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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Kent Terry, et al., Plaintiffs, v. William Newell, et al., Defendants.	No. CV-12-02659-PHX-DGC **ORDER**

Defendant Emory Hurley has filed a motion to dismiss (Doc. 52), as have Defendants William Newell, George Gillett, David Voth, Hope McAllister, Tonya English, and William McMahon (Doc. 53). The motions are fully briefed. For the following reasons, the Court will grant Defendants' motions to dismiss.[1]

I. Background Facts.

Plaintiffs are the parents of Border Patrol Agent Brian Terry, who was killed by Mexican drug cartel operatives while on duty in the Arizona desert on December 15, 2010. Defendant Emory Hurley is an Assistant United States Attorney ("AUSA"). Defendants William Newell, George Gillett, David Voth, Hope McAllister, Tonya English, and William McMahon are agents and officers with the United States Department of Alcohol, Tobacco, Firearms and Explosives ("ATF Defendants").

[1] The request for oral argument is denied because the issues have been fully briefed and oral argument will not aid the Court's decision. *See* Fed. R. Civ. P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

Plaintiffs allege that Mexican drug cartels funded and operated a firearms trafficking ring in the Phoenix-metropolitan area in 2009. Doc. 32, ¶ 77-78. Straw purchasers with clean backgrounds would certify to Federal Firearms Licensees that they were buying firearms for personal use and would then transfer them to cartel operatives. *Id*., ¶ 50, 79, 91. Plaintiffs allege that AUSA Hurley and the ATF Defendants "created, organized, implemented, and/or participated in a plan – code named 'Operation Fast and Furious' – to facilitate the distribution of dangerous firearms to violent criminals." *Id*., ¶ 2. The alleged strategy of Operation Fast and Furious (the "Operation") was to allow illegally purchased firearms to transfer into the hands of violent criminals, a practice known as "gunwalking." *Id*., ¶ 65. Such gunwalking, it was hoped, would result in the arrest of high ranking members of the Mexican drug cartel who were expected to procure the traced firearms from straw purchasers within the United States. *Id*., ¶¶ 78-79, 94. In furtherance of the Operation, AUSA Hurley and the ATF Defendants allegedly hindered other ATF agents and other law enforcement agencies from impeding the firearms trafficking conspiracy. *Id*., ¶ 94. Defendants intended to run interference with other law enforcement agencies until Defendants could obtain a wiretap which they believed would enable them to dismantle the entire organization. *Id*., ¶¶ 94, 111, 140, 143.

Plaintiffs allege the ATF Defendants identified Lone Wolf Trading Company as one source of weapons sold to straw purchasers. Defendants monitored straw sales by means of a hidden camera installed at Lone Wolf. *Id*., at 97. Plaintiffs allege that the ATF Defendants instructed Lone Wolf to continue making sales to suspicious purchasers and to share intelligence with them. *Id*., ¶ 100. Lone Wolf allegedly sold 619 weapons to straw purchasers between October 15 and December 31, 2010. *Id*., ¶¶ 107-08.

On December 15, 2010, Agent Terry was shot and killed in the desert near Rio Rico, Arizona, eighteen miles inside the U.S.-Mexico border. Plaintiffs allege that two of the weapons found at the scene had been sold by Lone Wolf and gunwalked by Defendants. *Id*., ¶¶ 121, 123, 160. Plaintiffs assert that their son's death resulted from Defendants' failure to intercept the illegally purchased weapons. *Id*., ¶¶ 418, 429.

Plaintiffs' *Bivens* action relies on a state-created danger theory and seeks compensatory and punitive damages against AUSA Hurley, the ATF Defendants, and Lone Wolf for loss of familial association and on behalf of Agent Terry' estate, under the Fifth Amendment Due Process Clause. *Id*., ¶¶ 9-10, 428, 444, 448, 450.

II. Legal Standard.

Defendants move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). Defendants mount a facial attack on the Court's subject matter jurisdiction rather than contesting specific factual allegations of the complaint. In resolving such a facial challenge, the Court assumes all of Plaintiffs' factual allegations to be true and draws all reasonable inferences in their favor. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009).[2]

III. Analysis.

In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*. 403 U.S. 388 (1971), the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp. v. Malesko,* 534 U.S. 61, 66 (2001). The *Bivens* court "proceed[ed] on the theory that a right suggests a remedy." *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). *Bivens* allows a plaintiff to bring an action for damages against individual federal officials for violating the Fourth Amendment despite the absence of any federal statute authorizing such an action. *See Bivens*, 403 U.S. at 397. The Supreme Court has also recognized *Bivens* actions to redress violations of the Fifth and Eighth Amendments. *See Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980).

Since its 1980 decision in *Carlson*, the Supreme Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68. The Court instead has asked whether Congress intended courts to devise a new *Bivens* remedy, and has declined to extend *Bivens* to embrace other constitutional

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[2] Defendants also move to dismiss under Rule 12(b)(6). Because the Court will grant the motion under Rule 12(b)(1), this order will not discuss Rule 12(b)(6).

violations. *See, e.g.*, *Chappell v. Wallace*, 462 U.S. 296, 297 (1983) (declining to find an implied right of action for military personnel who allegedly suffered racial discrimination at the hands of superior officers); *Bush v. Lucas*, 462 U.S. 367, 368 (1983) (declining to find an implied right of action for a federal civil-service employee who allegedly suffered violations of his First Amendment rights); *Wilkie v. Robbins*, 551 U.S. 537, 561-62 (2007) (declining to find an implied right of action for a landowner who allegedly suffered harassment and intimidation by federal officials in violation of the Fourth and Fifth Amendments).

In *Wilkie*, the Supreme Court identified a two-step analysis for determining the appropriateness of a *Bivens* remedy. *Id*. at 550; *W. Radio Servs. v. U.S. Forest Service*, 578 F.3d 1116, 1120 (9th Cir. 2009). First, the Court determines whether "any alternative, existing process for protecting" the plaintiff's interests "amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550. Such an alternative remedy raises the inference that Congress "expected the Judiciary to stay its *Bivens* hand." *Id*. at 554. "When the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, [the Supreme Court has] not created additional *Bivens* remedies." *Schweiker v. Chilicky*, 487 U.S. 410, 423 (1988).[3]

In *Bush*, the Supreme Court declined to recognize a *Bivens* action even though it assumed a First Amendment violation had occurred and acknowledged that "existing remedies do not provide complete relief for the plaintiff." 462 U.S. at 388. Noting that

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[3] Plaintiffs cite *Carlson* for the proposition that a *Bivens* action may be precluded only "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective," or when there are special factors counseling hesitation. Doc. 64 at 4 (emphasis in original). To the extent *Carlson* requires a clear statement from Congress before a remedial structure can preclude a *Bivens* action, that requirement has been repudiated by the Supreme Court. *See Schweiker*, 487 U.S. at 423; *see also W. Radio Servs.*, 578 F.3d at 1120 ("[S]o long as Congress' failure to provide money damages, or other significant relief, has not been inadvertent, courts should defer to its judgment.").

Congress is more competent than the Judiciary to carry out the necessary "balancing [of] governmental efficiency and the rights of employees," the Court refused to "decide whether or not it would be good policy to permit a federal employee to recover damages from a supervisor who has improperly disciplined him for exercising his First Amendment rights." *Id*. at 389-390. "So long as the plaintiff ha[s] an avenue for some redress, bedrock principles of separation of powers foreclose judicial imposition of a new substantive liability." *Malesko*, 534 U.S. at 69.

At the second step of the *Wilkie* analysis, the Court asks whether there are "factors counseling hesitation" before finding an implied *Bivens* right of action. *Wilkie*, 551 U.S. at 550. Even where Congress has given plaintiffs no damages remedy for a constitutional violation, the Court has declined to create a right of action under *Bivens* when doing so "would be plainly inconsistent with Congress' authority in this field." *Chappell*, 462 U.S. at 304. For example, the Court found that "the unique disciplinary structure of the Military Establishment and Congress' activity in the field" constituted special factors counseling against finding a *Bivens* remedy for enlisted military personnel against superior officers. *Id*. at 304.

This case can be resolved at step one of the *Wilkie* analysis. Congress has provided a comprehensive remedial scheme for Agent Terry's estate and survivors. The Federal Employees Retirement System ("FERS"), 5 U.S.C. §§ 8401, *et. seq*., the Federal Employees Compensation Act ("FECA"), 5 U.S.C. §§ 8101, *et. seq.*, and the Public Safety Officer Benefits Acts ("PSOBA"), 42 U.S.C. § 3796, all provide benefits for the survivors of federal employees who are killed in the course of their employment. These existing remedies "amount[] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550.

The FERS provides disability and death benefits to federal employees or their survivors. 5 U.S.C. §§ 8402(b)(2)(B), 8403, 8424, 8432, 8441-8451; 5 C.F.R. §§ 843.101, *et seq*. Under 5 U.S.C. §§ 8442(b)(1)(A) and 8462(e), a surviving spouse may receive 50% of the deceased employee's final annual basic pay, plus a $15,000

payment adjusted to reflect inflation. Section 8443 provides benefits for a deceased employee's surviving children. Section 8424 permits the parents of a deceased employee to recover benefits if the employee left no designated beneficiary, spouse, or children.

The FECA establishes a "comprehensive and exclusive compensation scheme for federal employees." *Markham v. United States*, 434 F.3d 1185, 1187 (9th Cir. 2006). The FECA provides that "[t]he United States shall pay compensation . . . for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty[.]" 5 U.S.C. § 8102(a). The FECA permits a spouse to receive up to 50% of a deceased employee's monthly pay. 5 U.S.C. § 8133(a)(1). Children and parents of a deceased employee can also recover FECA benefits under certain circumstances. 5 U.S.C. §§ 8133(a)(3)-(4). Most relevant here, FECA specifically states that it is the exclusive source of liability to the employee, spouse, or next of kin. *Id*. § 8116(c); *United States v. Lorenzetti*, 467 U.S. 167, 169 ("[T]he United States' liability for work-related injuries under FECA is exclusive[.]"). Indeed, several federal district courts have found that the availability of FECA remedies precludes a *Bivens* claim. *See Richards v. C.I.A.*, 837 F. Supp. 2d 574, 578 (E.D. Va. 2011); *Rivera v. Smith*, No. 1:10-CV-01015 AWIGSA, 2011 WL 902097, at *4 (E.D. Cal. March 15, 2011); *Williams v. Young*, 769 F. Supp. 2d 594, 600 n.6 (S.D.N.Y. 2011); *Briscoe v. Potter*, 355 F. Supp. 2d 30, 41-42 (D. D.C. 2004) *aff'd*, 171 Fed. App'x. 850 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006); *Hightower v. U.S.*, 205 F. Supp. 2d 146, 157-58 (S.D.N.Y. 2002). In addition, the Ninth Circuit has held that the FECA is relevant in a special factor analysis precluding recognition of a *Bivens* action brought by an injured employee or his survivors. *Berry v. Hollander*, 925 F.2d 311, 315 (9th Cir. 1991).

The PSOBA provides benefits to survivors of federal and other law enforcement officers killed in the line of duty. 42 U.S.C. § 3796(a)(1)-(5). The PSOBA also provides educational funding to the dependents of deceased public safety officers. 42 U.S.C. §§ 3796(d), *et seq*. Along with the FECA, the PSOBA has been cited by federal district courts in declining to imply a *Bivens* right of action. *Rivera*, 2011 WL 902097 at *4 n.2.

Plaintiffs argue that these federal statutes do not foreclose a *Bivens* claim because Plaintiffs have had no opportunity to adjudicate their claims in a public forum before a neutral arbiter. Doc. 59 at 6; Doc 64 at 5. The Supreme Court and Ninth Circuit have not required, however, that federal remedies provide a full panoply of due process protections before a *Bivens* action is precluded. To the contrary, *Bivens* actions are foreclosed "where Congress has provided *some* mechanism for relief that it considers adequate to remedy constitutional violations." *Moore v. Glickman*, 113 F.3d 988, 991 (9th Cir. 1997) (emphasis added).

Plaintiffs further argue that the federal statutes cited above "offer no . . . forum for the vindication of a constitutional claim against a federal officer." Doc. 64 at 6, 7. The Supreme Court has held, however, that "the presence of alleged unconstitutional conduct that is not *separately* remedied under the statutory scheme [does not] imply that the statute has provided 'no remedy' for the constitutional wrong at issue." *Schweiker*, 487 U.S. at 427-28 (emphasis in original). Thus, a *Bivens* action may be precluded where statutory remedies do not separately provide relief for the alleged constitutional violations that caused injury.

Plaintiffs argue that a *Bivens* claim should not be precluded in this case because the statutory scheme provides no separate deterrence for government wrongdoing, a primary policy reason for creating the *Bivens* remedy in the first place. Doc. 59 at 6. *Wilkie* explained, however, that "any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified." 551 U.S. at 500. Plaintiffs seem to suggest that the strong deterrent policies undergirding *Bivens* permit a court to imply a damages action where the available statutory remedies compensate a plaintiff for injuries but do not also adequately discourage a government agent's misconduct. Under such a reading of *Bivens*, a damages action would be implied whenever a remedial statutory scheme fails to

impose a penalty of some sort on the government actor who caused the injury. The Court cannot accept such a broad interpretation of *Bivens*. The Supreme Court has made clear during the last 30 years that it is not the prerogative of the judiciary to create *Bivens* causes of action whenever a judge deems a Congressional remedial scheme to be deficient in some respect. *Wilkie*, 551 U.S. at 550, 554; *Malesko*, 534 U.S. at 69; *Schweiker*, 487 U.S. at 423; *Chappell*, 462 U.S. at 304.

Plaintiffs argue that permitting the PSOBA to be construed in a manner that precludes a *Bivens* action would "conflict with the goal of attempting to remediate the harm from a fallen officer's death in service of their country." Doc. 64 at 6-7. Plaintiffs seem to argue that construing the PSOBA – a statute designed to provide relief to the survivor of an officer killed in the line of duty – in a manner that precludes a *Bivens* action defeats the goal of providing compensation to families. But the compensation available under the PSOBA is intended to remedy precisely the harm that Plaintiffs have suffered, namely the tragic death of their son. It is not the proper role of this Court to second-guess the remedial scheme established by Congress, find it insufficient, and impose an additional judicially-crafted remedy.

The Court recognizes that Plaintiffs have suffered a great loss, and that any financial remedy is likely insufficient to redress their injury. But as the Supreme Court has made clear, the bedrock principle of separation of powers counsels against judicially-created remedies when Congress has established a remedial scheme. Congress has done so here, and the Court therefore concludes that a *Bivens* action cannot be implied.

IT IS ORDERED that Defendants' motions to dismiss (Docs. 52, 53) are **granted**.

Dated this 15th day of November, 2013.

David G. Campbell
United States District Judge