

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT BOULE,
Plaintiff,
v.
ERIK EGBERT, *et al.*,
Defendants.

Case No. C17-0106RSM

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
REGARDING FOURTH AMENDMENT
VIOLATION

I. INTRODUCTION

This matter comes before the Court on Plaintiff's Motion for Summary Judgment On Plaintiff's Fourth Amendment Claim. Dkt. #94. Plaintiff argues that there is no genuine dispute as to any material fact regarding liability, and therefore judgment in his favor is appropriate with respect to his claim. *Id.* Defendant Egbert asserts that summary judgment in his favor is appropriate because Plaintiff impermissibly attempts to extend his *Bivens*¹ claims to a new context, he was invited onto the subject property, he was given permission to conduct the search at issue, and he is protected by qualified immunity in any event. Dkts. #102² and #131 (filed

¹ Referring to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

² Although not styled as a cross-motion for summary judgment, Defendant Egbert has moved for summary judgment on all claims. The Court resolves the Fourth Amendment portion of Defendant Egbert's motion in this Order, and the remainder of his motion (Dkt. #102) will be resolved by separate Order.

ORDER- 1

1 under seal).³ For the reasons set forth below, the Court disagrees with Plaintiff and DENIES his
2 motion.

3

4 II. BACKGROUND

5 Plaintiff initially filed this action on January 5, 2017. Dkt. #1. He filed an
6 Amended Complaint on September 6, 2017. Dkt. #22. The allegations arise from an
7 interaction with Defendant Erik Egbert, a United States Customs and Border Protection
8 (“CBP”) Officer, on March 20, 2014. *Id.*

9 Plaintiff resides in a house immediately adjacent to the U.S./Canada border. Dkt.
10 #99 at ¶ 4 (filed under seal)⁴. The house and its driveway are accessed by a one-lane
11 private dirt road that connects to a paved public street. *Id.* at ¶ 5. Plaintiff and Defendant
12 appear to agree that this property is in area known for cross-border smuggling of people,
13 drugs, illicit money and items of significance to criminal organizations. *Id.* at ¶ 7 and Dkt.
14 #108 at ¶ 10. In addition to living in the home, Plaintiff operates a bed and breakfast,
15 which is known as the Smuggler’s Inn. Dkts. #99 at ¶ 4 and #108 at ¶ 6.

16 Plaintiff has posted a sign at the intersection of the private dirt lane that leads to his
17 home and the paved public street that reads:

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22 Welcome to Smuggler’s Inn
23 Guests Only
24 Private Property
25 No Trespassing

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³ A number of documents in this matter have been filed under seal, with redacted versions available publicly. To the extent possible, the Court will reference only information available in the public documents. For any citations to the sealed documents, the same information is located at the same reference in the public version of the document.

⁴ While the Declaration of Robert Boule cited here was filed under seal, the information set forth in this factual background was contained on the public docket in Plaintiff’s motion for summary judgment (Dkt. #99).

1 Dkt. #99 at ¶ 16 and Ex. 5 thereto. There is conflicting evidence in the record as to when
2 that sign was posted. Defendant Egbert asserts that the sign was not posted as of March 20,
3 2014. Dkts. #130 at ¶ 23 and #133 at ¶ 23 (filed under seal). A friend of Plaintiff's states
4 that the sign has been posted for the last six or seven years. Dkt. #148 at ¶ 11.

5 On March 20, 2014, Defendant Egbert drove down the dirt lane into Plaintiff's
6 driveway. Dkts. #108 at ¶ 29 and #130 at ¶ 24. A photo of Plaintiff's property depicts the
7 drive way immediately adjacent to Plaintiff's home, surrounded on to sides by a tall
8 wooden fence. Dkts. #98, Ex. 4 and #108, Ex. A. Earlier that day, Defendant Egbert had
9 learned through conversation with Plaintiff of a guest arriving from Turkey who had
10 booked a room at Smuggler's Inn for that evening. Dkt. #130 at ¶ 30. Plaintiff informed
11 Agent Egbert that the guest had arrived in New York via air from Turkey the night before,
12 and had then flown to SEA-TAC airport that day. Dkts. #94 at 4-5 and #99 at ¶ 10. Two
13 persons employed by Plaintiff had driven to SEA-TAC airport in one of Plaintiff's vehicles
14 to pick up the guest and transport him to Smugglers Inn. Dkt. #99 at ¶ 10. As the vehicle
15 returned, driving down the lane and coming to a stop in the Plaintiff's driveway, Defendant
16 Egbert followed in his Border Patrol vehicle, entering Plaintiff's driveway and parking
17 immediately behind the vehicle. Dkts. #108 at ¶ 29 and #130 at ¶ 24.

18 The driver exited while the guest remained seated in the vehicle. According to
19 Defendant Egbert, when he approached the vehicle, the driver gave him permission to talk
20 to the guest, Mr. Kaya. Dkts. #108 at ¶ 32 and #130 at ¶ 24. However, Plaintiff, who was
21 on a nearby porch, told Defendant Egbert he was trespassing and asked him to leave his
22 property. Dkts. #99 at ¶ 10 and #108 at ¶ ¶ 33-34. Defendant Egbert was "puzzled" by the
23 behavior. Dkt. #108 at ¶ 35.

What happened next is not largely in dispute. The parties agree that Agent Egbert did not leave when asked to do so by Plaintiff. Dkt. #108 at ¶¶ 33-34. The parties also agree that Plaintiff moved between Defendant and the vehicle in which the passenger was seated. *Id.* Defendant Egbert states that he informed Plaintiff he (Egbert) wanted to speak with the guest about his immigration status. *Id.* at ¶ 34. The parties dispute what level of force, if any, was used for Agent Egbert to access the vehicle, but the parties agree that Agent Egbert opened the vehicle door and asked the guest about his status in the country. *Id.* at ¶¶ 37-38. The parties agree that Defendant Egbert confirmed that the guest was legally in the country and then allowed Plaintiff to escort the guest into his home. *Id.* at ¶¶ 40-41. The instant action followed.

III. DISCUSSION

A. Legal Standard on Summary Judgment

Summary judgment is appropriate where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In ruling on summary judgment, a court does not weigh evidence to determine the truth of the matter, but “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *Federal Deposit Ins. Corp. v. O’Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992)). Material facts are those which might affect the outcome of the suit under governing law. *Anderson*, 477 U.S. at 248.

The Court must draw all reasonable inferences in favor of the non-moving party. *See O'Melveny & Meyers*, 969 F.2d at 747, *rev'd on other grounds*, 512 U.S. 79 (1994). However, the nonmoving party must make a "sufficient showing on an essential element of

1 her case with respect to which she has the burden of proof" to survive summary judgment.
2 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Further, "[t]he mere existence of a
3 scintilla of evidence in support of the plaintiff's position will be insufficient; there must be
4 evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at
5 251.
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7 **B. Plaintiff's Fourth Amendment Claim**
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9 Plaintiff asks this Court to find as a matter of law that Agent Egbert violated
10 Plaintiff's Fourth Amendment Rights when he (Egbert) drove onto Plaintiff's curtilage and
11 refused to leave when asked to do so by Plaintiff. Dkt. #94 at 8-10. Defendant Egbert
12 responds that summary judgment in his favor is appropriate because: 1) allowing his claim
13 to proceed would be an unwarranted extension of *Bivens* into a new context; 2) he was
14 authorized by federal law to enter onto Plaintiff's property, and the driveway in front of
15 Smuggler's Inn is not an area where Plaintiff had a reasonable expectation of privacy for
16 purposes of the Fourth Amendment; 3) Plaintiff does not have standing to assert a claim
17 relating to the alleged detention or search of another person; and 4) he is entitled to
18 qualified immunity. Dkt. #128. For the reasons discussed below, the Court agrees that
19 allowing Plaintiff's claim to proceed would be an unwarranted extension of *Bivens* into a
20 new context.
21

22 *1. Curtilage*
23

24 As an initial matter, the Court examines whether the driveway outside Plaintiff's
25 home/inn is protected curtilage. The Fourth Amendment's protection of curtilage has long
26 been black letter law. "[W]hen it comes to the Fourth Amendment, the home is first among
27 equals." *Florida v. Jardines*, 569 U. S. 1, 6, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013).
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1 “At the Amendment’s ‘very core’ stands ‘the right of a man to retreat into his own home
2 and there be free from unreasonable governmental intrusion.’” *Ibid.* (quoting *Silverman v.*
3 *United States*, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961)). To give full
4 practical effect to that right, the U.S. Supreme Court considers curtilage – “the area
5 ‘immediately surrounding and associated with the home’” – to be ““part of the home itself
6 for Fourth Amendment purposes.”” *Jardines*, 569 U. S. at 6 (quoting *Oliver v. United*
7 *States*, 466 U.S. 170, 180, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984)). “The protection
8 afforded the curtilage is essentially a protection of families and personal privacy in an area
9 intimately linked to the home, both physically and psychologically, where privacy
10 expectations are most heightened.” *California v. Ciraolo*, 476 U.S. 207, 212-213, 106 S.
11 Ct. 1809, 90 L. Ed. 2d 210 (1986). When a law enforcement officer physically intrudes on
12 the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has
13 occurred. *Jardines*, 569 U. S. at 11. Such conduct thus is presumptively unreasonable
14 absent a warrant.

19 Defining the extent of the “curtilage,” depends on four factors: “the proximity of the
20 area claimed to be curtilage to the home, whether the area is included within an enclosure
21 surrounding the home, the nature of the uses to which the area is put, and the steps taken by
22 the resident to protect the area from observation by people passing by.” *Id.* at 301. The
23 Supreme Court has noted that, “for most homes, the boundaries of the curtilage will be
24 clearly marked: and the conception defining the curtilage – as the area around the home to
25 which the activity of home life extends – is a familiar one easily understood from our daily
26 experience.” *Oliver v. U.S.*, 466 U.S. 170, 182 n.12, 104 S. Ct. 1735, 80 L. Ed. 2d 214
27 (1984).

1 In this case, the Court agrees with Plaintiff that the driveway in front of his
2 house/inn is curtilage. According to photographs in the record, the driveway runs in a u-
3 shape, off of 99th St. SW, in front of the house/inn and alongside part of the front lawn past
4 the front perimeter of the house. Dkt. #98, Exs. 3 and 4. The top portion of the
5 driveway that sits behind the front perimeter of the house is enclosed on two sides by a
6 white, wooden fence that appears to be the height of a car. *Id.*, Ex. 4. A visitor
7 endeavoring to reach the front door of the house/inn would have to enter the driveway and
8 park, before proceeding up a set of steps leading to the front porch. *Id.* When Defendant
9 Egbert followed the vehicle and encountered the person sitting inside, it was parked in the
10 driveway near the front steps to the house/inn.

11 The “‘conception defining the curtilage’ is . . . familiar enough that it is ‘easily
12 understood from our daily experience.’” *Jardines*, 569 U.S. at 7 (quoting *Oliver*, 466 U.S.
13 at 182, fn. 12). Just like the front porch, side garden, or area “outside the front window,”
14 *Jardines*, 569 U.S. at 6, the driveway enclosure where Defendant Egbert stopped the
15 vehicle and confronted the guest inside constitutes “an area adjacent to the home and ‘to
16 which the activity of home life extends,’” and so is properly considered curtilage. *Id.* at 7
17 (quoting *Oliver*, 466 U.S. at 182, fn. 12). In physically intruding on the curtilage of
18 Plaintiff’s home/inn to stop and search the vehicle, Defendant Egbert not only invaded
19 Plaintiff’s Fourth Amendment interest in the item searched, *i.e.*, the vehicle, but also
20 invaded Plaintiff’s Fourth Amendment interest in the curtilage of his home/inn. Thus, the
21 question now before this Court is whether there is an exception that justifies the invasion of
22 the curtilage.

1 2. *Bivens*

2 Defendant Egbert first argues that this lawsuit is not recognized in the *Bivens*
3 context, and therefore should be dismissed. Dkt. #102 at 10-14 (*filed under seal*).
4
5 Specifically, Defendant argues that Plaintiff's claims present a new *Bivens* context because
6 the Supreme Court has not previously recognized an action against Border Patrol agents
7 conducting immigration checks, an action arising out of the use of force to overcome a
8 bystander's attempt to impede an investigation, or an action for alleged retaliation, and
9 therefore the claims are nothing like the *Bivens* actions the Supreme Court has previously
10 approved. *Id.*

13 In 1971 the United States Supreme Court decided *Bivens*. In that case, the Court
14 held that, even absent statutory authorization, it would enforce a damages remedy to
15 compensate persons injured by federal officers who violated the prohibition against
16 unreasonable search and seizures. *Bivens*, 403 U.S. at 397. The Court acknowledged that
17 the Fourth Amendment does not provide for money damages "in so many words." *Id.* at
18 396. However, the Court noted that Congress had not foreclosed a damages remedy in
19 "explicit" terms and that no "special factors" suggested that the Judiciary should
20 "hesitat[e]" in the face of congressional silence. *Id.* at 396-97. The Court held that it could
21 authorize a remedy under general principles of federal jurisdiction. *See id.* at 392 (citing
22 *Bell v. Hood*, 327 U.S. 678, 684, 66 S. Ct. 773, 90 L. Ed. 939 (1946)).
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26 Since then, the U.S. Supreme Court has made clear that expanding the *Bivens*
27 remedy is now a "disfavored" judicial activity, in recognition that it has "consistently
28 refused to extend *Bivens* to any new context or new category of defendants." *Correctional*
29 *Services Corp. v. Malesko*, 534 U. S. 61, 68, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001). The
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1 Court has recently set forth the proper test for determining whether a case presents a new
2 *Bivens* context. *Ziglar v. Abbasi*, ___ U.S. ___, 137 S. Ct. 1843, 1859-60, 198 L. Ed.2d 290
3 (2017).
4

5 If the case is different in a meaningful way from previous *Bivens* cases
6 decided by this Court, then the context is new. Without endeavoring to
7 create an exhaustive list of differences that are meaningful enough to
8 make a given context a new one, some examples might prove
9 instructive. A case might differ in a meaningful way because of the
10 rank of the officers involved; the constitutional right at issue; the
11 generality or specificity of the official action; the extent of judicial
12 guidance as to how an officer should respond to the problem or
13 emergency to be confronted; the statutory or other legal mandate under
14 which the officer was operating; the risk of disruptive intrusion by the
15 Judiciary into the functioning of other branches; or the presence of
16 potential special factors that previous *Bivens* cases did not consider.
17

18 *Id.* In determining whether a *Bivens* remedy should be recognized in that case, the Court in
19 *Abbassi* compared the respondents' claims to already recognized *Bivens* claims and noted
20 that a new context arises in cases where "even a modest extension" exists. *Id.* at 1864.
21

22 In the instant matter, the alleged conduct has the recognizable substance of Fourth
23 Amendment violations. Nevertheless, Defendant Egbert is a U.S. Border Patrol Agent,
24 rather than a traditional law enforcement officer, federal workplace supervisor, or prison
25 official, and was purporting to operate under a different "statutory or other legal mandate"
26 than the officials outlined in the "traditional" *Bivens* claims referenced in *Abbasi*. For these
27 reasons, the Court assumes that this case presents a "modest extension" in a "new context"
28 for the application of a *Bivens* remedy and must determine whether there are special factors
29 counseling against extension of *Bivens* into this area. *Ziglar*, 137 S.Ct. at 1857. The
30 Supreme Court's precedents "now make clear that a *Bivens* remedy will not be available if
there are 'special factors counselling hesitation in the absence of affirmative action by

Congress.”” *Id.* Thus, “the 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.” *Id.* at 1857-58. This requires the Court to assess the impact on governmental operations system-wide, including the burdens on government employees who are sued personally, as well as the projected costs and consequences to the government itself. *Id.* at 1858. In addition, “if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action.” *Id.*

Even assuming that Plaintiff had no other remedy than a *Bivens* claim for the alleged Fourth Amendment violation, this Court cannot extend *Bivens* if a “special factor” counsels hesitation. *See Wilkie v. Robbins*, 551 U.S. 537, 554, 562, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007). Thus, the Court must carefully weigh all the reasons Defendant Egbert has offered for denying a *Bivens* cause of action. Here, for the reasons set forth by Defendant, the Court agrees that Plaintiff’s claims raise significant separation-of-powers concerns by implicating the other branches’ national-security policies. *See* Dkt. #143 at 4-5. “The Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence.” *Hernandez*, 885 F.3d at 818-19. This Court agrees that the risk of personal liability would cause Border Patrol agents to hesitate and second guess their daily decisions about whether and how to investigate suspicious activities near the border, paralyzing their important border-security mission. *See Abbasi*, 137 S. Ct. at 1861. Likewise, the Court agrees that Congress is in the best position to evaluate the costs and benefits of a new legal remedy, particularly when it has already granted Border Patrol broad authority to secure the international border without providing a damages remedy for claims

1 arising in that context. *See Abbasi*, 137 S. Ct. at 1857–58 and 1862. For all of these
2 reasons, the Court finds that Plaintiff attempts an impermissible *Bivens* claim in a new
3 context, and special factors preclude such a claim. The Court therefore declines to address
4 Defendant’s alternative arguments regarding Defendant’s authorization under federal law,
5 standing or qualified immunity.

7 **IV. CONCLUSION**
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9 Having reviewed Plaintiff’s and Defendant’s motions for summary judgment, the
10 oppositions thereto and replies in support thereof, along with the supporting Declarations and
11 Exhibits and the remainder of the record, the Court hereby finds and ORDERS:

- 13 1. Plaintiff’s Motion for Summary Judgment on Plaintiff’s Fourth Amendment Claim
14 (Dkt. #94) is DENIED.
- 15 2. Defendant Egbert’s Motion for Summary Judgment on Plaintiff’s Fourth
16 Amendment Claim is GRANTED and the claim will be dismissed against Defendant
17 Egbert in its entirety.
- 18 3. The remainder of Defendant Egbert’s motion for summary judgment (Dkt. #102)
19 remains noted on the Court’s calendar and will be resolved by separate Order.

22 DATED this 21 day of August, 2018.
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26 RICARDO S. MARTINEZ
27 CHIEF UNITED STATES DISTRICT JUDGE
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