No. 10-35710

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARLINE COLE, as an individual and as personal representative of the Estate of Steven Bearcrane; CLETUS COLE, as an individual and as personal representative of the Estate of Steven Bearcrane; VERONICA SPRINGFIELD, as an individual and as personal representative of the Estate of Robert Springfield; P.B., minor child; V.S., minor child,

Plaintiffs-Appellees,

v.

MATTHEW ORAVEC, in his individual capacity,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

BRIEF FOR THE APPELLANT

TONY WEST
Assistant Attorney General

TIMOTHY Q. PURDON
United States Attorney
District of North Dakota

BARBARA L. HERWIG
(202) 514-5425
EDWARD HIMMELFARB
(202) 514-3547
Attorneys, Appellate Staff
Civil Division, Room 7646
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

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STATEMENT OF JURISDICTION

The plaintiffs invoked the jurisdiction of the district court under 28 U.S.C. 1331. 2 ER 78.[1] The order of the district court denying qualified immunity to Agent Matthew Oravec is appealable as a collateral order under 28 U.S.C. 1291. Mitchell v. Forsyth, 472 U.S. 511 (1985). The order being appealed was entered on June 17, 2010. 1 ER 1-13. The notice of appeal, filed on August 13, 2010, 2 ER 72-74, was timely under 28 U.S.C. 2107(b) and Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

This lawsuit challenges what the plaintiffs see as a failure of the federal government to provide sufficient resources for fighting crime in Indian Country. In addition to equitable claims against the government (which were dismissed below), the plaintiffs have brought a Bivens claim against two agents of the Federal Bureau of Investigation seeking damages in their individual capacities for allegedly failing to conduct sufficiently thorough investigations of the deaths of two Native American men, out of an alleged animus toward Native Americans. The district court granted qualified immunity to Agent Ernest Weyand, a supervisory agent, but denied qualified immunity to Agent Matthew Oravec.

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[1] The complaint also invokes jurisdiction under Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). But Bivens simply provides a cause of action in an appropriate case; jurisdiction must be based upon 28 U.S.C. 1331.

This qualified-immunity appeal on behalf of Agent Oravec presents the following questions:

1. Whether Agent Oravec is entitled to qualified immunity, because there is no non-conclusory allegation in the amended complaint that he treated similarly situated non-Native Americans differently and the complaint thus fails to plead a plausible equal-protection claim under Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

2. Whether Agent Oravec is entitled to qualified immunity, because the allegations of discriminatory motive in the amended complaint do not support a plausible equal-protection claim.

STATEMENT OF THE CASE

This is a qualified-immunity appeal brought by an agent with the Federal Bureau of Investigation who is alleged to have violated the plaintiffs' equal-protection rights. The plaintiffs, who are close relatives of two deceased Native American men, Steven Bearcrane and Robert Springfield, allege that Agent Matthew Oravec did only a cursory investigation of the men's deaths. They allege that his failure to do a fuller investigation was motivated by discriminatory animus toward Native Americans.

Although the district court dismissed numerous other claims in the amended complaint, the court agreed with the magistrate judge that the amended complaint stated a claim for a violation of equal protection. Accordingly, it denied qualified

immunity to Agent Oravec, who now appeals.

STATEMENT OF THE FACTS

1. The plaintiffs, who are members of the Crow tribe or the Gros Ventre tribe, are relatives of two deceased Native American men, Steven Bearcrane and Robert Springfield. Some of the plaintiffs are also the personal representatives of the deceased men. The plaintiffs have sued the Federal Bureau of Investigation (FBI), the United States Attorney's Office for South Dakota, the United States Attorney, Ernest Weyand (a supervisory FBI agent), and FBI Agent Matthew Oravec.

The amended complaint treats the deaths of the two men as the starting point for an effort at judicial "law reform," seeking to compel the government to provide greater resources to the enforcement of the criminal laws in Indian Country. It alleges that the FBI has inadequately investigated, and the U.S. Attorney's office has insufficiently prosecuted, crimes in Indian Country. Citing crime statistics and concerns expressed by tribal and federal government leaders, the plaintiffs allege that the refusal of federal agencies to provide the same prosecutorial services to Native Americans as to others has played an important part in the serious crime problem in Indian Country. 2 ER 81-86. The plaintiffs seek a declaration that this conduct violates the Constitution and an injunction prohibiting further alleged violations.

The amended complaint also seeks damages in a Bivens claim against FBI Agents Weyand and Oravec, accusing them of having been motivated by animus

toward Native Americans in performing only a "cursory" investigation of Bearcrane's death, despite the fact that the coroner had ruled the death a homicide, and a non-Indian man had admitted to shooting Bearcrane in a dispute over a horse. The plaintiffs also allege that the evidence counters the self-defense claim of the non-Indian man who shot Bearcrane and that the FBI failed to use common evidence-gathering methods and tests. 2 ER 87-89. In addition, they allege that the FBI and Agents Weyand and Oravec destroyed some evidence and refused to return personal belongings. 2 ER 89. However, the plaintiffs also allege that the FBI "referred" the Bearcrane case "to the U.S. Attorney's Office in South Dakota" for prosecution. 2 ER 94.[2]

The plaintiffs further allege that FBI Agents Weyand and Oravec refused to do an adequate investigation into the disappearance of Robert Springfield on a hunting trip and his subsequently confirmed death. 2 ER 89-90. The plaintiffs allege that the FBI and Agents Weyand and Oravec "consistently closed cases involving Indian victims without adequate investigation, especially sexual and other assaults involving Indian children and women." 2 ER 90-91. They allege that Agent Oravec hindered the investigation of other crimes and tried to intimidate plaintiff Cletus Cole when he visited the FBI office to ask about the investigation. 2 ER 92. And they allege that

[2] The plaintiffs' claim against the U.S. Attorney's Office for failing to prosecute the case was dismissed below and is not on appeal.

Agent Oravec made it difficult for victims to receive assistance and exercise other rights given to victims. 2 ER 93.

2. The government moved to dismiss the amended complaint. In findings and recommendations on the motion (which we will refer to as the "report"), the magistrate judge recommended dismissal of the declaratory and injunctive claims against the FBI and the United States Attorney's Office, and the individual-capacity claims against Agent Weyand. In particular, the magistrate judge recommended dismissal, for lack of standing, of the plaintiffs' equitable claims asserted in their own individual capacities, 1 ER 34-40,[3] as well as dismissal of their claims for violation of treaties with the Crow Tribe. 1 ER 65-70.

The magistrate judge, however, recommended denying dismissal of the individual-capacity claims against Agent Oravec, observing that the focus in this case is on whether the amended complaint adequately pleads substantive constitutional claims. 1 ER 48-50. The magistrate judge then proceeded to examine each claim under the "plausibility" standard set forth in Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

Examining the equal-protection claim against Agents Weyand and Oravec, the

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[3] The magistrate judge recommended against dismissal, for lack of standing, of the claims asserted by the plaintiffs as personal representatives of the deceased men.

magistrate judge characterized some of the allegations as "conclusory allegations that are not entitled to an assumption of truth," 1 ER 52, and observed that the amended complaint's factual allegations about crime in Indian Country were "troubling" but suggestive of only a "mere possibility" that the defendants had acted unlawfully. 1 ER 54. The magistrate judge then discussed the plaintiffs' allegations that the agents had "consistently closed cases involving Indian victims without adequate investigation," that Agent Oravec had blamed Native American women for sexual assaults against them, that he had hindered investigations of those crimes and tried to intimidate plaintiff Cletus Cole when the Coles inquired about the investigation of Bearcrane's death, that Agent Weyand had refused to remedy the situation when the Coles alerted him that the investigation was being mishandled, that the agents did only "the most cursory investigation" of Bearcrane's death despite its being ruled a homicide and despite the admission of a non-Indian man that he shot Bearcrane in a dispute, and that the agents had refused to investigate the death of Robert Springfield. 1 ER 54-56. The magistrate judge concluded that these allegations do not support the inference that Agent Weyand acted with a discriminatory motive. As a supervisory agent, Agent Weyand is liable only for his own actions. 1 ER 56-57. However, as to Agent Oravec, the magistrate judge ruled that a discriminatory motive could be inferred, and that a discrimination claim was therefore plausible:

> The circumstances of Bearcrane's death – that it was ruled

> a homicide, that a non-Indian did the shooting, that the investigation was allegedly insufficient due to Oravec's discriminatory motives – allow the Court to infer at this early stage of the proceedings that a claim is plausible. Similarly, although the allegations regarding Robert Springfield are more sparse, they do charge that Oravec's refusal to investigate the Springfield death was due to racial animus.

1 ER 57. While recognizing that "law enforcement agencies frequently must make difficult decisions about where to allocate limited resources, and that there may be alternative explanations for Oravec's decisions," the magistrate judge concluded that there were "non-conclusory factual allegations sufficient to plausibly suggest that Oravec acted with a discriminatory state of mind." 1 ER 57.[4] The magistrate judge did not, however, address the question whether there were sufficient allegations of differential treatment.

In addition, the magistrate judge recommended dismissal of the due-process claims based on DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), in which the Supreme Court held that the government's failure to protect one individual from another does not generally give rise to a due-process violation. The magistrate judge explained that the plaintiffs had not adequately

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[4] The magistrate judge recommended dismissal of the equal-protection claims against the FBI and the U.S. Attorney's Office, noting that there was no non-conclusory allegation that the FBI's Salt Lake City Field Office has a pattern or policy of discriminating against Native Americans or that the U.S. Attorney's Office was treating Native Americans differently from non-Native Americans. 1 ER 60-61.

alleged that either exception outlined in DeShaney applied: The relationship between the United States and Native Americans did not constitute a "special custodial relationship," and the government was not responsible for creating the danger in the first place. 1 ER 61-65.

3. Both the plaintiffs and the government filed objections to the magistrate judge's report. The district court accepted the report in all respects, dismissing the amended complaint, except the equal-protection Bivens claim against Agent Oravec.

Specifically, the district court agreed that the plaintiffs had standing as personal representatives of the deceased men, given their claim that the investigation was conducted in a discriminatory manner. 1 ER 5-6. The court also agreed with the magistrate judge that the allegations supported the inference of a discriminatory motive on the part of Agent Oravec, noting simply:

> After reviewing the allegations, this Court agrees that the factual allegations in the Amended Complaint create an inference that Defendant Oravec was motivated by racial animus when conducting his investigations into the deaths of Steven Bearcrane and Robert Springfield. Consequently, the equal protection claims asserted by the Personal Representatives against Oravec are not subject to dismissal at this time.

1 ER 7-8. The district court did not, however, address whether the amended complaint adequately alleged differential treatment of Native Americans.

SUMMARY OF ARGUMENT

This qualified-immunity appeal under Iqbal starkly presents the question whether an equal-protection claim can survive a motion to dismiss when there are no non-conclusory allegations of differential treatment.

In this case, the district court denied qualified immunity to Agent Oravec based solely on allegations of discriminatory motive, without even considering whether the amended complaint alleged differential treatment of Native Americans. Differential treatment and discriminatory motive are independent prerequisites to any equal-protection claim. Without non-conclusory allegations of differential treatment, a complaint cannot state a plausible claim.

Iqbal calls upon courts to refrain from assuming the truth of allegations that are purely conclusory and unsupported by factual allegations. Courts must look only at the factual allegations, assume the validity of those factual allegations, and then decide whether those factual allegations support a plausible claim for relief. That is critical. And the factual allegations, moreover, must suggest a plausible constitutional violation and may not be merely consistent with one.

The plaintiffs' principal allegation about differential treatment is a generic legal conclusion: that the FBI and Agents Oravec and Weyand "engaged in a pattern and practice of selectively discriminating against Native Americans in providing police services and protection on the Crow reservation in Montana," including a failure to

"adequately investigate crimes in which Native Americans are victims." Rather than support this statement of their legal conclusion with specific factual allegations of differential treatment, the plaintiffs offer the universe of allegedly substandard law enforcement in Indian Country. They plead that crime in Indian Country generally is high and that the federal government allegedly has not addressed that crime problem. They plead that, in their view, Agent Oravec did not do an adequate job in the Bearcrane and Springfield investigations, even though they admit that the Bearcrane case was referred for prosecution. And they plead that Agent Oravec failed to pursue assault cases involving Indian women and children. But even that last allegation is conclusory and unsupported by factual allegations regarding any specific cases.

Given the plaintiffs' complete failure to plead any factual allegations of differential treatment, Agent Oravec is entitled to qualified immunity on the equal-protection claim. It is, therefore, unnecessary for the Court to consider how substantial the factual allegations of differential treatment in a criminal investigation must be. If, however, the Court chooses to consider that question, the answer is that the plaintiffs must plead factual allegations comparable to those that would enable a criminal defendant to obtain discovery into an allegation of selective prosecution; that is, they must make a "credible showing of different treatment of similarly situated persons." United States v. Armstrong, 517 U.S. 456, 470 (1996). In the context of an allegedly discriminatory investigation, this could include non-conclusory allegations of an

actual, written policy that distinguishes based on race; specific cases involving non-Native Americans in which Agent Oravec conducted the investigation differently; or specific statistical data that compare the rates of crime investigations closed by an arrest in that office of the FBI, based on whether the victim is Native American. The amended complaint fails to make any such allegations.

Finally, the district court also erred in its analysis of the allegations of discriminatory motive. The amended complaint includes no factual allegations suggesting that Agent Oravec conducted investigations of crimes against Native Americans any differently from those not involving Native Americans. Absent such allegations, the plaintiffs' allegations about the way he handled the Bearcrane and Springfield investigations justify no inferences about discriminatory motive; they are mere criticisms of his actions. Those allegations are, at most, consistent with discriminatory motive, but they do not plausibly suggest such a motive. This is an independent basis for reversal.

ARGUMENT

Reviewability and Standard of Review. Qualified immunity and the adequacy of the pleading of the equal-protection claim were raised in the government's motion to dismiss the amended complaint and in the government's supplemental brief. Docket Entries 29, 50. They were raised again in the government's objections to the

magistrate judge's report. Docket Entry 55. The district court ruled on the motion to dismiss the equal-protection claim in its order partially granting and partially denying the motion. A denial of a motion to dismiss based on qualified immunity is reviewed de novo. Dunn v. Castro, 621 F.3d 1196, 1198 (9th Cir. 2010).

THE AMENDED COMPLAINT DOES NOT STATE A PLAUSIBLE EQUAL-PROTECTION CLAIM, BECAUSE IT MAKES NO NON-CONCLUSORY ALLEGATION OF DIFFERENTIAL TREATMENT OR DISCRIMINATORY INTENT.

The amended complaint fails at step one of the qualified-immunity analysis, because it makes only conclusory allegations that Agent Oravec engaged in differential treatment of Native Americans when conducting his investigations of the Bearcrane and Springfield deaths. The district court erred when it failed even to consider differential treatment, which is an essential element of an equal-protection claim. The district court also erred when it concluded that the allegations of discriminatory motive were sufficient to state a plausible equal-protection claim.

A. Qualified Immunity Requires The Court To Consider Two Separate Inquiries.

Qualified immunity "is 'an entitlement not to stand trial or face the other burdens of litigation.'" Saucier v. Katz, 533 U.S. 194, 200 (2001) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)). Because, as Mitchell explains, qualified immunity is "an immunity from suit rather than a mere defense to liability," 472 U.S. at

526, the Supreme Court has required the lower courts to address qualified immunity as early as possible in the proceedings. Saucier, 533 U.S. at 200.

"[G]overnment officials performing discretionary functions generally are granted a qualified immunity and are 'shielded 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.'" Wilson v. Layne, 526 U.S. 603, 614 (1999) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Qualified immunity "gives ample room for mistaken judgments," Malley v. Briggs, 475 U.S. 335, 343 (1986), and "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Id. at 341. Thus, a defendant is entitled to qualified immunity unless "it is obvious that no reasonably competent officer would have concluded" that the action was lawful; "but if officers of reasonable competence could disagree on this issue, immunity should be recognized." Id.

A defendant who raises qualified immunity necessarily poses two questions for the court, which may be analyzed in either order, within the court's sound discretion. Pearson v. Callahan, 555 U.S. 223, 129 S. Ct. 808 (2009). First, taking the factual allegations in the light most favorable to the plaintiff, do the plaintiff's allegations show the violation of a constitutional right at all? In answering this first question, the court is required to determine whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). See Moss v. U.S. Secret Serv., 572 F.3d 962, 970 (9th Cir. 2009) (allegations must support a claim that is "plausible, not merely possible").

Second, if the allegations plausibly show the violation of a constitutional right, was the right clearly established at the time the alleged events occurred? Siegert v. Gilley, 500 U.S. 226, 232 (1991); see Saucier, 533 U.S. at 201-02. The analysis of whether the right was clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." Saucier, 533 U.S. at 201. The right "must be defined at the appropriate level of specificity before a court can determine if it was clearly established." Wilson v. Layne, 526 U.S. at 615. It is not enough that an equal-protection right not to be treated differently based on race or national origin is clearly established; the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987) (emphasis added); see Saucier, 533 U.S. at 202 (inquiry is whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted") (emphasis added). Although it is not necessary that the specific action taken have been previously held unlawful, see Hope v. Pelzer, 536 U.S. 730, 740-41 (2002), the unlawfulness must be clear in light of the law in effect at the time the action was taken. Anderson, 483 U.S.

at 640.

This appeal focuses on the first of these two questions.

B. Agent Oravec Is Entitled To Qualified Immunity, Because The Amended Complaint Fails To Plead A Plausible Equal-Protection Claim.

A claim that a defendant's conduct violated equal protection requires that the plaintiff plead factual allegations of differential treatment as well as discriminatory motive. The district court focused entirely on allegations of discriminatory motive, without even considering whether the complaint alleged that Agent Oravec engaged in differential treatment of Native Americans. In fact, the amended complaint makes no non-conclusory allegations of differential treatment. Because Iqbal and Twombly hold that conclusory allegations are not entitled to a presumption of truth, the amended complaint fails to allege a plausible claim of a violation of equal protection, and the district court's denial of qualified immunity on that claim is in error.[5]

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[5] Although we have found no precedent for creating a Bivens action against a federal law-enforcement officer based on an allegedly discriminatory investigation, we assume for purposes of this appeal (but do not concede) that the Bivens remedy may be extended to the claim asserted here. Cf. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948 (2009) ("Petitioners do not press this [implied remedy] argument, however, so we assume, without deciding, that respondent's First Amendment claim is actionable under Bivens."). In a parallel context, this Court has permitted equal-protection damage actions against state or local law-enforcement officers based on differential treatment of investigations. See Elliot-Park v. Manglona, 592 F.3d 1003 (9th Cir. 2010); Estate of Macias v. Ihde, 219 F.3d 1018, 1028 (9th Cir. 2000) ("There is a constitutional right, however, to have police services administered in a nondiscrim-

(continued...)

1. Differential Treatment Is An Essential Element Of Any Equal-Protection Claim.

To support an equal-protection claim, a plaintiff must plead more than a discriminatory motive or intent. No equal-protection claim may survive a motion to dismiss without non-conclusory allegations of differential treatment of similarly situated people.

As the cases make clear, differential treatment of similarly situated people is absolutely fundamental to any claim that the government has violated equal protection. See, e.g., Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (plaintiff must have been "intentionally treated differently from others similarly situated"); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause * * * is essentially a direction that all persons similarly situated should be treated alike."); Ross v. Moffitt, 417 U.S. 600, 609 (1974) ("'Equal protection,' * * * emphasizes disparity in treatment by a State between classes of individuals

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[5](...continued)
inatory manner – a right that is violated when a state actor denies such protection to disfavored persons."); Navarro v. Block, 72 F.3d 712, 715-17 (9th Cir. 1996); Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 701 (9th Cir. 1990). The existence of a cause of action under section 1983 against state or local officials does not, however, mean that a Bivens action must be created to pursue the same constitutional claim against a federal official. For example, compare Pickering v. Board of Educ., 391 U.S. 563 (1968) (holding that a teacher could sue under section 1983 for First Amendment retaliation), with Bush v. Lucas, 462 U.S. 367 (1983) (holding that a federal employee could not sue his supervisor under Bivens for First Amendment retaliation).

whose situations are arguably indistinguishable."); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) ("if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution"); Dillingham v. INS, 267 F.3d 996, 1007 (9th Cir. 2001) ("In order to succeed on his [equal-protection] challenge, the petitioner must establish that his treatment differed from that of similarly situated persons."); Coalition for Economic Equity v. Wilson, 122 F.3d 692, 707 (9th Cir.), cert. denied, 522 U.S. 963 (1997) ("A denial of equal protection entails, at a minimum, a classification that treats individuals unequally.").

When an equal-protection claim is raised in the law-enforcement context, the same principles apply. For example, in a selective-prosecution case:

> It is appropriate to judge selective prosecution claims according to ordinary equal protection standards. Under our prior cases, these standards require petitioner to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose.

Wayte v. United States, 470 U.S. 598, 609 (1985) (emphasis added). By "discriminatory effect," the Court meant the differential treatment of similarly situated people. See United States v. Armstrong, 517 U.S. 456, 465 (1996) ("To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals

of a different race were not prosecuted."). Differential treatment is required in other selective-enforcement cases, as well. See, e.g., United States v. Barlow, 310 F.3d 1007, 1010 (7th Cir. 2002), cert. denied, 538 U.S. 1066 (2003) ("Barlow complains not of selective prosecution, but of racial profiling, a selective law enforcement tactic. But the same analysis governs both types of claims * * *."); Gardenhire v. Schubert, 205 F.3d 303, 319 (6th Cir. 2000) (selective-enforcement claims require discriminatory effect as well as purpose).

2. The Amended Complaint Contains No Non-Conclusory Allegation That Agent Oravec Engaged In Differential Treatment.

The amended complaint in this case fails to state a constitutional claim based on equal protection, because it contains no non-conclusory allegation that Agent Oravec engaged in differential treatment in his investigations, based on Native American status.

a. Conclusory Allegations Are Not Credited Under Iqbal and Twombly.

In Twombly, the Supreme Court explained that, while a complaint may not need detailed factual allegations, it must contain "enough factual matter (taken as true)" to suggest that the factual predicate for the claim occurred. 550 U.S. at 556; see id. at 570 (Court did not "require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face"). Emphasizing this

point, the Court stated:

> The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief."

Id. at 557 (emphasis added).

Later, in Iqbal, the Court extended this analysis to Bivens litigation and derived two principles from Twombly: first, that while a court must accept the truth of the complaint's factual allegations, it need not accept the truth of legal conclusions pleaded in the complaint; and second, that a complaint must state a plausible claim for relief to survive a motion to dismiss. Iqbal, 129 S. Ct. at 1950. Thus, the Court held:

> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Id.

In applying these rules, this Court has declared that it will "follow the [Supreme] Court's suggested sequence." Moss, 572 F.3d at 970. See Telesaurus VPC, LLC v. Power, 623 F.3d 998, 1003 (9th Cir. 2010).

b. The Plaintiffs' Allegations Of Differential Treatment Are Conclusory And Inadequate.

The allegations of differential treatment in the amended complaint are conclusory. There is no factual allegation supporting a claim that Agent Oravec treated the investigation of the death of any non-Native American differently from his investigation of Bearcrane's and Springfield's deaths.

i. Allegation of Differential Treatment.

The key allegation of differential treatment in the amended complaint is found in paragraph 27:

> Defendants FBI, Oravec and Weyand have adopted and engaged in a pattern and practice of selectively discriminating against Native Americans in providing police services and protection on the Crow reservation in Montana; such pattern and practice including, but not limited to the failure to adequately investigate crimes in which Native Americans are victims.

2 ER 87. This allegation states a legal conclusion and is "not entitled to the assumption of truth." Iqbal, 129 S. Ct. at 1950. Nor is it supported by other factual allegations "plausibly suggesting (not merely consistent with)" differential treatment. Twombly, 550 U.S. at 557.

The amended complaint attempts to back up this conclusory allegation of differential treatment with three sets of allegations: allegations about crime in Indian Country generally and the alleged failure of the federal government to address the

crime problem; allegations describing actions taken by Agent Oravec during the Bearcrane and Springfield investigations that the plaintiffs think were inadequate; and allegations that Agent Oravec failed to pursue assault cases involving Indian women and children. As we elaborate below, none of these allegations plausibly suggests that Agent Oravec treated the Bearcrane and Springfield investigations differently from investigations in non-Native American cases.

ii. Crime in Indian Country.

The amended complaint alleges that crime in Indian Country is higher than elsewhere in the country, and it attributes the high crime rate to the alleged failure of federal law enforcement and the U.S. Attorney's Offices to provide the same law enforcement and prosecutorial services to Native Americans as to non-Native Americans. 2 ER 81-86. It also alleges that "[t]he United States" – by which it means one U.S. senator – "has admitted disparate treatment of Native Americans in law enforcement." 2 ER 86.

These allegations serve as general background in the portion of this action that seeks judicial "law reform" through an order compelling the government to provide greater resources to the enforcement of the criminal laws in Indian Country. (That portion of the case was dismissed in district court and is not part of this appeal.) But they allege nothing about Agent Oravec personally, and they indicate nothing about his supposedly different treatment of the Bearcrane and Springfield investigations.

iii. Alleged Inadequacy of Bearcrane and Springfield Investigations.

The plaintiffs also allege that Agent Oravec's investigations were inadequate. With respect to the Bearcrane investigation, the plaintiffs allege that Agent Oravec "refused to do anything but the most cursory investigation" of the death of Steven Bearcrane in that, among other things, a non-Indian man admitted to shooting Bearcrane, supposedly during a dispute over a horse; unspecified evidence "appears to counter the self-defense claim made by the non-Indian man"; the FBI failed to use "common investigative tests and data-gathering," during the Bearcrane investigation; and Agent Oravec allegedly destroyed some evidence in the case. 2 ER 87-89. But they admit that the FBI referred the Bearcrane case to the U.S. Attorney's Office for prosecution. 2 ER 94.

With respect to the Springfield investigation, the plaintiffs allege that Agent Oravec refused to do an adequate investigation into the disappearance and death in that, among other things, he allegedly did not investigate after Springfield was reported missing after a hunting trip, did not investigate Springfield's death when the body was found, and failed to make a positive identification of the remains. 2 ER 90.

At most, these allegations are "consistent with" differential treatment of Native Americans, see Twombly, 550 U.S. at 557, but they provide no support for the notion that Agent Oravec handled any specific case involving someone other than a Native American any differently from the way he handled the Bearcrane and Springfield

investigations. Without any such allegations, enabling a comparison between his handling of investigations of crimes against Native Americans and his handling of crimes against non-Native Americans, there is nothing factual to suggest differential treatment and, therefore, no plausible claim for a violation of equal protection.

iv. Cases Involving Assaults on Native American Women and Children.

In a section captioned "Other Cases," the amended complaint makes its only effort to describe differential treatment:

> Upon information and belief of sources within the law enforcement community in or around the Crow Tribe, defendant FBI and individual defendants Oravec and Weyand consistently closed cases involving Indian victims without adequate investigation, especially sexual and other assaults involving Indian children and women.

2 ER 90-91. This paragraph is wholly conclusory and is based on information and belief of anonymous "sources." The amended complaint offers no facts in support. See Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1268 (11th Cir. 2009) ("the plaintiffs' allegations of conspiracy are 'based on information and belief,' and fail to provide any factual content that allows us 'to draw the reasonable inference that the defendant is liable for the misconduct alleged'") (quoting Iqbal, 129 S. Ct. at 1949). It is, therefore, not entitled to an assumption of truth. See Moss, 572 F.3d at 970 (allegation lacked "factual content to bolster it").

Although the amended complaint alleges that the FBI discriminated in its

treatment of sexual assaults on Indian reservations, 2 ER 90-91, the only support for that allegation comes from a bare citation to the writings of outside organizations. 2 ER 91. The amended complaint contains no factual pleading about the handling of specific cases or about the inadequacy of any specific investigation, let alone an investigation that was actually conducted by Agent Oravec. And even if there were such allegations, they would be irrelevant to the present litigation, because the Bearcrane and Springfield cases had nothing to do with "sexual and other assaults involving Indian children and women." They involved investigations of the deaths of Indian men.

c. The District Court Erred In Accepting These Allegations As Sufficient.

Despite the plaintiffs' failure to plead any factual allegations to support their claim of differential treatment by Agent Oravec, the district court, adopting the magistrate judge's analysis, appeared to accept allegations of discriminatory motive alone as sufficient to state an equal-protection claim. 1 ER 7-8; 1 ER 57-58. That was a critical error.

As we show in Part C. below, the allegations of discriminatory motive were themselves conclusory. But whether they were conclusory or not, an alleged discriminatory motive alone is simply not enough to show differential treatment; those are two separate elements of the equal-protection claim. Wayte, 470 U.S. at 609 (must

show "both" discriminatory effect "and" discriminatory motivation). See also Elliot-Park v. Manglona, 592 F.3d 1003,1006 (9th Cir. 2010) (plaintiff claimed that officers "fully investigated another drunk driving accident that occurred the same evening where the victim was Micronesian but the driver wasn't" and officers did not dispute racial discrimination could be inferred).

Thus, the plaintiffs' complete failure to plead specific, non-conclusory allegations indicating differential treatment of investigations of non-Native Americans alone requires reversal here.

3. To Satisfy Plausibility Requirements, Allegations Of Differential Treatment By Investigators Must, At A Minimum, Meet The Standards For Claims Of Selective Prosecution.

Given the plaintiffs' failure to plead any non-conclusory allegations at all of differential treatment by Agent Oravec, it is not necessary for the Court to decide how much factual support is required to support a claim of differential treatment in the context of criminal investigation. Nevertheless, we will address the question here, because the answer will show how wide the chasm is between what the amended complaint pleads and what the law requires.

a. In order to plead a plausible equal-protection claim based on discriminatory investigation, a plaintiff must make a showing of differential treatment that is comparable to the showing a criminal defendant must make in order to obtain dis-

covery on selective prosecution.

The standard for showing selective prosecution is "a demanding one." Armstrong, 517 U.S. at 463. While it is certainly true that "the decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification,'" id. at 464 (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)); see Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1481 (D.C. Cir. 1995) ("A federal attorney may not deliberately base a decision to prosecute on race, religion or the exercise of protected statutory or constitutional rights."), a defendant who wants to "dispel the presumption that a prosecutor has not violated equal protection" must "present 'clear evidence to the contrary.'" Armstrong, 517 U.S. at 465 (quoting United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926)). Thus, under Armstrong, the "required threshold" for obtaining discovery into selective prosecution is "a credible showing of different treatment of similarly situated persons." Id. at 470.

b. Although this appeal involves a Bivens action seeking damages against a federal investigator, and not a criminal case in which a claim of selective prosecution has been raised, there are three reasons that the standard for being allowed to proceed to discovery should be the same.

First, whereas Armstrong imposes its strict limits on a criminal defendant, whose very freedom is at stake, the plaintiff in a civil damages action faces no such

loss of liberty. The civil plaintiff should have no more right than the criminal defendant to conduct discovery into police conduct in other cases, absent a solid basis for inferring "different treatment of similarly situated persons." Armstrong, 517 U.S. at 470.

Second, discovery into investigations in other cases poses an equal risk of interfering with government functions, whether the person seeking discovery is a civil plaintiff or a criminal defendant. This concern with government functions was central to the decision in Armstrong. See Armstrong, 517 U.S. at 468 ("If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors' resources and may disclose the Government's prosecutorial strategy."). The same concern about government disruption underlies the rules of qualified immunity in a Bivens case. See, e.g., Iqbal, 129 S. Ct. at 1953 ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'") (quoting Siegert v. Gilley, 500 U.S. at 236 (Kennedy, J., concurring in judgment)); Pearson v. Callahan, 129 S. Ct. at 815 ("Indeed, we have made clear that the 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that '"insubstantial claims" against government officials [will] be resolved prior to discovery.'")

(quoting Anderson v. Creighton, 483 U.S. at 640 n.2); Harlow v. Fitzgerald, 457 U.S. at 806 ("public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability").

Third, and most important, the Supreme Court's recent decisions in Iqbal and Twombly, which articulate the pleading standards for civil cases, make it plain that civil plaintiffs who raise equal-protection claims of selective enforcement must plead factual allegations in support of their claim. One of the two basic elements of a claim of discriminatory failure to investigate is differential treatment. In this context, differential treatment means that other similarly situated crime victims who were of a different race had their crimes investigated more fully under similar circumstances. See Armstrong, 517 U.S. at 465 ("To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted."). Since Iqbal directs courts to ignore factual allegations that are no more than legal conclusions, 129 S. Ct. at 1950, a Bivens plaintiff in such a case would have to plead specific facts about differential treatment to state a plausible claim for relief. To satisfy this requirement – to get past a motion to dismiss and potentially into discovery in a Bivens case – the complaint would have to make a showing comparable to that imposed on criminal defendants in Armstrong.

c. Because the amended complaint in this case contains no non-conclusory allegations of differential treatment, despite the fact that the plaintiffs were on notice

of Iqbal when they filed it, the plaintiffs will not be able to make minor adjustments to their complaint in order to state a plausible equal-protection claim. For this reason, leave to amend should not be granted here. See Polich v. Burlington Northern, Inc., 942 F.2d 1467, 1472 (9th Cir. 1991) (dismissal without leave to amend is proper if it is clear that the "complaint could not be saved by any amendment"); compare Moss, 572 F.3d at 972 (granting leave to amend because the plaintiffs there "initiated the present lawsuit without the benefit of the Court's latest pronouncements on pleadings," i.e., Iqbal and Twombly).

If this Court nevertheless grants the plaintiffs in this case leave to amend, it should take the opportunity to describe some of the types of allegations that, in an appropriate case, might satisfy Iqbal and Twombly by plausibly establishing that a defendant accused of discriminatory investigations had engaged in different treatment of similarly situated persons. These are a few examples:

> *(i) Non-conclusory allegations that the law-enforcement agency had an actual race-based policy of conducting investigations differently.*

A plaintiff could show differential treatment by pleading non-conclusory allegations identifying a specific written policy or specific allegations supporting the existence of an unwritten policy calling for differential investigations based on race. Allegations supporting the existence of an unwritten policy might include, for example, a statement of a current or former official indicating that such an unwritten

policy existed. The FBI does not in fact use race-based investigative policies, but if the plaintiff in another case who sued a different law-enforcement organization could properly plead the existence of one, nothing more would be required at the pleading stage. See Wayte, 470 U.S. at 608 n.10 ("A showing of discriminatory intent is not necessary when the equal protection claim is based on an overtly discriminatory classification."); compare Armstrong, 517 U.S. at 469 n.3 ("We reserve the question whether a defendant must satisfy the similarly situated requirement in a case 'involving direct admissions by [prosecutors] of discriminatory purpose.'").

(ii) Allegations identifying crime reports in several other similar cases that were investigated differently by the defendant officer.

To show differential treatment, the plaintiffs would have to plead facts about several other cases involving victims who were not Native American in which Agent Oravec investigated the crimes differently. See Armstrong, 517 U.S. at 470 ("study failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted"). The difficulty of adducing the factual basis for such allegations is not an excuse for the failure to plead differential treatment. See United States v. Arenas-Ortiz, 339 F.3d 1066, 1071 (9th Cir.), cert. denied, 540 U.S. 1084 (2003) (Armstrong "did not articulate a standard that discovery is required in every case in which the defendant has no feasible way of augmenting an inadequate evidentiary showing").

When a plaintiff pleads that other cases were handled differently, there must be reference to more than one other case; a single comparable case would be insufficient to support a claim of differential treatment, because there are almost always "more likely explanations," Iqbal, 129 S. Ct. at 1951, for the seemingly differential treatment of one individual case. See, e.g., In re United States, 397 F.3d 274, 284 (5th Cir.), cert. denied, 544 U.S. 911 (2005) (unlike virtually all other defendants in alien smuggling case, the only defendant against whom death penalty was sought was directly involved in deaths of aliens); Gardenhire, 205 F.3d at 320 (unlike person who was not arrested, "there was a police report implicating the Gardenhires in a crime" and "the police were justified in treating them as suspects in a theft"). In other words, the complaint would have to plead factual allegations indicative of something resembling a pattern.[6]

[6] Although Elliot-Park appears to accept allegations regarding a single example of differential treatment in an investigation, the parties did not litigate the issue there, because the defendants conceded the point. Elliot-Park v. Manglona, 592 F.3d 1003, 1006 (9th Cir. 2010) ("The officers don't dispute that Elliott has pled facts from which a trier of fact could infer racial discrimination."). To the extent this Court treats the defendants' concession as a holding, we respectfully disagree with it. It is not, however, necessary to decide here whether an allegation of a single example of differential treatment suffices, given the fact that the plaintiffs in this case have pleaded no non-conclusory allegations about any other cases showing differential treatment.

(iii) Probative and well formulated statistical evidence suggesting differential treatment.

In rare cases, statistical data could support a claim of differential treatment, even though, as a general matter, statistical evidence is almost always misleading. See, e.g., United States v. Bass, 536 U.S. 862, 863 (2002) (per curiam) ("nationwide statistics demonstrating that '[t]he United States charges blacks with a death-eligible offense more than twice as often as it charges whites'" did not support discovery into race discrimination in capital sentencing); United States v. Arenas-Ortiz, 339 F.3d at 1069 (criticizing "assumption that 66.6% of the alien prison population is Hispanic because 66.6% of the statewide alien population is Hispanic").

In this case, where the plaintiffs allege that Agent Oravec handled two investigations differently from others, based on the decedents' status as Native Americans, it would not be enough to allege that the crime rates are higher on the Crow reservation, or that the conviction rates are lower, or that arrest rates are different. Those data are not relevant to the specific issue in this case: whether Agent Oravec intentionally failed to conduct thorough investigations of crimes against Native Americans. The only data that may be relevant to the thoroughness of investigations are data indicating rates of reported crimes that are cleared with an arrest, separated out

by type of crime reported.[7] Those data may be relevant, because the clearance rate offers a rough approximation of the thoroughness and effectiveness of investigations, an issue that is otherwise nearly impossible to evaluate statistically.

Because an equal-protection claim involves differential treatment, the statistics brought to bear on the matter would have to show both Native American and non-Native American data, so that the two sets of data could be compared. See Armstrong, 517 U.S. at 469 ("similarly situated defendants of other races could have been prosecuted, but were not"); United States v. Barlow, 310 F.3d at 1010 ("A finding that DEA agents did not approach whites who rode the Southwest Chief as frequently as African American travelers would not automatically establish that the agents' investigatory tactics were discriminatory; Barlow needed to show also that at least some of these whites not approached were similarly situated to him."); United States v. Turner, 104 F.3d 1180, 1185 (9th Cir.), cert. denied, 520 U.S. 1203, 1223 (1997) ("Nothing in the report, however, shows whether these sellers were similarly situated to the sellers chosen for prosecution here."); United States v. Bell, 86 F.3d 820, 823 (8th Cir.), cert. denied, 519 U.S. 955 (1996) ("Although Bell showed the only people arrested for violating the statute during a certain month were black, Bell failed to

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[7] The FBI's Uniform Crime Reports site provides an explanation of cleared crimes. See http://www2.fbi.gov/ucr/cius2009/offenses/clearances/index.html. A cleared crime requires that the person be arrested, charged, and turned over to the court for prosecution.

show white bicyclists also violated the statute and police chose not to arrest them."). Furthermore, because this is a Bivens action against an individual federal official, the statistics would also have to support a claim that Agent Oravec personally, and not the government as a whole, treated investigations differently based on Native American status.

C. The District Court's Holding That The Amended Complaint Plausibly Alleges Discriminatory Motive Is Also Mistaken.

The plaintiffs' failure to allege differential treatment is fatal to their equal-protection claim. But the district court also erred in holding that the plaintiffs have plausibly alleged discriminatory motive on Agent Oravec's part. The order denying qualified immunity should be reversed on this independent ground as well.

1. As we explained above, any equal-protection claim must be based on allegations of both differential treatment and discriminatory motive. Without adequate allegations of discriminatory motive, there is simply no equal-protection claim. See Village of Arlington Heights v. Metropolitan Housing Devel. Corp., 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); Washington v. Davis, 426 U.S. 229, 240 (1976) (it is a "basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose").

As the Supreme Court held in Iqbal,

> Under extant precedent purposeful discrimination requires more than "intent as volition or intent as awareness of consequences." It instead involves a decisionmaker's undertaking a course of action "'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group." It follows that, to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

Iqbal, 129 S. Ct. at 1948-49 (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979)). Although there are many ways that a discriminatory motive, or animus, can be pleaded, it may not be pleaded "generally" or with conclusory allegations. Id. at 1954 (rejecting plaintiff's argument that "the Federal Rules expressly allow him to allege petitioners' discriminatory intent 'generally,' which he equates with a conclusory allegation"). A plaintiff could plead that a defendant made biased statements reflecting an animus, or that he displayed animus though his behavior. In this case, however, the plaintiffs have failed to offer either direct evidence or a plausible inference of discriminatory motive.

The amended complaint cites one statement and several actions in support of its claim of animus. The alleged statement, offered in generalities without attribution to any source and without reference to date or other context, is that Agent Oravec "has been heard to say" that Native American women who were victims of sexual

assault "were asking for assault or words to that effect." 2 ER 91-92. This vague allegation, based on an anonymous source, hardly qualifies as a factual allegation. But even if it does, it indicates nothing about animus toward Native Americans. If anything, it suggests an animus toward women. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 701 (9th Cir. 1990) (distinguishing an allegation that an officer responding to a domestic abuse call stated that he "did not blame plaintiff's husband for hitting her, because of the way she was 'carrying on,'" which suggested "an animus against abused women," from an allegation in another case, in which officers' racist remarks showed a racial animus).

The amended complaint also alleges that Agent Oravec showed animus by taking steps to hinder the investigation of crimes with Native American victims and to prevent the victims from receiving assistance and from exercising their victims' rights under federal law. 2 ER 92. This allegation is supported with what it calls "example[s]": Agent Oravec allegedly "attempted to intimidate Cletus Cole," Bearcrane's father, who was inquiring about the case, by taking him "out of the range of cameras and showing Mr. Cole his gun"; Agent Oravec allegedly told the state crime victims compensation office that Bearcrane had caused his own death; he allegedly told that office to contact him directly on the case, instead of the FBI's normal contact; on "many" unspecified occasions, he allegedly interfered with county officials on Indian cases; he allegedly failed to identify Springfield's remains, "refused,

without reason," to return some of the remains, failed to provide information and documents to Springfield's widow, and delayed getting her a death certificate; and he allegedly destroyed some evidence and refused to return personal belongings that were needed in the investigation. 2 ER 92-94.

To the extent these allegations can be treated as factual, the plaintiffs fail to offer any factual comparison to the way Agent Oravec handled cases involving crime victims who were not Native Americans. Thus, the examples at most suggest questionable conduct; none of them, in itself, suggests an animus toward Native Americans, which is an essential element of any equal-protection claim. Indeed, as the magistrate judge admitted, "there may be alternative explanations for Oravec's decisions." 1 ER 58. See Iqbal, 129 S. Ct. at 1951 ("given more likely explanations, [defendants' actions] do not plausibly establish this [discriminatory] purpose").

Thus, the allegations in the amended complaint do not plausibly show that Agent Oravec acted with a discriminatory motive.

2. Despite the lack of any factual allegation indicating an animus toward Native Americans on Agent Oravec's part, and the magistrate judge's reliance on conclusory allegations of animus, the district court nevertheless upheld the magistrate judge's analysis. 1 ER 7.

The magistrate judge's basis for finding that the amended complaint adequately alleged discriminatory intent was that it contained allegations that Bearcrane's death

"was ruled a homicide, that a non-Indian did the shooting, that the investigation was allegedly insufficient due to Oravec's discriminatory motives." 1 ER 57. These allegations are wholly insufficient. The last of them is simply a statement of the legal conclusion itself, see Moss, 572 F.3d at 970 ("The bald allegation of impermissible motive on the Agents' part, standing alone, is conclusory and is therefore not entitled to an assumption of truth."), and the fact that Bearcrane's death was ruled a homicide shows nothing about animus on Agent Oravec's part, any more than the fact that a non-Indian did the shooting shows his animus. To put it differently, the fact that a person claiming injury is of a different race from the one accused of causing the injury might be consistent with a discriminatory motive for making an allegedly inadequate investigation, but it is well short of what is required to plead that such a motive plausibly was behind the challenged action. Iqbal, 129 S. Ct. at 1948-49 (allegations "must plead sufficient factual matter to show that [the officials] adopted and implemented the * * * policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race").

In any event, the plaintiffs themselves allege that the FBI "referred [the Bearcrane case] to the U.S. Attorney's Office in South Dakota" for prosecution. 2 ER 94. This allegation strongly undermines the inference of discriminatory motive. See Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001) ("a plaintiff can * * * plead himself out of a claim by including unnecessary details contrary to his

claims").

With respect to the death of Robert Springfield, the magistrate judge simply cited the amended complaint's allegation that "Oravec's refusal to investigate the Springfield death was due to racial animus." 1 ER 57. This allegation is purely conclusory, because it is nothing more than a statement of the legal conclusion that must be factually supported. As a result, the allegations of the amended complaint "'stop[] short of the line between possibility and plausibility of "entitlement to relief."'" Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 557).

In short, the utter lack of non-conclusory allegations of a discriminatory motive on Agent Oravec's part is an independent reason the district court's denial of qualified immunity should be reversed.

CONCLUSION

For the foregoing reasons, the district court's order denying qualified immunity should be reversed, and the case should be remanded with instructions to dismiss the Bivens claim against Agent Oravec.

Respectfully submitted,

TONY WEST
Assistant Attorney General

TIMOTHY Q. PURDON
United States Attorney
District of North Dakota

BARBARA L. HERWIG
(202) 514-5425
EDWARD HIMMELFARB
(202) 514-3547
Attorneys, Appellate Staff
Civil Division, Room 7646
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

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STATEMENT OF RELATED CASES

We are aware of no related cases within the meaning of Ninth Circuit Rule 28-2.6.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 7, 2011.

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/s/ Edward Himmelfarb
EDWARD HIMMELFARB
Attorney for the Appellant

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