**VICTORIA L. FRANCIS**
**TYSON M. LIES**
**Assistant U.S. Attorneys**
**U.S. Attorney's Office**
**2601 2nd Ave. N., Suite 3200**
**Billings, MT 59101**
**Phone: (406) 247-4633 – Victoria**
**Phone: (406) 247-4632 - Tyson**
**Email: victoria.francis@usdoj.gov**
**tyson.lies@usdoj.gov**

**ATTORNEYS FOR INDIVIDUAL DEFENDANTS**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MONTANA**
**BILLINGS DIVISION**

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| **LEROY NOT AFRAID and GINGER GOES AHEAD,**<br><br>**Plaintiffs**<br><br>**vs.**<br><br>**UNITED STATES OF AMERICA, and LOUISE ZOKAN-DELOS REYES, in her official and individual capacity; and JO-ELLEN CREE, in her official and individual capacity,**<br><br>**Defendants.** | **CV 19-100-BLG-SPW-TJC**<br><br>**DEFENDANTS LOUISE ZOKAN-DELOS REYES AND JO-ELLEN CREE'S REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS** |

Plaintiffs' arguments in their Response (doc. 20) cannot compensate for the insufficiency of the allegations in their Complaint. While Plaintiffs assert in their

Response that the Individual Defendants' Awarding Official's Technical Representative Report (the "Report") contained false and unsupported allegations, a review of the Complaint and the attached documents reveals that the Report findings were not clearly false as stated. Furthermore, despite Plaintiffs' attempts to analogize this case to others, the facts presented here are unlike any previous *Bivens* cases previously recognized by the Supreme Court or the Ninth Circuit Court of Appeals. Moreover, Plaintiffs now make broad claims that the Individual Defendants possessed ill will and personal animus toward the Plaintiffs, but allege no facts to show how the Individual Defendants could have violated Plaintiffs' constitutional rights. Thus, based on these pleading deficiencies, Plaintiffs' *Bivens* claims (Count I) against the Individual Defendants should be dismissed for failure to state a claim because (A) they are not cognizable, and (B) in any event, the Individual Defendants are shielded from *Bivens* liability by qualified immunity.

## ARGUMENT

### I. Plaintiffs' *Bivens* claims should be dismissed for failure to state a claim.

#### A. Plaintiffs' *Bivens* claims arise in a new context and should not be recognized.

"[E]xpanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017). Post-*Abbasi*, courts must decide (1) whether a case is different in a meaningful way from previous *Bivens* cases

decided by the Supreme Court, and, (2) if so, whether special factors exist that counsel hesitation in recognizing a *Bivens* cause of action. *Vega v. U.S.*, 881 F.3d 1146, 1153 (9th Cir. 2018); *Rodriguez v. Swartz*, 899 F.3d 719, 738 (9th Cir. 2018).

This case presents a new context for *Bivens* claims. While Plaintiffs cite a number of pre-*Abbasi* lower court cases (doc. 20, at 19) to argue otherwise, under the Supreme Court's holding in *Abbasi*, pre-*Abbasi* cases not decided by the Supreme Court do not establish prior contexts.[1] Plaintiffs likewise point to no Supreme Court case that presents a context similar to this one.

Special factors also counsel against recognizing a *Bivens* cause of action here. Specifically, Plaintiffs have alternative remedies, including tort claims under the FTCA and the opportunity to file rebuttals to the Report's findings with the Tribal Chairman and the Tribe's Ethics Board. Docs. 4-3; 4-6; *see Vega*, 881 F.3d at 1154 (concluding state tort law claims and the opportunity to petition for review of an alleged incident constituted sufficient alternative remedies for

[1] The only Supreme Court case Plaintiffs cite is *Hartman v. Moore*, 547 U.S. 250 (2006). But, as the Eleventh Circuit recently explained, the Supreme Court only assumed the existence of a First Amendment *Bivens* claim in *Hartman*. *Johnson v. Burden*, 781 F. App'x 833, 836 (11th Cir. 2019). The Court has repeatedly confirmed since *Hartman* that it has not extended *Bivens* to First Amendment claims. *Id.* (collecting cases); *Vega*, 881 F.3d at 1153.

plaintiff's First Amendment Bivens claims). Additionally, recognition of a *Bivens* cause of action here would interfere with federal executive employees' execution of their duties, thus undermining separation of powers. *Abbasi*, 137 S. Ct. at 1857; *Cole v. FBI*, No. CV 09-21-BLG-SEH-TJC, 2019 WL 1102569, at *7 (D. Mont. Feb. 7, 2019). Specifically, it would permit Plaintiffs to second-guess the monitoring decisions of the BIA, and would put the Court in the position of dictating how executive officials should exercise their discretion in determining compliance with self-determination contracts. *Abbasi*, 137 S. Ct. at 1861 (cautioning against recognizing a *Bivens* remedy in circumstances that "would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch"). Accordingly, a *Bivens* cause of action is not appropriate under these circumstances.

The Ninth Circuit's ruling in *Lanuza v. Love* does not apply here. *See* doc. 20, at 20-25. In that case, the Court of Appeals narrowly framed the relevant context: "Lanuza's claim arises in the context of deportation proceedings where a federal immigration prosecutor submitted falsified evidence in order to deprive Lanuza of his right to apply for lawful permanent residence." 899 F.3d 1019, 1027 (9th Cir. 2018). This case thus presents a very different context from *Lanuza*, with different legal mandates, different officers, and different special

factors. *See Abbasi*, 137 S. Ct. at 1859-60. Most importantly, this is not a case of forged evidence, as in *Lanuza*. In *Lanuza*, a government attorney intentionally forged an ostensible government document and consequently barred the plaintiff from obtaining permanent resident status to which he was otherwise lawfully entitled. 899 F.3d at 1021. Here, by contrast, Plaintiffs do not allege facts to show that the findings in the Report were false. Instead, they admit most of the underlying facts were true, but either disagree with the Report's conclusions and recommendations or misconstrue the Report's findings in order to portray them as "falsified." The following examples demonstrate the nature of Plaintiffs' claims:

- Plaintiffs contest the Individual Defendants' finding that they made loans to Tribal Court personnel, yet admit that the loans were made. Doc. 4 ¶¶ 60-61.
- Plaintiffs also claim that the Report accuses them of purchasing a Chevy Tahoe, but the Report actually states, and Plaintiffs admit, that a voucher existed for a vehicle purchase even though no vehicle was in the Court's possession. Doc. 4 ¶¶ 62-65; *see also* doc. 4-2, at 6, 10, 14, 15. While Plaintiffs believe the Individual Defendants should have investigated further to determine whether the vehicle was in fact purchased, the documents attached to Plaintiffs' Complaint show that the Tribal Court did not have

documents to verify this purchase, and the Report actually triggered the Tribe's Procurement Office to confirm whether the purchase occurred. Doc. 4-3, at 7; doc. 4-4, at 13.

- Plaintiffs claim that the Report demands that Plaintiff Not Afraid maintain a time card (doc. 4 ¶¶ 103-06), but the Report only observes that a Chief Judge is not required to keep a time card or work a minimum amount of time at the Tribal Court. Doc. 4-2, at 13.
- Plaintiffs claim that the Report's recommendation to "explain and repay severance pay" granted to Plaintiff Not Afraid's wife "presumed malfeasance" and disregarded the law. Doc. 4 ¶¶ 68-73. Yet the Tribal law they cite to justify the severance payment only permits severance to legislators, not judges, and no other Crow law or regulation permitted the payment. *See* doc. 4-4, at 10 (rejecting Plaintiffs' interpretation of Crow law); Crow Legislative Resolution 15-12, https://www.ctlb.org/wp-content/uploads/2015/09/LR-15-12-Severance-Benefit-Package.pdf.

A comparison of Plaintiffs' Complaint and the documents attached to Plaintiffs' Complaint (including the Report (doc. 4-2) and the Tribe Chairman's response to the Report (doc. 4-4)) demonstrate similar issues with each of the allegedly false findings Plaintiffs identify. This case therefore does not involve

falsified evidence as in *Lanuza*, and presents a very different context in which no *Bivens* remedy has ever been recognized.

The special factors in *Lanuza* similarly demanded a different conclusion from those present in this case. The *Lanuza* court concluded that a *Bivens* remedy would not challenge a political policy because no policy allowed "forged government documents to thwart the integrity of immigration proceedings." 899 F.3d at 1029. The plaintiff also had no alternative remedies, and the court did not believe a *Bivens* remedy posed a threat to the decisions of other government branches. *Id.* at 1032.

In this case, special factors counsel against recognizing a *Bivens* remedy. As noted earlier, Plaintiffs have alternative remedies available to them. If they believe tortious acts occurred, they can sue for remedies under the FTCA, a remedy of which they have already availed themselves in this litigation. *See Vega*, 881 F.3d at 1154. Plaintiffs were similarly afforded the opportunity to respond to the Report's findings and present their own evidence, another remedy of which they took advantage. Doc. 4-3. The Report otherwise had no connection or impact on Plaintiffs' employment, and it is not clear how the Report could, standing alone, impact their constitutional rights. To the extent the Report's findings played any role in an unrelated and separate hearing before the Tribe's

Ethics Board, Plaintiffs had a second opportunity to contest the findings and present their own evidence. Doc. 4-6. These alternative remedies adequately protected Plaintiffs' purported rights at issue (*i.e.*, their claimed rights to employment) and an additional *Bivens* remedy is not warranted. *Minneci v. Pollard*, 565 U.S. 118, 130 (2012) (noting that alternative remedies need not be perfectly congruent with *Bivens* remedy to be adequate).

Special factors likewise counsel against allowing a *Bivens* remedy under these circumstances because doing so would directly challenge BIA policy-making and undermine BIA administrative decisions. As the Supreme Court noted in *Abbasi*, even if an action calls into question the "conduct of a particular Executive Officer in a discrete instance," a *Bivens* claim would not be allowed because "the burden and demand of litigation might well prevent [executive officials]—or, to be more precise, future officials like them—from devoting the time and effort required for the proper discharge of their duties." *Abbasi*, 137 S. Ct. at 1860. This Court recently faced such a situation in *Cole v. FBI*, in which it dismissed *Bivens* claims against an individual FBI officer based on his alleged "patently deficient" investigation of a shooting death. 2019 WL 1102569, at *7. In dismissing the claims, this Court specifically noted that "[c]ourts are less equipped to evaluate the adequacy of law enforcement investigation decisions." *Id.* This

reasoning applies directly to this case. A *Bivens* remedy here would effectively permit second-guessing of the BIA's review and investigation of the Tribal Court's compliance with the Contract. It would challenge BIA's methods for monitoring self-determination contracts, and intrude on BIA officials' exercise of discretion. Such subversion of the separations of powers is not justified, especially since Plaintiffs had the opportunity to challenge the Report's findings and can assert claims under alternative statutes. Accordingly, Plaintiffs' *Bivens* claims are not cognizable and should be dismissed.

### B. Plaintiffs identify no constitutional violation that would negate qualified immunity.

The doctrine of qualified immunity intends to shield government employees from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Qualified immunity shields public officials from civil damages for performance of discretionary functions." *Mueller v. Auker*, 576 F.3d 979, 992 (9th Cir. 2009).

As the Individual Defendants demonstrated in their initial brief, Plaintiffs assert violations of their First Amendment and procedural and substantive due process rights, yet allege no facts to show how these rights were violated. Doc. 14, at 13-16. Plaintiffs' primary argument in response is that the Court must

accept their conclusory claims that the Individual Defendants violated their constitutional rights or that the Individual Defendants acted with "personal animus." Doc. 22, at 7, 18, 22. But this misconstrues the standard of review at the motion to dismiss stage. A court need only accept a plaintiff's "well-pleaded" allegations as true. *Shwarz v. U.S.*, 234 F.3d 428, 435 (9th Cir. 2000). It need not accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences," *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); Plaintiffs' legal conclusions, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); or "allegations that contradict facts that may be judicially noticed by the court," *Shwarz*, 234 F.3d at 435. Far from arguing that "they are entitled to qualified immunity because the findings in the AOTR were accurate," as Plaintiffs claim (doc. 22, at 22), Defendants assert that Plaintiffs have not sufficiently alleged any violations of clearly established constitutional rights. Because of the deficiencies in Plaintiffs' pleadings, the Individual Defendants are entitled to qualified immunity.

With regard to procedural due process, Plaintiffs do not show any entitlement to employment, nor is it clear how they were deprived of due process since they were given the chance to respond to the Report's findings and present their own evidence. Doc. 4-3; *see also Pavel v. Univ. of Oregon*, 774 F. App'x

1022, 1024 (9th Cir. 2019). Contrary to Plaintiffs' assertions (doc. 22, at 23), the Supreme Court has rejected claims that an elected official has a property interest in his position. *Taylor v. Beckham*, 178 U.S. 548, 575-578 (1900); *Snowden v. Hughes*, 321 U.S. 1, 7 (1944); *see also Rabkin v. Dean*, 856 F. Supp. 543, 549 (N.D. Cal. 1994) (holding that elected city official had no protected property interest in her position); *Velez v. Levy*, 401 F.3d 75, 86-87 (2d Cir. 2005) (holding that elected school board member lacked constitutionally cognizable property interest in her position). The cases Plaintiffs cite do not govern in this Circuit, and only establish that an elected official who has an expectation of continued employment as established by a specific law or regulation is entitled to due process before termination. Doc. 22, at 23. Here, Plaintiffs point to no law or regulation that would give them an expectation of employment. Indeed, Crow Law makes it clear that the Chief Judge can be removed, but nowhere establishes an expectation of employment. CROW LAW & ORDER CODE § 3-3-306, https://www.ctlb.org/wp-content/uploads/2015/07/title_03.pdf-1.pdf. Moreover, Plaintiffs are at odds to explain how they were deprived of due process. They were allowed to contest the Report's findings, and the Tribe's Chairman then assessed available evidence to respond to the findings. Doc. 4-2. Beyond that, the Report was not formally connected in any way to Plaintiffs' employment and could not independently lead

to their claimed injury (*i.e.*, loss of employment). Plaintiffs were later terminated through a completely separate Tribal process, and do not allege that they were deprived of due process in that process because they were given a hearing, permitted to put on evidence, and allowed to testify. Doc. 4-6. To the extent any due process requirements applied, therefore, these processes were sufficient to ensure Plaintiffs' rights were protected.

Plaintiffs similarly cannot establish a substantive due process violation. In their Response, Plaintiffs misunderstand the Individual Defendants' arguments and argue that the acts alleged in their Complaint were "arbitrary and capricious." Doc. 22, at 24. To state a claim for a deprivation of substantive due process, however, Plaintiffs must show that the acts deprived them of their interest in pursuing "common occupations or professions of life." *Lebbos v. Judges of Superior Court, Santa Clara County,* 883 F.2d 810, 818 (9th Cir. 1989); *Di Martini v. Ferrin*, 990 F.2d 1257, at *3 (9th Cir. 1993). Plaintiffs' Complaint alleges no such thing, and therefore their *Bivens* claims must be dismissed for failure to state a claim.

Finally, Plaintiffs' bald allegations of animus and conspiracy are insufficient to establish that the Individual Defendants retaliated against them for exercising their First Amendment rights. *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 970 (9th

Cir. 2009). In response to the Individual Defendants' arguments, Plaintiffs now attempt to establish some connection between the Individual Defendants and Plaintiffs' termination by claiming the Individual Defendants had "personal animus" toward the Plaintiffs, but allege no facts or circumstances evidencing such animus. Doc. 22, at 7, 18, 22. Such bald, conclusory allegations are not sufficient to show that the Individual Defendants took any action because of Plaintiffs' protected speech, and thus cannot establish that they violated Plaintiffs' First Amendment rights.

The Ninth Circuit Court of Appeals' decision in *Moss* is directly on point. In that case, the plaintiffs alleged *Bivens* claims against individual Secret Service agents, claiming that the agents violated plaintiffs' First Amendment rights when they forced plaintiffs to relocate their demonstration because plaintiffs' message was antagonistic to the president. 572 F.3d at 970. The Court of Appeals held that plaintiffs' allegation that the agents acted with impermissible motive, or pursuant to a Secret Service policy of suppressing speech critical of the president, "without any factual content to bolster it, is just the sort of conclusory allegation that the *Iqbal* Court deemed inadequate." *Id.* Similarly, here, Plaintiffs claim that the Individual Defendants acted out of personal animus, but cite no specific incidents of personal animus, and draw no plausible connection between Plaintiffs'

allegedly protected speech and the Individual Defendants' monitoring efforts. Plaintiffs therefore do not make out a First Amendment retaliation claim. *See also Miller v. City of Los Angeles*, No. CV 13-5148-GW(CWx), 2014 WL 12610195, at *5 (C.D. Cal. Aug. 7, 2014) (dismissing with prejudice § 1983 claims because plaintiff failed to allege specific facts to show an individual defendant's "personal participation in, or causal connection to" plaintiff's termination).

Again, *Lanuza* is inapposite. There, the court held qualified immunity would not shield an officer who "intentionally submits a forged document in an immigration proceeding in clear violation of 8 U.S.C. § 1357(b)." *Lanuza*, 899 F.3d at 1034. Here, Plaintiffs point to no forged evidence, and no criminal statute was violated. Based on Plaintiffs' allegations, therefore, the Individual Defendants did not violate a clearly established constitutional right and are entitled to qualified immunity.

## CONCLUSION

Based on the foregoing, Plaintiffs' claims against the Individual Defendants should be dismissed for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

**DATED** this 11th day of February, 2020.

KURT G. ALME
United States Attorney

/s/ Tyson M. Lies
Assistant U.S. Attorney
Attorney for Individual Defendants

## CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 2,866 words, excluding the caption and certificates of service and compliance.

DATED this 11th day of February, 2020.

/s/ Tyson M. Lies
Assistant U.S. Attorney
Attorney for Individual Defendants

## CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of February, 2020, a copy of the foregoing document was served on the following person by the following means.

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1. Clerk of Court

2. Terryl T. Matt
Joseph F. Sherwood
MATT LAW OFFICE, PLLC
310 East Main Street
Cut Bank, Montana 59427
(406) 873-4833 – phone
(406) 873-4944 – fax
terrylm@mattlawoffice.com
joes@mattlawoffice.com
*Attorneys for Plaintiff*

/s/ Tyson M. Lies
Assistant U.S. Attorney
Attorney for Individual Defendants