APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1407

JEREMY GRABER,

v.

POLICE OFFICER JOHN DOE II, Badge No. in his individual and official capacity as an officer for the city of Philadelphia Police Department; POLICE OFFICER JOHN DOE III, Badge No. in his individual and official capacity as an officer for the city of Philadelphia Police Department; POLICE OFFICER JOHN DOE IV, Badge No. in his individual and official capacity as an officer for the city of Philadelphia Police Department; SPECIAL AGENT MICHAEL BORESKY, in his individual and official capacity as a Special Agent for the U.S. Secret Services; POLICE INSPECTOR JOEL DALES, in his individual and official capacity as an Inspector for the city of Philadelphia,

SPECIAL AGENT MICHAEL BORESKY,

Appellant.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-18-cv-03168)

U.S. District Judge: Honorable Cynthia M. Rufe

Argued
October 4, 2022

Before: HARDIMAN, SHWARTZ, and NYGAARD,
Circuit Judges

(Filed: February 10, 2023)

OPINION OF THE COURT

SHWARTZ, Circuit Judge.

In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court held that a cause of action existed against federal agents who violated the Fourth Amendment. Relying on Bivens, Plaintiff Jeremy Graber sued Defendant Michael Boresky, a Special Agent for the United States Secret Service, asserting that Boresky violated his Fourth Amendment rights by arresting, detaining, and charging him with a crime without probable cause. In an order denying a motion to dismiss, the District Court held that a Bivens claim could be brought against Boresky. Thereafter, the Court dismissed Boresky's motion for summary judgment without prejudice based upon qualified immunity because it found that discovery was needed to determine whether Boresky was entitled to qualified immunity. At oral argument before our Court, Boresky stated that he is not

challenging the qualified immunity ruling but argued that we should review the District Court's Bivens ruling. Because the Bivens ruling is not a final decision and is not appealable under the collateral order doctrine, we lack jurisdiction to consider that interlocutory ruling and we must dismiss this appeal.

I

A

In 2016, Philadelphia hosted the Democratic National Convention (the "Convention"). The Department of Homeland Security ("DHS") designated the event as a National Special Security Event ("NSSE"). Once an event is designated an NSSE, federal agencies coordinate operational security with state and local law enforcement. Relevant here, the Secret Service "coordinate[d] the development and implementation of the overall operational security plan." App. 53.

In the lead-up to the Convention, the Secret Service announced that access to certain areas around the Convention would be restricted (the "Restricted Area").[1] The Restricted Area was surrounded by an eight-foot fence.

On the evening of July 27, 2016, Plaintiff joined political protests outside the Restricted Area.[2] Protestors breached the gated perimeter around the

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[1] The Restricted Area was Broad Street from 7th Street to 20th Street, the cross-streets between Packer Avenue to I-95, and the entirety of FDR Park.

[2] Plaintiff, a paramedic, was also there to provide emergency medical aid to protestors.

Restricted Area. The Philadelphia Police Department ("PPD") apprehended those within the Restricted Area. Plaintiff was one of seven individuals taken into custody. PPD did not prepare any arrest paperwork for Plaintiff.

Thereafter, the Assistant to the Special-Agent-in-Charge of the Secret Service in Philadelphia informed Boresky of the arrests and told him that the arrestees were to be charged with violating 18 U.S.C. § 1752,[3] and that Boresky would serve as the affiant for the criminal complaint.[4] The next morning, Special Agent Aaron McCaa e-mailed Boresky a synopsis of the events leading to the arrests as well as photographs of the fence and evidence seized from the arrestees.

Boresky appeared before a Magistrate Judge and signed an affidavit identifying Plaintiff as one of the seven individuals arrested inside the Restricted Area. Boresky attested that the contents of the affidavit were based upon his "personal knowledge, experience and training," "information developed during the course of this investigation," and "information . . . imparted to [him] by other law enforcement officers." App. 77. Boresky admits that he was not present at the arrest and did not write the affidavit but reviewed it for accuracy based upon the information in McCaa's

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[3] 18 U.S.C. § 1752 prohibits persons and groups from entering a restricted area where a Secret Service protectee is or will be visiting or an area restricted in conjunction with an event designated as a special event of national significance.

[4] The night before Plaintiff's arrest, Boresky served as the affiant for criminal complaints against four other individuals arrested for unlawfully entering the Restricted Area.

synopsis. Boresky did not view any video evidence before swearing out the affidavit.

Plaintiff was held overnight at the Federal Detention Center. Plaintiff's counsel thereafter provided Fox 29 News video clips to the Government confirming that Plaintiff never passed through the fence. Plaintiff was released and the charges were dismissed.

B

Citing Bivens, Plaintiff sued Boresky for false arrest, unlawful detention, and false charges. [5] Boresky moved to dismiss, arguing that Plaintiff could not pursue his Fourth Amendment claim against him under Bivens. Graber v. Dales, No. 18-CV-3168, 2019 WL 4805241, at *1-2 (E.D. Pa. Sept. 30, 2019) ("Graber I"). [6] The District Court employed the Supreme Court's two-step framework set forth in Ziglar v. Abbasi, 137 S. Ct. 1843 (2017), which requires a court to first consider whether a plaintiff's claim presents a context in which the Supreme Court had not previously recognized a Bivens claim and, if so, whether special factors counsel against extending Bivens to permit such a claim. Graber I, 2019 WL 4805241, at *3 (citing Ziglar, 137 S. Ct. at 1857-60).

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[5] Plaintiff also asserted First Amendment and conspiracy claims against all officers.

[6] The District Court dismissed the claims against Boresky in his official capacity for lack of subject-matter jurisdiction because the United States had not waived sovereign immunity for constitutional tort claims as well as Plaintiff's First Amendment and civil conspiracy claims against Boresky in his individual capacity for failure to state a claim. Graber I, 2019 WL 4805241, at *2, 7-9.

The Court denied Boresky's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), concluding that Plaintiff's Fourth Amendment claim, predicated on the assertion that he was arrested and charged without probable cause, did not present a "new Bivens context," id. at *3, and thus presented a basis for relief. The Court further held that, even if Plaintiff's claim arose in a new context, special factors did not counsel against extending Bivens to permit Plaintiff's claim to proceed. Id. at *4-5.

The case then proceeded to discovery. Amid discovery disputes between the parties, Boresky filed a motion for summary judgment based on qualified immunity and asked to stay discovery pending resolution of that motion. Graber v. Dales, 511 F. Supp. 3d 594, 595 (E.D. Pa. 2021) ("Graber II"). Plaintiff responded by filing a declaration under Federal Rule of Civil Procedure 56(d), asserting that he needed discovery to respond to Boresky's summary judgment motion.

The District Court concluded that Boresky's entitlement to qualified immunity hinged on whether it was "objectively reasonable" for him to believe that there was probable cause to detain and charge Plaintiff, and this required consideration of "evidence surrounding the statements and communication upon which Defendant Boresky relied." Id. at 599. Because Plaintiff had no opportunity to conduct any discovery, the Court concluded that it would be "wholly inequitable" to permit Boresky to rely upon affidavits and communications to which Plaintiff had no access and denied the qualified immunity motion without prejudice to permit discovery. Id. at 600.

Boresky appeals, waiving his challenge to the qualified immunity ruling and asking us to review whether the District Court erred in holding Plaintiff could bring a Bivens claim. Oral Argument at 5:52-6:02, Graber v. Boresky (Oct. 4, 2022) (No. 21-1407), https://www2.ca3.uscourts.gov/oralargument/audio/21-1407Graberv.SpecialAgentMichaelBoresky.mp3.

II[7]

A

At the outset, we must ensure we have jurisdiction over this appeal. While we would have had jurisdiction to review an interlocutory appeal of the District Court's qualified immunity order,[8] Mack v.

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[7] The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

[8] Where a district court defers ruling on qualified immunity to permit further fact discovery, as is the case here, "implicit in that ruling" is the legal conclusion that the plaintiff adequately pled a violation of clearly established law, and thus the order is immediately appealable. Oliver v. Roquet, 858 F.3d 180, 189 (3d Cir. 2017) (holding appellate jurisdiction existed despite factual component of the court's qualified immunity ruling); see also In re Montgomery Cnty., 215 F.3d 367, 370 (3d Cir. 2000) (concluding that an "implicit denial" of immunity claims is "sufficient to confer appellate jurisdiction"). The District Court's order dismissing the motion seeking summary judgment based on qualified immunity to allow for discovery contains the implicit legal conclusion that Bivens is available in this context. See Vanderklok v. United States, 868 F.3d 189, 197 (3d Cir. 2017) (characterizing Bivens remedy as a "threshold question of law" that "is directly implicated by the defense of qualified immunity"); see also Wilkie v. Robbins, 551 U.S. 537, 549 n.4 (2007) (recognizing appellate courts have jurisdiction over interlocutory appeals challenging a Bivens ruling in a qualified immunity appeal).

Yost, 968 F.3d 311, 318 (3d Cir. 2020), Boresky no longer challenges the qualified immunity ruling. As a result, we must determine whether we can review the Court's Rule 12(b)(6) Bivens ruling untethered from a challenge to a qualified immunity ruling. Boresky contends that we have jurisdiction under the collateral order doctrine.

We have jurisdiction over "appeals from all final decisions of the district courts." 28 U.S.C. § 1291. There are, however, "a small class of rulings, not concluding the litigation, but conclusively resolving claims of right separable from, and collateral to, rights asserted in the action." Will v. Hallock, 546 U.S. 345, 349 (2006) (quotation marks and citation omitted). Such interlocutory orders are appealable under the collateral order doctrine if they: (1) "conclusively determine the disputed question"; (2) "resolve an important issue completely separate from the merits of the action"; and (3) are "effectively unreviewable on appeal from a final judgment." Id. (citation omitted). The Supreme Court has described these elements as "stringent" to ensure that the collateral order doctrine does not "overpower the substantial finality interests § 1291 is meant to further." Id. at 349-50; see also Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994) (describing the collateral order doctrine as a "narrow exception" to the final order requirement). Orders falling into this narrow group "are sufficiently important and collateral to the merits [such] that they should nonetheless be treated as final." Will, 546 U.S. at 347 (quotation marks and citation omitted).

A Bivens ruling does not fall within this small group of orders that require interlocutory review under the collateral order doctrine: a Bivens ruling can be effectively reviewed after final judgment because, unlike various immunity doctrines, a Bivens ruling is not meant to protect a defendant from facing trial. The Supreme Court has identified several types of orders that are entered to protect a defendant from facing trial, and each would be effectively unreviewable if considered after final judgment is entered: orders denying absolute immunity, orders denying qualified immunity, orders denying Eleventh Amendment immunity, and adverse double jeopardy rulings. Id. at 350 (collecting cases). An order denying immunity (or double jeopardy protection) from suit cannot be "reviewed 'effectively' after a conventional final judgment," id. at 351, because the suit has already occurred by the time the appeal is reviewed, and thus the purpose of the immunity (or double jeopardy protection) is defeated, see, e.g., Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 42 (1995) ("[A]n official's qualified immunity is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." (quotation marks, citation, and emphasis omitted)).[9] Moreover, the immunity

[9] The dissent is correct that the collateral order doctrine allows review of more than orders addressing assertions of immunity, and each of the additional examples the dissent cites is similarly reviewable under the collateral order doctrine because each involves issues that are "in danger of becoming moot," and thus unreviewable, following a final judgment. United States v. Mitchell, 652 F.3d 387, 397 (3d Cir. 2011) (en banc) (citation omitted) (order prohibiting pretrial collection of defendant's DNA

doctrines in particular are meant to allow government officers to avoid "the burdens of litigation" and to carry out their duties without the threat of a "full trial . . . whenever they acted reasonably in the face of law that is not 'clearly established.'" Will, 546 U.S. at 352. Thus, immediate review of orders denying immunity furthers the goal of the immunity doctrines, which is to avoid trial, while also "honoring the separation of powers," "preserving the efficiency of government," and encouraging "the initiative of its officials." Id.

Bivens, however, is not an immunity doctrine. See, e.g., F.D.I.C. v. Meyer, 510 U.S. 471, 483-84 (1994) (observing that "whether there has been a waiver of sovereign immunity" is "analytically distinct" from whether substantive law upon which plaintiff relies provides a basis for relief). Rather, it is a judicially created cause of action that allows a plaintiff to sue a federal officer for damages for constitutional

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sample); see also United States v. Bellille, 962 F.3d 962, 737-38 (3d Cir. 2020) (order denying motion to withdraw as counsel); Doe v. Coll. of N.J., 997 F.3d 489, 494 (3d Cir. 2021) (order denying motion to proceed anonymously); United States v. Wecht, 537 F.3d 222, 228-29 (3d Cir. 2008) (order denying the public's right of access to a criminal trial). In other words, each of these issues, unlike a Bivens ruling, involves a right that would be "irretrievably lost" absent an immediate appeal. Praxis Props., Inc. v. Colonial Sav. Bank, S.L.A., 947 F.2d 49, 60 (3d Cir. 1991), as amended on denial of reh'g (Nov. 13, 1991) (order denying statutory right to a 90-day stay). The issue of whether there is a cognizable Bivens claim does not become moot following a final judgment. Instead, a litigant can continue to assert a defense under Bivens and seek review of that defense after the entry of a final judgment because his right not to be held liable is not "irretrievably lost" absent an interlocutory appeal.

violations. Bivens actions are very limited, and new ones cannot be created where "there is any rational reason (even one) to think that Congress is better suited to 'weigh the costs and benefits of allowing a damages action to proceed.'" Egbert v. Boule, 142 S. Ct. 1793, 1805 (2022) (emphasis omitted) (quoting Ziglar, 137 S. Ct. at 1858). The Court's focus in determining whether such a claim can be brought, therefore, is on whether courts should be in the business of creating avenues for liability, which is distinct from whether a defendant is immune from suit altogether.

The Supreme Court itself has recognized this difference and the impact it has on the ability to seek immediate review of a Bivens ruling. The Court stated that "if simply abbreviating litigation troublesome to Government employees were important enough for [collateral order] treatment, [then] collateral order appeal would be a matter of right whenever the Government lost a motion to dismiss under the Tort Claims Act, or a federal officer lost one on a Bivens action, or a state official was in that position in a case under 42 U.S.C. § 1983, or Ex parte Young."[10] Will,

[10] The dissent characterizes the Supreme Court's statement as dicta. Even if that label is accurate, we have held that statements made by the Supreme Court in "dicta are highly persuasive." Galli v. N.J. Meadowlands Comm'n, 490 F.3d 265, 274 (3d Cir. 2007). We have observed that, because the "Supreme Court uses dicta to help control and influence the many issues it cannot decide because of its limited docket," failing to follow those statements could "frustrate the evenhanded administration of justice by giving litigants an outcome other than the one the Supreme Court would be likely to reach were the case heard there." Official Comm. of Unsecured Creditors of Cybergenics

546 U.S. at 353-54 (rejecting application of the collateral order doctrine to the Federal Tort Claims Act's judgment bar). In short, the Supreme Court has recognized that a Bivens ruling is different from an immunity ruling and is not eligible for interlocutory appeal under the collateral order doctrine. Id.[11]

Accordingly, Boresky's assertion that there is no cause of action under Bivens is simply a defense to liability, which can be effectively reviewed after the entry of final judgment. Cf. Swint, 514 U.S. at 41-43 (holding that a denial of a motion for summary judgment on a Monell claim is not appealable under the collateral order doctrine because the defendant's argument would amount to a "mere defense to liability" that could be "reviewed effectively on appeal from final judgment"). Unlike an immunity ruling, any error in a Bivens ruling can be cured on appeal at the end of the case.[12] Thus, an order denying a motion

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Corp. v. Chinery, 330 F.3d 548, 561 (3d Cir. 2003) (quoting In re McDonald, 205 F.3d 606, 612-613 (3d Cir. 2000)).

[11] The dissent's observations about separation of powers are well-taken but they do not support creating an avenue for interlocutory review of an issue that goes directly to liability. The Supreme Court's Bivens jurisprudence cautions courts not to create new causes of action, as that is the job of the legislature. See Egbert, 142 S. Ct. at 1802 (2022). However, whether a court has created a cause of action or, in the language of Bivens, a plaintiff presented a context in which such a Bivens claim had not been recognized, presents questions about whether the plaintiff has stated a claim upon which relief may be granted, which is the type of ruling regularly reviewed after the entry of final judgment.

[12] Because an order denying dismissal based upon Bivens fails the third factor from Will, we need not consider whether the first or second Will factors—whether the order "conclusively

to dismiss or for summary judgment based upon Bivens, untethered to an order denying qualified immunity, is not appealable under the collateral order doctrine.[13]

A sister circuit court reached the same conclusion. In Himmelreich v. Federal Bureau of Prisons, 5 F.4th 653 (6th Cir. 2021), the Court of Appeals for the Sixth Circuit held that an appellate court lacks jurisdiction under the collateral order doctrine over a Bivens ruling absent an appealable qualified immunity order. Id. at 659. The court assumed without deciding that the Bivens order there, which permitted plaintiff to proceed on his First Amendment claim against a federal officer, was a conclusive ruling and that the order resolved an issue of separation of powers distinct from the plaintiff's constitutional claim. Id. at 661. However, the court concluded that the issue could be adequately reviewed following final judgment. Id. at 662. Like us, the court also observed that Bivens provides a "remedy for unconstitutional conduct" but "does not grant defendants entitlement not to stand trial." Id.

Because a Bivens ruling can be effectively reviewed after the entry of final judgment, it is not an order that falls within the small class of orders that are

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determine[d] the disputed question" or "resolve[d] an important issue completely separate from the merits of the action," 546 U.S. at 349—are satisfied.

[13] The Supreme Court counsels appellate courts to hesitate in enlarging the types of orders eligible for review under the collateral order doctrine that are not independently appealable nor certified for review under 28 U.S.C. § 1292(b). Swint, 514 U.S. at 47-48.

immediately appealable under the collateral order doctrine and, as a result, we lack appellate jurisdiction to review the District Court's Bivens ruling.[14]

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[14] The availability of an alternative appellate mechanism pursuant to 28 U.S.C. § 1292(b) also counsels against the position taken by the Government and the dissent. For difficult questions of law "in exceptional cases," parties may seek interlocutory review by a court of appeals. Milbert v. Bison Labs., Inc., 260 F.2d 431, 433 (3d Cir. 1958). A district court may grant a certificate of appealability under § 1292(b) when its order: "(1) involve[s] a 'controlling question of law,' (2) offer[s] 'substantial ground for a difference of opinion' as to its correctness, and (3) if appealed immediately 'materially advance[s] the ultimate termination of the litigation.'" Katz v. Carte Blanche Corp., 496 F.2d 747, 754 (3d Cir. 1974) (en banc) (quoting § 1292(b)). Certification is available for purposes that address the Government's concerns here: avoiding "a wasted[,] protracted trial" when "a pretrial order erroneously overrul[ed] a defense going to the right to maintain the action." Id. (citing legislative history of § 1292(b)). One of § 1292(b)'s regular uses is to permit interlocutory appeal to decide whether a statute permits a private cause of action. See, e.g., Zeffiro v. First Pa. Banking & Tr. Co., 623 F.2d 290, 292 (3d Cir. 1980) (whether an injured investor has a federal cause of action under the Trust Indenture Act of 1939); Northstar Fin. Advisors, Inc. v. Schwab Invs., 615 F.3d 1106, 1114-15 (9th Cir. 2010) (whether there is a private right of action to enforce § 13(a) of the Investment Company Act of 1940); Love v. Delta Air Lines, 310 F.3d 1347, 1350-51 (11th Cir. 2002) (whether the Air Carrier Access Act of 1986 implies a private right of action). That determination and the availability of a Bivens remedy present a question of law in the same category: can the plaintiff sue at all? The discretionary availability of § 1292(b)'s mechanism makes us hesitate to agree that an order allowing a Bivens claim to proceed is one within "that small class" of orders "too important to be denied review and too independent of the cause itself to require that appellate

III

For the foregoing reasons, we will dismiss this appeal.

consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

Jeremy Graber v. Special Agent Michael Boresky et al.,

No. 21-1407

HARDIMAN, *Circuit Judge,* dissenting.

This appeal is unusual. Special Agent Michael Boresky could have filed a meritorious interlocutory appeal of the District Court's order dismissing without prejudice his motion for summary judgment on qualified immunity. Instead, Boresky asks us to be the first appellate court to hold that an order denying a motion for summary judgment that challenges the existence of a *Bivens* cause of action is appealable before a final judgment is entered. This gambit implicates two conflicting trends of Supreme Court jurisprudence: the Court's careful policing of the expansion of the collateral order doctrine established in *Cohen v. Beneficial Industrial Loan Corporation,* 337 U.S. 541 (1949), and its repeated refusal to allow new constitutional tort actions against federal officers under *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971). It's hard to predict how the Supreme Court would resolve this conflict. But because I think the Court will allow interlocutory appeals in cases like this one—where the constitutional separation of powers is imperiled—I respectfully dissent.

I

In *Swint v. Chambers County Commission,* 514 U.S. 35 (1995), the Supreme Court identified appealable collateral orders as those that (1) are "conclusive," (2)

"resolve important questions separate from the merits," and (3) are "effectively unreviewable on appeal from the final judgment." 514 U.S. at 42. The majority opinion holds that Boresky failed to satisfy the third criterion. In doing so, it focuses on four types of collateral orders the Supreme Court has recognized, observing that each rejects a defense the purpose of which is to avoid suit altogether. Maj. Op. 10–12. The majority then notes that *Bivens* is "not an immunity doctrine" but rather addresses "whether courts should be in the business of creating avenues for liability." *Id.* at 11–12. I agree with those propositions.

But an immunity is neither sufficient nor necessary for an order denying a claim to be "effectively unreviewable on appeal." That criterion is met if an order denies a potentially dispositive pretrial defense that implicates a sufficiently important public value. *See Will v. Hallock,* 546 U.S. 345, 352–53 (2006). And we have recognized collateral orders that do not involve immunity defenses at all, much less immunity from suit. *See, e.g., United States v. Mitchell,* 652 F.3d 387, 398 (3d Cir. 2011) (en banc) (orders prohibiting pretrial collection of a criminal defendant's DNA sample); *United States v. Bellille,* 962 F.3d 731, 737–38 (3d Cir. 2020) (orders denying motions to withdraw as counsel in criminal cases); *Doe v. Coll. of N.J.,* 997 F.3d 489, 494 (3d Cir. 2021) (orders denying motions to proceed anonymously); *Chehazeh v. Att'y Gen.,* 666 F.3d 118, 139 (3d Cir. 2012) (*sua sponte* BIA orders to reopen removal proceedings); *United States v. Wecht,* 537 F.3d 222, 229 (3d Cir. 2008) (orders denying the public's right of access to a criminal trial); *Praxis Properties, Inc. v. Colonial Sav. Bank, S.L.A.,* 947 F.2d

49, 61 (3d Cir. 1991), *as amended on denial of reh'g* (Nov. 13, 1991) (orders denying requests for a litigation stay under 12 U.S.C. § 1821(d)(12)). The Supreme Court has done likewise. *See Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 170–72 (1974) (orders allocating the costs of providing notice to class members); *Stack v. Boyle,* 342 U.S. 1, 6 (1951) (orders denying motions to reduce bail). And several kinds of collateral orders involve interests that are less weighty than the constitutional value imperiled by the District Court's *Bivens* authorization: the separation of powers. *See, e.g., Cohen,* 337 U.S. at 546–47 (orders rejecting the applicability of security laws enacted after the initiation of derivative shareholder suits); *Praxis Properties,* 947 F.2d at 61 (orders denying requests for a litigation stay).

The majority leans on the Supreme Court's decision in *Will v. Hallock,* stating: "the Supreme Court has recognized that a *Bivens* ruling is different from an immunity ruling and *is not eligible for interlocutory appeal under the collateral order doctrine.*" Maj. Op. 13 (emphasis added). *Will* did not so hold. The issue there was whether a "refusal to apply the judgment bar of the Federal Tort Claims Act is open to collateral appeal." 546 U.S. at 347. The Court held it was not. *Id.*

What's more, *Will* characterized the interest supporting the FTCA's judgment bar as "avoidance of litigation for its own sake." *Id.* at 353. The Court contrasted this "mere avoidance" of trial generally with avoidance of a trial that would "imperil a substantial public interest"; the latter is what counts under *Swint's* third criterion. *Id.* "[I]f," the Court

concluded, "simply abbreviating litigation troublesome to Government employees were important enough for *Cohen* treatment," a 28 U.S.C. § 1291 appeal would lie whenever a federal officer lost a motion to dismiss "on a *Bivens* action"—or the Tort Claims Act, 42 U.S.C. § 1983, or *Ex parte Young,* 209 U.S. 123 (1908). *Id.* at 353–54.

The majority cites this sentence from *Will* as evidence of the Supreme Court's "recogni[tion]" that an order authorizing a *Bivens* cause of action is ineligible for interlocutory appeal. Maj. Op. 13. I don't put as much stock as my colleagues in the Court's drive-by dictum about *Bivens,* primarily because of several substantive points *Will* made. First, the Court noted that the FTCA's judgment bar isn't important enough to merit interlocutory appeal of orders denying its applicability because it resembles the defense of claim preclusion, which "has not been thought to protect values so great that only immediate appeal can effectively vindicate them." *Will,* 546 U.S. at 355. *Will* also contrasted the judgment bar's "essential procedural element"—the bar can be raised "only after a case under the Tort Claims Act has been resolved in the Government's favor"—with a qualified immunity defense, which is "timely from the moment an official is served with a complaint." *Id.* at 354. The defense that no *Bivens* cause of action lies is just like qualified immunity in this respect. Finally, *Will* acknowledged that "honoring the separation of powers" and "preserving the efficiency of government and the initiative of its officials" were "particular value[s] of a high order" sufficient to warrant § 1291 interlocutory review. *Id.* at 352. Those are precisely

the values imperiled by erroneous *Bivens* authorizations.

II

I agree with my colleagues that we must police the parameters of the collateral order class "stringent[ly]." Maj. Op. 9 (quoting *Will,* 546 U.S. at 349). That class must remain of "modest scope." *Will,* 546 U.S. at 350. Yet we do recognize new collateral orders. *See, e.g., Bellille,* 962 F.3d at 737–38; *Doe,* 997 F.3d at 494. Our task is to honor the collateral order doctrine's "internal logic" and "strict[ly] appl[y]" the *Cohen* criteria restated in *Swint. Ashcroft v. Iqbal,* 556 U.S. 662, 672 (2009).

A

The majority concludes that we lack jurisdiction because the order in question resolves an issue that would not be "effectively unreviewable on appeal" after final judgment. I understand that criterion—*Swift*'s third—differently than my colleagues.

The touchstone for that criterion is the importance of the values imperiled by an erroneous ruling. *See Will,* 546 U.S. at 351–52 ("only some orders denying an asserted right to avoid the burdens of trial qualify" under *Cohen,* namely those involving interests judged sufficiently valuable); *Sell v. United States,* 539 U.S. 166, 177 (2003) (the "importance of the constitutional issue" can distinguish appealable from non-appealable collateral orders); *Wecht,* 537 F.3d at 229 (asking whether the "value" of immediate vindication is "significant enough to justify [interlocutory] review"); *Lauro Lines s.r.l. v. Chasser,* 490 U.S. 495, 503 (1989) (Scalia, J., concurring) (post-judgment

vindication is "enough" when the interest in question is not "sufficiently important" to overcome the policies underlying the final judgment rule). So it's not enough—though it is necessary—for Boresky to invoke an interest that will be "essentially destroyed" if its vindication awaits post-trial review. *Lauro Lines,* 490 U.S. at 499. He must also invoke a "particular value of a high order" or a "substantial public interest" to tip the scale. *Will,* 546 U.S. at 352–53. Whether delayed review would imperil such a value is the collateral order doctrine's "decisive consideration." *Mohawk Industries, Inc. v. Carpenter,* 558 U.S. 100, 107 (2009).

As those precedents suggest, not only those prerogatives flying under the banner of "immunity" can be collateral.[1] First, not every denial of an immunity defense warrants interlocutory review. *See, e.g., Van Cauwenberghe v. Biard,* 486 U.S. 517, 524 (1988) (denial of a "claim of immunity from civil service of process" is not a collateral order); *We, Inc. v. City of Philadelphia,* 174 F.3d 322, 326 (3d Cir. 1999) (denial of "Noerr-*Pennington* immunity" is not a collateral order).

Second, not every collateral order denies an immunity claim. *Cohen* itself held that an order rejecting the applicability of a security law enacted after the initiation of a derivative shareholder suit was "final" under § 1291. 337 U.S. at 546–47. The Supreme Court has also recognized orders allocating

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[1] Since there is sometimes "no obviously correct way" to characterize the value or interest at issue, it is not always clear whether we are dealing with an "immunity." *Lauro Lines,* 490 U.S. at 500.

the costs of providing notice to class members as collateral. *Eisen,* 417 U.S. at 170–72. And we have recognized collateral orders implicating other rights or interests that are not immunities. It's true that whether a claimed entitlement is better characterized as an immunity from suit or defense against liability is a key consideration under the collateral order doctrine. *Robinson v. Hartzell Propeller, Inc.,* 454 F.3d 163, 171 (3d Cir. 2006). But that's because whereas a pure "right not to be tried" necessarily satisfies *Swint's* third criterion, not every "right whose remedy requires the dismissal" of a claim before trial does. *United States v. Hollywood Motor Car Co.,* 458 U.S. 263, 269 (1982).

The majority cites favorably the Sixth Circuit's decision in *Himmelreich v. Federal Bureau of Prisons,* 5 F.4th 653 (6th Cir. 2021), which denied that an order allowing a *Bivens* action to proceed was collateral under § 1291. Respectfully, that decision also misunderstands *Swint's* third criterion. *Himmelreich* assumed that the district court's order conclusively determined an important issue separate from the merits. 5 F.4th at 661. The court then denied that such an order was "effectively unreviewable" on appeal from final judgment. *Id.* at 662. It reasoned: "[u]nlike qualified immunity, *Bivens* provides a plaintiff's remedy for unconstitutional conduct. It does not grant defendants an entitlement not to stand trial." *Id.* But *Swint's* third criterion does not ask only whether a defendant has an entitlement not to stand trial. And *Himmelreich,* like the majority here, mistakenly concluded that *Will* foreclosed the argument that "the collateral order doctrine extends

to standalone appeals of district court orders recognizing a *Bivens* remedy." *Id.*

In short, *Swint's* third criterion does not look to whether an immunity is asserted. It focuses on the importance of the values involved in the order under review.

B

I would hold that interlocutory appeals from orders denying motions for summary judgment that challenge the cognizability of a *Bivens* cause of action are "final" under § 1291 and the collateral order doctrine. Though we have rejected the application of the collateral order doctrine to non-final orders in "the vast majority of cases," *Robinson,* 454 F.3d at 170, the order at issue here satisfies *Swint's* criteria. The Supreme Court's recent opinions delimiting the scope of *Bivens* underscore the importance of the values jeopardized when district courts wrongly allow such claims to proceed. And orders denying summary judgment motions arguing that no *Bivens* cause of action is cognizable conclusively determine an important question of law distinct from a *Bivens* claim's merits.

1

Orders like those just mentioned are effectively unreviewable on appeal because they imperil a "particular value of a high order" and "substantial public interest," *Will,* 546 U.S. at 352–53: the Constitution's separation of the legislative and judicial powers.

A cause of action is a "remedial mechanism." *Bivens,* 403 U.S. at 397. It permits a plaintiff to "appropriately

invoke the power of [a] court" to hear his suit and grant relief. *Davis v. Passman,* 442 U.S. 228, 240 n.18 (1979). The choice to allow a *Bivens* action to proceed against a federal officer requires consideration of "a number of economic and governmental concerns," including the "time and administrative costs" run up by the discovery and trial process and the extent to which "monetary and other liabilities should be imposed upon" officers who violate the Constitution. *Ziglar v. Abbasi,* 137 S. Ct. 1843, 1856 (2017). Congress is "best positioned" to reach that sort of judgment. *Hernandez v. Mesa,* 140 S. Ct. 735, 742 (2020) (*Hernandez* II). So it's a "significant step under separation-of-powers principles" for an Article III court to authorize a *Bivens* action. *Ziglar,* 137 S. Ct. at 1856. That's why doing so is a "disfavored judicial activity." *Id.* at 1857 (internal quotation marks and citation omitted).

The Supreme Court recently put the point more directly: "creating a cause of action is a legislative endeavor," pure and simple. *Egbert v. Boule,* 142 S. Ct. 1793, 1802 (2022). The Judiciary's power to authorize a *Bivens* cause of action at all is "uncertain"—so much so that a court should not extend *Bivens* if there is *any* rational reason to think Congress better positioned to decide whether to create a cause of action. *Id.* at 1803. That hurdle is a high one. So too the cost of wrongly clearing it: Congress cannot undo judicially created constitutional remedies. *Dongarra v. Smith,* 27 F.4th 174, 181 (3d Cir. 2022).

The Court has called the separation of powers a "particular value of a high order" that satisfies *Swint's* third criterion. *Will,* 546 U.S. at 352. In my view,

"protect[ing] the constitutional command of separation of powers" against the "impermissible assertion" of authority by "the federal courts" is an imperative worthy of immediate enforcement. *Helstoski v. Meanor,* 442 U.S. 500, 505–06 (1979). We should show "special solicitude" toward "threatened breach[es]" of the "separation of powers." *Nixon v. Fitzgerald,* 457 U.S. 731, 743 (1982).

It's true that forcing a *private* litigant to shoulder the burden of a legally unwarranted trial is often consistent with the calculus underlying the final judgment rule. *Cf. Robinson,* 454 F.3d at 171–72. But the *Bivens* defendant always is a *federal* officer. Also, unlike the defenses invoked under res judicata and statutes of limitation, which protect only the "interest in not being held ultimately liable" on some claim, *Bell Atl. v. Penn. Pub. Util. Comm'n,* 273 F.3d 337, 344 (3d Cir. 2001), the defendant sued under *Bivens* asserts that the court cannot entertain the claim in the first place. *See Elhady v. Unidentified CBP Agents,* 18 F.4th 880, 884 (6th Cir. 2021) ("Plaintiffs . . . often have no cause of action unless we extend *Bivens.* And if there is no cause of action, courts should stop there."); *Vanderklok v. United States,* 868 F.3d 189, 197 (3d Cir. 2017) (existence of *Bivens* cause of action is a "threshold question of law"). And though "privately negotiated" or privately "conferred" rights—such as entitlements allocated in settlement agreements—often fail to "rise to the level of importance" required by *Swint's* third criterion, *Digital Equipment Corp. v. Desktop Direct, Inc.,* 511 U.S. 863, 876, 878–79 (1994), the *Bivens* defendant's

right not to be subject to a claim for which no cause of action lies is assured by the Constitution.[2]

Judicial creation of a cause of action against federal officers places "great stress on the separation of powers." *Nestlé USA, Inc. v. Doe,* 141 S. Ct. 1931, 1938 (2021). And orders "rais[ing] questions of clear constitutional importance" are sufficiently important to warrant immediate review. *Sell,* 539 U.S. at 176; *see also Chehazeh,* 666 F.3d at 138–39 (an interest raising substantial concerns that implicate constitutional safeguards is "compelling" under *Swint's* third criterion). A court's decision to authorize a *Bivens* cause of action also generates "substantial costs" for Executive officers. *Ziglar,* 137 S. Ct. at 1855. Expansion of *Bivens* in violation of the separation of powers thus disrupts effective governance, subjecting officers to the same "distraction from duty" that qualified immunity is meant to foreclose. *Digital Equipment,* 511 U.S. at 881 (cleaned up). That harm cannot be undone even if the officer is acquitted. *See Sell,* 539 U.S. at 177. The problem with erroneous *Bivens* extensions, then, is "not limited to liability for money damages," *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985); a more serious risk is hindrance of government interests. *See Egbert,* 142 S. Ct. at 1805

[2] Though that entitlement is not express in the Constitution or federal law, the Supreme Court long ago discarded the rule that a value or interest must "rest[] upon an *explicit* statutory or constitutional guarantee" to warrant interlocutory review. *Midland Asphalt Corp. v. United States,* 489 U.S. 794, 801 (1989) (emphasis added). The value need only "originat[e] in the Constitution or statutes," or be "embodied in" those sources—as the separation of powers does and is. *Digital Equipment,* 511 U.S. at 879.

(courts inevitably "impair governmental interests" when they misapply the *Bivens* special factors analysis) (cleaned up). The Supreme Court has signaled that we should proactively mitigate those harms—including on our own initiative. *See id.* at 1806 n.3 (courts have a *sua sponte* "responsibility" to "evaluate any grounds that counsel against *Bivens* relief," even those not raised by the parties, because "recognizing a *Bivens* cause of action is an extraordinary act") (cleaned up). We've done the same by setting aside party waiver to correct *Bivens* errors. *See Bistrian v. Levi,* 912 F.3d 79, 88 (3d Cir. 2018) (overlooking waiver to reach the cognizability of a *Bivens* cause of action because "[t]o rule otherwise would be to allow new causes of action to spring into existence merely through the dereliction of a party").

In sum, a court's wrongful arrogation of the legislative power to create a cause of action for claims of constitutional torts against federal officers violates the constitutional separation of powers and disrupts effective governance. Because those harms are immediate and those interests essential, an order wrongly authorizing a *Bivens* claims to proceed is "effectively unreviewable" on appeal after final judgment.

2

Having explained why Boresky satisfies *Swint's* third criterion, I proceed to discuss the first two.

A decision authorizing a *Bivens* cause of action resolves an important question of law separate from the claim's merits. Whether a plaintiff can show that a federal officer committed a constitutional tort against him is legally distinct from whether his claim

is cognizable under *Bivens*. *See Dongarra,* 27 F.4th at 177 (explaining that a *Bivens* plaintiff must clear two distinct "hurdles" to recover damages: show an invasion of his legal rights, and show that "Bivens lets him sue"). That's why the District Court could analyze the *Bivens* question here without adverting once to Fourth Amendment doctrine. *See Graber v. Dales,* 2019 WL 4805241, at *2–6 (E.D. Pa. Sept. 30, 2019). And the threshold question of cognizability does not merge with the merits question: the "fact that an issue is outcome determinative does not mean that it is not 'collateral' for purposes of the *Cohen* test." *Mitchell,* 472 U.S. at 529 n.10.

Bivens analysis does require comparing the facts of an alleged constitutional violation to the facts of cases in which the Supreme Court authorized *Bivens* causes of action. But other legal issues that we review on interlocutory appeal under § 1291 involve similar comparisons. Double jeopardy challenges, for instance, require us to determine whether successive prosecutions are for the same offense—yet whether the Double Jeopardy Clause bars the suit is distinct from whether the accused committed a crime. *See id.* at 528. In cases implicating qualified immunity, similarly, whether "a particular complaint sufficiently alleges a clearly established violation of law cannot be decided in isolation from the facts pleaded." *Ashcroft,* 556 U.S. at 673. And qualified immunity analysis looks to precedent for law enshrining "clearly established" rights. *Kisela v. Hughes,* 138 S. Ct. 1148, 1152 (2018) (per curiam). Yet whether qualified immunity precludes the suit is also distinct from whether the official's actions were unlawful. *Mitchell,*

472 U.S. at 528–29. With qualified immunity as with *Bivens,* a plaintiff must do more than establish the merits of his tort claim to receive the requested relief. The majority puts the point well: though the merits question here is whether Boresky violated Graber's Fourth Amendment rights, the *Bivens* question is "can [Graber] sue at all?" Maj. Op. 16 n.14.

Finally, a decision authorizing a *Bivens* cause of action conclusively determines whether the claim can be maintained: but for that decision, a court should "reject" the claim. *Hernandez* II, 140 S. Ct. at 743. Where no *Bivens* cause of action lies, courts should "stop there." *Elhady,* 18 F.4th at 884. And once the district court rules on the issue at the summary judgment stage, the defendant typically will take "no further steps" to dismiss the claim on this ground. *Abney v. United States,* 431 U.S. 651, 659 (1977). That's because the defendant's pleadings, discovery, and summary judgment record almost always will show whether the facts of the case mirror those of the Supreme Court's *Bivens* authorizations. Under these circumstances, a court will not "meaningfully reconsider" its *Bivens* authorization after summary judgment. *See Doe,* 997 F.3d at 493.

* * *

Egbert wasn't the death knell for *Bivens,* but it nearly rang it. *See Egbert,* 142 S. Ct. at 1810 (Gorsuch, J., concurring in the judgment) (*Egbert* leaves "barely implicit" the conclusion that the "right answer" to whether to authorize a *Bivens* cause of action "will always be no"). The Supreme Court's deep skepticism toward *Bivens* and its progeny highlights the profound separation of powers implications of every

erroneous expansion of *Bivens* by federal courts. The "crucial question" here is whether deferring until final judgment our review of an order allowing a *Bivens* cause of action to proceed "so imperils" the separation of powers as to justify immediate appeal as of right. *Mohawk,* 558 U.S. at 108. Because I believe it does, I would recognize such orders as "final" under § 1291 and the collateral order doctrine.[3]

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[3] The "discretionary availability" of interlocutory certification under 28 U.S.C. § 1292(b) makes the majority "hesita[nt] to agree" with this conclusion because that mechanism "counsels against" expanding the class of collateral orders. Maj. Op. 16 n.14. Though that hesitation may be prudent as a general matter, the majority does not explain why § 1292(b) counsels against collateral recognition of orders authorizing *Bivens* causes of action.

First, it doesn't follow from an issue's appropriateness for § 1292(b) certification that the issue is *unsuitable* for collateral appeal under § 1291. Section 1292(b) authorizes parties to request that district courts certify, and empowers the Courts of Appeals to grant, interlocutory appeals involving "controlling question[s] of law" on which there is "substantial ground for difference of opinion," provided the appeal may "materially advance" the litigation's termination. 28 U.S.C. § 1292(b). If (collateral) orders denying a challenge to a *Bivens* cause of action satisfy those criteria, so do (collateral) orders denying qualified immunity or a double jeopardy defense. So even if the *Bivens* order under review satisfied § 1292(b), that fact wouldn't support the majority's holding. In any event, the order before us likely would *not* satisfy § 1292(b). After *Egbert,* the answer to the question whether courts can authorize a *Bivens* cause of action will almost always be "no." *See Egbert,* 142 S. Ct. at 1810 (Gorsuch, J., concurring in the judgment); *cf.* Maj. Op. 12 ("Bivens actions are very limited."). So there's little ground for difference of opinion as to whether authorization is permitted.

Second, the majority notes that one of § 1292(b)'s "regular uses is to permit interlocutory appeal to decide whether a statute

III

Having explained why appellate jurisdiction lies, I turn to the merits. Did the District Court err when it authorized a *Bivens* cause of action against Boresky for swearing out a warrant that lacked probable cause? It did.

We ask two questions to determine whether a *Bivens* cause of action is cognizable. Does the claim arise in a new context by differing "in a meaningful way" from previous *Bivens* causes of action the Supreme Court has authorized? *Ziglar,* 137 S. Ct. at 1859. If so, we then ask if any "special factors counsel[] hesitation" before extending *Bivens* into that new context. *Id.* at 1857. If there are, the cause of action cannot proceed. Those two inquiries often resolve into one: is there "any reason to think that Congress might be better equipped to create a damages remedy[?]" *Egbert,* 142 S. Ct. at 1803 (emphasis added). The court should not authorize the *Bivens* cause of action if there is.

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permits a private cause of action." Maj. Op. 15 n.14. But none of the cases the majority cites to support that statement involves a federal defendant and thus the threat to effective governance that *Bivens* authorizations pose. *See Ziglar,* 137 S. Ct. at 1856.

Courts have tools other than the collateral order doctrine to facilitate interlocutory appeals of important legal issues. For instance, 28 U.S.C. § 1292(e) and § 2072(c) authorize the Supreme Court to prescribe rules governing interlocutory appeals, including by designating certain classes of orders "final" under § 1291. The existence of alternative mechanisms for interlocutory appeal gives us reason to mark the boundary of the class of collateral orders "stringent[ly]." *Digital Equipment,* 511 U.S. at 883. But that proposition does not forbid us from recognizing new collateral orders, and our Court continues to recognize them notwithstanding those alternative mechanisms.

A

Graber's claim against Boresky arises in a new context. Among the circumstances "meaningful enough to make a given context a new one" are differences in the constitutional right at issue and the risk of disruptive intrusion by the Judiciary into the functioning of coordinate branches. *See Ziglar,* 137 S. Ct. at 1859–60. Graber's allegations differ in at least these two respects from *Bivens*.

The defendants in *Bivens* conducted a warrantless search during which they "manacled" a man in front of his family, threatened to arrest the family, booked the man at the federal courthouse, and subjected him to a strip search. *Bivens,* 403 U.S. at 389. Here, Boresky has been sued for charging Graber based on a warrant that purportedly lacked probable cause. So Graber invokes a different constitutional provision than Mr. Bivens did. *Compare* U.S. Const., amend. IV (guaranteeing that "no Warrants shall issue, but upon probable cause"), *with id.* (proscribing "unreasonable searches and seizures"). And the Supreme Court has "repeatedly refused" to extend *Bivens* "beyond the *specific clauses* of the specific amendments for which a cause of action has already been implied." *Vanderklok,* 868 F.3d at 200 (emphasis added). If that weren't enough, our intrusion into the Secret Service's management of the government's response to security breaches occurring at National Special Security Events would also disrupt the workings of the political branches. These differences from *Bivens* establish that Graber's claim arises in a new context.

B

Second, multiple special factors counsel hesitation in authorizing a new *Bivens* cause of action for claims like Graber's. We have noted that two *Ziglar* factors are "particularly weighty": the "existence of an alternative remedial structure and separation-of-powers principles." *Bistrian,* 912 F.3d at 90. Another special factor is "whether national security is at stake." *Id.* All these factors militate against allowing the *Bivens* claim to proceed against Boresky.

An alternative remedial process is available to plaintiffs like Graber. The Secret Service is a component of the Department of Homeland Security. *See* 6 U.S.C. § 381. Graber can report alleged civil rights abuses by the Secret Service to DHS's Office of the Inspector General. *See* Hotline, Office of the Inspector General, https://www.oig.dhs.gov/hotline. Congress has provided for a senior official within the Office to receive and review complaints about and to investigate alleged civil rights abuses. 5. U.S.C. App. 3 § 8I(f)(1)–(2). That procedure need not involve complainant participation or the right to judicial review. *Egbert,* 142 S. Ct. at 1806. What matters is that Congress or the Executive has created a remedial process *it* deems sufficient to secure deterrence of wrongful conduct. *Id.* at 1807. We cannot "second-guess that calibration by superimposing a *Bivens* remedy." *Id.* Doing so would raise obvious separation of powers concerns.

Authorizing a *Bivens* cause of action here also would require us to interfere with sensitive Executive-branch functions. *See Ziglar,* 137 S. Ct. at 1861; *Mack v. Yost,* 968 F.3d 311, 323 (3d Cir. 2020) (declining to

authorize a *Bivens* cause of action because "judicial intervention" in "administrative decisions would improperly encroach upon the executive's domain"). Those functions—coordinating the government's security plan for keeping high-level officers and candidates safe at a National Special Security Event—involve national security. Whether to create a "new substantive legal liability" for Secret Service agents participating in a coordinated response to security breaches is the sort of choice Congress, not the courts, should make. *Ziglar,* 137 S. Ct. at 1857 (cleaned up). Our failure to heed that counsel would embroil us in policy judgments we are ill-suited for. *See Egbert,* 142 S. Ct. at 1804–05. And we cannot "predict the 'systemwide' consequences" that would follow if we were to expand *Bivens* to allow suits like this one against Secret Service agents. *See id.* at 1803–04. A "Bivens cause of action may not lie where . . . national security is at issue." *Id.* at 1805.

* * *

The District Court's decision to authorize Graber's *Bivens* cause of action was contrary to a spate of recent Supreme Court decisions. I would vacate its order and remand with instructions to dismiss Graber's amended complaint against Boresky.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 18-3168

JEREMY GRABER,

Plaintiff,

v.

POLICE INSPECTOR JOEL DALES, *et al.*,

Defendants.

Filed: January 5, 2021

MEMORANDUM OPINION

RUFE, J.

Plaintiff Jeremy Graber alleges that his constitutional rights were violated when he was arrested during a protest at the 2016 Democratic National Convention ("DNC"). Defendant Michael Boresky, a Secret Service agent, has moved for summary judgment and to stay discovery pending the resolution of that motion. Plaintiff has filed a declaration under Federal Rule of Civil Procedure

56(d) contending that discovery is necessary before summary judgment can be decided.

I. Background

A. Plaintiff's Allegations

Plaintiff alleges the following facts. The 2016 DNC was held at the Wells Fargo Center in Philadelphia, Pennsylvania. The DNC was designated as a National Special Security Event and federal agencies were involved in its security. In particular, the Secret Service managed security for the DNC, which included setting up a security fence around the event. Over the course of the event, thousands of protesters gathered at the site of the DNC for marches, speeches, and demonstrations.

On the third night of the event, a protester cut the security fence with bolt cutters. Six protesters entered the restricted area and were arrested. Shortly after these arrests, Plaintiff alleges that Defendant Police Inspector Joel Dales "forcibly grabbed" him as he was standing in the crowd with hundreds of protesters.[1] Dales, with the assistance of other officers, searched Plaintiff. Plaintiff, who is a certified paramedic, was carrying a bag containing first aid items including "three small decorative knives that he used to cut gauze and clothing."[2] The officers seized the knives and then pulled him past the fence into the restricted area.[3] Inside the area, the officers handcuffed Plaintiff and searched him again. Plaintiff was arrested, placed

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[1] Amend. Compl. [Doc. No. 3] ¶ 22.

[2] *Id.* ¶ 19.

[3] *Id.* ¶ 23.

in a Philadelphia Police Emergency Patrol Wagon with the six protesters who had breached the fence, and taken to the Federal Detention Center. Special Agent Aaron McCaa and several other Secret Service agents were at the DNC the night of the arrest; Defendant Boresky was at his home.[4]

The next day, Defendant Boresky signed an affidavit that there was "probable cause to believe that . . . [Plaintiff and the six protesters] . . . knowingly entered the restricted grounds . . . in violation of 18 U.S.C. § 1752(a)(1)." He signed the affidavit in front of a United States magistrate judge, and Plaintiff was federally charged and ordered held without bail pending trial.[5] On July 29, 2016, video evidence confirmed that Plaintiff had not entered the restricted zone before being grabbed by Defendant Dales.[6] The charges against Plaintiff were then dismissed.[7]

B. Assertions in Defendant Boresky's Motion for Summary Judgment

In the Motion for Summary Judgment, Defendant Boresky provides declarations and exhibits expanding on the events described in the Amended Complaint. Late in the evening of Plaintiff's arrest, Defendant Boresky received an email informing him that Plaintiff and the six protesters would be charged with violating 18 U.S.C. §1752, entering a restricted

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[4] Boresky is the only Secret Service agent who has been named as a Defendant.

[5] Amend. Compl. [Doc. No. 3] ¶¶ 29-30.

[6] *Id.* ¶ 32.

[7] *Id.*

building or grounds.[8] Defendant Boresky was also informed that he would be the affiant on the criminal complaint.[9]

The next morning, Defendant Boresky received an email from Agent McCaa containing a synopsis of events leading to the arrests and photographs of the evidence seized.[10] Agent McCaa's synopsis stated in part:

> At approximately 2245 hours on 07/27/16, I observed the gate unexpectedly open and several protestors running from their side of the fence to the inside of the secure perimeter. The protestors were met by police who were attempting to close the gate as well as apprehend the suspects who had breached our secure perimeter. Police apprehended 7 suspects who breached the gate while other officers and agents were able to secure the gate preventing further protestors from gaining access to the secured zone. The suspects who breached the secure perimeter were identified as [Plaintiff and six other protesters].[11]

Defendant Boresky was also provided with the affidavit of probable cause that was prepared for him and, as discussed above, that he presented to the magistrate judge.[12]

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[8] *See* Doc. No. 45-5.

[9] *See* Doc. No. 45-4 ¶ 4; *see also* Doc. No. 45-5.

[10] *See* Doc. No. 45-1 ¶ 12; *see also* Doc. Nos. 45-6, 45-7, 45-8.

[11] Doc. No. 45-7.

[12] Doc. No. 45-1 ¶ 17.

The evening of the arrests, Special Agent Anna Marie De Marco received an email from a colleague requesting that she search for videos of the breach when she arrived at work the next day.[13] The next day, July 28, Special Agent De Marco found four videos of the breach, downloaded them, and burned them to a CD.[14] On July 29, Plaintiff was released from detention and the charges against him were dropped.[15] On or after August 1, Special Agent De Marco provided a copy of the CD containing the four videos to Defendant Boresky for his records.[16]

C. Procedural History

Plaintiff filed suit alleging that he was falsely arrested and detained in violation of the First, Fourth, and Fourteenth Amendments. He has brought this action against Philadelphia police officers under § 1983 and Defendant Boresky pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*.[17] Defendant Boresky argues in part that Plaintiff's suit is barred under the doctrine of qualified immunity.[18] The Court has previously held, ruling on Defendant Boresky's motion to dismiss, that qualified immunity turns on

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[13] Doc. No. 45-12 ¶ 4.

[14] *Id.* ¶ 5. Special Agent De Marco downloaded the videos about an hour after Defendant Boresky had signed the affidavit of probable cause. *See id.;* Doc. No. 45-1 ¶ 18.

[15] Doc. No. 3 ¶ 33.

[16] Doc. No. 45-12 ¶ 6.

[17] 403 U.S. 388 (1971). Plaintiff's First Amendment claims against Defendant Boresky were dismissed. *See Graber v. Dales,* No. 18-3168, 2019 WL 4805241, at *8 (E.D. Pa. Sept. 30, 2019).

[18] *See* Doc. No. 45 at 5.

whether it was objectively reasonable for Defendant Boresky to believe, based on the statements he received, that probable cause existed to arrest Plaintiff.[19] The Court also held that discovery was required to make this determination.[20]

At the Rule 16 scheduling conference, counsel for Defendant Boresky argued that discovery should be limited to only "what [Defendant Boresky] heard and what he relied on for his affidavit."[21] The Court rejected this extreme limitation, noting that other evidence, such as the circumstances leading to the arrest, may be relevant to allow Plaintiff to challenge Defendant Boresky's claim to qualified immunity.[22] The Court further noted that challenges to discovery were best handled through the Rules of Federal Procedure after "specific and formulated" requests were made.[23]

Six weeks after the scheduling conference—and before Plaintiff had served any discovery requests or interrogatories—Defendant Boresky presented Plaintiff with a proposed statement of facts and a limited set of documents.[24] These documents included email communications with Defendant Boresky, and declarations of Defendant Boresky and two other

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[19] *See Graber,* 2019 WL 4805241, at *6–*7.

[20] *See id.*

[21] Doc. No. 42 at 38.

[22] *See Id.* at 36–44.

[23] *Id.* at 33, 42.

[24] Doc. No. 45-1 at 2 n.1

Secret Service agents.[25] However, these documents did not include declarations of Agent McCaa or any agent who was directly involved in Plaintiff's arrest.

With Defendant Boresky's proposed statement of facts as a starting point, the parties attempted to negotiate the scope of discovery. This negotiation culminated with Defendant Boresky offering Plaintiff depositions of the three declarants on the condition that no additional discovery would be required.[26] After Plaintiff declined this offer, and two months before the scheduled close of discovery, Defendant Boresky moved for summary judgment and to stay discovery.[27] In response, Plaintiff filed a declaration under Federal Rule of Civil Procedure 56(d) and moved for additional discovery.[28] No discovery related to Defendant Boresky has occurred.

II. Legal Standard

"[B]y its very nature, the summary judgment process presupposes the existence of an adequate record," and the Court "is obliged to give a party

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[25] *See* Exhibits to Doc No. 45.

[26] *See* Doc. No. 45-1 at 2 n.1.

[27] *See* Doc. Nos. 45, 46.

[28] *See* Doc. Nos. 55 & 55-1. Rule 56(d) states:

> **When Facts Are Unavailable to the Nonmovant.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
>
> (2) allow time to obtain affidavits or declarations or to take discovery; or
>
> (3) issue any other appropriate order.

opposing summary judgment an adequate opportunity to obtain discovery." [29] Indeed, "[i]f discovery is incomplete, a district court is rarely justified in granting summary judgment, unless the discovery request pertains to facts that are not material to the moving party's entitlement to judgment as a matter of law." [30] "A district court abuses its discretion when it grants summary judgment in favor of the moving party without even considering a Rule 56(d) declaration filed by the nonmoving party."[31]

III. Discussion

"[F]ederal litigation revolves around the generous and wide-ranging discovery provided by the Federal Rules of Civil Procedure," and "liberal discovery rules and summary judgment motions" are relied on to "define disputed facts and issues and to dispose of unmeritorious claims."[32] But liberal discovery rules are at odds with the doctrine of qualified immunity, which when applicable, shields a government official from "the burdens of broad-reaching discovery."[33] As the Third Circuit has noted, qualified immunity may

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[29] *Doe v. Abington Friends Sch.,* 480 F.3d 252, 257 (3d Cir. 2007) (internal quotation marks and citation omitted).

[30] *Shelton v. Bledsoe,* 775 F.3d 554, 568 (3d Cir. 2015).

[31] *In re Avandia Mktg., Sales & Prod. Liab. Litig.,* 945 F.3d 749, 761 (3d Cir. 2019) (internal quotation marks and citation omitted), *cert. denied sub nom. GlaxoSmithKline LLC v. United Food & Commercial Workers Local 1776 & Participating Employers Health & Welfare Fund,* 141 S. Ct. 265 (2020).

[32] *Abington Friends.,* 480 F.3d at 256–57 (internal quotation marks and citation omitted).

[33] *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982).

be "implicitly denied" when an otherwise entitled official is subjected to the burden of discovery.[34]

Nevertheless, "discovery may be necessary before [Defendant's] motion for summary judgment on qualified immunity grounds can be resolved."[35] Where discovery is required, the need for generous and wide-ranging discovery, which is necessary to allow for a court to properly consider a case at the summary judgment stage must be balanced against the protections afforded to a government official claiming entitlement to qualified immunity. Thus, "any such discovery should be tailored specifically to the question of [Defendant's] qualified immunity."[36]

Here, qualified immunity turns on whether it was "objectively reasonable" for Defendant Boresky to believe there was probable cause to arrest Plaintiff.[37] This cannot be determined without considering evidence surrounding the statements and communication upon which Defendant Boresky relied, and cannot be opposed without an opportunity to conduct discovery related to the arrest.[38]

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[34] *Oliver v. Roquet,* 858 F.3d 180, 188 (3d Cir. 2017).

[35] *Anderson v. Creighton,* 483 U.S. 635, 646 n.6 (1987).

[36] *Id.*

[37] *See Rogers v. Powell,* 120 F.3d 446, 455 (3d Cir. 1997).

[38] This case is unlike *Oliver,* where the Third Circuit held that the district court erred by ordering discovery instead of granting summary judgment. In *Oliver,* no discovery was necessary because Plaintiff had failed to state a claim, and even if he had, no clearly established right had been violated. *See Oliver,* 858 F.3d at 194–96. Here, qualified immunity cannot be determined without establishing a record.

In Plaintiff's Rule 56(d) declaration, he requests depositions of Defendant Boresky, the declarants he relies upon, and Agent McCaa, who provided Defendant Boresky the information about Plaintiff's arrest.[39] Additionally, Plaintiff seeks discovery of all relevant communications Defendant Boresky may have had with Agent McCaa or other agents regarding the events leading up to Plaintiff's arrest.[40]

Defendant Boresky argues that his proposed statement of facts and supporting documents are sufficient to show probable cause and is "enough to demonstrate he is entitled to qualified immunity."[41] Defendant also argues that Plaintiff's Rule 56(d) declaration fails to specify how the requested discovery "would preclude summary judgment" and therefore should be rejected.[42]

However, Plaintiff has not been provided the opportunity to conduct *any* discovery and Plaintiff is entitled to "present evidence to properly oppose

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[39] *Id.* ¶ 6, 9. Plaintiff notes that it has not been established who authored the affidavit of probable cause, and this is a relevant subject of discovery.

[40] *Id.* ¶ 25.

[41] Doc. No. 63 at 29.

[42] Doc. No. 60 at 2 (quoting *Hart v. City of Philadelphia,* 779 F. App'x 121, 128 (3d Cir. 2019)). In the case Defendant Boresky cites for the proposition that the Court should reject an improper Rule 56(d) declaration, the Third Circuit held that because no discovery had occurred, it was an "exceptional circumstance[]" where no Rule 56(d) declaration was needed. *Hart,* 779 F. App'x at 128–29.

[Defendant's] motion." [43] It would be wholly inequitable to permit Defendant to rely upon affidavits and communications to which he, and not Plaintiff, has access, and deny Plaintiff the ability to request additional relevant documents or test the declarations through depositions.

Plaintiff has met the requirements under Rule 56(d), and Defendant's Motion for Summary Judgment will be dismissed without prejudice to allow for discovery. However, discovery remains limited as to what is necessary to determine the issue of qualified immunity, and Defendant may challenge any discovery request as provided by the Federal Rules of Civil Procedure.

IV. Conclusion

Defendant Boresky's Motion for Summary Judgment will be dismissed without prejudice. Plaintiff's Motion for Additional Discovery will be granted. An order will be entered.

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[43] *See Hart v. City of Philadelphia,* 779 F. App'x 121, 129 (3d Cir. 2019) (holding that it was an abuse of discretion to deny the plaintiff any discovery).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 18-3168

JEREMY GRABER,

Plaintiff,

v.

POLICE INSPECTOR JOEL DALES, *et al.*,

Defendants.

Filed: September 30, 2019

MEMORANDUM OPINION

RUFE, J.

Plaintiff Jeremy Graber alleges that his First and Fourth Amendment rights were violated when he was arrested and charged with a federal offense during a protest at the Democratic National Convention. Defendant Michael Boresky, a Secret Service agent, has moved to dismiss all claims against him.

I. BACKGROUND

The Democratic National Convention was held at the Wells Fargo Center in Philadelphia, Pennsylvania on July 25-27, 2016.[1] The Department of Homeland Security designated the Convention as a National Special Security Event, meaning an event that may be a target for terrorism or other criminal activity.[2] Accordingly, the Secret Service managed security for the Convention,[3] including setting up a security fence around the event.[4]

Throughout the Convention, various groups of protesters gathered outside to demonstrate.[5] On the evening of July 27, a protester breached the security fence near the corner of Broad Street and Pattison Avenue by cutting the fence with bolt cutters.[6] Several protesters entered the secure zone through the damaged fence and were arrested.[7]

Plaintiff alleges that at the time the fence was breached, he was standing nearby, but did not assist the breach or follow the other protesters into the secure area.[8] Nevertheless, Plaintiff alleges, Philadelphia police officer Joel Dales "forcibly grabbed" Plaintiff, pulled him through the crowd, and

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[1] Amend. Compl. [Doc. No. 3] at ¶¶ 3, 8.

[2] *Id.* at ¶ 8.

[3] *Id.*

[4] *Id.* at ¶ 12.

[5] *Id.* at ¶ 15.

[6] *Id.* at ¶¶ 19, 29.

[7] *Id.* at ¶ 21.

[8] *Id.* at ¶ 20.

began "illegally searching" Plaintiff's pockets assisted by several other Philadelphia police officers.[9] Finding three small knives in Plaintiff's possession, the officers allegedly pulled Plaintiff past the fence and into the secure area, where they handcuffed him and searched him again.[10] Plaintiff was transported with six other arrested protesters to the Federal Detention Center, where he was detained overnight.[11]

The following day, Defendant Michael Boresky, a Secret Service agent, filed an affidavit with a magistrate judge seeking a federal arrest warrant for Plaintiff and the other protesters and initiated a criminal complaint against them for knowingly entering the restricted grounds of the Convention in violation of 18 U.S.C. § 1752(a)(1).[12] On the basis of the complaint and affidavit, the magistrate judge ordered Plaintiff detained pending trial.[13] Within days, however, Plaintiff was released after footage of the protest confirmed that Plaintiff never intentionally entered the secure zone, and the government dismissed the charges against him shortly thereafter.[14]

Plaintiff has sued the Philadelphia police officers under § 1983 and asserts claims against Defendant

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[9] *Id.* at ¶ 22.

[10] *Id.* at ¶¶ 22–24.

[11] *Id.* at ¶ 25.

[12] *Id.* at ¶¶ 28–29.

[13] *Id.* at ¶ 30.

[14] *Id.* at ¶¶ 32–33.

Boresky, the only federal defendant, pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*.[15]

II. LEGAL STANDARD

A. Rule 12(b)(1)

Under Federal Rule of Civil Procedure 12(b)(1), a party may seek dismissal of an action for lack of subject matter jurisdiction. The plaintiff has "the burden of proof that jurisdiction does in fact exist."[16]

Sovereign immunity is a proper basis for a 12(b)(1) motion to dismiss because federal courts lack jurisdiction over suits against the United States except where it has consented to be sued.[17]

B. Rule 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a party may seek dismissal of an action for failure to state a claim upon which relief may be granted. To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[18]

In evaluating a Rule 12(b)(6) motion, the court "must accept all factual allegations in the complaint as true, construe the complaint in the light favorable to the plaintiff, and ultimately determine whether plaintiff may be entitled to relief under any

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[15] 403 U.S. 388 (1971).

[16] *Petruska v. Gannon Univ.,* 462 F.3d 294, 302 n.3 (3d Cir. 2006).

[17] *See United States v. Mitchell,* 445 U.S. 535, 538 (1980).

[18] *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombley,* 550 U.S. 544, 570 (2007)).

reasonable reading of the complaint."[19] The court need not accept as true legal conclusions, even those couched as factual allegations.[20] The Rule 12(b)(6) inquiry is generally limited to the material in the complaint itself, but courts may also consider exhibits attached to the complaint, undisputedly authentic documents upon which the complaint is based, and matters of public record.[21]

III. DISCUSSION

A. Motion to Dismiss Under Rule 12(b)(1)

Plaintiff sued Defendant Boresky in both his personal and official capacity for violations of his First and Fourth Amendment rights and conspiracy to violate his First and Fourth Amendment rights. Defendant Boresky has moved to dismiss the claims against him in his official capacity for lack of subject matter jurisdiction.

Claims against government officers in their official capacity are claims against the government itself.[22] The United States enjoys sovereign immunity from suit except where it consents to be sued.[23] In the absence of such consent, federal courts lack jurisdiction over suits against the United States.[24] Since the United States has not waived sovereign

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[19] *Mayer v. Belichick,* 605 F.3d 223, 229 (3d Cir. 2010).

[20] *Twombley,* 550 U.S. at 555.

[21] *Mayer,* 605 F.3d at 230.

[22] *Kentucky v. Graham,* 473 U.S. 159, 163–64 (1985).

[23] *Mitchell,* 445 U.S. at 538.

[24] *See id.*

immunity for constitutional tort claims,[25] the Court lacks subject matter jurisdiction, so Plaintiff's official-capacity claims against Defendant Boresky will be dismissed.[26]

B. Motion to Dismiss Under Rule 12(b)(6)

1. Fourth Amendment Claim

a. *Bivens* Analysis

Plaintiff first alleges that Defendant Boresky violated his Fourth Amendment rights. Because Defendant Boresky is a federal agent, this constitutional claim is viable only if a *Bivens* cause of action exists—if, in other words, the Court implies a private right of action directly under the Constitution. [27] Expanding the *Bivens* remedy, however, "is now a 'disfavored' judicial activity,"[28] and the Supreme Court has "repeatedly refused" to extend *Bivens* beyond the three contexts in which it has explicitly recognized an implied right of action. [29] Those three contexts are "violations of the Fourth Amendment's right against unreasonable searches and seizures" as recognized in *Bivens* itself; gender discrimination in employment under the Due Process Clause of the Fifth Amendment; and inadequate

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[25] *FDIC v. Meyer,* 510 U.S. 471, 478 (1994).

[26] Plaintiff does not oppose Defendant Boresky's motion to dismiss the official-capacity claims against him. *See* Pl.'s Mem. Opp. [Doc. No. 17] at 5.

[27] *See Ziglar v. Abbasi,* 137 S. Ct. 1843, 1854–55 (2017) ("Congress did not create an analogous statute [to 42 U.S.C. § 1983] for federal officials.").

[28] *Id.* at 1857 (citation omitted).

[29] *Bistrian v. Levi,* 912 F.3d 79, 89 (3d Cir. 2018).

prison medical care (and certain other conditions-of-confinement claims) under the Cruel and Unusual Punishments Clause of the Eighth Amendment.[30]

In *Ziglar v. Abbasi,* the Supreme Court provided a two-step analytic framework for determining whether to "extend a *Bivens*-type remedy."[31] First, courts must consider whether the claim presents a "new *Bivens* context," that is, whether "the case is different in a meaningful way from previous *Bivens* cases decided by" the Supreme Court. [32] A case might differ meaningfully, and thus represent a "new context," because of "the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; [and] the risk of disruptive intrusion by the Judiciary into the functioning of other branches[.]"[33]

If the context is new, courts consider whether any "special factors counsel[] hesitation" in extending a *Bivens* remedy.[34] "There may be many such factors, but two are particularly weighty: the existence of an alternative remedial structure and separation-of-powers principles."[35] Courts also consider "whether a claim addresses individual conduct or a broader policy

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[30] *Id.* at 89, 90–94.

[31] 137 S. Ct. at 1859.

[32] *Id.* at 1859.

[33] *Id.* at 1859–60.

[34] *Id.* at 1857.

[35] *Bistrian,* 912 F.3d at 90.

question" and "whether national security is at stake," among other factors.[36] The central question at which all these considerations aim is "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."[37]

Plaintiff alleges that Defendant Boresky violated his Fourth Amendment rights by filing an affidavit in support of an arrest warrant that resulted in his unconstitutional detention. Whether this presents a new *Bivens* context is a perplexing question after *Abbasi.* [38] On one hand, Plaintiff's claims seem to challenge precisely the kind of core, run-of-the-mill Fourth Amendment activity for which a *Bivens* cause of action has always been thought to be available—the seizure of a person without probable cause by a federal agent, just as in *Bivens* itself.[39] On the other hand, *Abbasi* made clear that even relatively trivial factual differences might make a context new. [40] Here,

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[36] *Id.*

[37] *Abbasi,* 137 S. Ct. at 1857–58.

[38] Defendant Boresky suggests that this argument is waived because Plaintiff did not argue in his response that this is not a new context. Def.'s Reply Mem. [Doc. No. 21] at 3. The Court deems it appropriate, however, to consider both elements of the *Abbasi* analysis.

[39] *See Bivens,* 403 U.S. at 389.

[40] *ee Abbasi,* 137 S. Ct. at 1860; *Tun-Cos v. Perrotte,* 922 F.3d 514, 520–25 (4th Cir. 2019) (holding that a search-and-seizure claim presented a new context because it "concern[ed] ICE agents' enforcement of the INA, rather than traditional law enforcement officers' enforcement of the criminal law"). Complicating things further, the Third Circuit has recognized that the list of existing, Supreme Court-approved *Bivens*

Defendant Boresky was the affiant on the arrest warrant, not the on-scene arresting officer; he is a Secret Service agent, not a federal narcotics agent; and, Defendant Boresky argues, Plaintiff's arrest outside the Convention—an event attended by the President, Vice President, and Democratic presidential nominee—has a national-security dimension that the typical Fourth Amendment *Bivens* claim lacks.[41]

Whether these differences are "meaningful" is a close call. Seeking an arrest warrant from a magistrate judge is different from personally handcuffing a suspect, but both are part and parcel of the seizure of a person.[42] As to the federal agency involved, while it is true that "as part of the new-context analysis, the *Abbasi* Court 'refused to extend

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contexts may not be as limited as *Abbasi* suggested; at least one other Supreme Court case, *Farmer v. Brennan,* 511 U.S. 825 (1994), approved an implied right of action against federal officials for a failure-to-protect claim by a prison inmate. *See Bistrian,* 912 F.3d at 90–92. That claim, according to the Third Circuit, remains available—but as far as the Court is aware, *Farmer* is the only member of this "invisible *Bivens*" set and Plaintiff has not identified a similar Supreme Court case covering the context at issue here other than *Bivens* itself.

[41] Concerns about judicial intrusion on national security policy are better treated as a special factor counselling hesitation than as part of the new context analysis. *See Abbasi,* 137 S. Ct. at 1860–62.

[42] *See Jacobs v. Alam,* 915 F.3d 1028, 1038–39 (6th Cir. 2019) (holding that despite some "factual differences," claims for excessive force, false arrest, malicious prosecution, fabrication of evidence, and civil conspiracy were "run-of-the-mill challenges to 'standard law enforcement operations' that [fell] well within *Bivens* itself" and thus were not new contexts).

Bivens to any . . . new category of defendants,'"[43] the Court notes that the federal agency whose officers were sued in *Bivens* no longer exists.[44] Thus, a different agency name on the back of an officer's windbreaker, standing alone, seems insufficient to constitute a new context.[45]

Even if Plaintiff's claim is different enough from *Bivens* itself to be called a new context, however, the special factors counselling hesitation pressed by Defendant Boresky are not persuasive. Defendant Boresky emphasizes that the Convention was "designated as a National Special Security Event," and that judicial intrusion into matters of national security raises separation-of-powers concerns.[46] This is certainly true of national security *policy*. If Plaintiff

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[43] *Tun-Cos,* 922 F.3d at 525.

[44] Reorganization Plan No. 1 of 1968, Pub. L. No. 90-623, § 4, 82 Stat. 1367, 1368 (abolishing the Bureau of Narcotics in the Department of the Treasury and establishing the Bureau of Narcotics and Dangerous Drugs in the Department of Justice); H.R. DOC. NO. 90-250, at 9–10 (1968) (explaining that inconsistent penalty schemes and a lack of manpower warranted eliminating the Bureau of Narcotics and consolidating anti-drug operations in the Department of Justice); Diane E. Hoffman, *Treating Pain v. Reducing Drug Diversion and Abuse,* 1 ST. LOUIS U. J. HEALTH L. & POL'Y 231, 263–64 (2008) (tracing evolution of agencies responsible for federal drug enforcement beginning with the Federal Bureau of Narcotics, which was replaced in 1968 by the Bureau of Narcotics and Dangerous Drugs, which merged with other agencies in 1973 to become the Drug Enforcement Administration).

[45] This is unlike a situation where an agency's officers are charged with enforcing a legal regime entirely separate from the criminal law. *See Tun-Cos,* 922 F.3d at 524–25.

[46] Def.'s Mem. [Doc. 8] at 13.

were challenging broader Secret Service procedures, or even case-specific decisions like the chosen location of the secure perimeter outside the Convention, that could counsel against extending a *Bivens* remedy.[47] But the connection to national security here is tenuous. Crucially, this case is unlike *Abbasi,* which sought relief against top Department of Justice officials including the Attorney General himself and thus implicated high-level policy decisions.[48] At this stage it appears that Plaintiff's claims do not implicate government policy at all; rather, Plaintiff is merely challenging the constitutionality of a one-off arrest. In other words, this is a "straightforward case against a single low-level federal officer." [49] The Supreme Court warned in *Abbasi* that "national-security concerns must not become a talisman used to ward off inconvenient claims."[50] The proper focus here

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[47] One paragraph of the Amended Complaint does contain some vague gripes that security measures at the Convention were excessive and arbitrary. *See* Amend. Compl. at ¶ 13. The Court understands this as mere background, as Plaintiff has sued only the arresting officers, not those who set Secret Service policy, and has not requested policy changes as part of the relief sought in this action. Plaintiff's briefing confirms this. *See* Pl.'s Mem. at 18 ("It is the individual decision by Defendant Boresky[,] not a challenge to the policy of the federal government[,] that is challenged in Plaintiff's complaint."). In addition, Defendant Boresky concedes that Plaintiff is challenging only individual misconduct and argues instead that policy is implicated insofar as permitting a *Bivens* cause of action to lie against Secret Service agents would force the agency to anticipate lawsuits when it makes decisions. Def.'s Reply Mem. at 5.

[48] *Abbasi,* 137 S. Ct. at 1853.

[49] *Lanuza v. Love,* 899 F.3d 1019, 1029 (9th Cir. 2018).

[50] *Abbasi,* 137 S. Ct. at 1862.

is the concrete actions Plaintiff challenges in this case, which amount to ordinary criminal law enforcement.

Nor does this case concern the life-or-death snap judgments that Secret Service agents must sometimes make while protecting high-level government officials. The potential for chilling decisive action in the course of protecting Presidents would indeed give the Court pause.[51] Plaintiff's claim instead concerns the decision—made with the benefit of at least half a day of investigation, and while the suspect was already in custody—to seek an arrest warrant from a magistrate judge, an altogether routine task for any law enforcement officer.

Finally, Congress's failure to provide an explicit damages remedy despite its "involvement in shaping the Secret Service and national security events" is not especially telling in this case.[52] When Congress has legislated extensively in a particular area without creating a damages remedy, that can indicate that congressional inaction was intentional. [53] *Abbasi,* however, linked this concept of meaningful inaction to

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[51] *See Reichle v. Howards,* 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring) ("Officers assigned to protect public officials must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy.").

[52] Def.'s Mem. at 15; *cf. Hernandez v. Mesa,* 885 F.3d 811, 820 (5th Cir. 2018), *cert. granted,* 139 S. Ct. 2636 (2019) (declining to extend *Bivens* in a cross-border shooting case where the United States and Mexico had engaged in "serious dialogue" regarding the very shooting at issue, reasoning that the court should not overrule the other branches' considered decision not to take action against the agent).

[53] *Abbasi,* 137 S. Ct. at 1862.

the inappropriateness of challenging high-level policy through a *Bivens* suit.[54] Because high-level policy decisions are likely to attract congressional attention, the Court explained in *Abbasi,* it was particularly "difficult to believe that 'congressional inaction' was inadvertent."[55] Here, Plaintiff does not challenge Secret Service policy, but rather alleges individual, low-level misconduct, which is far likelier to escape congressional notice.[56] The handful of statutes creating the Secret Service and governing its mandate[57] cannot be compared to Congress's "frequent and intense" attention to the prevention of terrorism in the wake of the September 11, 2001 attacks.[58] Moreover, given that Plaintiff's claim is so close to the core of *Bivens* itself, it is particularly

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[54] *Id.*

[55] *Id.*

[56] *See Turkmen v. Ashcroft,* No. 02-2307, 2018 WL 4026734, at *8 (E.D.N.Y. Aug. 13, 2018) ("[I]n dismissing plaintiffs' detention policy claims in *Ziglar,* the Court pointed out that Congress's 'silence is notable because it is likely that high-level policies will attract the attention of Congress.' Because plaintiffs' prisoner abuse claim does not involve 'high-level policies,' this aspect of *Ziglar's* holding is not controlling here.").

[57] *See* Def.'s Mem. at 14.

[58] Indeed, *Abbasi* noted affirmative evidence that Congress anticipated the potential for civil rights abuses in the prevention of terrorism and that the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("PATRIOT Act"), Pub. L. No. 107-56, § 1001, 115 Stat. 272, 391 (2001), required regular reports to Congress on that subject. 137 S. Ct. at 1862. The absence of a damages remedy is far more telling where it is clear that Congress contemplated that one might be needed.

unlikely that Congress meant to preclude a damages remedy by its silence.

As for alternative remedies, Defendant Boresky argues that the Federal Tort Claims Act and the availability of relief against the Philadelphia police officers under § 1983 are enough for Plaintiff. But "the existence of an FTCA remedy does not foreclose an analogous remedy under *Bivens*,"[59] since it is "crystal clear that Congress intended the FTCA and *Bivens* to serve as parallel and complementary sources of liability." [60] And the Court is not aware of any precedent (and Defendant has provided none) holding that the availability of relief against other individual officers should preclude a *Bivens*-type remedy.

While *Abbasi* disallowed challenges to "large-scale policy decisions" through a *Bivens* suit, it did not call into question "the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose."[61] Indeed, the Court made clear that a *Bivens* cause of action remains available where it is most needed—in "individual instances of . . . law enforcement overreach" for which the remedy is "damages or nothing." [62] At this early stage of Plaintiff's lawsuit, his claim appears to land squarely within that category.

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[59] *Bistrian,* 912 F.3d at 92; *see also id.* ("[T]he prospect of relief under the FTCA is plainly not a special factor counseling hesitation in allowing a *Bivens* remedy.").

[60] *Id.* (quoting *Corr. Servs. Corp. v. Malesko,* 534 U.S. 61, 68 (2001)).

[61] *Abbasi,* 137 S. Ct. at 1856.

[62] *Id.* at 1862.

b. Qualified Immunity Analysis

Because the Court has determined that a *Bivens* cause of action is available for Plaintiff's Fourth Amendment claim, the question remains whether Defendant Boresky is entitled to qualified immunity. To overcome the defense of qualified immunity, a plaintiff must plausibly "allege facts showing that the conduct of each individual federal defendant (1) 'violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct.'"[63] The Court concludes that Plaintiff has adequately alleged a Fourth Amendment violation and that the issue of qualified immunity cannot be resolved at this stage.

First, Plaintiff has plausibly alleged that Defendant Boresky's conduct violated the Fourth Amendment. Fairly read, the complaint alleges the following: Plaintiff was arrested without probable cause by Philadelphia police officers while exercising his First Amendment rights at a protest outside the Convention; Plaintiff was held in custody overnight; and the following day, Defendant Boresky filed an affidavit in support of a federal warrant for Plaintiff's arrest, the content of which is revealed by video footage of the event to be "completely false."[64] Taking into consideration trial testimony in the underlying criminal case against the other six protesters arrested with Plaintiff, as Defendant Boresky would have the

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[63] *George v. Rehiel,* 738 F.3d 562, 572 (3d Cir. 2013) (quoting *Ashcroft v. Al-Kidd,* 563 U.S. 731, 735 (2011)).

[64] Amend. Compl. at ¶ 33.

Court do,[65] it also appears that Defendant Boresky was not at the scene when Plaintiff was arrested, but rather relied solely on information provided to him by one Special Agent McCaa (who is not named as a defendant) in preparing the affidavit.[66]

"The legality of a seizure based solely on statements issued by fellow officers depends on whether the officers who issued the statements possessed the requisite basis to seize the suspect."[67] Liability for an unconstitutional seizure thus passes directly through an officer in Defendant Boresky's position—an affiant without first-hand knowledge of the underlying facts—and turns on whether the officer on whose statements he relied had probable cause himself. In other words, the collective knowledge doctrine is no help to Defendant Boresky, since facts and circumstances actually supporting probable cause were allegedly not within the collective knowledge of the officers with whom he was collaborating and communicating. [68] Since Plaintiff has adequately alleged that the officers on the scene lacked probable cause to arrest him, he has stated a claim against Defendant Boresky as the affiant as well.

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[65] *See* Def.'s Mem. at 6; *see Mayer,* 605 F.3d at 230 (noting that matters of public record may be considered on a motion to dismiss without converting the motion to one for summary judgment).

[66] Def.'s Mem. at 18.

[67] *Rogers v. Powell,* 120 F.3d 446, 453 (3d Cir. 1997).

[68] *Contra* Def.'s Mem. at 18 (citing *O'Connor v. City of Philadelphia,* 233 F. App'x 161, 165 (3d Cir. 2007)).

Second, even if the on-scene officers in fact lacked probable cause to arrest Plaintiff, Defendant Boresky would still be entitled to qualified immunity if it were "objectively reasonable for him to believe, on the basis of [those officers'] statements, that probable cause for the arrest existed." [69] That inquiry, however, necessarily requires examining the content of the statements on which Defendant Boresky relied. [70]

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[69] *Rogers,* 120 F.3d at 455. The Court notes that although courts in this Circuit continue to adhere to the *Rogers* formulation of the qualified immunity standard for reliance on fellow officers' statements, *see Summerville v. Gregory,* No. 14-7653, 2019 WL 4072494, at *21 n.22 (D.N.J. Aug. 29, 2019), in general the "objectively reasonable" formulation of the qualified immunity standard has given way to the "clearly established law" formulation, *compare, e.g., Wood v. Strickland,* 420 U.S. 308, 318 (1975), *with, e.g., Kisela v. Hughes,* 138 S. Ct. 1148, 1152 (2018) (per curiam), and in that respect the wording of *Rogers* may be outdated. Either way, however, the result is the same here.

[70] *See Rogers,* 120 F.3d at 455–57 (examining each statement in turn to determine whether they amounted to mere "rumors" or instead were "clear" and "unambiguous[]" enough that the officer's reliance on them was objectively reasonable); *United States v. Vasquez-Algarin,* 821 F.3d 467, 480–81 (3d Cir. 2016) (holding that the government had not proven there was probable cause for an arrest where the arresting officer "relied entirely on informant tips and the word of another detective" but failed to "describe with any specificity the information provided by that other officer or the basis for that officer's statement"); *Ciardiello v. Sexton,* 390 F. App'x 193, 199–200 (3d Cir. 2010) ("[W]here the arresting officer 'never received a clear statement from a fellow law enforcement officer confirming the existence of probable cause for the suspect's arrest,' and instead relied on vague or irrelevant statements by other officers, the arresting officer is not entitled to qualified immunity.") (citing *Rogers,* 120 F.3d at 455–56)).

Since those statements are not in the record at this stage, it is not possible to say whether it was objectively reasonable for Defendant Boresky to rely on them. [71] The Court is mindful that qualified immunity is an immunity from suit, not merely a defense to liability,[72] and that resolving the issue as early as possible is therefore desirable. In this case, however, it appears that at least some discovery will be required to answer this question.

2. First Amendment Claim

Plaintiff next claims that Defendant Boresky violated his First Amendment rights by interfering with his protected speech in the form of participation in a political protest outside the Convention. [73] Although the Amended Complaint is not entirely clear in this respect, Plaintiff seems to assert that his arrest unconstitutionally "terminat[ed]" his protected speech in the form of "demonstrat[ing] and gather[ing] in protest," [74] rather than that he was arrested in retaliation for the content of his speech. In other words, because Defendant Boresky allegedly effected Plaintiff's arrest without probable cause, and the arrest interrupted the exercise of his First

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[71] Alternatively, if the question were whether it was clearly established that the statements on which Defendant Boresky relied were not adequate to support probable cause, that too would require examining the content of the statements.

[72] *George,* 738 F.3d at 571 ("Qualified immunity is not merely a defense, but also 'an entitlement not to stand trial or face the other burdens of litigation.'" (citing *Saucier v. Katz,* 533 U.S. 194, 200 (2001))).

[73] Amend. Compl. at ¶ 41–46.

[74] Amend. Compl. ¶¶ 44–45.

Amendment right to gather in protest, the illegality of the arrest is claimed to constitute not only a Fourth Amendment violation but a First Amendment violation as well. Defendant Boresky argues that Plaintiff has not stated a claim for a First Amendment violation.

An arrest without probable cause that cuts short an act of speech does have an inherent First Amendment dimension.[75] But the night of Plaintiff's arrest was the last night of the Convention, [76] and by the time Defendant Boresky filed the affidavit, Plaintiff had already been in custody overnight.[77] The Convention had ended, and so, presumably, had the protest. It is therefore unclear what ongoing act of speech Defendant Boresky's actions could have affected. The conspiracy count of the Amended Complaint does allege that "[t]he concerted actions of all the Defendants prevented the Plaintiff [from] exercising

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[75] *See Occupy Columbia v. Haley,* 738 F.3d 107, 120–121 (4th Cir. 2013) (holding that plaintiffs stated a First Amendment claim because arrest prevented them from continuing to protest); *Dellums v. Powell,* 566 F.2d 167, 195 (D.C. Cir. 1977) (explaining that loss of an opportunity to protest due to arrest was a cognizable First Amendment claim); *Haus v. City of New York,* No. 03-4915, 2011 U.S. Dist. LEXIS 155735, at *72 (S.D.N.Y. Aug. 31, 2011) ("[T]he arrest of a person participating in a political protest, in effect entirely[ ]precluding the arrestee's further participation in that First Amendment activity, will trigger a First Amendment violation unless the arrest is supported by probable cause or the police reasonably apprehended that, absent the arrest, the peace or safety of the public would be endangered.").

[76] Amend. Compl. at ¶¶ 8, 29.

[77] *Id.* at ¶¶ 29–30.

his First Amendment right to protest on the night of his arrest *and the two subsequent days the Plaintiff was held in federal custody*." [78] But without any allegation that there was some protest to rejoin, Defendant Boresky's actions are too attenuated from Plaintiff's speech to amount to a First Amendment violation.[79] Accordingly, Plaintiff's First Amendment claim will be dismissed without prejudice. The Court therefore does not reach the *Bivens* analysis on this claim.[80]

3. Conspiracy Claim

In addition to the constitutional claims against Defendant Boresky, Plaintiff alleges a conspiracy between Defendant Boresky and the Philadelphia police officers to violate his constitutional rights. "Under Pennsylvania law, a cause of action for civil conspiracy requires 1) a combination of at least two individuals acting with a common purpose of committing a criminal act or intentional tort, 2) an overt act in furtherance of this agreement, and 3)

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[78] *Id.* at ¶ 48 (emphasis added).

[79] If Plaintiff were claiming First Amendment retaliation, merely prolonging his detention might constitute an independent violation. Instead, his claim is that his arrest and detention prevented him from protesting. Thus, he must allege that he could have continued to protest had Defendant Boresky released him from custody instead of filing the affidavit.

[80] While the existence of a *Bivens* cause of action is a "threshold question," a court "can sometimes resolve a case by demonstrating that a plaintiff would lose on the constitutional claim he raises, even if *Bivens* provided a remedy for that type of claim." *Bistrian,* 912 F.3d at 88–89 & n.15. If Plaintiff chooses to amend his Complaint, the *Bivens* question would then have to be resolved.

actual legal damage to the plaintiff."[81] Defendant Boresky argues that Plaintiff has not adequately alleged either 1) an underlying common law or constitutional tort to support the conspiracy claim or 2) facts that show a common purpose.

As explained above, Plaintiff has stated a claim against Defendant Boresky for a Fourth Amendment violation, which serves as the underlying constitutional tort. However, the complaint contains no allegation that Defendant Boresky communicated or otherwise acted in concert with the Philadelphia police officers who arrested Plaintiff outside the Convention. Even taking into account the publicly available testimony in the criminal case against the other six arrestees, it appears that Defendant Boresky only communicated with Special Agent McCaa. Accordingly, the conspiracy claim against Defendant Boresky will be dismissed without prejudice, leaving that claim to proceed only against the Philadelphia police officers.

IV. CONCLUSION

For the reasons set forth above, Defendant Boresky's motion will be granted as to all claims against him in his official capacity, as well as the First Amendment and civil conspiracy claims against him in his personal capacity. The motion will be denied as to Plaintiff's Fourth Amendment claim against Defendant Boresky in his personal capacity. An appropriate order will be entered.

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[81] *Aetna Inc. v. Insys Therapeutics, Inc.,* 324 F. Supp. 3d 541, 553 (E.D. Pa. 2018) (citations omitted).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1407

JEREMY GRABER,

v.

POLICE OFFICER JOHN DOE II, Badge No. in his individual and official capacity as an officer for the city of Philadelphia Police Department; POLICE OFFICER JOHN DOE III, Badge No. in his individual and official capacity as an officer for the city of Philadelphia Police Department; POLICE OFFICER JOHN DOE IV, Badge No. in his individual and official capacity as an officer for the city of Philadelphia Police Department; SPECIAL AGENT MICHAEL BORESKY, in his individual and official capacity as a Special Agent for the U.S. Secret Services; POLICE INSPECTOR JOEL DALES, in his individual and official capacity as an Inspector for the city of Philadelphia,

SPECIAL AGENT MICHAEL BORESKY,

Appellant.

(E.D. Pa. No. 2-18-cv-03168)

SUR-PETITION FOR REHEARING

Filed: 05/10/2023

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, and NYGAARD*, Circuit Judges.

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Patty Shwartz
Circuit Judge

Dated: May 10, 2023
CJG/cc: Paul J. Hetznecker, Esq.
Joseph F. Busa, Esq.
Jaynie Lilley, Esq.

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* Hon. Richard L. Nygaard's vote is limited to panel rehearing only.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 18-3168-CMR

JEREMY GRABER,

Plaintiff,

v.

POLICE INSPECTOR JOEL DALES, *et al.*,

Defendants.

Filed: March 6, 2020

DECLARATION OF MICHAEL J. PLATI, SPECIAL AGENT IN CHARGE, CRIMINAL INVESTIGATIVE DIVISION, UNITED STATES SECRET SERVICE

I, Michael J. Plati, hereby make the following declaration:

1. I am employed as the Criminal Investigative Division (CID) Special Agent in Charge (SAIC) for the United States Secret Service (Secret Service). I have been employed by the Secret

Service since September 1997, and assigned as the SAIC of CID since August 2016.

2. Additionally, I was the Deputy Coordinator for the Secret Service for the 2016 Democratic National Convention ("DNC"). In my capacity as the Deputy Coordinator, I worked with the lead Coordinator, Assistant Special Agent in Charge (ASAIC) John Ryan, and reported to the Dignitary Protective Division of the Office of Protective Operations in Washington, D.C. ASAIC Ryan and I were responsible for working with Secret Service personnel and other federal, state and local agencies to design and implement the security plan for the DNC in Philadelphia, Pennsylvania.

3. Prior to my assignment as Deputy Coordinator for the DNC in 2015, I was assigned to the New York Field Office from 1998 to 2003, and then the Presidential Protective Division from 2003 to 2008. Subsequently, I was transferred to our CID until 2010, when I was promoted to the Assistant to the Special Agent in Charge of the Administrative Operations Division. In 2012, I was transferred back to CID, as its Assistant to the Special Agent in Charge, until being selected as the Deputy Coordinator for the DNC.

4. I transferred to Philadelphia to assume my duties as Deputy Coordinator in October 2015, and worked full time on security planning for the DNC until August 2016.

Statutory Authorities of the Secret Service

5. Pursuant to 18 U.S.C. § 3056, the Secret Service is charged with protecting the President, Vice-President, President-Elect, and Vice-President Elect, and the immediate families of these individuals. In addition, the Secret Service is responsible for protecting major Presidential and Vice-Presidential candidates, and, within 120 days of the general Presidential election or as directed by the President, the spouses of these candidates.

6. Under 18 U.S.C. § 3056(e)(1), the Secret Service is charged with participating in the planning, coordination, and implementation of security operations at designated special events of national significance.

7. 18 U.S.C. § 1752 prohibits persons and groups from entering a restricted area where a Secret Service protectee is or will be visiting or an area restricted in conjunction with an event designated as a special event of national significance.

National Special Security Events

8. Presidential Policy Directive-22 articulates the designation process for special events of national significance, or National Special Security Events (NSSEs), and clarifies the responsibilities of lead agencies for managing such events.

9. Many special events occurring throughout the Nation receive Federal security assistance.

Members of the public attend these events en masse, and such gatherings are often emblematic of our Nation's diverse culture or involve conduct of the Nation's political or foreign affairs.

10. Some events—such as presidential nominating conventions, presidential inaugurations, international summits, State of the Union addresses, and Olympic games held in the United States—present highly symbolic targets for terrorism. Such events have been designated as NSSEs because they warrant the full protective, incident management, and counterterrorism capabilities of the Federal Government.

11. The Secretary of Homeland Security (Secretary) is responsible for designating events as NSSEs, after consultation with the National Security Council.

12. The Secretary is assisted in the NSSE designation process by the NSSE Working Group, comprised of interagency subject-matter experts and co-chaired by the Secret Service, the Federal Bureau of Investigation, and the Federal Emergency Management Agency.

13. The NSSE Working Group is responsible for conducting an assessment of each event being considered for NSSE designation, and for providing an NSSE designation recommendation to the Secretary based upon relevant security, incident management, and intelligence or counterterrorism factors.

14. NSSE designation factors may include: the size of the event; the anticipated attendance by U.S. officials and foreign dignitaries; the availability of required security, incident management, and counterterrorism resources; and the national, international, or symbolic significance of the event.

15. The Secretary has designated the Secret Service with lead responsibility for the design, planning, and implementation of security operations at NSSEs. This includes, when necessary, coordinating the involvement of assets from other federal, state, and local departments and agencies to complete the overall security requirements of the event.

16. Other federal departments providing specialized units in support of NSSEs include: the Departments of Defense, Health and Human Services, Transportation, and Energy; other Department of Homeland Security components; and other agencies and departments as required to protect NSSE venues, attendees, and events.

The Secret Service's Role in Planning and Providing Security for the 2016 DNC

17. In accordance with Presidential Policy Directive-22, the Deputy Secretary of the Department of Homeland Security designated the 2016 DNC, held during the week of July 25, 2016, an NSSE on July 2, 2015.

18. As the lead federal agency charged with designing, planning and implementing security

at the DNC, the Secret Service's responsibilities included protecting the then-current President and Vice-President, former Presidents and their spouses, the candidates and their spouses, and ensuring the safety of all others attending or participating in the convention.

19. In planning security for the DNC, the Secret Service drew on experience gained in prior presidential nominating conventions, presidential inaugurations, economic summits, and other high profile events both in the United States and abroad.

20. In planning for the DNC, as for other major events, the Secret Service considered many potential security threats, including but not limited to terrorist attacks, lone gunmen, fire, environmental hazards, chemical or biological attacks, cyberattacks, structural safety concerns, and suicide bombers. The security plan included law enforcement sensitive operational strategies to prevent attacks, and emergency response strategies in the event they did occur.

21. Security planning for the DNC was a collaborative process between the Secret Service and many other interested state, federal, and local agencies, and drew upon the expertise of law enforcement as well as experts in public health and safety, emergency response, disaster response, traffic flow, and many other fields.

22. Secret Service agents responsible for ensuring security during an NSSE often need to act with particular urgency to address a wide spectrum of threats. Particularly when pre-determined security measures are compromised, Secret Service agents must make snap judgment calls and rely on similar judgment calls by their state and local partners.

23. As security planners, the Secret Service and its law enforcement partners did not plan the convention itself, nor did we determine the many ways that the City of Philadelphia would accommodate the convention. The Democratic National Convention Committee (DNCC) decided what convention-related events would occur, and when and where. The mayor and other city government officials, whose mission includes protecting the interests of the tens of thousands of people who live and work in the area around the convention center and were affected by the DNC, made many decisions concerning traffic flow and the use of streets. The DNCC's plans for the convention, and the city's plans for accommodating the convention, were the starting point for our security plan. Our role was to devise security strategies that would permit those plans to be implemented safely.

24. Secret Service security planners met routinely for months with the Philadelphia Police Department and other law enforcement partners to ensure the safety of DNC participants and the public at large. The

security planning process also included outreach to local groups and entities who would be potentially affected by the plan, including local businesses, residents, and the local chapter of the American Civil Liberties Union.

25. To provide notice and help participants and non-participants plan for this major event, the Secret Service, in conjunction with its law enforcement and public safety security planning counterparts, issued a press release on July 7, 2016, more than two weeks ahead of the event. The press release included information on security screening, designations of the secured areas around the Wells Fargo Center, road closures, vehicle restrictions, flight and maritime restrictions, and numerous other resources for additional information.

Releasing Sensitive Information Would Undermine the Secret Service's Critical Protective Mission

26. The Secret Service has grave concerns if its law enforcement sensitive protective techniques, methodologies, and sources regarding protectees, including the President of the United States, are disclosed. These techniques may vary by venue, but the fundamental protective methods consistently employed by the Secret Service are used on a daily basis to afford protection to the President, Vice President, former Presidents and all other agency protectees.

27. Information concerning Secret Service security plans, sources, and methods could be used to

assist a potential attacker in developing and executing a plan that could allow him or her to evade the scrutiny of law enforcement and potentially thwart one or more of the many layers of protection afforded by the Secret Service. Disclosure of any one of these protective layers could undermine the security of our protectees.

28. Our adversaries are constantly seeking to gather information that could assist them in defeating the means and methods used by the Secret Service in protecting our Nation's leaders. The release of law enforcement sensitive operational information could enable adversaries to violate the law and harm Secret Service protectees by giving those adversaries information to more easily plan, disable, or circumvent Secret Service protective techniques. Any release of sensitive information could be one piece of information that could be combined with others to better understand our protective methods and their strengths and weaknesses. The release of any sensitive information, which could end up in the hands of those seeking to harm Secret Service protectees, presents a danger to those protectees and the Secret Service personnel assigned to protect them, as well as to the general public attending events or meetings with our protectees.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

2/14/2020	/s/ Michael Plati
Date	Michael J. Plati
	Special Agent in Charge
	Criminal Investigative Division
	United States Secret Service