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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

PARDEEP KUMAR, Plaintiff, vs. PATRICK SCHILDT, VIOLET SCHILDT, KENNETH BIRD, in his individual and official capacity, and LAURA SOLLARS, in her individual and official capacity, Defendants.	CV 24-65-GF-JTJ REPLY BRIEF IN SUPPORT OF KENNETH BIRD AND LAURA SOLLARS' MOTION TO DISMISS

Even taking Kumar's allegations as true, his Complaint and response to the motions to dismiss show this case is another attempt to create federal jurisdiction where none exists. Kumar claims BIA employees "detained" him (they did not) and prevented him from accessing property pursuant to an order that was reversed and invalidated by the Blackfeet Tribal Court—he was never entitled to access in the first place. And he makes no plausible argument as to how he was damaged in any way. Indeed, since the Tribal Court ruled he was not permitted to access the property, he could not have been damaged by any purported failure to access it. While the Court must accept Kumar's well-pleaded allegations as true on a motion to dismiss, it does not accept bald, conclusory allegations; unwarranted deductions of fact; or unreasonable inferences. *See, e.g.*, *Boudette v. Oskerson*, 2022 WL 16531819, at *2 (D. Mont. Oct. 28, 2022) (collecting cases).

The thrust of Kumar's argument is that he has been denied timely relief as to his claims against the Schildts in Tribal Court, but it was Kumar who asked the Tribal Court to not issue a scheduling order (which it indicated it would do) and to suspend the proceedings. This Court directed Kumar to exhaust his remedies in Tribal Court, but Kumar has sought to block those proceedings. This case is Kumar's third attempt to usurp the Tribal Court's jurisdiction, and the Court should decline his invitation to do so.

Nevertheless, even taking Kumar's allegations as true, his *Bivens* claims against Superintendent Bird and Deputy Superintendent Sollars fail. No court has ever recognized a *Bivens* claim like Kumar's, and Supreme Court precedent makes clear this Court should not either.

I. Kumar's official-capacity claims under *Bivens* should be dismissed.

Kumar does not dispute that his official-capacity claims must be dismissed under Rule 12(b)(1). (*See* Doc. 23 at 5–6.) "[A] *Bivens* action can be maintained against a defendant in his or her individual capacity only, and not in his or her official capacity." *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1173 (9th Cir. 2007) (citation omitted). The Court should therefore dismiss Kumar's official-capacity claims for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1).

II. Kumar's individual-capacity *Bivens* claims should also be dismissed.

When asked to extend *Bivens*, the Court engages in a two-step inquiry. The first is to determine whether the claim is made against "a new category of defendants" or arises in a "new context" (as compared to the circumstances in *Bivens*, *Davis*, or *Carlson*). *See Hernandez v. Mesa*, 589 U.S. 93, 102 (2020). If either of these characteristics is established, the Court proceeds to the second step—determining whether any alternative remedies or processes exist and whether

any special factors weigh in favor of creating a new *Bivens* remedy. Here, both steps show Kumar's claims should be dismissed.

A. BIA employees are undisputedly a new category of defendants.

The fact that Superintendent Bird and Deputy Superintendent Sollars are BIA employees automatically places Kumar's claims beyond the contours of any recognized *Bivens* claim and triggers the second step of the *Bivens* inquiry. *See Hernandez*, 589 U.S. at 102. Kumar does not dispute that his claims are being made against a new category of defendants. Nor does he point to any case where a court has ever recognized a *Bivens* claim against a BIA employee.

On this basis alone, the Court cannot create a new *Bivens* remedy unless Kumar establishes both that (1) no alternative remedies exist and (2) there are special factors weighing in favor of creating a new *Bivens* remedy. *See Clements v. Comp. Sec. Servs., Inc.*, 2021 WL 22116, at *4 (D. Mont. Jan. 4, 2021) (observing that both showings must be made before *Bivens* can be extended). Kumar cannot establish either.

B. Kumar's claims arise in a new context.

The fact that Kumar's claims are made against a new category of defendants is a sufficient reason to proceed to the second step of the *Bivens* analysis—determining whether an alternative remedy exists and whether there are special

factors to consider. But there is an additional reason why Kumar's claims are not recognized *Bivens* claims and why the Court must proceed to the second step—Kumar's claims arise in a new context.

The Supreme Court has repeatedly made clear it is unwilling to expand *Bivens*. It has "consistently refused to extend *Bivens* liability to any new context or new category of defendants," *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001). The Court held in *Abbasi* that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017). And it reasoned that the outcome of even "the Court's three *Bivens* cases might have been different if they were decided today." *Id.* at 134. Judge Easterbrook, writing for the Seventh Circuit en banc, was perhaps more to the point: "Whatever presumption in favor of a *Bivens*-like remedy may once have existed has long since been abrogated." *Vance v. Rumsfeld*, 701 F.3d 193, 198 (7th Cir. 2012) (en banc).

Kumar's claims are legally and factually different from the only three recognized contexts—*Bivens*, *Davis*, and *Carlson*:

- In *Bivens*, the Supreme Court recognized a Fourth Amendment claim against law enforcement agents of the Federal Bureau of Narcotics who searched the plaintiff's apartment without a warrant and arrested him in connection with drug crimes. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971);

- In *Davis*, the Supreme Court recognized a Fifth Amendment Equal Protection Claim brought by a former congressional administrative assistant

against the Congressman who admitted firing her because she was a woman. *Davis v. Passman*, 442 U.S. 228, 230 (1979); and

- In *Carlson*, the Supreme Court recognized an Eighth Amendment claim asserted by the estate of a deceased prisoner against Bureau of Prison officials who allegedly failed to treat his asthma, causing his death. *Carlson v. Green*, 446 U.S. 14, 16 & n.1 (1980).

That Kumar asserts his claims under the Fourth and Fifth Amendment does not make his claims similar to *Bivens*, *Davis*, or *Carlson*. The Supreme Court has consistently rejected new *Bivens* claims even when made under the Fourth and Fifth Amendments. *See, e.g.*, *Egbert v. Boule*, 596 U.S. 482 (2022) (rejecting Fourth Amendment claim); *Hernandez*, 589 U.S. at 103–04; *Ziglar v. Abbasi*, 582 U.S. 120 (rejecting Fourth and Fifth Amendment claims).

Here, Kumar makes no attempt to align the circumstances of his Fourth Amendment claim with that of *Bivens* itself—the only recognized Fourth Amendment *Bivens* claim. Instead, he argues generally that *Bivens* was a recognized Fourth Amendment claim, so his must be, too. But that is not enough. In *Hernandez*, for example, the Supreme Court rejected an attempt to extend *Bivens* in the Fourth Amendment search-and-seizure context because the circumstances of that case differed from *Bivens* itself. *See* 589 U.S. at 103–04. Kumar must show the circumstances of his case are substantially similar to *Bivens* and not different in any "meaningful" way.

Kumar cannot make this showing; nor does he attempt to do so. The context of his case differs from *Bivens* in several meaningful ways: First, as noted above, *Bivens* involved a claim against the Federal Bureau of Narcotics, not the BIA. *See* 403 U.S. at 389–90. Second, *Bivens* involved a search and seizure by law enforcement officers, not civilian employees, as alleged in this case. *See id.* Third, *Bivens* involved a law enforcement officer searching inside a person's home, *see id.*; Superintendent Bird and Deputy Superintendent Sollars undisputedly did not search the property at issue in this case; nor was the search at a home. Fourth, unlike the officers in *Bivens*, Superintendent Bird and Deputy Superintendent Sollars undisputedly did not make an arrest or charge him criminally.[1] *See id.* Finally, unlike in *Bivens*, this case involves the potential interests of a separate sovereign—the Blackfeet Nation.

Kumar's Fifth Amendment claim likewise arises in a new context. Kumar invokes Fifth Amendment procedural and substantive due process, but the Supreme Court has never recognized a *Bivens* claim under these provisions. Instead, the Supreme Court has repeatedly rejected such claims. *See Abbasi*, 582 U.S. at 135 (citing numerous cases where the Court as rejected procedural and

[1] As discussed in the United States' opening brief, a mere threat to arrest does not amount to a Fourth Amendment violation. (*See* Doc. 14 at 31–32 (collecting cases).)

substantive due process claims under *Bivens*). So, too, has the Ninth Circuit and this court. *See, e.g.*, *Marquez v. C. Rodriguez*, 81 F.4th 1027 (9th Cir. 2023) (rejecting Fifth Amendment due process claim); *Harper v. Nedd*, 71 F.4th 1181, 1187 (9th Cir. 2023) (same); *Vega v. United States*, 881 F.3d 1146, 1153 (9th Cir. 2018) (same); *Raiser v. Gelmis*, 2023 WL 121222, at *6 (D. Mont. Jan. 6, 2023) (same); *Clements*, 2021 WL 22116, at *3 (same); *Not Afraid v. United States*, 2020 WL 6947716, at *10–*11 (D. Mont. Sept. 8, 2020) (same).

The only Fifth Amendment claim recognized by the Supreme Court is *Davis*, which was an employment discrimination claim. Kumar makes no attempt to align the circumstances of his case with that of *Davis*, and no colorable argument can be made to that effect. Instead, Kumar points to the Ninth Circuit's decision in *Lanuza*, but that case gains Kumar no ground. In *Lanuza*, the Ninth Circuit recognized a *Bivens* remedy "where a government immigration attorney intentionally submitted a forged document in an immigration proceeding to completely bar an individual from pursuing relief to which he was entitled." *Lanuza v. Love*, 899 F.3d 1019, 1034 (9th Cir. 2018). But the court explained that the claim arose in a new context and only recognized the claim after proceeding to the second step and finding that special factors weighed in favor of recognition. *See id.* at 1028–34. Thus, *Lanuza* is contrary to Kumar's contention that his Fifth

Amendment claim arises in an established context. It does not. It arises in a new context.

C. Alternative remedies exist and no special factors weigh in favor of creating a new *Bivens* remedy.

Since Kumar's claims are made against a new category of defendants and would create a new *Bivens* context, the Court must proceed to the second step of the *Bivens* inquiry. It requires Kumar to show both: (1) no alternative remedy exists for his claims and (2) special factors weigh in favor of creating a new *Bivens* remedy. Kumar fails to establish either.

When considering whether an alternative remedy exists, "[T]he relevant question is not whether the court should provide for a wrong that would otherwise go unredressed, nor does it matter that existing remedies do not provide complete relief." *Egbert*, 596 U.S. at 493 (cleaned up). "So long as Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a *Bivens* remedy." *Id.* at 498. If an alternative remedy exists, the inquiry ends, and the court should not create a new Bivens remedy. *Id.* at 493.

As discussed in the United States' opening brief, Kumar has alternative remedies. (Doc. 14 at 23–24.) He may report Superintendent Bird's and Deputy Superintendent Sollars' alleged conduct to the Department of Interior's Office of

Inspector General (OIG). (*See id.*) The Ninth Circuit and other courts have held that reporting to OIG offices is an adequate remedy that obviates the extension of *Bivens*. (*See id.*)

Kumar makes no attempt to explain why reporting to OIG would be an inadequate remedy (nor could he in light of binding Ninth Circuit law). Instead, he complains tribal court is an inadequate remedy for his claims against the Schildts. (Doc. 23 at 12–13.) The question under *Bivens*, though, is Kumar's remedy as to Deputy Bird and Deputy Superintendent Sollars, not the Schildts.

The Court should reject Kumar's claims because he fails to show there is no adequate remedy for his claims. But his claims also fail under the second step of the *Bivens* inquiry because no special factors exist that weigh in favor of creating a new *Bivens* remedy.

Kumar makes no serious effort to address this consideration. Instead, he summarily argues Superintendent Bird and Deputy Superintendent Sollars' "involvement . . . contributes to the jurisdiction complications of this case. The Blackfeet Court of Appeals has even questioned its continuing jurisdiction over the case given the BIA Defendants' recent involvement." (Doc. 23 at 13.) Kumar does not explain, though, how these considerations—even if true—are special factors weighing in favor of a new *Bivens* remedy. What is more, Kumar fails to support

his characterization of the Blackfeet Court's purported view of the case. He provides no transcript or order reflecting this sentiment. Instead, Kumar himself has asked the tribal court to abandon the case so he could improperly pursue his claims before this Court, a request in direct contravention to this Court's order that Kumar exhaust his tribal court remedies. All the while, Kumar has advanced his own, unsubstantiated allegations before the Tribal Court while Deputy Bird and Deputy Superintendent Sollars are not parties to that lawsuit (nor could they be).

There are no special factors that weigh in favor of creating a new *Bivens* remedy in this case. Kumar's allegations center on whether Superintendent Bird and Deputy Superintendent Sollars should or should not have taken various actions in connection with a tribal court order—whether they should have done more to enforce the tribal court order, whether they failed to recognize its effect, or otherwise acted inconsistently with the order. Kumar's claims directly implicate the relationship between the Executive Branch and a tribal sovereign. When a potential *Bivens* claim bears any relation separation of powers or to tribal matters, that is a factor weighing against creation of a *Bivens* remedy. *See Not Afraid,* 2020 WL 6947716, at *13–*14 (recognizing tribal relations is a special factor prohibiting creation of a *Bivens* remedy); *Martin v. Gourneau*, 2024 WL 1640945, at *10 (D.N.D. Feb. 28, 2024) (same); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565

(1903) (same); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902) (same); *Abbasi*, 582 U.S. at 135 (recognizing separation of powers is a special factor prohibiting creation of a *Bivens* remedy).

Separately, this Court explained that the economic and governmental costs associated with creating a new *Bivens* remedy is another special factor illustrating why no new *Bivens* remedy should be created. *Not Afraid*, 2020 WL 6947716, at *13; *Cole v. FBI*, 2019 WL 1102569, at *8 (D. Mont. Feb. 7, 2019).

Kumar does not address these factors in his response brief. The Court should reject his attempt to extend *Bivens*.

III. Superintendent Bird and Deputy Superintendent Sollars are entitled qualified immunity.

Finally, Kumar offers no specific argument regarding Superintendent Bird's and Deputy Superintendent Sollars' qualified immunity. Kumar argues, in generalized fashion, that he has a right to be free from unreasonable searches and seizures, so qualified immunity cannot apply. (Doc. 23 at 13–14.) Kumar, though, does not explain how Superintendent Bird and Deputy Superintendent Sollars—two civilian BIA employees—violated any federal statutory or constitutional right or violated any right that was clearly established at the time. *See Waid v. Cnty. of Lyon*, 87 F.4th 383, 387 (9th Cir. 2023). Kumar bears the burden of making this showing. *Id.* at 387–88.

Kumar has not identified any similar cases where a court concluded that civilian government employees violate any constitutional rights by preserving the status quo of a dispute while they respond to a trespassing complaint. Kumar was not placed into custody; he was not handcuffed; he was not arrested; nor was he confined in any way. Even taking Kumar's allegations as true, mere questioning and a purported threat to arrest do not violate the Fourth Amendment. (*See* Doc. 14 at 31–35 (collecting cases).) Moreover, Kumar cannot claim to have been unconstitutionally denied access to the property when the only basis for access—the tribal court TRO/PI—was determined to be unlawful and invalidated. (Doc. 1 at ¶ 46; Doc. 14-5.) Kumar never had a legitimate basis to access the property in the first place, and he could not have been damaged in any way for any inability to access it. Even so, Superintendent Bird and Deputy Superintendent Sollars advised Blackfeet law enforcement that BIA would not take any action related to the property because—as this Court already concluded—the tribal court is responsible for resolving this dispute. (*See* Doc. 1 at ¶ 45; Doc. 14-3 at ¶ 11.)

Even if Kumar's *Bivens* claims are actionable, Superintendent Bird and Deputy Superintendent Sollars are entitled to qualified immunity. The Court should therefore dismiss Kumar's claims on this alternative basis.

CONCLUSION

The Court should dismiss Kumar's claims against Superintendent Bird and Deputy Superintendent Sollars.

DATED this 19th day of November 2024.

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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 2,813 words, excluding the caption and certificates of service and compliance.

DATED this 19th day of November 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November 2024, a copy of the foregoing document was served on the following person by the following means.

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