkpoint search and seizure for the primary purpose of drug enforcement in violation of the clearly established Supreme Court precedent in *City of Indianapolis v. Edmond*. Compl. at ¶¶ 3-4, ¶¶ 77-78. Accordingly, he is not entitled to qualified immunity.

A. The Premature Summary Judgment Motion Should Be Denied Under Rule 56(d)

This motion for summary judgment is premature. "[T]rial courts should refrain from entertaining summary judgment motions until after the parties have had a sufficient opportunity to conduct necessary discovery." *Velez v. Awning Windows, Inc.*, 375 F.3d 35, 39 (1st Cir. 2004) (citing *Carmona v. Toledo*, 215 F.3d 124, 133 (1st Cir. 2000)); *see also Berkovitz v. Home Box Office, Inc.*, 89 F.3d 24, 29–30 (1st Cir. 1996)).[14] "It follows that when a party moves for summary judgment, the opposing party must be afforded a fair chance to obtain and synthesize available information before being required to file an opposition." *Velez*, 375 F.3d at 39. "When discovery has barely begun and the nonmovant has had no reasonable opportunity to obtain and submit additional evidentiary materials to counter the movant's affidavits, conversion of a Rule 12 motion to a Rule 56 motion is inappropriate." *Whiting v. Maiolini*, 921 F.2d 5, 7 (1st Cir. 1990) (citation omitted). "[W]here, as here, plaintiffs' case turns so largely on their ability to secure evidence

[14] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, *after adequate time for discovery* and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.") (emphasis added); *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 n. 5 (1986) (noting "Rule 56(f)'s [now Rule 56(d)'s] provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition").

within the possession of defendants, courts should not render summary judgment because of gaps in a plaintiff's proof without first determining that plaintiff has had a fair chance to obtain necessary and available evidence from the other party." *Carmona v. Toledo,* 215 F.3d 124, 133 (1st Cir. 2000) (vacating award of summary judgment before discovery). Applying these precepts, a Rule 56 motion is wholly premature in this case. Here, there has been no opportunity for discovery at all. No answer has been filed. The pretrial conference has not yet occurred. No discovery plan has issued. And the discovery period has not yet commenced. *See* Bond Decl. ¶ 5.

Federal courts—including this Court—have repeatedly rejected similar efforts of defendants to seek summary judgment at such an early stage of litigation by submitting self-serving evidence without the plaintiff having an opportunity to conduct discovery. *See, e.g., Heino v. United States Bank, N.A.*, 16-cv-128-LM, 2016 DNH 219, 2016 WL 7116017, at *5 (D.N.H. Dec. 6, 2016) (McCafferty, J.) ("[B]ecause Heino has had no opportunity to conduct discovery, the court will generously construe Heino's request for discovery as it relates to each of her claims, and summary judgment will be denied to the extent that discovery may raise a triable issue of fact"); *Hellstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000) ("Hellstrom was prejudiced in his efforts to accumulate needed evidence because he was denied the opportunity to conduct discovery. The grant of summary judgment to the VA was premature."); *White's Landing Fisheries v. Buchholzer*, 29 F.3d 229, 231-32 (6th Cir. 1994) ("The subsequent grant of summary judgment to the defendants was … issued without any discovery taking place. In light of *Anderson* and *Celotex*, we cannot sustain this result."); *Birkholz v. Phila. Indem. Ins. Co.*, No. 11-12264, 2013 U.S. Dist. LEXIS 40330, at *2 (D. Mass. Mar. 21, 2013) ("[T]his court rarely authorizes the filing of motions for summary judgment before discovery is completed, and it is not evident that it would be appropriate to decide the merits of the Motion on the present record");

Fid. Real Estate Partners V LLC v. Lembi, Civil Action No. 06-11141-NMG, 2006 U.S. Dist. LEXIS 106544, at *5 (D. Mass. Dec. 15, 2006) (motion for summary judgment denied without discovery); *Chernova v. Elec. Sys. Servs.*, 247 F. Supp. 2d 720, 722-23 (D. Md. 2003) (declining to convert a motion to dismiss into a motion for summary judgment where employee had not yet had opportunity to conduct discovery); *Rigodon v. Deutsche Bank Sec., Inc.*, 2004 U.S. Dist. LEXIS 22385, at *9-12 (S.D.N.Y. Nov. 1, 2004) (denying summary judgment where the plaintiff did not have an opportunity to discover information essential to the opposition).

Rule 56(d) applies in precisely such circumstances. Pursuant to Rule 56(d), "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition [to summary judgment], the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d). "Rule 56(d) serves a valuable purpose." *In re PHC, Inc. Shareholder Litig.*, 762 F.3d 138, 143 (1st Cir. 2014) (quoting *Rivera–Almodovar v. Instituto Socioeconomico Comunitario, Inc.*, 730 F.3d 23, 28 (1st Cir. 2013)). "It protects a litigant who justifiably needs additional time to respond in an effective manner," and "provides a safety valve for claimants genuinely in need of further time to marshal facts, essential to justify [their] opposition ... to a summary judgment motion." *Id.* (internal quotation marks and citations omitted). When considering requests under this rule, district courts "should construe motions that invoke the rule generously, holding parties to the rule's spirit rather than its letter." *Id.* (quoting *Res. Trust Corp. v. N. Bridge Assocs., Inc.*, 22 F.3d 1198, 1203 (1st Cir. 1994)). When the requirements of Rule 56(d) are satisfied, "a strong presumption arises in favor of relief." *Id.*

In this case, the application of Rule 56(d) is straightforward. The case remains at the pleading stage and there has been no opportunity for discovery. Bond Decl. ¶ 5. Defendant Qualter

seeks summary judgment based on factual proffers outside the complaint, which Plaintiff has not yet had the opportunity to examine. *See id.* ¶¶ 5-11. To take one example, Defendant Qualter seeks summary judgment on the basis of his "belie[f] that the primary purpose of the checkpoint was immigration enforcement," citing internal documents including "the operations plan for this checkpoint" and the prior "legal sufficiency review." Def.'s Mot. at 24. But Plaintiff has had no opportunity to obtain discovery about these assertions, and Defendant Qualter has not even produced the documents that he claims to have relied upon—namely, the operations plan and legal sufficiency review.[15] Bond Decl. ¶¶ 7-8. Absent any opportunity to examine the documents mentioned by Defendant Qualter, or to take the deposition of Defendant Qualter himself, the Plaintiff is unable to meaningfully engage with these new factual assertions. *Id.*

As another example, Defendant Qualter seeks summary judgment on the basis of his canine's training in searching for concealed humans. Def.'s Mot. at 24. Here again, Mr. Drewniak has had no opportunity to test this assertion in discovery. Bond Decl. ¶ 9. The facts elicited at the state court hearing—in which Defendant Qualter admitted that his canine had never detected a concealed human at a checkpoint, Compl. ¶ 85—indicate that discovery would introduce significant reasons to doubt Defendant Qualter's version of events. Bond Decl. ¶ 9.

In all, Defendant Qualter has submitted the testimony of three people, and referenced numerous internal agency documents, to support their motion for summary judgment. *See* Garcia Decl., ECF No. 19-2; Qualter Decl., ECF No. 19-3; Forkey Decl., ECF No. 19-4. Without discovery, Plaintiff "has had no reasonable opportunity to obtain and submit additional evidentiary materials to counter the movant's affidavits." *Whiting*, 921 F.2d at 7 (1st Cir. 1990) (citation omitted). Especially given Defendant Qualter's recognition that Fourth Amendment cases like this

[15] As discussed below, *infra* 24, a focus on subjective intent is also legally irrelevant.

one present "a fact-intensive analysis," Def.'s Mot. at 23, it would be improper to weigh facts at the summary judgment stage before any opportunity for discovery on key factual points. *See generally* Bond Decl. ¶¶ 5-11.

B. Defendant Qualter Cannot Demonstrate Qualified Immunity at the Pleading Stage

Applying the appropriate standard and taking all well-pleaded allegations as true, Defendant Qualter cannot demonstrate that he is entitled to qualified immunity. When evaluating qualified immunity at the pleading stage, courts must accept "all well-pleaded facts in the light most favorable to the plaintiff." *Marrero-Mendez v. Calixto-Rodriguez*, 830 F.3d 38 (1st Cir. 2016). "Qualified immunity affords limited protection to public officials faced with liability . . . 'insofar as their conduct does not violate clearly established statutory of constitutional rights of which a reasonable person would have known." *Raiche v. Pietroski*, 623 F.3d 30, 35 (1st Cir. 2010) (quoting *Pearson v. Callahan*¸ 555 U.S. 223 (2009)). "Thus, to determine whether qualified immunity applies in a given case, we must determine: (1) whether a public official has violated a plaintiff's constitutionally protected right; and (2) whether the particular right that the official has violated was clearly established at the time of the violation." *Id.* (citation omitted). In this case, the answer to both questions is "yes," and Defendant Qualter is not eligible for qualified immunity.

1. Defendant Qualter Violated Plaintiff's Fourth Amendment Rights

Under the first prong, the complaint plausibly alleges a Fourth Amendment violation by Defendant Qualter. "The Fourth Amendment requires that searches and seizures be reasonable." *Edmond*, 531 U.S. at 37. Although there are "limited exceptions," "[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *Id.* at 37, 41 (citing *Chandler v. Miller*, 520 U.S. 305, 308 (1997)). In *Edmond*, the Supreme Court

considered these general rules as applied to a traffic checkpoint in which officers briefly stopped vehicles at a checkpoint and "[a] narcotics-detection dog walk[ed] around the outside of each stopped vehicle." *Id.* at 35. The Court held that the checkpoint was for the primary purpose of drug interdiction and, thus, violated the Fourth Amendment. *Id.* at 40-41.

As alleged in the complaint, Defendant Qualter violated this Fourth Amendment rule. The complaint alleges that Defendant Qualter "searched and seized Plaintiff during the August 2017 checkpoint without a warrant or any reasonable suspicion of criminal activity." Compl. ¶¶ 16, 64. As in *Edmond*, Defendant Qualter used a search dog trained to detect controlled substances to sniff the vehicle in which Mr. Drewniak was traveling. Compl. ¶¶ 66, 69. When the canine alerted, Defendant Qualter ordered Mr. Drewniak and his friends to undergo further detention in a "secondary inspection" area. Compl. ¶¶ 67, 70. Once in the secondary inspection area, Defendant Qualter ordered Mr. Drewniak and his friends to exit the vehicle, and proceeded to complete "a lengthy and invasive search of the entire vehicle," including the center console. Compl. ¶¶ 71-76. After the dog failed to re-alert, Defendant Qualter yelled at Mr. Drewniak "WHERE'S THE FUCKING DOPE?" Compl. ¶ 76. Indeed, after considering Defendant Qualter's testimony and other evidence, a state court judge has already determined that this very checkpoint was for the primary purpose of drug enforcement and, thus, violated the Fourth Amendment. Compl. Ex. A at 11-12. As explained in *Edmond*, "[w]ithout drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life." *Edmond*, 531 U.S. 32.

Defendant Qualter nonetheless contends that the complaint is deficient because it does not plausibly allege that he "believed" that drug enforcement was the primary purpose for the checkpoint. Def.'s Mot. at 23. Setting aside the fact that this "belief" has been submitted without

adversarial discovery, neither the Fourth Amendment nor qualified immunity rests on subjective intent. As described in *Edmond* itself, Fourth Amendment reasonableness "is predominantly an objective inquiry." *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011) (quoting *Edmond*, 531 U.S. at 47). Likewise, qualified immunity rests on the "objective legal reasonableness of the action." *Pearson*, 555 U.S. at 244 (quoting *Wilson v. Layne*, 526 U.S. 603, 614 (1999)); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982) (abandoning subjective intent as a consideration in the qualified immunity analysis). Because the complaint plausibly alleges a constitutional violation under the objective inquiry, the Plaintiff satisfies the first prong of the qualified immunity analysis.

2. The Violation Was Clearly Established in *Edmond*

Applying step two of the qualified immunity test, the prohibition of checkpoint searches for the primary purpose of drug enforcement is clearly established in *Edmond*. "A right is 'clearly established' when 'the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right."[16] *Marrero-Mendez v. Calixto-Rodriguez*, 830 F.3d 38, 45 (1st Cir. 2016) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "[T]he precise violative action at issue need not have previously been held unlawful[.]" *Id.*

Applying these rules, a reasonable officer would understand that stopping and seizing people in checkpoint searches for the primary purpose of drug enforcement violates the Fourth Amendment. *See Edmond*, 531 U.S. 41-42. Not only that, but based on the facts in *Edmond*, that officer would also understand that using drug-sniffing dogs is a key indicator that the search is for the primary purpose of drug interdiction. *Id.* at 40. Indeed, the primary mode of drug detection at

[16] To the extent Defendant Qualter claims he was simply acting consistently with broader CBP policies and practices—policies and practices that have not been submitted to Plaintiff in discovery—that is not determinative. Rather, the appropriate question remains whether a prudent official "reasonably could have believed that the conduct at issue was constitutional. *See Savard v. Rhode Island*, 338 F.3d 23, 32 (1st Cir. 2003) (in reviewing qualified immunity, considering whether "prudent prison officials reasonably could have believed that Rhode Island's strip search policy was constitutional"). As discussed below, given the precedent in *Edmond*, no reasonable officer would have believed that it was constitutional to use a checkpoint to pursue a drug search of a known U.S. citizen.

the *Edmond* checkpoint was the use of "[a] narcotics detection dog walk[ing] around the outside of each stopped vehicle." *Id.* at 35. Although the Court in *Edmond* acknowledged that "walk[ing] a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search," the primary purpose of drug enforcement made the original seizure and any subsequent searches improper. *Id.* at 40.

To be sure, a reasonable officer in Defendant Qualter's position would also be aware of statutory law and Supreme Court precedent addressing border patrol agents' authority to perform searches in furtherance of detecting unlawful border crossings. *See* 8 U.S.C. § 1357(a)(3); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976). As discussed below, however, no reasonable officer would believe that such authority would authorize the search and seizure at issue here. This is for several reasons.

First, the authority provided by 8 U.S.C. § 1357(a)(3) applies only to searches undertaken "for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States."[17] 8 U.S.C. § 1357(a)(3). Defendant Qualter's search of Mr. Drewniak did not satisfy this basic requirement. Defendant Qualter searched and seized Mr. Drewniak to search for drugs *after* Mr. Drewniak confirmed that he was a United States citizen. Compl. ¶¶ 68-78. Not only did this search fail to advance any immigration-related purpose, but, more broadly, no reasonable officer would have had any basis to believe that *anyone* stopped at the checkpoint had crossed the

[17] Section 1357(a)(3) states: "Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant . . . within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, *for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States*." 8 U.S.C. § 1357(a)(3) (emphasis added). This statutory authority is cabined by the Fourth Amendment. *United States v. Brignoni-Ponce*, 422 U.S. 873, 877 (1975) (stating "no Act of Congress can authorize a violation of the Constitution") (internal citation omitted).

Canadian border. *See* Compl. ¶ 45. In performing these checkpoint searches for drugs, Defendant Qualter was not acting under the umbrella of section 1357(a)(3).

Second, although the Supreme Court has provided limited approval for border checkpoints in *Martinez-Fuerte*, Defendant Qualter's actions plainly exceed that ruling and thus remain subject to the general rule announced in *Edmond.* In *Martinez-Fuerte*, the Supreme Court held that three immigration checkpoints on the southern border in California and Texas were reasonable under the Fourth Amendment. 428 U.S. at 565–66. Unlike the use of the drug-sniffing dog in *Edmond*, the checkpoints in *Martinez-Fuerte* featured only visual inspection and (for some people) a brief inquiry into immigration status. *Id.* at 546-50. The Court determined that the purpose of these checkpoints was to "minimize illegal immigration" near the border. *Id.* at 552, 553-54, 559, 565. *Martinez-Fuerte* did not purport to approve the "reasonableness" of all border checkpoints, expressly noting that "[o]ur holding today is limited to the type of stops described in this opinion"—which involved no drug searches or drug-sniffing dogs at either primary or secondary inspection areas. *Id.* at 567. Later describing the scope of *Martinez-Fuerte*, the Supreme Court reiterated that it provided only a limited exception "to the general rule that a seizure must be accompanied by some measure of individualized suspicion." *Edmond*, 531 U.S. at 41.

Defendant Qualter's search of Mr. Drewniak for drugs falls well outside the limited exception in *Martinez-Fuerte*. Defendant Qualter seized Mr. Drewniak to search for drugs *after* Mr. Drewniak confirmed that he was a United States citizen. Compl. ¶¶ 68-78. Unlike the brief visual inspection and limited inquiry into immigration status in *Martinez-Fuerte*, Defendant Qualter searched Mr. Drewniak using a drug-sniffing canine that had only detected drug offenses at past checkpoints. *See* Compl. ¶ 85 (stating that Defendant Qualter's dog had *never* detected a concealed human at a checkpoint). This search falls squarely under the rule in *Edmond* involving

general searches for drug enforcement, not under the limited exception in *Martinez-Fuerte*. A reasonable officer thus would have complied with *Edmond* by refraining from the checkpoint search and seizure of Mr. Drewniak.

Defendant Qualter nevertheless contends that assessing a checkpoint's "primary purpose" is "fact-intensive," and that "such a constitutional standard" can never be "clearly established." Def.'s Mot. at 23. Unsurprisingly, he cites no authority for this extraordinary proposition. Many Fourth Amendment inquiries are intensely factual, yet that does not prevent courts from finding that constitutional rules are clearly established, nor does it prevent courts from denying qualified immunity in Fourth Amendment cases. *See, e.g.*, *Raiche*, 623 F.3d at 39 (denying qualified immunity for a Fourth Amendment excessive force claim).

Defendant Qualter also suggests that the checkpoint should be presumed to have been for immigration purposes, and that exterior sniffs by drug-detection dogs are not considered a search. Def.'s Mot. at 22. But the Court in *Edmond* squarely addressed the argument that exterior dog sniffs are not a search, and nonetheless focused on the concern that the search using these methods was for the primary purpose of drug interdiction. *Edmond*, 531 U.S. at 40. On these facts, as in *Edmond*, there is no reasonable argument that the search and seizure of Mr. Drewniak was for any purpose other than drug detection and a "general interest in crime control." *Id.* at 44.

CONCLUSION

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

Respectfully submitted,

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