IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFREY M. WILLETT,	)	No. 1:18-cv-1707-TSC
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
MICHAEL R. POMPEO, *et al.*,	)	
	)	
Defendants	)	

RENEWED MOTION TO DISMISS
OF INDIVIDUAL-CAPACITY DEFENDANTS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), and the Court's minute entry of April 2, 2020, Defendants Nancy Berryhill, Stephen B. Dietz, III, Michele Thoren Bond, Jonathan M. Rolbin, Christine L. McLean, John D. Wilcock, Patrick P. O'Carroll, Jr., George Penn, Douglas Roloff, Matthew Deuchler, and Adrienne C. Messer respectfully renew their motion to dismiss all claims asserted against them in their individual capacities. In support of this renewed motion, the Defendants refer the Court to their Memorandum of Points and Authorities filed herewith under Local Civil Rule 7(a).

As the Defendants explain there, all claims asserted against them under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), should be dismissed because (1) the claims are time-barred under the statute of limitations; (2) a *Bivens* damages remedy is unavailable; and (3) the Defendants have qualified immunity. Any non-*Bivens* claim asserted in Count 5 (whether based on conspiracy under 42 U.S.C. § 1985(3),

federal criminal statutes, or common-law fraud) should also be dismissed as barred by the statute of limitations or qualified immunity or because it otherwise fails to state a claim upon which relief can be granted.

Respectfully submitted,

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DATE: May 4, 2020

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Renewed Motion to Dismiss on counsel for all parties by electronic means through the Court's Case Management/Electronic Case File system on May 4, 2020.

s/ Jeremy Scott Brumbelow
JEREMY SCOTT BRUMBELOW
Counsel for Individual-Capacity Defendants

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	)	
Defendants	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF INDIVIDUAL-CAPACITY DEFENDANTS' RENEWED MOTION TO DISMISS

Plaintiff sues 12 current or former federal employees for their supposed roles in subjecting him to federal investigation and in revoking and destroying his United States passport (which was promptly replaced) and denying him a post-revocation hearing. Alleging that the Defendants violated the United States Constitution, he seeks damages from them in their individual capacities under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Defendants Berryhill, Dietz, Bond, Rolbin, McLean, Wilcock, O'Carroll, Penn, Roloff, Deuchler, and Messer now seek dismissal of all such claims. Pursuant to Federal Rule of Civil Procedure 12(b)(6), all *Bivens* claims (and any non-*Bivens* claim that Plaintiff might be asserting in his fifth count) warrant dismissal because (1) they are time-barred; (2) Plaintiff lacks a non-statutory *Bivens* remedy for his asserted injuries; and (3) his claims are barred by qualified immunity.[1]

[1] Secretary Pompeo is also sued personally, Compl. at p. 1; *id.* ¶ 9, but has not been properly or timely served, *see* Fed. R. Civ. P. 4(i)(3), and undersigned counsel does not represent him. *See* 28 C.F.R. § 50.15. The Secretary, therefore, is not a party to

I. BACKGROUND

For present purposes, the Defendants assume the truth of the following non-conclusory "well-pleaded factual allegations" in the complaint, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-64 (2007), and the information in its exhibits. *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006).

Once known as "Michael James Kocik," Plaintiff changed his name to "Jeffrey Michael Willett" through proceedings in a Nevada state court in 2005. Compl. ¶¶ 24-27. On May 9, 2006, he applied for a new passport to reflect his new name, submitting to the State Department, *inter alia*, a copy of the Nevada court's name-change order. On May 16, 2006, the State Department issued Plaintiff a new passport, "Passport No. 218029753," "under his changed name." *Id.* ¶¶ 28-29.

Some three years later, in July 2009, Plaintiff "met a Romanian student" named Roxanne Ciopei, who had worked in the United States on visas but was having trouble cashing her tax-refund checks because her name was misspelled on her Social Security card. On her behalf, Plaintiff sought to intervene with the Social Security Administration ("SSA") and persuade it to give Ciopei "a new corrected social security card," *id.* ¶¶ 30-34. When those efforts failed, Plaintiff complained to Congressman Tom Perriello who, on June 28, 2010, relayed Plaintiff's concerns to the SSA Office of Inspector General ("SSA-OIG"). Defendant O'Carroll

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this motion. In circumstances like these, the Court is empowered to dismiss without prejudice under Rule 4(m).

(then the Inspector General) responded in an August 6, 2010 letter. Compl. Ex. B.

As his submissions reveal, Plaintiff had made a November 2009 "complaint" to SSA about its handling of the Ciopei matter but was "rebuffed," Compl. ¶¶ 35-36; *id.* Ex. B at 1. He "then escalated his concerns" to SSA-OIG, Compl. ¶ 37, and characterized "the SSA's decision" not to give Ciopei a "replacement card" as "fraud and waste," *id.* Ex. B at 1-2. SSA-OIG allegedly "refused to open an investigation," Compl. ¶ 37. But as Defendant O'Carroll explained to the Congressman, an SSA-OIG investigation "was not blocked" but, rather, "was declined, as there was no fraud or waste to investigate, and thus, no basis for OIG involvement." *Id.* Ex. B at 1-2; *see id.* at 1 (noting that SSA Office of General Counsel sent Plaintiff "letters explaining why a replacement card cannot be issued [for Ciopei] while the numberholder remains outside of the United States and unauthorized to work").

Undeterred, Plaintiff "embarked on a campaign of telephone calls and emails" to SSA-OIG employees, "demanding (often angrily) an investigation." *Id.* at 2. Senior SSA-OIG employees (like Defendant Penn, then a Deputy Chief Counsel) "tried repeatedly to explain to [Plaintiff] that SSA had acted appropriately," but his "calls and emails continued" in such a "harass[ing]" way that the agency became concerned that he was threatening "employee safety" in violation of 42 U.S.C. § 1320a-8b. It prohibits certain threatening or intimidating conduct or communications toward SSA employees. *Id.* Thus, the SSA-OIG Office of Investigations sent Special Agents to Plaintiff's "home to interview him to ensure that he did not pose a threat to SSA or OIG employees." *Id.* Plaintiff identifies

those Special Agents as Defendants Roloff, Messer, and Deuchler and acknowledges that they conducted the referenced home visit on May 13, 2010. Compl. ¶ 37. He says these Defendants "threaten[ed] [him] with arrest unless he agreed to drop" his SSA complaint, which he "declined to do," *id.*; *accord id.* ¶ 21. According to O'Carroll's letter, Plaintiff "had a recording device" during the visit and "refused" the Special Agents' "lawful order to discontinue recording the interview," at which point they "terminated" the interview. *Id.* Ex. B at 2.

Months later, on February 24, 2011, unidentified SSA-OIG Special Agents contacted an unidentified Special Agent from "Diplomatic Security" (a State Department component) "requesting assistance in locating" Plaintiff. Compl. Ex. C at 3 (Diplomatic Security Service Case Summary, May 14, 2015). This redacted Case Summary referred to Plaintiff's 2006 passport application. But it recounted an apparent SSA-OIG assessment that Plaintiff had not actually "change[d] his name to 'Jeffrey Willett'" because "a notarized record from Clark County, Nevada" indicated there were no court records of any such name change. *Id.* That court record revealed that a search of the Clark County Courts' clerk records from January 1, 2005, to February 15, 2011, yielded no record of any name-change action there, within those dates, involving "Kocik" or "Willett." *Id.* Ex. M (court record of Feb. 15, 2011, signed by Deputy Clerk Silva). The Case Summary also referred to SSA-OIG information to the effect that Plaintiff had maintained his Social Security number in his former name—"Kocik, not Willett." *Id.* Ex. C at 3. Plaintiff thus suggests that he was subjected to "a criminal investigation" for "passport fraud,"

either by the SSA-OIG, State Department, or perhaps both, Compl. ¶¶ 38-39, and was considered for prosecution by the United States Attorneys for the Eastern District of Virginia and the District of New Hampshire (the latter considering such charges as passport and mail fraud and "misuse of a Social Security number," *id.* Ex. C at 1-2). Each declined prosecution, respectively, on October 26, 2011, and March 26, 2013. *Id.* at 1-4; *accord* Compl. ¶¶ 46-47, 52. No investigation, then, is alleged to have resulted in Plaintiff's arrest or prosecution. Indeed, he concedes he "never was accused or prosecuted for any crime," *id.* ¶ 188(b).

Meanwhile, the State Department revoked the passport (No. 218029753) it had issued to Plaintiff in 2006. *Id.* ¶ 51. It so advised him in a letter dated December 20, 2012, and signed by Defendant McLean, then the Acting Director of the State Department's Legal Affairs and Law Enforcement Liaison. *Id.* Ex. E. As she explained, the State Department had taken "[t]his action" under 22 C.F.R. § 51.62(a)(2), which provides for the revocation of a United States passport "obtained illegally, fraudulently or erroneously." *Id.* at 1. The apparent concern was that Plaintiff had obtained the passport "by virtue of a fraudulent supporting document," *i.e.*, a "forged" Nevada court name-change order. Compl. ¶ 49. The State Department believed this to be so, McLean told Plaintiff, because its investigation had uncovered that the Nevada court

> has no record of your name change or of the court document you provided in support of your passport application. In addition, further government records indicate that you continue to identify yourself to government authorities as Michael James Kocik, and not as Jeffrey Michael Willett.

Id. Ex. E at 1. The letter concluded by reminding Plaintiff that the revoked

passport was "the property of the U.S. Government, and must be surrendered upon demand"; requesting him to surrender the passport (by mail) to a State Department office; warning him that continued use of the passport would be a felony under 18 U.S.C. § 1544; and advising him of his right to a post-revocation hearing under 22 C.F.R. §§ 51.70-51.74. *Id.* at 1-2.

The State Department mailed the revocation letter to Plaintiff at the same Virginia address he had provided in his 2006 application. Compl. Exs. E & L. Apparently, Plaintiff did not get the letter right away. But he admits he received it on August 20, 2014, while at the United States Consulate General in Amsterdam, Netherlands, seeking "extra visa pages" for the revoked passport. Compl. ¶¶ 57(d), 59, 119 & Exs. F & G; *see id.* ¶¶ 53-56, 57(a)-(c), 58 & Ex. D.

On September 12, 2014, Plaintiff's attorney requested a post-revocation hearing. Compl. ¶¶ 68(b), 120; *id.* Ex. G at 1. In a matter of days, however, and outside of any hearing process, that attorney cleared up the fraud concern underlying the revocation. As mentioned, the State Department had determined that Plaintiff used a forged name-change order to procure the passport because it understood that the Nevada court had neither the original order nor *any* record of the name-change case. But as Plaintiff's attorney demonstrated, the Nevada court later located Plaintiff's name-change file, which "had been misplaced, under a wrong entry (Cocik instead of Kocik)." *Id.* The attorney, then, promptly demonstrated that the name-change order was legitimate and, thus, that there was

nothing fraudulent about the 2006 passport application.[2]

Consequently, on September 18, 2014, Vice Consul Grant Phillipp (a non-party State Department official) proposed a fix: Plaintiff should simply "apply for a new passport," Compl. ¶¶ 69, 71, 73. Plaintiff did so on September 23, 2014, and, six days later, was "notified" through his attorney that the "'new passport is ready for collection.'" *Id.* ¶¶ 75-76. Thus, on September 30, 2014—a week after the application date and only a month and 11 days after learning of the prior passport's revocation—"Plaintiff collected new Passport No. 505869857." *Id.* ¶¶ 77, 132(b). He still requested, however, "the return of" his "old," revoked passport because it "contained vital entry/exit stamps and visas necessary to cross borders," *id.* ¶ 82. Mr. Phillipp replied that the State Department's Consular Affairs staff in Amsterdam "had been ordered to 'return'" the revoked passport to the United States "for destruction.'" *Id.*; *see id.* ¶ 72. On October 8, 2014, Mr. Phillipp informed Plaintiff's attorney that the revoked passport was, in fact, "'sent for destruction by the Department, so there is no way to retrieve it.'" *Id.* ¶ 85.

Despite receiving a new passport and learning of the revoked one's

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[2] *See* Compl. Ex. H ¶¶ 2, 4 (Aff. of Paralegal Muzgay who assisted Plaintiff's attorney and stated that, when she inquired with Nevada court personnel on Sept. 3, 2014, "they initially could not find the case. After research on their part, I was informed that when the case was entered into the system, Mr. Willett's previous name, Michael James Kocik was entered as Michael James Kocic. The clerk fixed this error, and provided me with a certified copy of the Order for Name Change."); *accord* Compl. ¶ 60(d)-(e). For clarity, we note that this affidavit, and the attorney letter discussed in text above, give different spellings of the erroneous surname under which the Nevada court misplaced Plaintiff's file. *Compare* Ex. H ("Kocic" in paralegal affidavit), *with* Ex. G at 1 ("Cocik" in attorney letter).

destruction, Plaintiff continued to pursue the hearing his attorney requested in September 2014. By State Department regulation, that hearing should have occurred within 60 days, or by November 11, 2014. *Id.* ¶¶ 121, 123 (citing 22 C.F.R. § 51.70(c) (2014)). But it never did. *Id.* ¶ 124. The complaint describes the months-long effort by Plaintiff, his attorney, and Defendant Wilcock (then the State Department's Acting Consul General, Bureau of Consular Affairs, in Amsterdam) to schedule the hearing from November 2014 to June 2015. *Id.* ¶¶ 122, 125-130, 132(c), 138-153. Plaintiff, however, nixed the proposed hearing dates because he believed he lacked the "evidence" he needed "to prepare," including documents he sought under the Freedom of Information Act ("FOIA"). *Id.* ¶¶ 87, 126, 128(c), 130(a), 140-42, 145-46, 149. During this impasse, Wilcock suggested to Plaintiff and his attorney that the hearing request was moot since Plaintiff already had obtained a new passport. *Id.* ¶ 143; *see id.* ¶ 150(c)-(d) (quoting Wilcock's statement to Plaintiff on June 9, 2015, that "you were issued" the "new U.S. passport . . . on September 23, 2014," which was "the remedy that would have been available should you have prevailed at a hearing"; thus, "the available remedy" from any hearing "has already been provided to you"). Ultimately, Wilcock proposed a final hearing date for June 26, 2015. When that was rejected by Plaintiff and his attorney, Wilcock advised the attorney on June 29, 2015, that "this was the last opportunity for a hearing and the hearing file is now closed." *Id.* ¶¶ 152-53.

More than three years later, on July 20, 2018, Plaintiff filed his complaint in this case (Doc. 1), seeking damages under *Bivens* for alleged constitutional

violations arising from the investigations and passport matters described above. Compl. ¶¶ 1, 5. Specifically, in five counts against mostly unspecified "Defendants" sued collectively, Plaintiff asserts:

(1) a Fourth Amendment claim against Defendants Roloff, Messer, and Deuchler for "conducting" an "unlawful" SSA-OIG "investigation" of Plaintiff, which lacked "probable cause or reasonable suspicion of wrongdoing" and was an "unreasonable search and seizure," *id.* ¶¶ 156-59 (First Cause of Action);

(2) a claim under the Fourteenth Amendment Privileges and Immunities Clause for the alleged denial of the post-revocation hearing, *id.* ¶¶ 160-66 (Second Cause of Action);

(3) a claim under the Fifth Amendment Due Process Clause for the destruction of the revoked passport, *id.* ¶¶ 167-73 (Third Cause of Action);

(4) a claim under the Fifth Amendment Due Process Clause and the Fourteenth Amendment's Due Process, Equal Protection, and Privileges and Immunities Clauses, for the passport revocation and, as in Count 2, the alleged hearing denial, *id.* ¶¶ 174-84 (Fourth Cause of Action); and

(5) a First Amendment claim that the investigation, passport revocation and destruction, and alleged hearing denial were retaliation for Plaintiff's having criticized SSA for "its treatment" of Ciopei, *id.* ¶¶ 2, 51, 186; *see also id.* ¶¶ 185-95 (Fifth Cause of Action that includes, with First Amendment *Bivens* claim, cursory references to "conspiracy" under 42 U.S.C. § 1985(3); two criminal statutes, 18 U.S.C. §§ 1341, 1519; and common-law fraud).

II. DISCUSSION

Plaintiff's *Bivens* claims fail for several reasons. But their most obvious defect—the only one the Court need address—is that they are time-barred. *See infra* Part A. Plaintiff challenges alleged conduct that, by his own account, occurred from November 2009 (at the earliest) to June 29, 2015 (at the latest). All agree that his *Bivens* claims are subject to a three-year limitations period. So when he filed his complaint on July 20, 2018, that was too late. Even if Plaintiff timely sued, his

Bivens claims face two other insurmountable obstacles. As explained in Part B, in light of *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), no *Bivens* remedy is available because alternative processes and other "special factors" counsel against extending *Bivens* to the new context of this case. And as explained in Part C, all *Bivens* claims are barred by qualified immunity. Lastly, insofar as Plaintiff purports to include in Count 5 any non-*Bivens* claim for relief (*e.g.*, under § 1985(3)), those claims also fail as a matter of law. *See infra* Part D.

A. ANY *BIVENS* CLAIM IS OUT OF TIME.

"[N]o statute of limitations for this *Bivens*-type action has been expressly provided by Congress," *McClam v. Barry*, 697 F.2d 366, 371 (D.C. Cir. 1983), *overruled on other grounds by Brown v. United States*, 742 F.2d 1498 (D.C. Cir. 1984) (en banc). Nor has Congress "provide[d] a specific statute of limitations to govern" analogous "actions" brought under 42 U.S.C. § 1983. *Owens v. Okure*, 488 U.S. 235, 239 (1989). The Supreme Court, however, has held that state law fills the gap and supplies the limitations period for § 1983 claims. 488 U.S. at 236, 239-41. *Owens* clarified that, for § 1983 claims brought in a state with multiple personal-injury statutes of limitations, the one that governs is the "residual or general" provision, applicable to all personal-injury claims not embraced by a specific provision. *Id.* at 236, 242-51 & n.12. And because "a *Bivens* action," when available, "is the federal analog to suits brought against state officials" under § 1983, *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006), the D.C. Circuit and other Courts of Appeals have consistently subjected *Bivens* claims to the same state-law

limitations provisions that apply to § 1983 claims. *See*, *e.g.*, *Jones v. Kirchner*, 835 F.3d 74, 82 n.7 (D.C. Cir. 2016); *Rossiter v. Potter*, 357 F.3d 26, 34 n.7 (1st Cir. 2004); *Kelly v. Serna*, 87 F.3d 1235, 1238 (11th Cir. 1996).

1. A three-year statute of limitations applies to the *Bivens* claims.

As Plaintiff concedes, District of Columbia law—specifically, D.C. Code § 12–301—supplies the limitations period for his *Bivens* claims. Compl. ¶¶ 5-6; *see Jones*, 835 F.3d at 80-81; *Doe v. U.S. D.O.J.*, 753 F.2d 1092, 1114 (D.C. Cir. 1985). That provision prescribes a one-year period for claims "for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment," § 12-301(4), and a three-year period for claims "for which a limitation is not otherwise specially prescribed," § 12-301(8). Plaintiff's claims probably "bear[]" little "resemblance," and are not "closely analogous," to "any of the common-law torts listed in . . . § 12–301(4)." *McClam*, 697 F.2d at 372, 375-76. Even were that not so, *Owens* favors application of the "residual or general" limitations provision, 488 U.S. at 236, which, here, is § 12-301(8). *See Lederman v. United States*, 131 F. Supp. 2d 46, 61 (D.D.C. 2001) ("*Owens* is relevant to plaintiff's *Bivens* actions in this case"), *remanded on other grounds*, 291 F.3d 36 (D.C. Cir 2002).

Some decisions in this district suggest that certain *Bivens* claims still might be subject to the one-year provision even after *Owens*. *See*, *e.g.*, *Jefferson v. Harris*, 170 F. Supp. 3d 194, 213-14 (D.D.C. 2016) (acknowledging that *Owens* might "carry over into the *Bivens* context" but still applying one-year provision to *Bivens* claim); *accord Wormley v. United States*, 601 F. Supp. 2d 27, 35 (D.D.C. 2009); *Lewis v.*

Bayh, 577 F. Supp. 2d 47, 51-52 (D.D.C. 2008). But on balance, the precedent favors the three-year provision here. *See Jones*, 835 F.3d at 81-82; *Earle v. D.C.*, 707 F.3d 299, 305 (D.C. Cir. 2012); *Banks v. Chesapeake & Potomac Tel. Co.*, 802 F.2d 1416, 1428-29 (D.C. Cir. 1986); *see also Loumiet v. United States*, 828 F.3d 935, 947 (D.C. Cir. 2016) ("In this case, there is no dispute that the District of Columbia's general three-year statute of limitations applies to Loumiet's *Bivens* claims."); *McDonald v. Salazar*, 831 F. Supp. 2d 313, 319-20 (D.D.C. 2011) (as *Owens* was based on the "same concerns [that] underlie *Bivens* actions," the "appropriate limitations period" for *Bivens* claims is the general three-year one in § 12-301(8)), *aff'd in part*, 2012 WL 3068440 (D.C. Cir. July 20, 2012) (per curiam). Plaintiff says the three-year provision applies to his *Bivens* claims, Compl. ¶¶ 5-6, and, for present purposes, we proceed on the assumption that he is right. *See Carr v. Sessions*, 2019 WL 917651, *7 (D.D.C. Feb. 25, 2019) (for *Bivens* claims, the limitations period is "[t]hree years at most"), *aff'd sub nom.*, *Carr v. Barr*, 2019 WL 5394634, *1 (D.C. Cir. Oct. 3, 2019) (per curiam).

2. Plaintiff sued more than three years after his claims accrued.

Whether Plaintiff timely sued depends on when his *Bivens* claims "accrued," as that is when the statute of limitations "beg[a]n[] to run," *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 571 U.S. 99, 105 (2013); *see Gabelli v. S.E.C.*, 568 U.S. 442, 448 (2013) (limitations "clock begins to tick" when "a claim . . . accrues"). There are two basic approaches to this "question of federal law," *Wallace v. Kato*, 549 U.S. 384, 388 (2007). First, under the traditional or "'standard rule,'" "'a right accrues when it

comes into existence,'" and thus "a claim accrues 'when the plaintiff has a complete and present cause of action,'" *Gabelli*, 568 U.S. at 448 (citations omitted)—"that is, when 'the plaintiff can file suit and obtain relief,'" *Wallace*, 549 U.S. at 388 (citation omitted). "Under this rule, often called the 'injury-occurrence rule,' a claim would 'accrue' when the injury occurs, even if undiscovered." *Robert L. Kroenlein Tr. v. Kirchhefer*, 764 F.3d 1268, 1275 (10th Cir. 2014) (citing *Petrella v. M.G.M., Inc.*, 572 U.S. 663, 670 n.4 (2014)); *accord TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring); *see Norwest Bank Minn. Nat'l Ass'n v. F.D.I.C.*, 312 F.3d 447, 452 & n.4 (D.C. Cir. 2002) (subject to "limited exceptions," "it has long been settled that statutes of limitations begin running when the wrong has been committed"). Second, under the "discovery rule" of accrual, the statute of limitations "typically begin[s] to run only when the injury is or reasonably could have been discovered." *Gabelli*, 568 U.S. at 451. Although potentially applicable in certain cases of "fraud or concealment" or "latent disease and medical malpractice," the Supreme Court has "not adopted" as its "own" "position" the view that the discovery rule governs *all* federal-claim accrual. *TRW*, 534 U.S. at 27.

As Plaintiff did not file suit until July 20, 2018, his *Bivens* claims are time-barred if they accrued prior to July 20, 2015. They plainly did so under the injury-occurrence rule, which the Supreme Court and D.C. Circuit have applied in § 1983 cases, *Wallace*, 549 U.S. at 388; *Earle*, 707 F.3d at 305-06 & n.9, and which should apply here. Plaintiff does not allege "latent disease" or "medical malpractice" or that any Defendant fraudulently concealed his asserted injuries. *TRW*, 534 U.S. at

27. Each of those events, as Plaintiff describes them, occurred more than three years before he sued: the challenged SSA-OIG investigation dates back to 2009-2011, *see* Compl. ¶¶ 21, 35-36, 37-39 & Exs. B & C, and the passport events transpired from December 20, 2012 (the revocation-letter date, *id.* Ex. E) to June 29, 2015 (when the State Department "closed" Plaintiff's hearing request, *id.* ¶¶ 152-53). All the challenged conduct pre-dates July 20, 2015, and so the *Bivens* claims are time-barred under the traditional accrual rule.

Although the traditional rule should apply to *Bivens* claims "[i]n most circumstances," *Carr*, 2019 WL 917651, at *7, some decisions in this district say that there are "limited circumstances" in which the discovery rule might apply. *Coulibaly v. Tillerson*, 278 F. Supp. 3d 294, 300 (D.D.C. 2017); *see Jacksonville Urban League v. Azar*, 2019 WL 3208686, *4 (D.D.C. July 16, 2019) (a *Bivens* claim may accrue under the traditional approach *or* when plaintiff has "'actual notice' of the allegedly-wrongful conduct"); *accord Berman v. Crook*, 293 F. Supp. 3d 48, 56 (D.D.C. 2018). "The discovery rule is most often reserved for tort cases which, unlike this case, involve injuries that are difficult to discover." *In re Navy Chaplaincy*, 69 F. Supp. 3d 249, 257 (D.D.C. 2014); *accord Coulibaly*, 278 F. Supp. 3d at 300 n.6. Thus, "it is not at all clear that the discovery rule" could possibly apply "in this circumstance," *Lattisaw v. D.C.*, 118 F. Supp. 3d 142, 157 (D.D.C. 2015), *aff'd*, 672 F. App'x 22 (D.C. Cir. 2016) (per curiam). "But even assuming that the more lenient discovery rule applies," Plaintiff's *Bivens* claims are "still untimely" for the reasons that follow. *Coulibaly*, 278 F. Supp. 3d at 300.

Even when the discovery rule applies, "it is discovery 'of the *injury*,'" not "'the other elements of a claim,'" that "'starts the clock.'" *Navy Chaplaincy*, 69 F. Supp. 3d at 257 (quoting *Rotella v. Wood*, 528 U.S. 549, 555-56 (2000)) (emphasis added in *Navy Chaplaincy*); *see Coulibaly*, 278 F. Supp. 3d at 300 (accrual occurs when "'plaintiff discovers, or with due diligence should have discovered, the injury supporting the legal claim'") (quoting *Lattisaw*, 118 F. Supp. 3d at 157).

Plaintiff acknowledges that he was aware of the injuries underlying his *Bivens* claims well before July 20, 2015. For instance, he sues Defendants Roloff, Messer, and Deuchler for their role in an SSA-OIG investigation that involved their coming to his home to interview him. His pleadings make clear that he was present for Defendants' visit, Compl. ¶¶ 21, 37, & Ex. B, and so he "was most certainly contemporaneously aware" of this particular event. *Lattisaw*, 118 F. Supp. 3d at 157. Indeed, Plaintiff is the sort of litigant to whom Chief Justice Roberts referred in his opinion for the Court in *Gabelli*: "Usually when a private party is injured, he is immediately aware of that injury and put on notice that his time to sue is running." 568 U.S. at 450. By his own account, Plaintiff was "immediately aware," *id.*, of the challenged home visit when it occurred "on May 13, 2010," Compl. ¶ 37, and, thus, was "on notice" *then* "that his time to sue" Roloff, Messer, and Deuchler was "running." 568 U.S. at 450. But he waited more than *eight years* to do so. That was far too late even by discovery-rule standards.

Similarly, with respect to the passport claims, Plaintiff acknowledges that (1) he knew about the revocation on August 20, 2014, Compl. ¶¶ 57(d), 59, 119; (2) he

knew about the revoked passport's destruction on October 8, 2014, *id.* ¶ 85; and (3) he knew that he had not received the requested hearing by the presumptive regulatory deadline on November 11, 2014, *id.* ¶¶ 121, 123-24, and knew by June 29, 2015, that he would not receive *any* hearing since the State Department had "closed" the "hearing file," *id.* ¶¶ 152-53. For these asserted injuries, too, Plaintiff waited too long to sue even under the discovery rule.

For these reasons, the discovery rule does not help Plaintiff, and it certainly does not delay the accrual of his claims, as he suggests in conclusory fashion, to July 23, 2015, when he says he received documents under FOIA. Compl. ¶ 6. The FOIA documents—whatever they were—may well have given Plaintiff additional details about the underlying events. But as the Supreme Court made clear in *Rotella*, the "clock" starts with "discovery of the *injury,*" 528 U.S. at 555 (emphasis added), and "[a]ccrual does not wait until the injured party has access to or constructive knowledge of *all* the facts required to support its claim." *Sprint Commc'ns Co. v. F.C.C.*, 76 F.3d 1221, 1228 (D.C. Cir. 1996) (emphasis added). Given the specificity of his own allegations showing that, at multiple points prior to July 20, 2015, Plaintiff knew or should have known of the alleged injuries underlying the claims he now seeks to bring, his receipt of FOIA documents on July 23, 2015, is irrelevant.

Ultimately, as between injury occurrence or discovery, the Court "need not decide" which accrual rule applies because Plaintiff's "claims are barred under either." *Carr*, 2019 WL 917651, at *7; *Coulibaly*, 278 F. Supp. 3d at 300. Well before July 20, 2015, Plaintiff had a "complete and present cause of action" and

could have filed suit to "obtain relief," *Gabelli*, 568 U.S. at 448; *Wallace*, 549 U.S. at 388, *and* he had discovered (or reasonably could have discovered) the asserted injuries underlying his claims. Thus, under the three-year statute, dismissal of all *Bivens* claims in Counts 1-5 is "appropriate" because "the complaint on its face is conclusively time-barred." *Bregman v. Perles*, 747 F.3d 873, 875-76 (D.C. Cir. 2014) (citations and internal quotation marks omitted); *accord Smith-Haynie v. D.C.*, 155 F.3d 575, 578 (D.C. Cir. 1998) ("an affirmative defense" such as the statute of limitations "may be raised by pre-answer motion under Rule 12(b) when the facts that give rise to the defense are clear from the face of the complaint").

B. *BIVENS* OUGHT NOT BE EXTENDED TO THIS CASE.

For his asserted injuries—arising from a federal investigation and a passport revocation—Plaintiff asks the Court to provide him with a non-statutory damages remedy pursuant to *Bivens*. But such a remedy has never been "an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances [the Supreme Court has] found a *Bivens* remedy unjustified." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). Indeed, the Supreme Court has authorized a *Bivens* remedy only three times—in *Bivens* itself and, thereafter, in *Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson v. Green*, 446 U.S. 14 (1980). "Since *Carlson*," the Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001); *see also Hernández v. Mesa*, 140 S. Ct. 735, 743 (2020) ("[F]or almost 40 years, we have consistently rebuffed requests to add to

the claims allowed under *Bivens*.") (citing cases). Instead, "'it has reversed more than a dozen appellate decisions that had created new actions for damages." *De la Paz v. Coy*, 786 F.3d 367, 372 (5th Cir. 2015) (quoting *Vance v. Rumsfeld*, 701 F.3d 193, 198 (7th Cir. 2012) (en banc)).

In *Abbasi*, the Supreme Court confirmed that "expanding the *Bivens* remedy" outside the parameters of *Bivens*, *Davis*, and *Carlson* "is now a 'disfavored' judicial activity." 137 S. Ct. at 1857 (quoting *Iqbal*, 556 U.S. at 675); *accord Hernández*, 140 S. Ct. at 742 (further stating that, in "constitutional cases" as in "statutory" ones, the Court has been "at least equally reluctant to create new causes of action" not "expressly created by Congress," and in each case type, "our watchword is caution").

Post-*Abbasi*, if a court is presented with a proposed *Bivens* claim, it first must determine if the claim arises in a "new context" as compared to *Bivens*, *Davis*, and *Carlson*. 137 S. Ct. at 1855, 1859-60, 1864-65; *Loumiet v. United States*, 948 F.3d 376, 381-82 (D.C. Cir. 2020). If so, then the court must conduct "a special factors analysis" before "allowing [the claim] to proceed." *Abbasi*, 137 S. Ct. at 1857-60. "[A] *Bivens* remedy will not be available if there are 'special factors counselling hesitation in the absence of affirmative action by Congress.'" *Id.* at 1857 (certain internal quotation marks and citations omitted). This case presents a new context, and special factors counsel against the *Bivens* extension that Plaintiff seeks. His *Bivens* claims, therefore, should be dismissed.

1. Plaintiff's proposed *Bivens* claims are novel.

"The proper test for determining whether a case presents a new *Bivens*

context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by this Court"—*Bivens*, *Davis*, and *Carlson*—"then the context is new." *Id.* at 1859. The non-"exhaustive list of differences that are meaningful enough to make a given context a new one" includes:

> 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; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

Id. at 1859-60.

"[E]ven a modest extension is still an extension," and, here, "the new-context inquiry is easily satisfied." *Id.* at 1864–65. Obviously, this case bears no "resemblance" to *Carlson* (an inmate's Eighth Amendment denial of medical care) or *Davis* (a fired congressional staffer's Fifth Amendment equal-protection claim alleging gender discrimination). *Id.* at 1860. Neither those cases, nor *Bivens*, had anything to do with the State Department, the SSA or SSA-OIG, passports, investigations that involved no arrest or prosecution, or the First Amendment. Indeed, the D.C. Circuit and this Court recently held that First Amendment claims present a "new context" for *Abbasi* purposes. *Loumiet*, 948 F.3d at 382; *Corsi v. Mueller*, 422 F. Supp. 3d 51, 77-78 (D.D.C. 2019), *appeal docketed*, No. 19-5314 (D.C. Cir. Nov. 15, 2019).

Plaintiff's complaint also includes a Fourth Amendment challenge to an SSA-OIG "investigation" that involved a visit by its Special Agents to Plaintiff's home for

an interview. But no arrest or prosecution, no physical contact with Plaintiff, and no "search" or "seizure" there within the meaning of the Fourth Amendment resulted. Compl. ¶¶ 156-59 (Count 1). This Fourth Amendment claim meaningfully differs from the one in *Bivens*, which involved federal narcotics agents' warrantless entry into, and search of, the plaintiff's home and their handcuffing and arresting of the plaintiff for narcotics violations. 403 U.S. at 390, 397. *Abassi*'s own "new context" finding applied, *inter alia*, to a Fourth Amendment claim notwithstanding *Bivens*. 137 S. Ct. at 1853-54, 1858. So too, then, is Plaintiff's Fourth Amendment claim novel even though *Bivens* also involved a Fourth Amendment claim. *See Hernández*, 140 S. Ct. at 743 ("A claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized."); *accord Wilson v. Libby*, 498 F. Supp. 2d 74, 86 (D.D.C. 2007) *aff'd*, 535 F.3d 697 (D.C. Cir. 2008); *Vanderklok v. United States*, 868 F.3d 189, 199 (3d Cir. 2017); *De la Paz*, 786 F.3d at 372.

The Supreme Court's "understanding of a 'new context' is broad." *Hernández*, 140 S. Ct. at 743 (citation omitted). For the reasons just explained, the proposed "*Bivens* claims in this case assuredly arise in a new context," *id.*, and so "a special factors analysis is warranted." *Corsi*, 422 F. Supp. 3d at 78.

2. Special factors counsel against a *Bivens* extension here.

According to *Abbasi*, the special-factors inquiry

> must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed. Thus, to be a "special factor counselling hesitation," a factor must cause a court to hesitate

before answering that question in the affirmative.

137 S. Ct. at 1857-58. "[S]eparation-of-powers principles" are "central to the analysis. The question is 'who should decide' whether to provide for a damages remedy, Congress or the courts? The answer most often will be Congress." *Id.* at 1857 (citations omitted). "[I]f there are sound reasons to think Congress *might* doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III." *Id.* at 1858 (emphasis added); *see also id.* at 1862, 1865 (describing special-factors "inquiry [as] respecting the likely or probable intent of Congress," and stating "legislative action suggesting that Congress does not want a damages remedy is itself a factor counseling hesitation"). Here, several considerations suggest that Congress would *not* "want the Judiciary to entertain a damages suit" in a case like this one. *Id.* at 1858.

a. First, if there is "any alternative, existing process for protecting" Plaintiff's asserted interests, this may counsel against "providing a new and freestanding remedy in damages," *Wilkie*, 551 U.S. at 550. Here, Plaintiff had "*some* procedure to defend and make good on his position" outside the *Bivens* arena. *Id.* at 552 (emphasis added). He could have sought injunctive relief in federal court for his passport grievances and, potentially, those concerning any investigation. *See Abbasi*, 137 S. Ct. at 1862-63, 1865 (injunctive relief was an alternative process in special-factors analysis); *Malesko*, 534 U.S. at 62 (injunctive-relief suits have "long

[been] recognized as the proper means for preventing entities from acting unconstitutionally"); *Mejia-Mejia v. U.S. I.C.E.*, 2019 WL 4707150, *5 (D.D.C. Sept. 26, 2019) (declining to extend *Bivens* where "claims for declaratory and injunctive relief" were "one . . . example" of "alternative mechanisms available to challenge the constitutionality of the kind of government action at issue"); *see, e.g.*, *Haig v. Agee*, 453 U.S. 280, 287 (1981) (after passport revocation, plaintiff "at once" sued Secretary of State for "declaratory and injunctive relief" based on alleged constitutional violations); *Juluke v. Hodel*, 811 F.2d 1553, 1554-57 (D.C. Cir. 1987) (district court "appropriately entertained" First Amendment injunction action against enforcement of regulations governing protest near White House and "then properly declined" to grant injunction on merits); *Reporters Comm. for Freedom of Press v. A.T. & T. Co.*, 593 F.2d 1030, 1065 (D.C. Cir. 1978) (although a party "invoking equitable intervention in the criminal investigative process has a particularly heavy burden," "anticipatory judicial involvement in criminal investigations" may be "warrant[ed]" in "the most extraordinary circumstances"); *Boggs v. Bowron*, 842 F. Supp. 542, 546, 548, 562-63 (D.D.C. 1993) (agreeing to adjudicate Declaratory Judgment Act suit seeking "to enjoin" on "constitutional grounds" an "ongoing criminal investigation and possible future criminal prosecution," but denying relief on merits), *aff'd*, 1995 WL 623690 (D.C. Cir. 1995).[3]

[3] *Accord North v. Walsh*, 656 F. Supp. 414, 420, 423 n.13 (D.D.C. 1987) (the "strong policy against intervening in ongoing criminal investigations" is "not absolute. When parties challenge instances of egregious prosecutorial misconduct, courts have enjoined criminal investigations."); *cf. Deaver v. Seymour*, 822 F.2d 66, 69 (D.C. Cir. 1987) (observing that "the Supreme Court has upheld federal injunctions

Additionally, apart from federal-court avenues, an "alternative remedial structure" under *Abbasi*, 137 S. Ct. at 1858, "can take many forms, including *administrative*, statutory, equitable, and state law remedies." *Vega v. United States*, 881 F.3d 1146, 1154 (9th Cir. 2018) (emphasis added); *see Malesko*, 534 U.S. at 74 ("Inmates in respondent's position also have full access to remedial mechanisms established by the BOP, including suits in federal court for injunctive relief and grievances filed through the BOP's Administrative Remedy Program[.]"); *Liff v. O.I.G.,* 881 F.3d 912, 920-21 (D.C. Cir. 2018) (no *Bivens* remedy for government contractor where a "constellation of statutes and regulations . . . provide a remedy" for "contracting-related disputes," including "myriad" administrative processes). In this case, the State Department regulations in effect at the time, 22 C.F.R. §§ 51.70-51.74 (2014-2015), provided Plaintiff with an alternative process for his passport claims. And as soon as the error underlying the revocation came to light, the State Department issued Plaintiff a new passport. Compl. ¶¶ 75-77. And in other situations in which administrative processes do not yield some redress, judicial review might be available. That, too, is reason not to extend *Bivens*. *See, e.g., W. Radio Servs. Co. v. United States Forest Serv.*, 578 F.3d 1116, 1123 (9th Cir. 2009) ("the APA leaves no room for *Bivens* claims based on

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to restrain state criminal proceedings only where the threatened prosecution chilled exercise of First Amendment rights"); *PHE, Inc. v. U.S. D.O.J.*, 743 F. Supp. 15, 22-23 (D.D.C. 1990) ("it is within the equitable powers of a federal court to issue injunctions preventing bad faith prosecutions which are brought to discourage First Amendment activities"); *Shaw v. Garrison*, 467 F.2d 113 (5th Cir. 1972) (enjoining state perjury prosecution brought "in bad faith").

agency action or inaction").

"[T]his is not a case," then, "in which 'it is damages or nothing'" for this Plaintiff. *Abbasi*, 137 S. Ct. at 1862 (citations omitted). The presence of such alternative processes "*alone* may limit the power of the Judiciary to infer a new *Bivens* cause of action," *id.* at 1858 (emphasis added). Here, they counsel against the Court extending *Bivens* to the new context of this case. *See id.* at 1863 ("when alternative methods of relief are available, a *Bivens* remedy usually is not").

b. Second, even were there no alternative process to protect Plaintiff's interests, that would not "conclude our analysis because, 'even in the absence of an alternative, a *Bivens* remedy is a subject of judgment[],'" *Vanderklok*, 868 F.3d at 205-06 (quoting *Wilkie*, 551 U.S. at 550, & citing *Meshal v. Higgenbotham*, 804 F.3d 417, 425 (D.C. Cir. 2015)). "Indeed, in *Abbasi,*" the Supreme Court "explained that existence of alternative remedies was merely a further reason not to create *Bivens* liability." *Hernández*, 140 S. Ct at 750 n.12. And so it is also appropriate to "weigh[] reasons for and against the creation of a new cause of action, the way common law judges have always done," *Wilkie*, 551 U.S. at 554. At this stage of the inquiry, the question is "whether anything" else about this case causes the Court "'to pause before acting without express congressional authorization.'" *Farah v. Weyker*, 926 F.3d 492, 500 (8th Cir. 2019) (quoting *Abbasi*, 137 S. Ct. at 1858). This "threshold . . . is remarkably low. . . . Hesitation is a pause, not a full stop, or an abstention; and to counsel is not to require. 'Hesitation' is 'counseled' whenever thoughtful discretion would pause even to consider." *Arar v. Ashcroft*, 585 F.3d 559,

574 (2d Cir. 2009) (en banc); *accord Maria S. v. Garza*, 912 F.3d 778, 784 (5th Cir.), *cert. denied*, 140 S. Ct. 81 (2019).

That "threshold" is met here. As mentioned, Plaintiff seeks a damages remedy that Congress has not provided. It subjected state officials to damages liability under 42 U.S.C. § 1983, but "did not create an analogous statute for federal officials." *Abbasi*, 137 S. Ct. at 1854. Nor did Congress provide a damages remedy in any particular legislation relating to the SSA-OIG and State Department and their operations at issue in this case. *See*, *e.g.*, Inspector General Act of 1978, 5 U.S.C. App. 3; *see also* 22 U.S.C. § 211a (Passport Act of 1926); Executive Order No. 11295 (Aug. 5, 1966); 22 U.S.C. § 4802(a)(2)(B)(x) (Omnibus Diplomatic Security and Antiterrorism Act of 1986); 22 U.S.C. § 2709(a) (State Department Basic Authorities Act, as amended by Foreign Relations Authorization Act). Thus, before authorizing "a new species of litigation" against Inspector General or State Department personnel for their investigatory or passport-related conduct, *Wilkie*, 551 U.S. at 562, it is necessary to consider, among other things, "whether a *Bivens* action 'would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch," *Farah*, 926 F.3d at 500 (citation omitted), and "assess[] . . . its impact on governmental operations systemwide." *Abbasi*, 137 S. Ct. at 1858.

Such considerations counsel against a *Bivens* extension here. If Plaintiff could use a *Bivens* action to challenge an "investigation" into his conduct (whether undertaken by SSA-OIG or the State Department), that would certainly run "the risk of burdening and interfering with the executive branch's investigative and

prosecutorial functions." *Farah*, 926 F.3d at 500; *accord Corsi*, 422 F. Supp. 3d at 78. Moreover, any *Bivens* challenge to the State Department's investigations and passport decisions could implicate national security and foreign policy. And such matters are "rarely proper subjects for judicial intervention," *Haig*, 453 U.S. at 292, because "[n]ational-security policy is the prerogative of the Congress and President," *Abbasi*, 137 S. Ct. at 1861. "These concerns are even more pronounced when the judicial inquiry comes in the context" of a money-damages claim, because "[t]he risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy." *Id.*; *see also Vanderklok*, 868 F.3d at 208 (noting the "particularly pronounced" "hesitancy to imply a *Bivens* remedy in a case with national security implications"). Thus, while an extension of *Bivens* into the context of this case might yield such "benefits" as compensating a wrongly injured plaintiff and "deterring misconduct," it also would risk the sorts of significant "costs" described above. *Farah*, 926 F.3d at 502. Although "a balance must be struck," the Legislative Branch is better able to "weigh these competing policy concerns," and so the task is one for Congress. *Id.*; *see Corsi*, 422 F. Supp. 3d at 78 ("Congress, not the courts, should decide whether a damages remedy for retaliatory threat of prosecution should be recognized").

* * * * *

This case presents a context both novel for *Bivens* purposes and ill-suited for judicial extension of a damages remedy. The "special factors" are compelling, especially when "[t]aken together," *Chappell v. Wallace*, 462 U.S. 296, 304 (1983),

and considered in the aggregate. *Abbasi*, 137 S. Ct. at 1857-58, 1860-63. As there is ample "reason" for the Court "to pause before applying *Bivens*" in the "new context" of this case involving "a new class of defendants," it should reject the Plaintiff's request to extend *Bivens* and dismiss all such claims against all Defendants. *Hernández*, 140 S. Ct. at 743.

C. QUALIFIED IMMUNITY BARS ALL *BIVENS* CLAIMS.

Because *Bivens* does not give Plaintiff "a cause of action, there is no reason to enquire further into the merits of his claim or the asserted defense of qualified immunity." *Wilkie*, 551 U.S. at 567. But if the Court resolves that "antecedent" question in Plaintiff's favor, *Hernández v. Mesa*, 137 S. Ct. 2003, 2006 (2017) (per curiam), it should proceed to consider if qualified immunity nonetheless bars his claims. "In the limited settings where *Bivens* does apply," *Iqbal*, 556 U.S. at 675, any *Bivens* claim is still "subject to the defense of qualified immunity." *Malesko*, 534 U.S. at 72. As explained below, that defense bars all of Plaintiff's claims.

1. Qualified Immunity: The General Framework

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). By "protect[ing] 'all but the plainly incompetent or those who knowingly violate the law,'" *Abbasi*, 137 S. Ct. at 1867 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)), this doctrine "acts to safeguard

government, and thereby to protect the public at large," *Wyatt v. Cole*, 504 U.S. 158, 168 (1992); *see also White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) ("qualified immunity is important to society as a whole") (citations and internal quotation marks omitted); *Harlow*, 457 U.S. at 817-18 (doctrine is designed to promote "effective government" and "avoid [its] excessive disruption"); *Simpkins v. D.C. Gov't*, 108 F.3d 366, 370 (D.C. Cir. 1997) (stating that, as "insubstantial *Bivens* actions" "impose undue burdens on the officer being sued, and thus interfere with the operations of the government," it is the "duty of the lower federal courts to stop" such actions "in their tracks and get rid of them").

Courts have "discretion to decide which of the two prongs of qualified-immunity analysis to tackle first." *al-Kidd*, 563 U.S. at 735. At the first step, a court determines "whether the facts that a plaintiff has alleged . . . make out a violation of a constitutional right," *Pearson v. Callahan*, 555 U.S. 223, 232 (2009), and, in so doing, applies the pleading standards of Federal Rule of Civil Procedure 8. Rule 8(a)(2) "requires more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action," *Twombly*, 550 U.S. at 555. "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Rather, Plaintiff must allege "[f]actual allegations" with "enough heft" to "raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555, 557. "[O]nly a complaint that states a plausible claim for relief survives a motion to

dismiss," *Iqbal*, 556 U.S. at 679. And a claim

> has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Id. at 678 (citations omitted).

It follows that, absent factual allegations plausibly suggesting a given defendant's personal involvement in "the deprivation of an actual constitutional right at all," *Conn v. Gabbert*, 526 U.S. 286, 290 (1999), the defendant should be dismissed at the first step of the qualified-immunity analysis. *See Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (initial "determination" in qualified-immunity analysis is "whether the plaintiff has asserted a violation of a constitutional right at all"); *Simpkins*, 108 F.3d at 369 (a *Bivens* complaint "must at least allege that the defendant federal official was personally involved in the illegal conduct"); *accord DeBrew v. Atwood*, 792 F.3d 118, 131 (D.C. Cir. 2015).

If a plaintiff "has satisfied this first step," then the court, at step two, "must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct. Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." *Pearson*, 555 U.S. at 232. To meet that burden, the plaintiff must show that, "at the time of the challenged conduct," the "'contours'" of his or her asserted rights were

> "sufficiently clear" that *every* "reasonable official would have understood

> that *what he is doing* violates that right." We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question *beyond debate*.

al-Kidd, 563 U.S. at 741 (emphasis added; citations omitted). It is the plaintiff's "burden to show that the particular right in question—narrowly described to fit the factual pattern confronting the officers—was clearly established." *Dukore v. D.C.*, 799 F.3d 1137, 1145 (D.C. Cir. 2015) (citation omitted). "The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (citations omitted); *accord D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018) ("The 'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct in the *particular* circumstances before him. . . . This requires a *high* 'degree of *specificity*.'") (emphasis added; citations omitted). If "a reasonable officer *might* not have known *for certain*" that the particular conduct ascribed to him or her "was unlawful," then "the officer is immune from liability." *Abbasi*, 137 S. Ct. at 1867 (emphasis added).

2. At least seven Defendants have qualified immunity, at step one, because Plaintiff alleges no facts plausibly suggesting their personal involvement in any challenged conduct.

Even if Plaintiff's allegations might "demonstrate unconstitutional misconduct by *some* governmental actors," *Iqbal*, 556 U.S. at 666 (emphasis added), at least seven Defendants are not alleged to have had a thing to do with it, or they are connected to a given event in only the barest and most conclusory of terms. Indeed, two Defendants did not even occupy the offices ascribed to them at the relevant time. Absent factual allegations plausibly suggesting their personal

involvement in a constitutional violation "at all," *Conn*, 526 U.S. at 290; *Siegert*, 500 U.S. at 232, these Defendants—Berryhill, Dietz, Bond, Rolbin, O'Carroll, and Penn—should be dismissed at the first step of the qualified-immunity analysis.

(a) Defendant Berryhill

Plaintiff sues Defendant Berryhill "[p]ersonally and in her official capacity" as Acting Commissioner for the SSA, Compl. at p. 2 (caption), but, thereafter, does not say what, if anything, she did to violate the Constitution. Indeed, after naming Berryhill in the caption, Plaintiff never even mentions her again, not even in the "Parties" or "Preliminary Statement" sections of the complaint. He apparently sued Berryhill simply on account of the high-level position she occupied in the federal agency employing some of the subordinate employees who allegedly had direct involvement in the underlying events. Agency heads like Berryhill, however, cannot be sued under *Bivens* for their subordinates' constitutional torts or civil-rights violations. That has long been the law in this circuit. *See*, *e.g.*, *Cameron v. Thornburgh*, 983 F.2d 253, 258 (D.C. Cir. 1993) ("In the absence of any allegations specifying the involvement of Thornburgh or Quinlan in this case, the claims against them are based on nothing more than a theory of *respondeat superior*, which of course cannot be used in a *Bivens* action."). And it became the law of the land in *Iqbal*, where the Supreme Court confirmed that government officials sued under *Bivens* "may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." 556 U.S. at 676. "Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each

Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.*

Given this precedent, Plaintiff has not alleged any basis for this litigation to proceed against Defendant Berryhill in her individual capacity. That deficiency is even clearer upon a comparison of the dates of the underlying events with the dates of Berryhill's tenure as Acting Commissioner for the SSA. As emphasized in the limitations argument in Part A above, the events underlying this case occurred from November 2009 (when Plaintiff filed his SSA "complaint" about the Ciopei matter), to June 29, 2015 (when the State Department told Plaintiff that it would not be holding a hearing on the passport revocation). But Berryhill did not assume her position as Acting Commissioner until much later—on January 21, 2017. *See* https://www.ssa.gov/history/commissioners.html (further showing that her successor took office on June 17, 2019). A government officer's tenure is properly subject to judicial notice. *Booth v. Fletcher*, 101 F.2d 676, 678-79 (D.C. Cir. 1938). As Berryhill was not even in office when any of the challenged conduct occurred, it is all the more inappropriate for Plaintiff to sue her for it, personally, in this lawsuit.

(b) Defendant Dietz

Defendant Dietz is in a similar position. After identifying him as an individual-capacity defendant in the caption and a "Preliminary Statement," Compl. at pp. 1-2, Plaintiff alleges that Dietz, as the Executive Director of the State Department's Bureau of Diplomatic Security, was "responsible for the investigation leading to the revocation of [his] passport," Compl. ¶ 14. Plaintiff also alleges that,

in February 2011, SSA-OIG "contacted DS," *i.e.*, the Bureau of Diplomatic Security, and prompted it to investigate Plaintiff for passport fraud. *Id.* ¶ 39. Here, Plaintiff places Dietz's name in parentheses next to "DS," *id.*, even though the document on which this allegation relies (the Diplomatic Security Case Summary, *see* Compl. Ex. C) does not identify any "DS" point of contact because that name is redacted.

Such boilerplate pleadings are insufficient under *Twombly* and *Iqbal* to overcome Dietz's qualified immunity at the first step of the analysis. That is especially true because he did not occupy the position in question at the relevant time. Dietz did not assume his position with the Bureau of Diplomatic Security until October 2014. https://www.state.gov/biographies/stephen-b-dietz-iii/. That was well *after* any alleged State Department investigation, the December 2012 passport revocation, and the new passport's issuance in September 2014. On these dates, Dietz worked in a *different* State Department component, the Bureau of Budget and Planning, which had nothing to do with the events underlying this case. *Id.* Nor, in his current Diplomatic Security position, did Dietz have anything to do with Plaintiff's hearing requests from September 2014 to June 2015, as those were handled by yet another State Department component, the Bureau of Consular Affairs. *See*, *e.g.*, Compl. at pp. 1-2 (allegations in caption and Preliminary Statement about Defendant Wilcock and Bureau of Consular Affairs); *id.* ¶¶ 17, 68, 71, 122, 127-28, 130, 138, 141, 143, 147-48, 150. Thus, as Dietz did not occupy his current position when the challenged Diplomatic Security conduct occurred, it is all the more inappropriate for Plaintiff to sue him for it, personally, in this lawsuit.

(c) Defendants Bond, Rolbin, O'Carroll, and Penn

Rounding out this group are Defendants Bond and Rolbin from the State Department and Defendants O'Carroll and Penn from SSA-OIG, all named as individual-capacity defendants in the caption and "Preliminary Statement," Compl. at pp. 1-2. Here again, Plaintiff pleads only "labels and conclusions" and the "formulaic recitation" of a claim's "elements," *Twombly*, 550 U.S. at 555. *See* Compl. ¶ 16 (alleging that Bond, as Acting Assistant Secretary of State for Consular Affairs, was "responsible for protecting the interests of U.S. citizens abroad, including those entitled to a post-revocation hearing"); *id.* ¶ 68(b) (Plaintiff's attorney sought post-revocation hearing "through" Consular Affairs, which was "under" Bond's "supervision"); *id.* ¶ 11 (alleging that Rolbin, as Director of the State Department's Law Enforcement Liaison Division, was "responsible for all matters related to the revocation of Plaintiff's U.S. passport"); *id.* ¶ 51 (alleging that multiple State Department components, *i.e.*, "Defendants DOS . . . CA, DS, and LELD," conspired to revoke the passport, and placing "Rolbin" in parentheses next to "LELD"); *id.* ¶ 20 (alleging that Penn, as SSA-OIG Deputy Chief Counsel, "refused to open an investigation into waste, fraud, or mismanagement" as Plaintiff "requested" and, instead, "on information and belief, directed an unauthorized investigation to be opened against Plaintiff"); *id.*¶ 37 (alleging that Plaintiff "escalated his concerns" about SSA's handling of the Ciopei matter "to the SSA OIG," adding Penn's name in parentheses and stating that he "not only refused to open an investigation, but, on information and belief, surreptitiously sent" Roloff,

Messer, and Deuchler to Plaintiff's home for the May 2010 interview); *id.* ¶ 19 (alleging that O'Carroll, as "the SSA Inspector General," was "responsible for overseeing the investigation of Plaintiff"); *id.* ¶ 38 ("on or about February 24, 2011, . . . O'Carroll authorized SSA OIG to launch a criminal investigation against Plaintiff not otherwise authorized by the SSA OIG Mission Statement").

Taken in light of *Iqbal*, these allegations are so conclusory and non-specific that they fail to plausibly allege wrongdoing by these Defendants sufficient to defeat qualified immunity. 556 U.S. at 683. As explained above, these supervisory State Department and SSA-OIG officials cannot be sued personally for the alleged misconduct of their subordinates, and the complaint alleges no facts showing that these Defendants, "through [their] own individual actions, . . . violated the Constitution." *Id.* at 676; *see also Zhao v. Unknown Agent of C.I.A.*, 411 F. App'x 336, 336 (D.C. Cir. 2010) (per curiam) ("Appellant failed to state a claim under *Bivens* . . . against the Secretary of the Department of Homeland Security because he did not allege that the Secretary, through her 'own individual actions, has violated the Constitution.'").

3. The challenged conduct, as alleged, did not clearly violate the Constitution in any event.

Even assuming that all Defendants were personally involved in the challenged conduct—and recognizing that the complaint ascribes at least some of it to Defendants Roloff, Messer, Deuchler, McLean, and Wilcock—Plaintiff's claims still fail because they do not allege a violation of clearly established law.

Count 1 states no clearly established Fourth Amendment violation against

Roloff, Messer, and Deuchler. Compl. ¶¶ 156-59. Their mere "investigation" of Plaintiff—even their visiting his home for the May 2010 interview and their alleged threat to arrest him—were not "searches" or "seizures" within the meaning of the Fourth Amendment. "When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak." *Kentucky v. King*, 563 U.S. 452, 469–70 (2011); *accord Barbieri v. United States*, 2017 WL 4310255, *10 (E.D. Pa. Sept. 28, 2017) (plaintiff cited no "authority establishing that the mere appearance of a government official at his office or the interviewing of his employees constitutes a Fourth Amendment violation"). More generally, "there is no constitutional right to be free of investigation," *United States v. Trayer*, 898 F.2d 805, 808 (D.C. Cir. 1990), or to be investigated only if there is "probable cause or reasonable suspicion of wrongdoing." Compl. ¶ 157. "The initiation of a criminal investigation in and of itself does not implicate a federal constitutional right," and so the Constitution "does not require evidence of wrongdoing or reasonable suspicion of wrongdoing by a suspect before the government can begin investigating that suspect." *Rehberg v. Paulk*, 611 F.3d 828, 850 n.24 (11th Cir. 2010), *aff'd on other grounds*, 566 U.S. 356 (2012); *see Sanders v. City & Cnty. of S.F.*, 226 F. App'x 687, 689 (9th Cir. 2007) ("Appellants point to no case law that supports the proposition that probable cause must exist before an investigation can commence. That is not surprising, given that the

impetus behind criminal investigations is to develop probable cause."). And even "a mere threat to do an unconstitutional act does not create a constitutional wrong." *Loritz v. Pfingst*, 94 F. App'x 439, 440 (9th Cir. 2004) (citing *Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987)); *accord Emmons v. McLaughlin*, 874 F.2d 351, 353-54 (6th Cir. 1989). It follows that Plaintiff's allegations describe no Fourth Amendment violation and certainly no clearly established one.

Plaintiff fares no better with Count 2 (invoking the Fourteenth Amendment Privileges and Immunities Clause) or the part of Count 4 invoking that same provision as well as the Fourteenth Amendment's Due Process and Equal Protection Clauses (all in connection with the passport revocation and hearing denial, in which the complaint says Defendants McLean and Wilcock played *some* role). These claims fail because "the fourteenth amendment does not apply to the federal government," *United States v. Edwards*, 98 F.3d 1364, 1368 (D.C. Cir. 1996). And so it has nothing to say about passport revocation. *See, e.g., Quaid v. Kerry*, 161 F. Supp. 3d 70, 75-76 (D.D.C. 2016) (so ruling).

The revoked passport's *destruction*—which Plaintiff seeks to litigate under the Fifth Amendment Due Process Clause in Count 3—is not attributed to any particular individual-capacity defendant. Compl. ¶¶ 167-73. That is reason enough to dismiss this count. *See*, *e.g.*, *Marcilis v. Twp. of Redford*, 693 F.3d 589, 596-97 (6th Cir. 2012) ("categorical references to 'Defendants,'" identifying them only as DEA employees, failed to "allege, with particularity, facts that demonstrate what

each defendant did to violate the asserted constitutional right").[4] The claim also fails on its merits. Contrary to his cursory suggestion, *see* Compl. ¶ 168, Plaintiff had no due-process *property* interest in the revoked passport because it "at all times remain[ed] the property of the United States," which could "demand" its "return[]," 22 C.F.R. § 51.7(a); *accord Atem v. Ashcroft*, 312 F. Supp. 2d 792, 801 n.16 (E.D. Va. 2004) ("No property interest is implicated because United States passports are not the property of the individuals to whom they are issued."). And while a passport's revocation may implicate "a specific liberty interest" relating to "the right to travel internationally," *id.* (citing *Haig*, 453 U.S. at 307), no authority suggests that Plaintiff had a due-process liberty interest in any *particular* passport (such as the revoked one he wanted back). Whatever the scope of Plaintiff's liberty interest in these circumstances, it surely was satisfied when the State Department issued him a new passport one week after he applied for it and just over a month after he learned of the prior passport's revocation.

Plaintiff also challenges in Count 4 the passport revocation and alleged hearing denial under the *Fifth* Amendment Due Process Clause. Compl. ¶¶ 174-84. Neither violated due process. As stated above, Plaintiff had no property interest in his passport. Whatever his *liberty* interest, it entitled him not to a "prerevocation

[4] *See also Grieveson v. Anderson*, 538 F.3d 763, 778 (7th Cir. 2008) (rejecting "[v]ague references to a group of 'defendants,' without specific allegations tying the individual defendants to the alleged unconstitutional conduct"); *accord Robbins v. Becker*, 794 F.3d 988, 993 (8th Cir. 2015) ("'Liability for damages for a federal constitutional tort is personal, so each defendant's conduct must be independently assessed.'") (citation omitted).

hearing" but, at most, "a statement of reasons" for the passport revocation and "an opportunity for a prompt postrevocation hearing," *Haig*, 453 U.S. at 309-10 (footnote omitted), all of which Plaintiff received. Defendant McLean gave him the reasons for the revocation in her letter of December 20, 2012, which Plaintiff received on August 20, 2014. Compl. ¶¶ 57(d), 59, 119 & Ex. E. He also was given the opportunity for a post-revocation hearing, which his attorney requested on September 12, 2014. *Id.* ¶¶ 68(b), 120. But 11 days later, at the State Department's suggestion, Plaintiff successfully applied for a new passport and "collected" it on September 30, 2014. *Id.* ¶¶ 75-77. That process, itself, perhaps satisfied any hearing requirement triggered by a liberty interest in travel, or at least a reasonable officer could have thought so. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation and internal quotation marks omitted). A process that allowed Plaintiff to promptly reapply for, and then quickly receive, a new passport fits that description, or, again, a reasonable officer could have thought so.

Plaintiff nonetheless persisted with his hearing request, but he rejected several hearing dates that were proposed. *See*, *e.g.*, *id.* ¶¶ 152-53. Yet "one who claims more process is due has the burden of fairly testing the adequacy of what is provided." *Agee v. Baker*, 753 F. Supp. 373, 388 (D.D.C. 1990). Plaintiff alleges no facts showing how a further hearing would have made any difference or why individual officials should be liable for an agency's alleged failure to provide it. *See*

Moore v. Agency for Intern. Development, 80 F.3d 546, 548 (D.C. Cir. 1996). The pleadings thus describe not a hearing "denial" by any individual Defendant but, instead, a refusal by Plaintiff to avail himself of the hearing process that the State Department offered him, even after issuing him a new passport. "The Constitution's due process guarantees call for no more than what has been accorded here," *Haig*, 453 U.S. at 310.

Lastly, with respect to the First Amendment claim in Count 5, Plaintiff does not allege facts plausibly suggesting that any individual-capacity defendant took any action toward Plaintiff, whether in connection with an investigation or the passport-related events, as "retaliation" for his Ciopei-related speech. Moreover, insofar as he seeks to challenge any investigation as "retaliatory" under the First Amendment, it is doubtful whether a "'retaliatory investigation with a view to promote prosecution'" is even "a cognizable constitutional tort, let alone a cognizable claim under *Bivens*." *Corsi*, 422 F. Supp. 3d at 77 (quoting *Hartman*, 547 U.S. at 262 n.9); *accord id.* at 80. That question aside, Plaintiff's allegations on this front are entirely conclusory and, thus, insufficient to state a claim at the first step of the qualified-immunity analysis.

D. ANY NON-*BIVENS* CLAIM IN COUNT 5 ALSO FAILS.

Plaintiff repeatedly says this case is "a *Bivens* action," Compl. ¶ 5; *accord id.* ¶¶ 1, 3, 137, 156, 158, and he explicitly alleges a First Amendment *Bivens* claim in Count 5. *Id.* ¶¶ 185-95. Less clear is whether he also includes there some non-*Bivens* claim for relief. The Count 5 heading makes perfunctory reference to two

criminal statutes—"mail fraud" under 18 U.S.C. § 1341, and "obstruction of justice by destruction of evidence" under 18 U.S.C. § 1519—and to District of Columbia tort law, *i.e.*, "common-law fraud." Compl. ¶ 185. Certain Count 5 paragraphs do the same. *See id.* ¶ 195 (vaguely alleging that unspecified "Defendants" made "false or fraudulent claims"); *accord id.* ¶ 189; *see also id.* ¶¶ 190, 192 (alleging violations of §§ 1341, 1519, by federal agencies or their components). Certain others refer to "conspiracy" under 42 U.S.C. § 1985(3). *See* Compl. ¶ 188 (partial listing of statutory elements); *id.* ¶ 188(c) (conclusory allegation that unspecified "Defendants . . . conspired" to accuse Plaintiff of passport fraud); *accord id.* ¶¶ 188(a), 191. No such claim appears in its own count. *But see* Fed. R. Civ. P. 10(b). So it is unclear if Plaintiff seeks damages from the individual-capacity defendants under the criminal statutes or § 1985(3) or on the basis of common-law fraud. If he does, all such claims fail as a matter of law and should be dismissed.

That is certainly true for any claim under 18 U.S.C. §§ 1341 and 1519, which, as criminal statutes, "do not and cannot provide the basis for" a civil plaintiff's "cause[] of action." *Masoud v. Suliman*, 816 F. Supp. 2d 77, 80 (D.D.C. 2011); *accord Carr*, 2019 WL 917651, at *5 n.7, *6; *see RJ Prod. Co. v. Nestle USA, Inc.*, 2010 WL 1506914, *2 n.1 (D.D.C. Apr. 15, 2010) (no "private cause[] of action" in § 1341); *Peavey v. Holder*, 657 F. Supp. 2d 180, 190 (D.D.C. 2009) (same as to § 1519), *aff'd*, 2010 WL 3155823 (D.C. Cir. Aug. 9, 2010) (per curiam).

Plaintiff fares no better with any § 1985(3) or fraud claim. For the reasons explained in Part A above, any such claim is barred by the same three-year statute

of limitations that bars the *Bivens* claims. *See*, *e.g.*, *Hughes v. Abell*, 794 F. Supp. 2d 1, 12 (D.D.C. 2010) (fraud); *Lewis*, 577 F. Supp. 2d at 51-52 (§ 1985). Any § 1985(3) claim is also barred by qualified immunity. Plaintiff's bare, conclusory allegations are insufficient under *Iqbal* and *Twombly* to plausibly suggest that the individual-capacity defendants formed the requisite "agreement" or "meeting of the minds," *Lewis*, 577 F. Supp. 2d at 55-56, or acted out of "some racial, or perhaps otherwise class-based, invidiously discriminatory animus," *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971); *see Atherton v. D.C.*, 567 F.3d 672, 688-89 (D.C. Cir. 2009) (affirming dismissal of § 1985(3) claim as the "bare facts" alleged did not satisfy this element). Nor was it clearly established at the relevant time that the individual-capacity defendants—as employees "in the same branch of the Government (the Executive Branch)" and "in the same Department" or agency (State Department or SSA)—could have violated § 1985(3) through their "conversations and agreements" with each other. *Abbasi*, 137 S. Ct. at 1867-69 (granting qualified immunity on § 1985 claim based on, *inter alia*, the "division in the courts of appeals . . . respecting the validity or correctness of the intracorporate-conspiracy doctrine with reference to § 1985 conspiracies") (citing *Bowie v. Maddox*, 642 F.3d 1122, 1130-31 (D.C. Cir. 2011)). Finally, any fraud claim fails because Plaintiff has not alleged facts, with the "particularity" required by Federal Rule of Civil Procedure 9(b), satisfying the elements of this tort as to any individual-capacity defendant. *See*, *e.g.*, *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 27 (D.D.C. 2000) (discussing fraud elements under District tort law), *on reconsideration in part*, 147 F. Supp. 2d 1

(D.D.C. 2001). Even if he had, all individual-capacity defendants have absolute immunity under the Westfall Act with respect to any common-law fraud claim. 28 U.S.C. § 2679(b)(1); *see generally Osborn v. Haley*, 549 U.S. 225 (2007).

III. CONCLUSION

For the foregoing reasons, Defendants Berryhill, Dietz, Bond, Rolbin, McLean, Wilcock, O'Carroll, Penn, Roloff, Deuchler, and Messer respectfully request that all claims asserted against them in their individual capacities be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Memorandum of Points and Authorities on counsel for all parties by electronic means through the Court's Case Management/Electronic Case File system on May 4, 2020.

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