IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NORTH DAKOTA

RENEE MARTIN, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	)	**REPLY BRIEF IN SUPPORT OF INDIVIDUAL FEDERAL DEFENDANTS' MOTION TO DISMISS** Civil Action No. 3:22-cv-00136-PDW-ARS

INTRODUCTION

Plaintiff, Renee Kay Martin, has sued federal employees from the Bureau of Indian Affairs (hereinafter "BIA") and the Federal Bureau of Investigation (hereinafter "FBI") in their individual capacities, alleging they violated her son's constitutional rights. *See* Complaint, ECF No. 1. The Individual Federal Defendants (BIA officers Lieutenant Kelan Gourneau, Officer Michael Slater, Officer Evan Parisien, Officer Heather Baker, and Chief Earl Charbonneau; as well as FBI Special Agent Reed Mesman) moved to dismiss. *See* MTD and Mem, ECF No. 64-66. The Individual Federal Defendants argued dismissal was warranted because (1) special factors counseled against extending *Bivens*; (2) even if a *Bivens* remedy were available, the Individual Federal Defendants are entitled to qualified immunity.

In opposition to this motion, Plaintiff fails to address a number of legal arguments supporting dismissal – most notably that a *Bivens* remedy is not available here because the Supreme Court has never recognized an implied cause of action against BIA officers performing law enforcement services in Indian country or against FBI agents merely investigating police-

involved shootings and special factors counsel hesitation against extending *Bivens*.[1] *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022) (finding no cause of action for an alleged use of force by United States Customs and Border Patrol agents on private property near an international border); *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1848 (2017). Instead, Plaintiff argues the Individual Federal Defendants violated her son's constitutional rights because they allegedly violated internal BIA policy and are not entitled to qualified immunity.[2] While it is clear this *pro se* Plaintiff has made her best effort to grapple with complex legal issues, she still misunderstands the law and cites to irrelevant statutes to defend her claims. While her pro se status may entitle her pleadings to liberal construction, it cannot serve to create a legal claim where none exists. Plaintiff's arguments fail as a matter of law for several reasons.

ARGUMENT

I. A Bivens Remedy is Unavailable and Plaintiff Fails to Provide Any Argument to the Contrary

Plaintiff's opposition is notably silent on the unavailability of a *Bivens* remedy in this case. She never disputes the particular authorities the Individual Federal Defendants cites. Instead, she states merely states in conclusory fashion that "Bivens does apply" because "there was an unreasonable search with no probable cause." However, this is a misguided oversimplification of *Bivens* and its progeny that does not survive modern scrutiny.

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[1] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[2] This is the first time Plaintiff is raising these allegations. Plaintiff also includes allegations of FOIA violations, violation of the Indian Civil Right Act of 1968, and raising false fraud claims on a GoFundMe account. These allegations go beyond what is included in her Complaint and should be disregarded. *See Thomas v. United Steelworkers Local 1938*, 743 F.3d 1134, 1140 (8th Cir. 2014) (finding plaintiff may not amend his complaint through a memorandum or brief in opposition to a motion); *Patrick v. Wal-Mart, Inc.*, 681 F.3d 614 (5th Cir. 2012) (finding no error in district court's refusal to grant plaintiff leave to amend complaint where request was first raised in opposition to a motion to dismiss). But even if considered, they do not save, and indeed are not even legally relevant to her claims.

Since issuing decisions in *Bivens*, *Carlson*,[3] and *Davis*,[4] the Supreme Court has repeatedly cautioned against *Bivens* expansion, finding extensions of implied damages remedies to new contexts is a "disfavored" judicial activity and noting the Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001); *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). Thus, before permitting a lawsuit to proceed on a *Bivens* theory, courts must first ask whether a case arises in a context that differs "in a meaningful way from previous *Bivens* cases decided by [the Supreme Court]." *Abbasi,* 137 S. Ct. at 1859. *See also Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020). If a case differs meaningfully from *Bivens*, *Davis*, or *Carlson*, a court must consider whether any special factors counsel hesitation in expanding *Bivens* to the plaintiff's claims. *Abbasi*, 137 S. Ct. at 1857. *See also Hernandez*, 140 S. Ct. at 743 (noting this "special-factors" inquiry must concentrate on "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.").

Here, Plaintiff never denies that this case is meaningfully different from *Bivens*, *Davis*, or *Carlson*. She never denies that there are special factors counselling hesitation in expanding *Bivens* to these claims. Nor, more importantly does she address the numerous new context and special factors arguments raised by the Individual Federal Defendants in their motion to dismiss establishing that no judicially implied remedy is appropriate here. Those include:

- A new class of defendants;
- Existing alternative remedies to address Plaintiff's complaints;

[3] *Carlson v. Green*, 446 U.S. 14 (1980).

[4] *Davis v. Passman*, 442 U.S. 228 (1979).

- A new geographic area that raises unique issues of federal jurisdiction and sovereignty; and
- A new and never recognized action of an FBI agent investigating an officer involved in shooting or "meeting" with a decedent's family afterwards.

Plaintiff's silence on these points is the equivalent of a concession. *See, e.g., Biddle v. Hall*, 15 F.2d 840, 841 (8th Cir. 1926) (construing the silence of the district attorney as a concession). As such, and for the reasons stated in their motion to dismiss, a dismissal of all Individual Federal Defendants with prejudice is warranted.

II. The Individual Federal Defendants are Entitled to Qualified Immunity

A. Neither the Alleged Violation of an Internal Policy, Nor any other Factor Plaintiff Points to, Equates to a Constitutional Violation, or Defeat Qualified Immunity

Plaintiff asserts that the "disregard of following prescribed policies" disqualifies the Individual Federal Defendants from the protections of qualified immunity. In support of this assertion, she attaches and references broad swatches of BIA policies. However, even assuming each Individual Federal Defendants engaged in some action personally that violated internal policy – an allegation neither pled nor explained in any detail – violating an internal policy does not equate to a Constitutional violation and does not waive the defense of qualified immunity.[5] In fact, the Supreme Court has stated that it is not "fair, or sound policy, to demand official compliance with statute and regulation on pain of money damages." *Davis v. Scherer*, 468 U.S.

[5] *See Muick v. Reno*, 83 F. App'x 851, 853 (8th Cir. 2003) (citing *Arcoren v. Peters*, 829 F. 2d 671, 676-77 (8th Cir. 1987) (violation of regulation does not suffice under *Bivens*), *cert. denied*, 485 U.S. 987 (1988)*; see also Kramer v. Jenkins*, 806 F.2d 140, 142 (7th Cir.1986) ("violation of an administrative rule is not the same thing as the violation of the Constitution"); *Ramos v. Gilkey*, No. 96 C 7528, 1997 U.S. Dist. LEXIS 5244 at 5 (N.D. Ill. April 17, 1997) (finding federal employees can "violate a federal regulation without violating the Constitution"); *Gibson v. Federal Bureau of Prisons*, 121 Fed. Appx. 549, 551 (5th Cir. 2004) ("violation of a prison regulation without more does not state a constitutional violation"). *Blair v. Anderson*, No. 8:07CV295, 2011 U.S. Dist. LEXIS 22165 at *7 (D. Neb. Mar. 4, 2011) (finding violations of internal policies are irrelevant to whether a constitutional violation occurred).

183, 196 (1984) (internal citations omitted). The Court specifically notes that "officials [such] as police officers … to say nothing of higher level executives who enjoy only qualified immunity, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. . ." *Id.* As the Court explained, "[t]hese officials are subject to a plethora of rules, often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively." *Id.* But at its core, the violation of such policy is not tantamount to a constitutional violation. *Id*. at 194 (noting that "officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision."); *see also Muick v. Reno*, 83 F. App'x at 853.

Plaintiff's opposition also continues to focus on and improperly conflate the alleged warrant confusion and lack of knowledge of who owned the subject property with the allegation of excessive force. *See* Compl. at 2-5 (referencing the "unreasonable search with no probable cause;" the "disproportionate relationship between the need for the use of the force and the amount of force used;" entry into the "homestead" without approval; and "act[ing] in an illegal and unconstitutional manner as it pertains to excessive force" as the alleged constitutional violations). However, the Supreme Court has held that such conflation is without merit. *Cnty. of Los Angeles v. Mendez*, 581 U.S. 420, 428 (2017) ("An excessive force claim is a claim that a law enforcement officer carried out an unreasonable seizure through a use of force that was not justified under the relevant circumstances. It is not a claim that an officer used reasonable force after committing a distinct Fourth Amendment violation such as an unreasonable entry."). Despite being presented with case law disproving her theory, plaintiff continues to assert –

without any supporting case law[6] – that the alleged faulty warrant in this case is relevant to the constitutionality of the use of force. It is not.

Furthermore, despite the denial in her opposition, Plaintiff's Complaint acknowledges that prior to the decedent's death there was an "incident" in Bottineau County. Per the same NDBCI report that Plaintiff relies on throughout her entire Complaint, the decedent used a gun in that incident. *See* ECF 65 at 9. Thus, it was not unreasonable for the officers pursuing him to believe he was still armed.[7] *See Kohorst v. Smith*, 968 F.3d 871, 877 (8th Cir. 2020). Based on this serious offense, it was objectively reasonable for the BIA officers to treat the decedent as a potential suspect who posed a threat to officer safety.

Not only did the incident in Bottineau County support the reasonableness of the use of force here, Plaintiff cannot ignore that the NDBCI report she relies on and incorporates in numerous instances in her Complaint also indicates the decedent had a weapon and fired it that night on the porch, leaving shell casings. *See Sinclair v. City of Des Moines*, 268 F.3d 594, 596 (8th Cir. 2001) ("[N]o constitutional or statutory right exists that would prohibit a police officer from using deadly force when faced with an apparently loaded weapon."); *Shannon v. Koehler*, 616 F.3d 855, 863 (8th Cir. 2010) ("[T]here can be no doubt that officers are permitted to use force when their safety is threatened."). In short, none of plaintiff's argument can overcome her

[6] Plaintiff's citation to *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), partially supports the Individual Federal Defendants position because it specifically held that only the federal government could prosecute Indians for major crimes committed in Indian country, but is largely irrelevant as this case has nothing to do with the disestablishment of Indian reservations.

[7] Plaintiff's Complaint does not acknowledge that the decedent was armed but as the individuals noted in their MTD, even assuming he was unarmed, the officers had reasonable *belief* that he was in possession of a firearm. *See* Mem, ECF No. 66 at fn 10, and cases cited therein.

failure to establish a constitutional violation as required to defeat dismissal under the first prong of qualified immunity.

B. Plaintiff Still Fails to Allege Personal Involvement by the Individual Federal Defendants

Plaintiff's opposition still fails to address the other component of prong one of qualified immunity, pleading facts to indicate "each individual defendant's personal involvement in the alleged violation." *White v. Jackson*, 865 F.3d 1064, 1081 (8th Cir. 2017); *S.M. v. Krigbaum*, 808 F.3d 335, 340 (8th Cir. 2015). Despite Plaintiff's inclusion of additional allegations in her opposition, this defect is still not cured as the additional facts about other incidents and interactions, *see* Answer Brief for Motion to Dismiss, ECF No. 76 at 5-8, are irrelevant to the allegations at hand. And, as previously stated, Plaintiff is unable to amend her pleading through her opposition brief.[8] Thus, the determination turns only on what is pled in her Complaint.

Plaintiff's Complaint:

- Refers to the defendants collectively;
- Fails to identify what officers were present at the time of the incident;
- Fails to identify the role of any officer with respect to the alleged warrant; and
- Only specifically mentions Special Agent Mesman and Lt. Gourneau, merely claiming that Gourneau offered to pursue the decedent in response to a call reporting the shooting in Bottineau County, *see* Compl. at 4-5, and that Mesman was present at a meeting on February 18, 2021, with the decedent's family. *Id*.

None of the aformentioned allegations are sufficient to state a claim. At best, Plaintiff could argue she made one relevant allegation against one defendant, Officer Parisien, by stating he

[8] *See* supra fn 2.

fired his weapon that night of decedent's death. But for the reasons stated above, even if he fired the fatal shot, such conduct was not an unconstitutional use-of-force. Put simply, Plaintiff's Complaint does not allege "who is alleged to have done what to whom" and thus is unable "to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state." *Robbins*, 519 F.3d at 1249–50; *see also Lanman v. Hinson*, 529 F.3d 673, 684 (6th Cir. 2008). Thus, plaintiff has not adequately alleged personal participation.

C. There Was No Violation of a Clearly Established Right

Plaintiff notes she is aware that "[q]ualified [i]mmunity shields executive officials and or/officers from civil liability when 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *See* Answer Brief for Motion to Dismiss, ECF No. 76 at 3. However, despite this fact, Plaintiff fails, in the face of the aforementioned details and controlling caselaw, to explain what such a clearly established right might be. Instead, she merely concludes there was a "disproportionate relationship between the need for the use of the force and the amount of force used." Here, the Individual Federal Defendants are unaware of any case law that would have put every reasonable officer on notice that the Fourth Amendment required anything different than what five officers on the scene did in this case: shot at an individual they *reasonably believed* to be armed (and who as it turned out was armed and discharged his own weapon repeatedly on the porch that night). *E.g.*, *Kohorst*, 968 F.3d at 877 and Mem, ECF No. 66 at fn 10, and cases cited therein, (granting qualified immunity in use of force cases even where the subject ended up bring unarmed). Dismissal with prejudice is thus warranted.

CONCLUSION

For the reasons stated above, the Individual Federal Defendants respectfully requests that the Court grant their Motion and dismiss them from the case with prejudice.

Dated: July 19, 2023

Respectfully submitted,

C. SALVATORE D'ALESSIO, JR.
Director, Torts Branch

MARY HAMPTON MASON
Senior Trial Counsel, Torts Branch

/s/ Chibogu Nneka Nzekwu
CHIBOGU NNEKA NZEKWU
Trial Attorney
New York Reg. No.5515994
Torts Branch, Civil Division
United States Department of Justice
P.O. Box 7146, Ben Franklin Station
Washington, D.C. 20044
Phone: (202) 616-4325
Fax: (202) 616-4314
E-mail: Chibogu.n.nzekwu@usdoj.gov
Attorneys for Lt. Kelan Gourneau, Officer Michael Slater, Officer Evan Parisien, Officer Heather Baker, Chief Earl Charbonneau, and Special Agent Reed Mesman in their Individual Capacities