**Pro Bono Case No. 19-35593**

IN THE

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**Paul Lietz**,

*Plaintiff-Appellant*,

*v.*

**Keri Barbero**, **Andrew Wilper**, and **Does 1–25**,

*Defendants-Appellees.*

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On appeal from the United States District Court
for the District of Idaho
Case No. 1:18-cv-554-EJL
Hon. Edward J. Lodge

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# PLAINTIFF-APPELLANT PAUL LIETZ'S REPLACEMENT OPENING BRIEF

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October 15, 2021

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# STATEMENT OF JURISDICTION

The district court had jurisdiction over this federal civil-rights action under 28 U.S.C. § 1331. It granted Defendants' motion to dismiss and issued its final judgment on June 20, 2019. ER-4. Plaintiff Paul Lietz timely appealed 27 days later. ER-3; Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

# ISSUES PRESENTED

Lietz, a veteran, alleges that employees of the Department of Veterans Affairs (VA) retaliated against him for his protected speech. He seeks damages under *Bivens v. Six Unknown Named Agents*. The district court dismissed his claim on the basis that he could have sought relief under 38 U.S.C. § 7316.

1. Section 7316 is for medical "malpractice or negligence" claims. Lietz seeks relief for retaliation, not malpractice or negligence. This Court has recognized other First Amendment retaliation claims under *Bivens*, and no "special factors" support denying the same relief here. Can Lietz bring his claim under *Bivens*?

2. This Court clearly established as early as 1999 that the First Amendment prohibits retaliation against protected speech; as early as 2000 that the threat of legal sanctions can chill speech; and as early as 2006 that grievances are protected speech. Lietz alleges that beginning in 2015, VA staff retaliated against his grievances with the threat of legal sanctions. Does his claim overcome their assertion of qualified immunity?

# INTRODUCTION

Paul Lietz served his country for nearly 25 years. He was a combat engineer in the U.S. Marine Corps and then worked in military intelligence. He received dozens of medals for his service. In 2003, he was honorably discharged. He now receives treatment at the Boise VA Medical Center for injuries sustained in the line of duty.

Lietz is a man who speaks his mind. He knows when he's being talked down to, or when he's being treated shabbily, or when the country he served doesn't live up to its promises to him in return. He's not afraid to say so. And by his own admission, he's not always polite about it. In conversation, he might swear. But he is not physically violent or threatening. The government has never disputed that.

Keri Barbero and Andrew Wilper are administrative staff at the Boise VA Medical Center. They didn't like Lietz's grievances. They thought his language was "vulgar." So they sought to curb his speech with an "order of behavioral restriction." Under this order, whenever Lietz came to the facility, he was placed under armed guard. VA police had to be present at all times—even when Lietz was undergoing medical procedures. He was "watched at every turn and threatened with arrest if he did not comply." ER-84. By their own admission, nothing he'd said or done was threatening, so this was nothing but retaliation against the content of his speech.

Lietz filed suit under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1970), seeking damages for violations of his First Amendment rights. He represented himself *pro se*, just as he did in his grievances to the VA. The government argued that his *Bivens* claim should be dismissed because he had a remedy under the Federal Tort Claims Act. The district court agreed and dismissed his case.

The district court was mistaken. This Court and the Supreme Court have held repeatedly that the FTCA does not displace *Bivens* claims. It cannot: It offers a remedy only for acts tortious under state law. The specific provision the district court cited, 38 U.S.C. § 7316, is even narrower: It offers a remedy only for medical malpractice committed by the VA's direct caregivers. Neither provision offers relief for violations of federal constitutional rights.

The only way for Lietz to obtain relief is through *Bivens*. The Supreme Court has limited *Bivens* when "special factors" are present, such as when a suit might threaten national security, or burden high-ranking executive officials, or seek to change Executive Branch policy. But Lietz seeks only damages against low-level federal employees for their violations of his First Amendment rights. This Court should let him proceed.

# STATEMENT OF THE CASE

These facts are from Lietz's complaint, which on a motion to dismiss this Court takes as true.[1]

**1.** Paul Lietz is a veteran. We make certain promises to those who honorably serve. We promise them "prompt and appropriate treatment for any physical or emotional disability." 38 C.F.R. § 17.33(a)(2). We do not condition treatment on meekness or servility: We give them a broad right "to present grievances" if they receive substandard care, or if their rights have been violated, or if they wish to call attention to "any other matter." *Id.* § 17.33(g). They may address their grievances to staff members, VA officials, members of Congress, or "any other person." *Id.* They may do so, we tell them, "without fear or reprisal." *Id.*

Lietz filed "written grievance[s]" about how staff at the Boise VA Medical Center had treated him. ER-90–91 ¶¶ 47, 52. He asserted that they had violated his rights, disregarded federal statutes, and committed "other types of willful misconduct in office." *Id.*; ER-76 ¶¶ 78–79. He admits that he was not always polite in these missives, ER-21, but that's as far as any impropriety went. He did not "threaten,

[1] Defendants' original Answering Brief (OAB), Dkt. 7, includes some novel allegations unburdened by citations to the complaint or the record. *See, e.g.*, OAB 9. If Defendants' replacement answering brief renews such allegations, the Court should decline to consider them. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

intimidate, or bully" anyone; he did not "disrupt" the medical center's operations; and he never did anything that required the VA police to intervene. ER-77 ¶¶ 81–83. He simply exercised his rights under VA regulations and the First Amendment. ER-83–84 ¶¶ 13–14.

In return, Defendants—administrative staff at the VA—retaliated against him with Orders of Behavioral Restriction (OBRs). ER-76 ¶¶ 76–78. Under these orders, Lietz had to report to the VA police upon arrival at the medical facility. ER-84 ¶ 15. He had to be accompanied by a police escort throughout his stay. *Id.* He couldn't even undergo medical procedures without an officer present. *Id.*

VA regulations authorize this type of order under narrow and specified circumstances. If a veteran's behavior "jeopardize[s]" the "health or safety" of others or "interfere[s] with the delivery of safe medical care," the facility's chief of staff—here, Wilper—may restrict the time, place, or manner in which the veteran receives care. 38 C.F.R. § 17.107(b)(1). Any such order must include a "summary of the pertinent facts" and the bases for issuing the order. *Id.* § 17.107(b)(5), (c). It must be "narrowly tailored" to the need for restrictions. *Id.* § 17.107(b)(2). And it must avoid "undue interference with the patient's care." *Id.*

The first order here, issued in 2015, alleged that Lietz had engaged in unspecified "disruptive and threatening behavior." ER-64 ¶ 1. Lietz sought clarification. ER-65 ¶ 4. Barbero, chair of the

facility's Disruptive Behavior Committee, wrote back and told him that the objectionable conduct had taken place over the phone. ER-65 ¶ 6; ER-63 ¶ 5. Lietz appealed. ER-65 ¶ 10. After reviewing the incident, the committee rescinded the order. ER-68 ¶ 26.

In 2017, Barbero issued a second OBR against Lietz. ER-68 ¶ 1. This one alleged that he had exhibited "abusive language and aggressive behaviors" during "conversation/correspondence with VA staff." ER-68 ¶ 1. But VA staff's internal emails, which Lietz obtained using FOIA requests, told a somewhat different story. ER-70 ¶¶ 12, 14; ER-68–69 ¶¶ 4–5. In discussing whether to issue the OBR, at least two staff members acknowledged that Lietz had done nothing "direct[ly]" or "physical[ly] threat[ening]." ER-68–69 ¶ 4. They took issue only with his "vulgar and volatile" language. ER-68–69 ¶¶ 1, 4. Still, Barbero opted to order the behavioral restrictions. ER-68 ¶ 1.

**2.** Lietz filed suit *pro se* in federal district court. ER-61. He alleged that VA staff had issued the OBRs in retaliation for his "exercising of his rights to defend himself" and "to try and intimidate [him] from filing grievances." ER-76 ¶¶ 76, 78; *see also* ER-90 ¶¶ 48–49, 51-52. He alleged that on top of the OBRs, VA staff had sought unsuccessfully to have criminal charges filed against him "to coerce [him] into stopping his filing of grievances, responses, and other

correspondence with the agency." ER-76–77 ¶ 80. He argued that such retaliation violated his rights under the First Amendment.[2]

The district court dismissed Lietz's claim without reaching the merits. ER-16. It held that Congress, by providing a statutory right of action for "malpractice or negligence of a health care employee of the VA furnishing health care or treatment," had displaced any remedy under *Bivens* for violations of the First Amendment. ER-12–16 (quoting 38 U.S.C. § 7316(a)(1) (alteration omitted)).

This appeal followed.

[2] He included other claims, such as that the OBRs did not comply with regulatory requirements, but he pursues only his First Amendment claim on appeal.

## STANDARD OF REVIEW

This Court reviews de novo whether a plaintiff has stated a claim and whether a defendant is entitled to qualified immunity. *Keates v. Koile*, 883 F.3d 1228, 1234 (9th Cir. 2018). It accepts as true the plaintiff's well-pleaded allegations of fact and construes them in the light most favorable to the plaintiff. *Id.*; *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). When the plaintiff is *pro se*, this Court has "emphasized" that his pleadings must be construed "liberally." *Capp v. Cty. of San Diego*, 940 F.3d 1046, 1052 (9th Cir. 2019). If the complaint, so construed, contains "even one allegation" of a harmful act that violated the plaintiff's clearly established constitutional rights, the plaintiff is entitled to go forward with his claims. *Keates*, 883 F.3d at 1235 (quoting *Pelletier v. Fed. Home Loan Bank*, 968 F.2d 865, 872 (9th Cir. 1992)); *see Starr*, 652 F.3d at 1216–17.

## SUMMARY OF ARGUMENT

**1.** Lietz may seek relief under *Bivens*. He alleges that federal officials violated his First Amendment rights. *Bivens* supplies a cause of action against federal officials if (a) the claim is similar enough to existing *Bivens* cases or (b) no "special factors" counsel against extending *Bivens* to a new context.

**a.** Retaliation against protected speech is a well-recognized *Bivens* claim under this Court's precedents. *Boule v. Egbert*, 998 F.3d

370, 389–92 (9th Cir. 2021). Whether the Supreme Court has also recognized such a claim is less clear. *See Hartman v. Moore*, 547 U.S. 250, 256 (2006); *Reichle v. Howards*, 566 U.S. 658, 663–64 n.4 (2012). Even if Lietz's claim does seek an extension of *Bivens*, it is only a modest extension.

**b.** No "special factors" counsel against permitting Lietz's claim to proceed. Lietz has no alternative remedy: The FTCA is only for state-law tort claims; 38 U.S.C. § 7316 is only for medical-malpractice claims; and the Veterans Court is only for challenges to benefits decisions. *F.D.I.C. v. Meyer*, 510 U.S. 471, 477–78 (1994); *Tunac v. United States*, 897 F.3d 1197, 1204–05 (9th Cir. 2018). Lietz's First Amendment claim fits none of these molds. And no other special factor counsels denying relief.

**2.** Defendants are not entitled to qualified immunity. Qualified immunity comprises two prongs: (a) whether the officer violated a right and (b) whether that right was clearly established. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

**a.** Defendants violated Lietz's First Amendment right against retaliation for protected speech. His grievances to the VA were protected speech. *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009). Defendants placed him under armed guard and threatened him with arrest in response. Such conduct would

chill a person of ordinary firmness from continuing to present grievances. *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000).

**b.** These principles were clearly established a decade or more before the conduct at issue. *See generally Hartman*, 547 U.S. at 256. So Lietz's suit may proceed.

# ARGUMENT

When federal officials retaliate against protected speech, the victim may seek damages "on the authority of *Bivens*." *Id.* Lietz has a right to pursue that remedy here.

## 1. Lietz has a cause of action under *Bivens* because federal officials violated his First Amendment rights.

If a state official violates an individual's constitutional rights, the individual may hold the official accountable under 42 U.S.C. § 1983. *Bivens* is the "federal analog": It permits the victims of a constitutional violation by a federal official to sue the official for damages in federal court. *Hartman*, 547 U.S. at 254 n.2. In recent decades, the Supreme Court has contracted the scope of *Bivens*, but it still "remains available in appropriate circumstances." *Boule*, 998 F.3d at 389.

This Court asks two questions in evaluating a claim seeking relief under *Bivens*. *Id.* at 385. The first is whether the claim has previously

been recognized or whether it seeks to "extend[]" *Bivens* to a "new context." *Id.* at 385, 390 (quoting *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020)). If the claim is similar enough to existing *Bivens* cases, the inquiry is over and the claim may proceed on the merits. *Shorter v. United States*, 12 F.4th 366, 372–73 (3d Cir. 2021); *see Boule*, 998 F.3d at 387.

If it presents a new context, then the second question is whether "special factors"—chiefly, whether the plaintiff has an adequate alternative remedy—counsel hesitation before allowing the claim to proceed. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017); *Lanuza v. Love*, 899 F.3d 1019, 1031 (9th Cir. 2018).[3] If a plaintiff lacks an adequate alternative remedy and no other special factors disfavor granting relief, the plaintiff may proceed under *Bivens*. *Boule*, 998 F.3d at 390–92; *Lanuza*, 899 F.3d at 1028.

### 1.1. Lietz's First Amendment claim is at most a modest extension of *Bivens*.

A claim arises in a "new" context if it differs "in a meaningful way" from previous *Bivens* cases. *Abbasi*, 137 S. Ct. at 1859. This

[3] Earlier cases sometimes treated "alternative remedies" as step one and "special factors" as step two. *See, e.g.*, *Wilkie v. Robbins*, 551 U.S. 537, 550, 554 (2007). In these cases, the existence of a new context was essentially a silent step zero. *See id.* at 549. As this Court has observed, nothing turns on the difference; this brief points it out only for clarity. *Lanuza*, 899 F.3d at 1031 n.7.

Court has recognized *Bivens* claims based on retaliation against protected speech for 35 years. *See Gibson v. United States*, 781 F.2d 1334, 1341–42 (9th Cir. 1986) (permitting *Bivens* claim against federal agents who had undertaken a "campaign of harassment to disrupt [the plaintiff's] political activities"); *Mendocino Env't Ctr. v. Mendocino Cty.* (*Mendocino I*), 14 F.3d 457, 464 & n.4 (9th Cir. 1994) (similar). In *Ziglar v. Abbasi*, the Supreme Court announced a new test for identifying whether a context is "new." 137 S. Ct. at 1859–60. Applying that test, this Court has continued to recognize First Amendment retaliation claims. *Boule*, 998 F.3d at 389–92. So under this Court's precedents, Lietz's claim does not arise in a new context.

The Supreme Court's cases are more equivocal. Claims against federal officers alleging retaliation for protected speech have come before the Court at least five times. In one case, the Court denied relief in light of the "comprehensive" relief provided by civil-service regulations. *Bush v. Lucas*, 462 U.S. 367, 368 (1983). In three others, the Court "assumed" that *Bivens* extends to First Amendment claims and proceeded to the merits. *Wood v. Moss*, 572 U.S. 744, 757 (2014); *see also Reichle*, 566 U.S. at 663–64 n.4; *Ashcroft v. Iqbal*, 556 U.S. 662, 675–76 (2009). In the remaining case, *Hartman v. Moore*, the Court explicitly stated, as a necessary part of its reasoning, that *Bivens* reaches First Amendment retaliation claims: "When the vengeful officer is

federal, he is subject to an action for damages on the authority of *Bivens*." *Hartman*, 547 U.S. at 256; *see Boule*, 998 F.3d at 389–90.

That statement was seemingly *un*equivocal. But it was also preambular: The question presented in *Hartman* was on the merits of the First Amendment claim, not whether there was a cause of action, and on the merits the claim failed. 547 U.S. at 260–66 (holding that the plaintiff had failed to allege causation). So six years later the Court asserted that it had not, in fact, "held that *Bivens* extends to First Amendment claims." *Reichle*, 566 U.S. at 663–64 n.4. But it has also repeatedly shied away from holding that *Bivens* does *not* extend to such claims, leaving them in a state of suspended animation.

This Court should hold that because First Amendment retaliation is a long-recognized context in this circuit, both pre- and post-*Abbasi*, Lietz's claim does not arise in a new context. But even if it does, it represents at most a "modest" extension of previous *Bivens* cases. *See Boule*, 998 F.3d at 387 (quoting *Abbasi*, 137 S. Ct. at 1864). And even though a modest extension still requires analysis of special factors, *see id.* at 387, 390–92, no special factors counsel denying relief here.

### 1.2. Lietz has no alternative remedy.

The focus of the special-factors inquiry is on the separation of powers: Was Congress's failure to provide the plaintiff with a cause of action "inadvertent" or intentional? *Lanuza*, 899 F.3d at 1028;

*Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). If it was intentional, courts should "refrain" from overriding that decision. *Abbasi*, 137 S. Ct. at 1858. But if it was inadvertent, courts have more power to fashion a remedy. *See Lanuza*, 899 F.3d at 1031.

Congress sometimes shows its intentions by channeling claims to some "alternative, existing" avenue for redress. *See Wilkie*, 551 U.S. at 550. But any alternative remedy "still must be adequate." *Boule*, 998 F.3d at 391 (quotation marks omitted). It must protect the same interests as the federal constitutional claim. *Fazaga v. FBI*, 965 F.3d 1015, 1059 (9th Cir. 2020), *cert. granted on other grounds*, 141 S. Ct. 2720 (June 7, 2021). And it must "offer 'deterrence and compensation' that is 'roughly similar' to what is available under *Bivens*." *Quintero Perez v. United States*, 8 F.4th 1095, 1105 (9th Cir. 2021) (quoting *Minneci v. Pollard*, 565 U.S. 118, 120, 130 (2012)).

A few examples help illustrate. Begin with *Schweiker v. Chilicky* and *Bush v. Lucas*, two cases in which the alternative remedies sufficed. In each, Congress had created "comprehensive federal program[s]"—Social Security disability insurance in *Schweiker*, civil-service protections in *Bush*. *Adams v. Johnson*, 355 F.3d 1179, 1183–84 (9th Cir. 2004) (citing *Schweiker*, 487 U.S. at 423, and *Bush*, 462 U.S. at 368). Each program came with "extensive statutory remedies" to redress the plaintiffs' injuries. *Id.* The statutory remedies did not provide complete relief, but they did provide primary compensatory relief—full retroactive

benefits in *Schweiker*, 487 U.S. at 417, and back pay in *Bush*, 462 U.S. at 371. In both cases, the Court held that such relief sufficed and declined to provide additional, extra-statutory relief through *Bivens*. *See Adams*, 355 F.3d at 1183–85.

In contrast, consider the FTCA. The Supreme Court and this Court have consistently held that the FTCA does not supplant *Bivens* claims. *Carlson v. Green*, 446 U.S. 14, 20–23 (1980); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001); *Quintero Perez*, 8 F.4th at 1105; *Boule*, 998 F.3d at 391–92. It falls short on both deterrence and compensation. It cannot "deter the unconstitutional acts of individuals" because it offers a right of action only "against the United States." *Quintero Perez*, 8 F.4th at 1105 (quoting *Malesko*, 534 U.S. at 68); *see also Meyer*, 510 U.S. at 485 ("the purpose of *Bivens* is to deter *the officer*"). And because it depends on state law for the source of substantive liability, it provides no compensation at all for plaintiffs who "alleg[e] the deprivation of a federal constitutional right." *Meyer*, 510 U.S. at 477–78; *Carlson*, 446 U.S. at 23.[4]

Here, the district court claimed that the medical malpractice and negligence remedial scheme in 38 U.S.C. § 7316 provided Lietz with an

[4] Also, Congress amended the FTCA to carve out claims "for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). But *Carlson* predates that amendment, and these reasons are independent of it.

adequate alternative remedy. ER-12–16. Defendants might also raise the benefits-review procedure set forth in the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified in scattered sections of 35 U.S.C.). Neither of these, however, permits Lietz to seek relief for the unconstitutional retaliatory conduct of which he complains. So they cannot supplant his remedy under *Bivens*.

#### 1.2.1. Section 7316 does not provide a remedy for violations of First Amendment rights.

Lietz cannot seek relief under § 7316 for at least two reasons. First, by its terms, § 7316 covers only claims for medical malpractice and negligence. Second, it relies on the FTCA's cause of action, 28 U.S.C. § 1346(b), and the Supreme Court has held that that provision cannot support claims for violation of a constitutional right.

Section 7316's narrow focus starts at the title: "Malpractice and negligence suits: defense by United States."[5] Its plain text follows suit, offering veterans an exclusive remedy for injuries arising from the "malpractice or negligence of a health care employee of the [VA] in furnishing health care or treatment." 38 U.S.C. § 7316(a)(1). This text

[5] A statute's title or heading is a "permissible indicator[] of meaning." *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 221 (2012). All the more so when it is part of the bill enacted by Congress. *United States v. Schopp*, 938 F.3d 1053, 1060–61 n.3 (9th Cir. 2019); *see* Department of Veterans Affairs Health-Care Personnel Act of 1991, Pub. L. No. 102-40, 105 Stat. 187.

contains two distinct limits on the scope of the remedy: Plaintiffs may seek relief only for "malpractice or negligence . . . in furnishing health care or treatment," and they may seek relief only against "health care employee[s]" of the VA. *Id.* This Court has explained that the latter provision means employees "directly engaged in patient care." *Tunac*, 897 F.3d at 1204–05.[6] So, in sum, § 7316 provides a remedy for "claims of medical negligence on the part of medical professionals." *Id.* at 1205.

Lietz's claim has nothing to do with medical malpractice or negligence. Lietz doesn't allege that Defendants' treatment of him fell below the medical standard of care. In fact, drawing inferences from his complaint in his favor, Defendants aren't directly engaged in patient care at all. Wilper is the center's chief of staff, and Barbero is chair of the medical center's Disruptive Behavior Committee. ER-63 ¶¶ 4–5. They're administrative staff. And Lietz alleges that they violated his First Amendment rights by retaliating against him for his protected

[6] The district court relied on an out-of-circuit case, *Ingram v. Faruque*, to hold that any employee "providing support to . . . medical personnel"—that is, any employee of the medical center—was a "health care employee." ER-15 (citing 728 F.3d 1239, 1251 (10th Cir. 2013)). Because this Court's caselaw is to the contrary, *Tunac*, 897 F.3d at 1204–05, the district court erred.

speech. *See, e.g.*, ER-76 ¶¶ 76–77; ER-83 ¶ 13. That kind of claim cannot be brought under § 7316. *See Tunac*, 897 F.3d at 1204–05.[7]

For that matter, *no* kind of constitutional claim can be brought under § 7316. Rather than provide an independent right of action, that provision makes use of the existing right of action in the FTCA. *See* § 7316(a)(1) (referring to the remedy "provided by sections 1346(b) and 2672 of title 28").[8] But the FTCA's right of action does not cover federal constitutional claims. *Meyer*, 510 U.S. at 477–78. It covers only conduct tortious under "the law of the place where the act or omission occurred"—that is, under state substantive law. *Id.* (quoting 28 U.S.C. § 1346(b)); *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1024–25 (9th Cir. 2001). Repurposing this right of action makes sense for § 7316, because medical-malpractice claims are creatures of state law. But it follows that § 7316 cannot provide a remedy for violations of federal constitutional law.

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[7] For this reason, even if the question were recast as whether § 7316 provides Defendants with "immunity" from Lietz's claims, *cf. Hui v. Castaneda*, 559 U.S. 799, 807 (2010), the answer would still be "no." Section 7316's "exclusiv[ity]" provision still applies only to claims of medical malpractice or negligence by medical professionals. *Tunac*, 897 F.3d at 1204–05.

[8] Section 2672 does not provide a remedy at law; it merely authorizes agency heads to settle claims brought under the FTCA.

Still, the district court dismissed Lietz's *Bivens* claim with reference to § 7316. ER-12–16. It reasoned by analogy to another statute, 42 U.S.C. § 233(a), which provides a similar remedy against the U.S. Public Health Service. ER-13. That statute, the Supreme Court has held, does preclude at least some *Bivens* claims. *Hui v. Castaneda*, 559 U.S. 799, 805–06 (2010). So, the district court reasoned, § 7316(a) must preclude the *Bivens* claim here. ER-13.

The district court was mistaken. True, § 233(a) and § 7316(a) share some similarities, but the Supreme Court did not read § 233(a) as broadly as did the district court. Rather, it carefully cabined its decision to "the harm alleged in [that] case." *Hui*, 599 U.S. at 808, 813. Specifically, Francisco Castaneda alleged that the defendants had improperly treated his cancerous lesion. *Id.* at 802–03. Such misconduct, if committed by a "private person," would support a standard medical-malpractice claim. So the FTCA, through § 233(a), provided a remedy against the United States. *See id.* at 812 ("[A]n FTCA remedy is unquestionably available for the misconduct alleged in this case.").

Lietz's First Amendment claim is cut from a different cloth. As explained above, it has nothing to do with medical malpractice. More importantly, *no* state-law tort is "capable of protecting the constitutional interests at stake" in a First Amendment claim. *Cf. Minneci*, 565 U.S. at 125. No state-law tort imposes liability on a private person for

retaliating against speech by restricting the speaker's access to the person's property. *Cf. Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) ("The right to exclude is one of the most treasured rights of property ownership." (cleaned up)). So by the same token, the FTCA does not impose liability for such conduct on the United States. *See Meyer*, 510 U.S. at 477–78. Victims of First Amendment violations must turn elsewhere for relief.

The district court found another reason for its conclusion in § 7316(f), which "expands" subsection (a) to cover "intentional torts." ER-13 (quoting *Ingram v. Faruque*, 728 F.3d 1239, 1248 (10th Cir. 2013)). It reasoned that because intent is an element of a First Amendment retaliation claim, subsection (f) must permit Lietz to seek relief under § 7316(a). ER-13–14. Not so. Subsection (f) broadens § 7316(a)'s coverage to torts like "assault" and "battery." *See* 28 U.S.C. § 2680(h) (carving out such torts from § 1346(b)); 38 U.S.C. § 7316(f) (negating § 2680(h) for claims brought under § 7316(a)).[9] Those torts are still violations of duties under state law—not violations of the federal Constitution.[10]

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[9] Congress added this subsection to permit suits for "medical battery" as well as garden-variety medical negligence. *Levin v. United States*, 568 U.S. 503, 517–18 & n.7 (2013).

[10] *Ingram*, like *Hui*, involved a traditional state tort: false imprisonment. 728 F.3d at 1240. It had no occasion to consider injuries under the First Amendment, so ruling for Lietz would not create a circuit split.

In short, with or without § 7316(f), a predicate state-law tort is essential to an FTCA claim. No state-law tort, no remedy; no remedy, no "alternative remedial scheme[]" to displace *Bivens*. *Meyer*, 510 U.S. at 477–78; *Delta Sav. Bank*, 265 F.3d at 1024–25; *Lanuza*, 899 F.3d at 1032.

#### 1.2.2. The VJRA does not provide a remedy for violations of First Amendment rights.

The VJRA establishes an "exclusive pathway for judicial review of [veterans'] benefits decisions." *Tunac*, 897 F.3d at 1202. If a claim would "require[] the district court to determine whether the VA acted properly in handling a veteran's request for benefits," or if resolving the claim might otherwise affect the VA's benefits decisions, the VJRA requires the veteran to "seek a forum in the Veterans Court and the Federal Circuit." *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1025–26 (9th Cir. 2012) (en banc). But not all "action or inaction by the VA . . . automatically constitutes a 'benefit.'" *Tunac*, 897 F.3d at 1203 (quoting *Thomas v. Principi*, 394 F.3d 970, 975 (D.C. Cir. 2005)).

Here, the VA's own regulations expressly provide that issuing an OBR is *not* a decision about benefits coverage: "Although VA may restrict the time, place, and/or manner of care under this section, VA will continue to offer the full range of needed medical care to which a patient is eligible[.]" 38 C.F.R. § 17.107 note. In other words, issuing

an OBR does not affect a veteran's entitlement to benefits. It follows that the VJRA does not provide a pathway for judicial review.

There appears to be no appellate authority on this precise question. There is, however, one well-reasoned district-court decision from within this circuit. *Johnson v. United States*, 2013 WL 6502818, at *9 (N.D. Cal. 2013). Reviewing analogous caselaw, that court noted that on the one hand, the VA's suspending an attorney from practice is not a benefits decision, but on the other hand, the VA's appointment of a fiduciary to receive benefits is a benefits decision. *Id.* (collecting cases). From these cases, it gleaned the rule that "a decision which only incidentally affects benefits in a collateral manner does not fall within the purview of [the VJRA], whereas a decision which directly affects the handling and receipt of benefits does." *Id.*

Applying that rule to OBRs, it reasoned that an OBR does not "deprive or limit the substantive benefits" to which a veteran is entitled and does not "materially affect the manner" in which such benefits are received. *Id.* So, it continued, any impact on the veteran's entitlement to benefits is "collateral and incidental." *Id.* And thus it concluded that the VJRA did not deprive it of jurisdiction to hear the veteran's claim. *Id.*

The district court's decision in *Johnson* was correct and is on all fours here. Requiring Lietz to have a police escort on facility grounds with no change in his entitlement to benefits has only a collateral and

incidental effect on his benefits. It thus does not fall within the purview of the VJRA, and so the VJRA, in turn, does not provide Lietz with an alternative remedy to *Bivens*.

### 1.3. No other special factors counsel denying relief.

Even without an alternative remedial scheme, federal courts must consider whether other special factors "counsel[] hesitation" before authorizing a *Bivens* action. *Wilkie*, 551 U.S. at 550 (quotation marks omitted). *Abbasi* catalogued several such factors, 137 S. Ct. at 1857–63, which this Court summarized as follows:

- the rank of the officer involved;
- whether *Bivens* is being used as a vehicle to alter an entity's policy;
- the burden on the government if such claims are recognized;
- whether litigation would reveal sensitive information;
- whether Congress has indicated that it does not wish to provide a remedy; and
- whether there is adequate deterrence absent a damages remedy.

*Lanuza*, 899 F.3d at 1028. Courts should weigh these factors against the reasons for granting relief, "the way common law judges have always done." *Wilkie*, 551 U.S. at 554. Ultimately, "*Abbasi* makes clear that, though disfavored, *Bivens* may still be available in a case against an

individual federal officer who violates a person's constitutional rights while acting in his official capacity." *Lanuza*, 899 F.3d at 1028.

Here, no special factors counsel denying relief.

**No high-ranking officers.** Lietz does not "challenge high-level executive action" or seek relief against high-level officers of the Executive Branch. *Cf. id.* at 1028–29. He has dismissed his appeal against (and thus accepted dismissal of his claims against) higher-level VA officials, Dkt. 28, leaving only Barbero, the chair of the Boise medical center's Disruptive Behavior Committee, and Wilper, the center's chief of staff. ER-63 ¶¶ 4–5. These defendants are "low-level federal officer[s]," not "high-ranking executive[s]" like the Attorney General of the United States or the Director of the FBI. *Lanuza*, 899 F.3d at 1029. Lietz seeks to hold them responsible for their own misconduct—issuing the OBRs against him—not the acts of their subordinates. His claim "strictly comport[s] with *Bivens*," so this factor does not counsel against allowing it to proceed. *Id.*

**No policy alterations.** Lietz does not "challenge or seek to alter the policy of the political branches." *See id.* He does not argue that the VA has a "general policy" of retaliating against unpleasant speech. *Cf. Abbasi*, 137 S. Ct. at 1860. Indeed, the VA's policy is that patients retain their constitutional rights when they seek treatment. 38 C.F.R. § 17.33(i). Lietz challenges only "individual instances" of retaliation, which "due to their very nature are difficult to address except by way of

damages actions after the fact." *See Abbasi*, 137 S. Ct. at 1862; *Reid v. United States*, 825 F. App'x 442, 445 (9th Cir. 2020) (permitting a *Bivens* claim where the plaintiff alleged "individualized injuries and fears of retaliation unique to him, not the inmate population as a whole").

**No great burden on the government.** Because Lietz does not seek relief against high-level officials and does not seek to change official policy, allowing this suit to proceed would not impose a burden on the government greater than any "run-of-the-mill" civil-rights claim. *See Lanuza*, 899 F.3d at 1029–30. This is a "straightforward case against [two] low-level federal officer[s]." *See id.* at 1029.

**No sensitive discovery**. For the same reasons, discovery in this lawsuit would not "border upon" or "directly implicate" any high-level policymaking deliberations. *Cf. Abbasi*, 137 S. Ct. at 1860–61. Indeed, Lietz has already obtained much of the relevant evidence. ER-68–69 ¶ 4 (excerpting emails Defendants exchanged before imposing the second OBR). To the extent further discovery is necessary, it likely would "not involve the disclosure of any sensitive government information at all." *See Lanuza*, 899 F.3d at 1030.

**No Congressional indication of reluctance to provide a remedy.** Unlike the alternative-remedies inquiry, this special factor requires interpretation of Congressional silence. *See id.* at 1031 ("there is no single, specific congressional action to consider and interpret" (quoting *Abbasi*, 137 S. Ct. at 1856)). When a plaintiff challenges

individual instances of misconduct rather than "high-level policies," Congress's silence is more likely to be "inadvertent," because "Congress presumes that, as a general matter, federal employees faithfully execute federal law." *Abbasi*, 137 S. Ct. at 1862 (quoting *Schweiker*, 487 U.S. at 423); *Lanuza*, 899 F.3d at 1031.

Congressional attention to remedies for veterans' claims has naturally focused on the two most common varieties—claims for better benefits, 38 U.S.C. § 511 (the VJRA), and claims for medical malpractice, 38 U.S.C. § 7316. It channeled the former through the Veterans Court and the latter through the FTCA. *Tunac*, 897 F.3d at 1201–05. But it left claims for constitutional violations untouched. If it had wanted all claims to go through the FTCA or the Veterans Court, "it would have said so." *Lanuza*, 899 F.3d at 1031 n.6. But it didn't. There's "no evidence" it considered one-off constitutional torts. *See id.* at 1031. So there is no evidence it was reluctant to provide plaintiffs like Lietz a remedy.

**No deterrence absent a damages remedy.** Because Congress has provided no other avenue for plaintiffs like Lietz to obtain relief, a damages remedy under *Bivens* is the only way to deter similar types of constitutional violations.

**No other special factors.** Along with the factors above, the Supreme Court has contemplated a few other reasons that could justify denying relief, none of which apply here. Lietz's claim involves no

"sensitive issues of national security." *Lanuza*, 899 F.3d at 1026 (describing the decision in *Abbasi*). Nor would recognizing it have any effect on foreign relations. *Boule*, 998 F.3d at 388 (describing the decision in *Hernandez*). Nor does Lietz seek redress for an injury "arising out of or in the course of activity incident to military service." *Lanuza*, 899 F.3d at 1026–27 n.3 (describing *United States v. Stanley*, 483 U.S. 669, 683–84 (1987), and *Chappell v. Wallace*, 462 U.S. 296, 299–304 (1983)). Nor does he seek relief against a special class of defendants. *Cf. Malesko*, 534 U.S. at 63 (no *Bivens* action against private entity); *Meyer*, 510 U.S. at 483–86 (nor a federal agency). Nor are the elements of a First Amendment retaliation claim "unclear." *Cf. Wilkie*, 551 U.S. at 561 & n.11. Quite the contrary: The law is "settled" and the legal standards for adjudicating a retaliation claim are "well established and administrable." *Hartman*, 547 U.S. at 256; *see Lanuza*, 899 F.3d at 1033.

In short, none of the special factors that have stayed the judiciary's hand in other cases is present here. Any "costs imposed by allowing a *Bivens* claim to proceed" are outweighed by "compelling interests" in protecting veterans from retaliation for exercising their rights under the First Amendment. *See Boule*, 998 F.3d at 389. This Court should allow Lietz's claim to proceed.

## 2. Defendants are not entitled to qualified immunity.

Defendants raised qualified immunity below, but the district court declined to decide the issue, disposing of the case instead for lack of a cause of action under *Bivens*. ER-9, ER-16. But on a motion to dismiss, qualified immunity is a pure question of law that this Court reviews de novo. *See Keates*, 883 F.3d at 1234. Because Lietz plausibly alleges that Defendants violated his clearly established constitutional right against retaliation for protected speech, this Court should reverse.

### 2.1. Qualified immunity protects government agents only when the law is unclear.

Qualified immunity shields government agents from liability for violating a constitutional right if the right was not "clearly established." *Camreta v. Greene*, 563 U.S. 692, 705 (2011). It comprises two prongs: Whether the officer violated a right and whether that right was clearly established. *Pearson*, 555 U.S. at 236. Courts may address the prongs in any order, but the Supreme Court has recognized that addressing the merits first is "often beneficial," and this Court "typically" addresses the merits first. *Id.*; *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1168 (9th Cir. 2013).

Defendants bear the burden of proving they are entitled to qualified immunity. *Slater v. Deasey*, 789 F. App'x 17, 21 (9th Cir. 2019) (citing *Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005)).

This issue may be the subject of a split within this circuit, *cf. Isayeva v. Sacramento Sheriff's Dep't*, 872 F.3d 938, 946 (9th Cir. 2017), but the Supreme Court has consistently held that a government agent seeking immunity bears the burden "of showing that such an exemption is justified." *Richardson v. McKnight*, 521 U.S. 399, 412 (1997) (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988)) (qualified immunity); *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 (1993) (absolute immunity); *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 281 (1993) (Scalia, J., concurring) ("[T]he defendant official bears the burden of showing that the conduct for which he seeks immunity would have been privileged at common law in 1871."). The Court has also held that "qualified immunity is an affirmative defense and that the burden of pleading it rests with the defendant." *Crawford-El v. Britton*, 523 U.S. 574, 587 (1998) (quotation marks omitted).

To determine whether an officer violated clearly established law, this Court looks for factually similar cases, "mindful that there need not be a case directly on point." *A.K.H. ex rel. Landeros v. City of Tustin*, 837 F.3d 1005, 1013 (9th Cir. 2016) (quotation marks omitted).[11] If Lietz's complaint contains "even one allegation of a harmful act that

[11] The Supreme Court has recently reaffirmed that controlling precedents can clearly establish the law even for novel facts. *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020) (per curiam); *see also Hope v. Pelzer*, 536 U.S. 730, 738, 741 (2002).

would constitute a violation of a clearly established constitutional right," he can go forward with his claims. *Keates*, 883 F.3d at 1235 (quoting *Pelletier*, 968 F.2d at 872).

### 2.2. Defendants retaliated against Lietz for protected speech, violating the First Amendment.

The First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech. *Hartman*, 547 U.S. at 256. To state a First Amendment retaliation claim, a plaintiff must show (1) that he was engaged in a constitutionally protected activity; (2) that the officials' actions would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the protected activity was a substantial or motivating factor in the officials' conduct. *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 827 (9th Cir. 2020); *Mendocino Env't Ctr. v. Mendocino Cty.* (*Mendocino II*), 192 F.3d 1283, 1300–01 (9th Cir. 1999).

Lietz satisfies all three elements. He was "[p]rotesting through telephone calls, and letters and/or correspondence against the agency" and "[f]iling grievance through letters and/or correspondence against the agency." ER-83 ¶ 13. That is quintessentially protected speech. *See Brodheim*, 584 F.3d at 1271 (holding, in the prison context, that submitting grievances is protected speech); *see also* 38 C.F.R. § 17.33(g) (protecting veterans' right to "present grievances . . . without fear or

reprisal"). It remains protected even if his language was "disrespectful." *Brodheim*, 584 F.3d at 1271.

In response, Defendants issued two OBRs requiring that Lietz have a police escort whenever he received treatment at the medical center. ER-64 ¶ 1; 65 ¶ 6; ER-68 ¶ 1. He was "forced to have medical procedures performed with VA police present." ER-84 ¶ 15. He was "watched at every turn and threatened with arrest if he did not comply." *Id.* Defendants also sought unsuccessfully to have criminal charges filed against him. ER-76–77 ¶ 80.[12]

Such conduct would chill a person of ordinary firmness from continuing to present grievances. *See Index Newspapers*, 977 F.3d at 827. A threat of "punishment or adverse regulatory action" makes reasonable people "apprehens[ive]" and thus chills their speech. *Brodheim*, 584 F.3d at 1271. That is why even "[i]nformal measures, 'such as the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation,' can violate the First Amendment." *White*, 227 F.3d at 1228 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)). Imposing an OBR on Lietz was

[12] Wilper also refused to process his OBR appeals. ER-103–04 ¶¶ 119, 124–26 (alleging that Wilper refused to forward his appeals to the network director); *cf.* 38 C.F.R. § 17.107(e) (requiring a facility's chief of staff to forward a veteran's appeals to the network director).

both a formal legal sanction and, implicitly, a threat of arrest.[13] Both are enough to deter a reasonable person from continuing to speak out.

Lietz also alleges that Defendants' intent was to "coerce [him] into stopping his filing of grievances, responses, and other correspondence with the agency." ER-76–77 ¶¶ 76–78, 80; *see also* ER-84 ¶¶ 15, 18 (alleging that Defendants took these actions "[a]s a direct and proximate result of Plaintiff's decision to exercise his 1st Amendment rights"). So Lietz has adequately alleged that his protected activity was a "substantial or motivating factor" in Defendants' conduct. *See Index Newspapers*, 977 F.3d at 827.

In sum, Lietz alleges that Defendants used the OBR and threat of further prosecution to prevent him from continuing to file grievances. That much is enough to state a claim for retaliation in violation of the First Amendment.

### 2.3. Lietz's right to "speak out" without retaliation has long been clearly established.

Defendants' retaliatory actions began in 2015. ER-64 ¶ 1. Almost a full decade earlier, the Supreme Court held that "the law is settled that as a general matter the First Amendment prohibits

[13] The OBRs also forced Lietz to undergo medical procedures with VA police present, violating his privacy—which can also have a chilling effect. *See Perry v. Schwarzenegger*, 591 F.3d 1126, 1139 (9th Cir. 2009).

government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Hartman*, 547 U.S. at 256. The Court also set forth the elements in more detail: protected speech, adverse action, and causation. *Id.* And as early as 1999, this Court had laid out the same elements. *Mendocino II*, 192 F.3d at 1300–01.

That much specificity is enough to clearly establish the law. "If qualified immunity provided a shield in all novel factual circumstances, officials would rarely, if ever, be held accountable" for violating the Constitution. *Mattos v. Agarano*, 661 F.3d 433, 442 (9th Cir. 2011) (en banc). In addition, *Brodheim* had established by 2009 that filing grievances—even disrespectful ones—is protected speech. 584 F.3d at 1271. And as early as 2000, this Court had held that the threat of legal sanctions and similar measures were coercive enough to support a retaliation claim. *White*, 227 F.3d at 1228. Threatening Lietz with arrest and criminal charges, and requiring that he be accompanied by armed guard, surely fits the bill. *See* ER-84 ¶ 15; ER-76–77 ¶ 80.

In sum, by 2015, a reasonable federal official would have known that individuals have a First Amendment right to be free from such retaliation. Lietz alleges that Defendants violated that right. He is entitled to proceed on that claim.

# CONCLUSION

For all these reasons, the judgment of the district court should be reversed.

Dated: October 15, 2021

Respectfully submitted,

By: */s/Athul K. Acharya*
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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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