12-222
No. ____

IN THE
Supreme Court of the United States

MATTHEW ORAVEC, in his individual capacity,

Petitioner,

v.

EARLINE COLE, as an individual and as personal representative of the Estate of Steven Bearcrane; CLETUS COLE, as an individual and as personal representative of the Estate of Steven Bearcrane; VERONICA SPRINGFIELD, as an individual and as personal representative of the Estate of Robert Springfield; P.B., minor child; V.S., minor child,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a motion to dismiss brought by a federal law enforcement officer asserting qualified immunity should be granted under *Aschroft v. Iqbal,* 556 U.S. 662 (2009), where the complaint alleges a *Bivens* claim through nothing more than a formulaic recitation of the elements of the cause of action, general and unsupported statistics and musings, and alleged policy problems having nothing to do with the particular officer.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the denial of Petitioner Matthew Oravec's motion to dismiss on qualified immunity grounds is reported at 465 F. App'x 687. Pet. App. 1a-4a. The Ninth Circuit's order denying rehearing is unreported. Pet. App. 66a-67a. The opinion of the United States District Court for the District of Montana is reported at 719 F. Supp. 2d 1229. Pet. App. 5a-65a. The opinion of the Magistrate Judge, which was adopted by the District Court, is appended to the District Court's decision. Pet. App. 16a-64a.

JURISDICTION

The Ninth Circuit entered its judgment on January 10, 2012, and denied a timely petition for rehearing on May 21, 2012. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case presents the important question of whether a court may interpret *Aschroft v. Iqbal*, 556 U.S. 662 (2009), in a way that renders its tenets essentially meaningless – and whether such an interpretation is permissible in the context of an assertion of qualified immunity by a federal law enforcement officer sued in his personal capacity.

1. Plaintiffs, who are members of the Crow tribe or the Gros Ventre tribe, are relatives of two deceased Indian men, Steven Bearcrane and Robert Springfield. The gravamen of the complaint is that the FBI and the U.S. Attorney's Office inadequately

investigated the deaths of Mr. Bearcrane and Mr. Springfield.

Plaintiffs brought this action primarily seeking a declaration that the FBI and the U.S. Attorney's Office have violated the equal protection component of the Fifth Amendment by refusing to provide Indians the same investigatory and prosecutorial services that non-Indians receive. Plaintiffs also sought an injunction barring any future equal protection violations. Those efforts at law reform were dismissed by the district court and are not at issue in this Petition.

Plaintiffs' suit also asserted an equal protection claim specifically directed at Matthew Oravec, the FBI agent who investigated the deaths of Mr. Bearcrane and Mr. Springfield.[1] Seeking damages from Agent Oravec personally under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), Plaintiffs alleged that Agent Oravec violated equal protection guarantees by conducting an inadequate investigation into the deaths of Mr. Bearcrane and Mr. Springfield and by "failing to provide police services to Native Americans on and in the vicinity of the Crow Reservation because they are Native American." Pet. App. 72a.

2. The allegations in the complaint purportedly stating a *Bivens* claim were these:

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[1] In addition, Plaintiffs brought a claim against Ernest Weyand, a supervisory FBI agent, which was dismissed by the district court.

The complaint asserted that the federal government has a "policy of discrimination against Native Americans in investigations and prosecution of crimes." Pet. App. 73a (capitalization omitted). But to support that claim, the complaint cited nothing more than statistics reporting high crime rates on Indian reservations, *id.* at 73a-78a, and unsupported and contextless quotations from tribal leaders and government officials claiming that federal officials, in general, inadequately investigate and prosecute crimes on Indian reservations, *id.* at 76a-78a.

Regarding the death of Steven Bearcrane, the complaint alleged that Mr. Bearcrane was shot in the head and killed; that an unnamed "non-Indian man admitted to shooting Mr. Bearcrane"; that this unnamed man claimed self-defense; that Agent Oravec investigated the death; and that the FBI referred the matter to the U.S. Attorney for prosecution. *Id.* at 80a-81a, 86a. Claiming that Agent Oravec's investigation was an "example of [his] pattern and practice of selectively discriminating against Native Americans," the complaint alleged only that Agent Oravec "refused to do anything but the most cursory investigation" and declined to "use[] common investigative tests." *Id.* at 79a-80a.

The complaint alleged no specific examples showing that Agent Oravec treated the Bearcrane investigation differently than other, similar investigations involving non-Indian victims (a necessary element of an equal protection claim). In this regard, the complaint made only the following bald assertion:

> Defendants FBI, Oravec and Weyand have adopted and engaged in a pattern and practice of selectively discriminating against native Americans in providing police services and protection on the Crow reservation in Montana; such pattern and practice including, but not limited to the failure to adequately investigate crimes in which Native Americans are victims.

Id. at 79a.[2]

Last, asserting that Agent Oravec harbored "animus toward Native Americans," the complaint alleged that Agent Oravec "has been heard to say that female Native American victims of sexual assault were asking for assault or words to that effect." *Id.* at 83a. The complaint did not specify when or where Agent Oravec allegedly made that statement or who allegedly heard him make it.[3]

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[2] The complaint also asserted, "[u]pon information and belief," that Agent Oravec "consistently closed cases involving Indian victims without adequate investigation, especially sexual and other assaults involving Indian children and women." Pet. App. 82a. It then cited a website publication of Amnesty International and an article from *National NOW Times*, neither of which reported anything about Agent Oravec. *Id.* at 83a.

[3] As described below, this allegation – like many in the complaint – is conclusory and not entitled to an assumption of truth. In addition, while Agent Oravec recognizes that his own position on the facts of the matter is not relevant at the motion-to-dismiss stage, he strongly denies having ever made any such statement (and also denies the other allegations of the complaint that relate to him).

3. Agent Oravec asserted qualified immunity and moved to dismiss the *Bivens* claim. The district court denied the motion. Its reason for doing so was stated in a single, unilluminating sentence:

> After reviewing the allegations, this Court agrees that the factual allegations in the Amended Complaint create an inference that Defendant Oravec was motivated by racial animus when conducting his investigation into the deaths of Steven Bearcrane and Robert Springfield.

Pet. App. 11a. Although differential treatment is a necessary element of an equal protection claim, the district court did not address whether Plaintiffs had adequately alleged such treatment – that is, whether Plaintiffs had alleged that Agent Oravec had conducted the investigation in question differently than he had conducted the investigation of crimes involving non-Indian victims.

4. Agent Oravec immediately appealed the denial of qualified immunity under the collateral order doctrine, *see Iqbal*, 556 U.S. at 671-72, arguing that the complaint failed to state a cognizable *Bivens* claim under the pleading standard set forth in *Iqbal*. Agent Oravec maintained that the numerous allegations in the complaint that were conclusory or unrelated to him personally must be disregarded. The remaining allegations, Agent Oravec argued, did not plausibly suggest an equal protection violation, not least because the complaint lacked *any* allegations of differential treatment.

In a memorandum opinion, the Ninth Circuit affirmed the denial of qualified immunity with respect to Agent Oravec's investigation into the death of Mr. Bearcrane. In concluding that the complaint adequately alleged "differential treatment," the Ninth Circuit reasoned:

> The amended complaint sufficiently alleges differential treatment with regard to the Bearcrane investigation. It alleges that contrary to standard procedures, agent Oravec provided Bearcrane's family with [fewer] investigatory services than he would have provided to a non-Native American victim's family. These allegations, viewed together with the non-conclusory allegations regarding the poor provision of law enforcement services to Native Americans on the reservations, allow the court "to draw the reasonable inference" that agent Oravec conducted the Bearcrane investigation differently than he would have conducted an investigation of a similarly situated non-Native American victim. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

Pet. App. 2a-3a. The Ninth Circuit remanded for discovery and trial on the equal protection claim against Agent Oravec.[4]

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[4] The Ninth Circuit reversed the district court's denial of qualified immunity with respect to Agent Oravec's investigation into the death of Mr. Springfield, but suggested that this aspect of Plaintiffs' *Bivens* claim could be saved by re-pleading, and

Agent Oravec petitioned unsuccessfully for panel rehearing or rehearing en banc. Pet. App. 66a-67a. Agent Oravec then moved to stay the mandate pending this Court's review, contending that this case presented a compelling opportunity for this Court to clarify and reinforce the *Iqbal* pleading standard and explaining that the protections of qualified immunity would be effectively lost if Agent Oravec were subject to disruptive discovery while his petition for certiorari was pending. The Ninth Circuit granted that request.

REASONS FOR GRANTING THE PETITION

In the decision below, the Ninth Circuit interpreted the pleading standard of *Ashcroft v. Iqbal* in a way that rendered its important tenets meaningless. The Court of Appeals deemed a bald recitation of an element of the claim at issue "non-conclusory," and it credited an allegation nearly identical to one held insufficient in *Iqbal*. The court also found Agent Oravec's liability "plausible" based on the most general and unsupported allegations – nothing more than statistics and pundits' musings. Compounding those problems, the Ninth Circuit permitted the complaint to proceed on the basis of allegations having nothing at all to do with Mr. Oravec, in clear derogation of *Iqbal*.

Although the Ninth Circuit identified *Iqbal* as establishing the standard to evaluate motions to dismiss, the Ninth Circuit's interpretation of that stan-

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therefore remanded with instructions to allow Plaintiffs to file an amended complaint.

dard drained it of any force. If the Ninth Circuit's approach is allowed to stand, that court (and perhaps others as well) will feel free in the future to ignore *Iqbal*'s important strictures on federal pleading and to apply a far more lenient version of the motion-to-dismiss test.

That outcome is untenable. As described below, nearly all the courts of appeals recognize that *Iqbal* marked a sea change, and those circuits – unlike the Ninth Circuit here – give full force to *Iqbal*'s tenets. The decision below, therefore, creates an aberration in the law of federal pleading. That alone is sufficient to warrant this Court's intervention by summary reversal or full review. Indeed, given the stark conflict between *Iqbal* and the decision below, summary reversal is eminently appropriate here.

That is especially so given that the Ninth Circuit eviscerated *Iqbal* in the context of Agent Oravec's assertion of qualified immunity. As this Court has recognized, qualified immunity provides a critical protection for federal officers; that issue must be decided as early as possible in the proceedings to prevent officers from being subjected to the burden of discovery and trial where claims are meritless. Accordingly, when presented with a motion to dismiss raising a qualified immunity argument, courts must strictly adhere to *Iqbal* to weed out insubstantial claims at the outset of the litigation. Here, the Ninth Circuit took the opposite approach: by interpreting *Iqbal* to mean essentially nothing, the Court of Appeals subjected Agent Oravec to the burdens of discovery, and possibly even trial, on the basis of a complaint that

did little more than express Plaintiffs' aggrievement that the crime the FBI referred for prosecution was not actually prosecuted by other government officials.

I. The Ninth Circuit's Interpretation of *Iqbal* Is Irreconcilable with This Court's Teachings in That Case

1. The landmark decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), "retired" the fifty-year-old "no set of facts" pleading standard and established in its place two "working principles" for determining whether to dismiss a complaint under Rule 12(b)(6). *Iqbal*, 556 U.S. at 669, 678 (internal quotation marks omitted). First, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," "[t]hreadbare recitals of the elements of a cause of action," and "mere conclusory statements." *Id.* at 678. Second, "only a complaint that states a *plausible* claim for relief survives a motion to dismiss"; allegations that are "merely consistent with" misconduct fail to state a claim. *Id.* at 678-79 (emphasis added). In applying these principles, *Iqbal* emphasized that a complaint asserting a *Bivens* claim "must plead that each Government-official defendant, *through the official's own individual actions*, has violated the Constitution." *Id.* at 676 (emphasis added). Thus, a *Bivens* defendant "is only liable for his or her *own* misconduct," not the actions of others. *Id.* at 677 (emphasis added).

2. The Ninth Circuit's decision here renders meaningless *Iqbal*'s first working principle – that "conclusions" are "not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679.

The Ninth Circuit correctly recognized that "[t]o state a violation of equal protection," Plaintiffs were required to allege not just "discriminatory motive" but also, critically, "*differential treatment*." Pet. App. 2a (emphasis added) (citing *Wayte v. United States*, 470 U.S. 598, 608-09 (1985)).[5] The Ninth Circuit ruled that Plaintiffs had adequately alleged differential treatment on the basis of two parts of the complaint: (1) an allegation that "agent Oravec provided Bearcrane's family with [fewer] investigatory services than he would have provided to a non-Native American victim's family," and (2) other unnamed "allegations regarding the poor provision of law enforcement services to Native Americans on the reservations." Pet. App. 2a-3a.

By crediting those allegations, the Ninth Circuit interpreted *Iqbal* in a way that deprived *Iqbal*'s first working principle of any force whatever. First, the allegation that Agent Oravec "provided Bearcrane's family with [fewer] investigatory services than he would have provided to a non-Native American victim's family," Pet. App. 2a, should have been discarded, not accepted for purposes of deciding Agent Oravec's Rule 12(b)(6) motion. *Iqbal* made clear that

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[5] This Court has never held that a *Bivens* remedy exists for the claim asserted against Agent Oravec: the alleged failure to conduct an adequate investigation of a crime in violation of the equal protection component of the Fifth Amendment.

"[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, *do not suffice*." *Iqbal*, 556 U.S. at 678 (emphasis added). The bald allegation that Agent Oravec treated the Bearcrane family differently than others was precisely that – a recital of an element of Plaintiffs' cause of action (differential treatment). A proper interpretation of *Iqbal* would have deemed that allegation "conclusory" and required some "factual matter" in support of the differential-treatment element. *Id.* The Ninth Circuit's interpretation of *Iqbal*, however, permitted the complaint to proceed on the basis of a "[t]hreadbare recital[] of [an] element of a cause of action," despite this Court's clear instructions to the contrary. *Id.*

Second, by holding that the complaint contained unnamed other "non-conclusory allegations regarding the poor provision of law enforcement services to Native Americans on the reservations," Pet. App. 3a, the Ninth Circuit interpreted the meaning of "conclusory" so narrowly that it is hard to image allegations that would *not* pass muster under *Iqbal*'s first working principle. Indeed, many of the allegations that the Ninth Circuit apparently credited are strikingly similar to allegations that this Court rejected in *Iqbal*. For example, the complaint alleges generally that Agent Oravec discriminated against Native Americans:

> Defendants FBI, Oravec and Weyand have adopted and engaged in a pattern and practice of selectively discriminating against Native Americans in providing po-

> lice services and protection on the Crow reservation in Montana; such pattern and practice including, but not limited to the failure to adequately investigate crimes in which Native Americans are victims.

Pet. App. 79a. *Iqbal* deemed insufficient a nearly identical allegation. *See Iqbal*, 556 U.S. at 680 (rejecting as conclusory an allegation that government officials "'knew of, condoned, and willfully and maliciously agreed to subject [the plaintiff]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest'" (quoting complaint)).[6]

Plaintiffs' remaining allegations "regarding the poor provision of law enforcement services to Native Americans" are general and unsupported. For example, the complaint cites statistics about crime *rates* on Indian reservations, *see, e.g.*, Pet. App. 73a-75a, but it makes no attempt to show that those rates are the result of poor police services. Similarly,

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[6] The complaint at issue here also contains a few other allegations that are equally analogous to the conclusory allegations rejected in *Iqbal*. *See* Pet. App. 75a-76a ("Refusal of federal agencies, such as defendant FBI, to provide the same law enforcement services to Native Americans as provided to non-Native Americans has played a major part in creating the serious crime problem in Indian country."); Pet. App. 77a ("Refusal of federal agencies, such as defendant U.S. Attorney's Office, to provide the same prosecutorial services to Native Americans as are provided to non-Native Americans has played a major part in creating the serious crime problem in Indian Country . . . .").

while the complaint alleges that the United States "declined to prosecute 62% of Indian country criminal cases referred to federal prosecutors," Pet. App. 77a, that statistic alone is simply not relevant. The complaint makes no reference to the rate of prosecutions in other, similar contexts, and does not provide any basis to believe that the prosecution rate is improper or in any way attributable to the actions of FBI agents, who refer matters to prosecutors but do not decide whether a prosecution should go forward. Finally, the complaint haphazardly quotes the opinions of commentators and lawmakers regarding police services on reservations, but it fails to provide *any basis* for those opinions. *See, e.g.*, Pet. App. 73a-77a. By concluding that these allegations were "nonconclusory," Pet. App. 2a-3a, the Ninth Circuit made *Iqbal*'s first working principle a dead letter.

3. The Ninth Circuit's interpretation of *Iqbal*'s second working principle – that "only a complaint that states a *plausible* claim for relief survives a motion to dismiss," *Iqbal*, 556 U.S. at 679 (emphasis added) – is likewise at odds with this Court's teachings.

To plausibly allege the required element of differential treatment, the complaint would have to allege facts in support of two points: (a) that Agent Oravec's investigation of the death of Mr. Bearcrane was inadequate and (b) that Agent Oravec conducted adequate investigations of crimes involving non-Indians. The complaint utterly fails on both scores.

As an initial matter, the complaint fails to make a plausible claim that Agent Oravec's investigation

was inadequate. The complaint alleges that Mr. Bearcrane's attacker – whom the complaint does not name – claimed self-defense, and that Agent Oravec investigated the circumstances of the alleged crime and the matter was referred to the U.S. Attorney's office for prosecution. Pet. App. 79a-81a, 86a. Those allegations provide no basis for concluding that Agent Oravec's investigation was in any way lacking.

The complaint also asserts that "[t]he evidence appears to counter the self-defense claim made by the non-Indian man," *id.* at 80a, but the complaint fails to describe the nature of this "evidence" or how it "appears to counter" the self-defense claim. And the complaint asserts that "[t]here is no evidence that the FBI . . . used common investigative tests and data-gathering" in investigating Mr. Bearcrane's death, *id.*, but it offers no reason to believe that those investigative techniques were appropriate or would have led to different results. Thus, the complaint is at the very most "merely consistent with" a conclusion that Agent Oravec's investigation was inadequate. *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). It is more likely that Agent Oravec's investigation was sufficient and Mr. Bearcrane's family was simply unhappy with the U.S. Attorney's decision not to bring charges. "As between that obvious alternative explanation . . . , and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion." *Id.* at 682 (internal quotation marks omitted).

Critically, moreover, the complaint says nothing about how Agent Oravec has investigated crimes

committed against non-Indians. That omission is fatal, as an equal protection claim requires proof that the defendant "intentionally treated [the plaintiff] differently from others similarly situated." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *accord United States v. Armstrong*, 517 U.S. 456, 465 (1996) ("To establish a discriminatory effect in a race case [alleging discriminatory prosecution], the claimant must show that similarly situated individuals of a different race were not prosecuted."). Indeed, claims of discriminatory police work have succeeded only where there was clear evidence that a police officer gave preferential treatment to a person of a different race or ethnicity than the plaintiff. *See, e.g.*, *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1111 (10th Cir. 2008) ("[The plaintiff] contrasts [the defendant's] enforcement of [another, similarly situated person's] protective order with his refusal to enforce both [the plaintiff's] emergency and permanent protective orders."); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 535 (6th Cir. 2002) (relying on testimony that when the defendant "found Hispanic passengers hiding under a blanket, he called the Border Patrol, but that if he found white people hiding under a blanket, he would not"). Here, by contrast, the complaint contains no examples of how Agent Oravec has conducted investigations of crimes involving non-Indian victims. Thus, even if the complaint can be read to plead with the requisite plausibility that Agent Oravec's investigation was inadequate (which it cannot), the complaint contains *no* allegations suggesting that Agent Oravec

provided *better* law enforcement services to similarly situated non-Indian victims.

The Ninth Circuit's interpretation of *Iqbal*'s second working principle, therefore, permitted this complaint to proceed based on allegations that were at best no more than "consistent with" a conclusion that Agent Oravec violated the guarantee of equal protection. Yet that outcome is precisely what this Court rejected in *Iqbal:* "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." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). The Ninth Circuit's decision, therefore, conflicts with *Iqbal*'s teachings.

4. Last, by allowing Plaintiffs' claim to proceed, the Ninth Circuit's decision conflicts with *Iqbal*'s requirement that a *Bivens* claim be based on a defendant's "own individual actions." *Iqbal*, 556 U.S. at 676. The bulk of the complaint has nothing to do with Agent Oravec. Agent Oravec is not responsible for the crime rate on all – or even some – Indian reservations. *See* Pet. App. 73a-76a. Nor does he have anything to do with nationwide prosecution rates. *See id.* at 77a. Once the FBI refers crimes for prosecution – as it referred the Bearcrane murder, *see id.* at 86a – the *prosecutors*, not the FBI agents, determine whether to bring charges. The complaint's mélange of quotations from commentators and lawmakers, moreover, are simply not about Agent Oravec; they assert *general* grievances and make claims of *general* problems.

Yet the Ninth Circuit pointed to these general allegations "regarding the poor provision of law enforcement services to Native Americans on the reservations" in holding that the complaint plausibly alleged that "*[A]gent Oravec* conducted the Bearcrane investigation differently than he would have conducted an investigation of a similarly situated non-Native American victim." Pet. App. 3a (emphasis added). That reasoning flies in the face of *Iqbal*, which made clear that a *Bivens* defendant "is only liable for his or her own misconduct." *Iqbal*, 556 U.S. at 677. Indeed, even if the complaint adequately alleged that some government officials had violated the Constitution by providing fewer "investigatory services" to Indians than to non-Indians, *see* Pet. App. 2a, *Iqbal* nevertheless requires dismissal here due to the complaint's failure to allege facts showing that *Agent Oravec* treated Indians differently than non-Indians. *See Iqbal*, 556 U.S. at 683-84 (even if the plaintiff alleged "serious official misconduct" by "defendants who are not before [the court]," the defendants before the court "cannot be held liable unless they themselves" participated in the misconduct).

Plainly, then, the Ninth Circuit's reasoning violates *Iqbal* in numerous respects. Summary reversal is warranted given how far the Ninth Circuit has strayed from the path laid out by this Court in that decision. In the alternative, review on the merits is needed to ensure that *Iqbal*'s requirements are enforced.[7]

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[7] The Ninth Circuit went astray not only with respect to Plaintiffs' allegations that Agent Oravec violated the Constitution by

II. The Ninth Circuit's Lax Approach Conflicts with Other Circuits' Strict Adherence to *Iqbal*

Unlike the Ninth Circuit here, other circuits recognize the importance of *Iqbal*'s teachings and give full force to *Iqbal*'s tenets. The decision below, therefore, creates a conflict between other circuits' strict adherence to *Iqbal* and the Ninth Circuit's improperly lenient version of the *Iqbal* standard.

1. For example, following *Iqbal*, 556 U.S. at 678, other circuits do not hesitate to disregard as conclusory allegations that are mere "[t]hreadbare recitals of the elements of a cause of action." *See, e.g.*, *Van Leer v. Deutsche Bank Sec., Inc.*, No. 11-1520, 2012 U.S. App. LEXIS 9091, at *8-9 (4th Cir. May 2, 2012); *Santiago v. Warminster Twp.*, 629 F.3d 121, 131-32 (3d Cir. 2010); *Barrett v. Orman*, 373 F. App'x 823, 826 (10th Cir. 2010); *Edwards v. Prime Inc.*, 602 F.3d 1276, 1300-01 (11th Cir. 2010); *Hayden v. Paterson*, 594 F.3d 150, 161-62 (2d Cir. 2010); *Rhodes v. Prince*, 360 F. App'x 555, 559 (5th Cir. 2010); *Rao v. BP Prods. N. Am., Inc.*, 589 F.3d 389, 399 (7th Cir.

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inadequately investigating the death of Mr. Bearcrane, but also with respect to Plaintiffs' similar allegations regarding the investigation of Mr. Springfield's death. Although the Ninth Circuit held that the allegations regarding Mr. Springfield's death were insufficient to state a *Bivens* claim, the court remanded with instructions to allow Plaintiffs to file an amended complaint. That gave Plaintiffs license to re-plead the Springfield allegations with the same conclusory recitation that the Ninth Circuit approved with respect to the Bearcrane allegations. This Court should make clear that such a recitation does not state a viable claim against Mr. Oravec.

2009); *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 611 (6th Cir. 2009).

As described above, the Ninth Circuit's ruling here stands at odds with these decisions. The Ninth Circuit credited precisely the kind of "threadbare recital of the elements of a cause of action" that *Iqbal* condemned; other circuits would not have done what the Ninth Circuit did. *See supra* pp. 10-11 (Ninth Circuit improperly relied on an unadorned assertion of the "differential treatment" element of an equal protection claim – that Agent Oravec "provided Bearcrane's family with [fewer] investigatory services than he would have provided to a non-Native American victim's family," Pet. App. 2a).

2. Likewise, other circuits look to the specific allegations that *Iqbal* rejected for guidance in interpreting the *Iqbal* standard. For instance, *Iqbal* deemed "conclusory" an allegation that government officials "'knew of, condoned, and willfully and maliciously agreed to subject [the plaintiff]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.'" 556 U.S. at 680 (quoting complaint). Many circuits have cited that allegation as a model of what is "conclusory" and have disregarded allegations that were similar. *See, e.g.*, *L.L. Nelson Enters., Inc. v. Cnty. of St. Louis*, 673 F.3d 799, 810 (8th Cir. 2012); *Khalik v. United Air Lines*, 671 F.3d 1188, 1193 (10th Cir. 2012); *Mamani v. Berzaín*, 654 F.3d 1148, 1153 (11th Cir. 2011); *Santiago*, 629 F.3d at 131-32; *Hayden*, 594 F.3d at 161-62.

Yet the Ninth Circuit here paid no heed to the specific allegations in *Iqbal* and, in fact, *credited* an allegation that is nearly identical to the *Iqbal* allegation that other circuits have cited as a model of what is "conclusory." *See supra* pp. 11-12 (decision below improperly credited an allegation that Agent Oravec "adopted and engaged in a pattern and practice of selectively discriminating against Native Americans," Pet. App. 48a). In light of this Court's direction and the approach taken by the Ninth Circuit's sister courts, that laxity is inexplicable.

3. Further, in interpreting the meaning of *Iqbal*'s "plausibility" requirement, other circuits have dismissed equal protection claims founded on flimsy allegations. *See, e.g.*, *McCauley v. City of Chi.*, 671 F.3d 611, 617 (7th Cir. 2011) (dismissing claim of discriminatory policing under *Iqbal* where "[m]any of the alleged 'facts' [were] actually legal conclusions or elements of the cause of action"); *Argueta v. U.S. Immigration & Customs Enforcement*, 643 F.3d 60, 75 (3d Cir. 2011) (dismissing *Bivens* claim under *Iqbal* where the plaintiffs "did not really identify in their pleading what exactly [the defendants] should have done differently . . . that would have prevented the unconstitutional conduct"); *Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 684 (6th Cir. 2011) (dismissing equal protection claim because "[n]othing but legal conclusions suggest[ed] that the state defendants acted with unlawful discriminatory animus" and admonishing the district court for "fail[ing] to heed the teaching of *Iqbal*").

The Ninth Circuit here, however, deviated substantially from those decisions. Other circuits would properly have rejected the general statistics and the contextless, unsupported assertions of commentators that the Ninth Circuit found sufficient to state a plausible equal protection violation. *See supra* pp. 12-16.

4. Finally, many courts of appeals have vigorously enforced *Iqbal*'s requirement, 556 U.S. at 676, that a *Bivens* claim be based on a defendant's "own individual actions." *See, e.g.*, *LaMagna v. Brown*, No. 11-488-pr, 2012 U.S. App. LEXIS 6691, at *4 (2d Cir. Apr. 4, 2012); *Bright v. Thompson*, 467 F. App'x 462, 464 (6th Cir. 2012); *Constitutional Guided Walking Tours v. Independence Visitor Ctr. Corp.*, 454 F. App'x 118, 122-23 (3d Cir. 2011); *Jones v. Roy*, 449 F. App'x 526, 526-27 (8th Cir. 2011); *Soto-Torres v. Fraticelli*, 654 F.3d 153, 158-60 (1st Cir. 2011); *Lobozzo v. Colo. Dep't of Corr.*, 429 F. App'x 707, 712 (10th Cir. 2011); *Zhao v. Unknown Agent of the Central Intelligence Agency*, 411 F. App'x 336, 336-37 (D.C. Cir. 2010); *Nalls v. Bureau of Prisons of United States*, 359 F. App'x 99, 101 (11th Cir. 2009). The Ninth Circuit's decision here, however, permitted the complaint to proceed on the basis of allegations that had nothing at all to do with Agent Oravec. *See supra* pp. 16-17.

Indeed, the decision here is part of a troubling line of cases in which the Ninth Circuit has failed to adhere to *Iqbal*'s teaching that a constitutional tort claim must be based on a defendant's own actions. *See Starr v. Cnty. of L.A.*, 659 F.3d 850, 854 (9th Cir.

2011) (O'Scannlain, J., dissenting from the denial of rehearing en banc) (criticizing the panel majority for adopting an "*Iqbal* lite" standard that had "the effect of inserting *respondeat superior* liability into section 1983 despite the Supreme Court's admonition that a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution" (internal quotation marks omitted)), *cert. denied*, 132 S. Ct. 2101 (2012)[8]; *Ammons v. Wash. Dep't of Social & Health Servs.*, 648 F.3d 1020, 1046 (9th Cir. 2011) (Bybee, J., dissenting) (criticizing the majority decision for permitting a constitutional tort to proceed without specific allegations of a supervisory defendant's wrongdoing), *cert. denied*, 132 S. Ct. 2379 (2012); *Al-Kidd v. Ashcroft*, 598 F.3d 1129, 1138-41 (9th Cir. 2010) (O'Scannlain, J., dissenting from the denial of rehearing en banc) (criticizing the majority decision for "stretch[ing] beyond recognition the rule that a government official is liable only when he personally violates the constitution"), *panel decision reversed on other grounds*, 131 S. Ct. 2074 (2011). If left unchecked, the Ninth Circuit will undoubtedly continue

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[8] *Starr* presented a poor vehicle to correct the Ninth Circuit's failure to adhere to *Iqbal* because the case involved the difficult and unusual question of how to apply *Iqbal* to an Eighth Amendment deliberate-indifference claim. Even the *Starr* petitioner admitted that *Iqbal* "does not apply itself effortlessly to an Eighth Amendment case." Pet. Reply Br. 4, *Baca v. Starr*, 132 S. Ct. 2101 (2012) (No. 11-834), 2012 WL 1228264; *see also* 132 S. Ct. 2101 (noting that Justice Breyer was recused from the case). This case, however, involves an equal protection claim, as to which *Iqbal*'s meaning is clear and the Ninth Circuit's failure to adhere to *Iqbal* can be seen in high relief.

to permit *Bivens* claims to proceed without allegations regarding a defendant's individual conduct. That is evidenced by a Ninth Circuit decision that was issued *after* the decision at issue here and suffers from the same serious flaw. *See Williams v. Cnty. of San Mateo*, No. 08-17747, 2012 U.S. App. LEXIS 13470, at *5-6 (9th Cir. July 2, 2012) (Ikuta, J., dissenting). This Court's intervention – by summary reversal or a decision on the merits – is plainly needed.

III. Agent Oravec's Assertion of Qualified Immunity Makes This Case a Particularly Good Vehicle to Affirm the Force of *Iqbal*'s Tenets

This case presents a particularly appropriate vehicle for this Court to re-emphasize *Iqbal*'s commands. That is because the outcome here is especially pernicious in light of Agent Oravec's claim to qualified immunity.

As *Iqbal* explained, there are "serious and legitimate reasons" for applying the qualified immunity doctrine vigorously:

> If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might other-

> wise be directed to the proper execution of the work of the Government.

Iqbal, 556 U.S. at 685.

Further, because "the basic thrust of qualified immunity is to free officials from the concerns of litigation, including avoidance of disruptive discovery," *id.* (internal quotation marks omitted), courts must address qualified immunity as early as possible in the proceedings, *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity is "an *immunity from suit* rather than a mere defense to liability" (emphasis added; internal quotation marks omitted)). Vigilant adherence to *Iqbal*'s mandates is therefore never more critical – and a court's failure to follow *Iqbal* is never more problematic – than in the context of a motion to dismiss raising a qualified immunity defense. *See Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011) (*Iqbal* standard has "greater bite" in the context of constitutional torts). A proper application of *Iqbal* in those circumstances weeds out conclusory, implausible claims as early as possible in the proceedings, whereas lax adherence to *Iqbal* subjects government officials to the disruptive costs of litigation by "unlock[ing] the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678-79.

Here, the Ninth Circuit's cursory treatment of the "differential treatment" prong of an equal protection claim not only unlocks those doors, but flings them wide. The *other* prong of an equal protection claim – discriminatory *intent* – is, like any malign motive,

"easy to allege and hard to disprove." *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998); *see also Mitchell*, 472 U.S. at 526 (qualified immunity is "effectively lost if a case is erroneously permitted to go to trial"). Thus, it is vital that courts pay special heed to whether an equal protection claim is founded on specific facts showing that the defendant treated the plaintiff differently than others similarly situated. The Ninth Circuit's decision here ignored that principle by finding discriminatory treatment solely on the basis of conclusory statements and general statistics. It thereby permitted the infliction of "disruptive discovery," *Iqbal*, 556 U.S. at 685 – and even "the costs and expenses of trial," *Saucier*, 533 U.S. at 200 – by any plaintiff capable of contriving allegations of discriminatory motive, *see Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982) (explaining that "bare allegations of malice should not suffice"). The outcome here thus runs counter to the fundamental purpose of the qualified immunity doctrine, and must not stand.

In short, the Ninth Circuit decision here was no ordinary misapplication of *Iqbal*. By permitting Plaintiffs' claim to proceed on the basis of nothing but conclusory assertions and general statistics having nothing to do with Agent Oravec, the Ninth Circuit's decision rendered *Iqbal* meaningless, created a conflict with other circuits' decisions, and, in the process, subjected a government official to a significant burden in a situation where clear case law should have ended the case at the earliest possible point. *Iqbal*, 556 U.S. at 685.

The precedent set by this decision is disastrous, and this case thus presents an appropriate vehicle for this Court to reinforce that *Iqbal*'s tenets are important ones that lower courts cannot not ignore. This Court has not hesitated to summarily reverse in other cases in which federal officers have been wrongly deprived of qualified immunity, *see Ryburn v. Huff*, 132 S. Ct. 987 (2012) (summarily reversing the Ninth Circuit); *L.A. County v. Rettele*, 550 U.S. 609 (2007) (same); *Brosseau v. Haugen*, 543 U.S. 194 (2004) (same); *Hunter v. Bryant*, 502 U.S. 224 (1991) (same), and the same result is appropriate here.

CONCLUSION

The judgment of the Ninth Circuit should be summarily reversed, or, in the alternative, the petition for a writ of certiorari should be granted and the case heard on the merits.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals,
For the Ninth Circuit.

Earline COLE, as an individual and as personal representative of the Estate of Steven Bearcrane; Cletus Cole, as an individual and as personal representative of the Estate of Steven Bearcrane; Veronica Springfield, as an individual and as personal representative of the Estate of Robert Springfield; P. B., minor child; V. S., minor child,
Plaintiffs–Appellees,
v.
Matthew ORAVEC, in his individual capacity,
Defendant–Appellant.

No. 10–35710.
Argued and Submitted Aug. 4, 2011.
Filed Jan. 10, 2012.

Before: SCHROEDER and M. SMITH, Circuit Judges, and BENITEZ, District Judge.*

MEMORANDUM**

Defendant–Appellant Matthew Oravec, an agent with the Federal Bureau of Investigation, appeals from the district court's denial of his qualified

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* The Honorable Roger T. Benitez, United States District Judge for the Southern District of California, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

immunity motion in this *Bivens* action[1] brought on behalf of two deceased Native American men. The Appellees are relatives of the two deceased men—Steven Bearcrane and Robert Springfield. The Appellees allege that Oravec violated their right to equal protection when he failed to conduct a sufficiently thorough investigation of the two deaths out of an alleged animus toward Native Americans.

To state a violation of equal protection, the Appellees must demonstrate both differential treatment and discriminatory motive. *Wayte v. United States,* 470 U.S. 598, 608–09, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985) (citations omitted). Reviewing de novo, *see Dunn v. Castro,* 621 F.3d 1196, 1198 (9th Cir. 2010), we conclude the district court properly denied qualified immunity because the amended complaint states a valid claim against Oravec with regard to the investigation into Steven Bearcrane's death. However, because the allegations made on deceased Robert Springfield's behalf are not sufficient, we reverse that portion of the court's decision and remand with leave to amend.

1. The amended complaint sufficiently alleges differential treatment with regard to the Bearcrane investigation. It alleges that contrary to standard procedures, agent Oravec provided Bearcrane's family with less investigatory services than he would have provided to a non-Native American victim's family. These allegations, viewed together with the

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[1] *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

non-conclusory allegations regarding the poor provision of law enforcement services to Native Americans on the reservations, allow the court "to draw the reasonable inference" that agent Oravec conducted the Bearcrane investigation differently than he would have conducted an investigation of a similarly situated non-Native American victim. *See Ashcroft v. Iqbal,* 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).

The amended complaint also sufficiently alleges discriminatory motive. It alleges that despite the fact that Bearcrane's death was ruled a homicide, the non-Native American man admitted to shooting Bearcrane, and there was evidence negating the claim of self-defense, Oravec failed to properly investigate the case. Moreover, it alleges that Oravec consistently closed cases involving Indian victims without adequate investigation, and that he has been heard to make improper remarks about female Native American victims of sexual assault. Viewed together, these allegations "plausibly suggest" the differential treatment was due to the fact that Bearcrane was a Native American and his killer was not, and that agent Oravec acted with an animus toward Native Americans when he conducted the allegedly poor investigation into Bearcrane's death. *See Iqbal,* 129 S. Ct. at 1951; *see also Elliot–Park v. Manglona,* 592 F.3d 1003, 1006–07 (9th Cir. 2010).

2. On the other hand, the amended complaint does not contain sufficient non-conclusory allegations of differential treatment as to the Springfield investigation. There are no allegations that Oravec

conducted the Springfield investigation any differently than he would have conducted any other investigation. Even viewed together with the allegations of differential treatment of Native Americans in general, the allegations as to the Springfield investigation are "merely consistent with" Oravec's liability, and therefore "stop[ ] short of the line between possibility and plausibility of entitlement to relief." *See Iqbal,* 129 S. Ct. at 1949 (citation and internal quotation marks omitted).

3. The Appellees seek leave to amend if any part of their complaint against Oravec is dismissed. The court "should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Here, the allegations "strongly suggest" the complaint can be saved by amendment. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1990) (as amended). We therefore remand to allow the Appellees leave to amend their complaint with regard to the Springfield investigation.

Each party shall bear its own costs on appeal.

Affirmed in part; reversed in part and remanded.

APPENDIX B

United States District Court
For the District of Montana

Earline COLE, as an individual and as personal representative of the Estate of Steven Bearcrane, Cletus Cole, as an individual and as personal representative of the Estate of Steven Bearcrane, Precious Bearcrane, minor child, Veronica Springfield, as an individual and as personal representative of the Estate of Rovbert Springfield, and Velma Springfield, minor child,

Plaintiffs,

v.

FEDERAL BUREAU OF INVESTIGATIONS, Salt Lake City Field Office, United States Attorney's Office for South Dakota, Ernest Weyand, in his individual and official capacity, and Matthew Oravec, in his individual capacity,

Defendants.

No. CV-09-21-BLG-RFC-CSO
June 17, 2010

RICHARD F. CEBULL, District Judge.

ORDER ADOPTING FINDINGS AND RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE ON MOTION TO DISMISS

United States Magistrate Judge Carolyn Ostby has entered Findings and Recommendation (Doc. 53)

on Defendants' Motion to Dismiss the Amended Complaint (Doc. 28). Magistrate Judge Ostby recommends that Counts I, II, VI and V be dismissed and, and Count III be dismissed except as to the claims of the Personal Representatives against Defendant Matthew Oravec.

Upon service of a magistrate judge's findings and recommendation, a party has 14 days to file written objections. 28 U.S.C. § 636(b)(1). On June 8, 2010, Plaintiffs filed timely objections. (Doc. 54.) On June 10, 2010, Defendants filed their own objections and response to Plaintiffs' objections. (Doc. 55). Accordingly, the Court must make a *de novo* determination of those portions of the Findings and Recommendations to which objection is made. 28 U.S.C. § 636(b)(1).

I. Objections as to Standing

A. Standing as to Individual Capacity Claims

The Magistrate Judge found that the Plaintiffs, in their capacity as personal representatives of crime victims Steven Bearcrane and Robert Springfield have standing to assert their constitutional enforcement of law under *Elliot-Park v. Manglona*, 592 F.3d 1003 (9th Cir. 2010). The Magistrate Judge also found that Plaintiffs do not have standing to assert that right in their individual capacities.

The Court agrees with the Magistrate Judge's determination that Plaintiffs here lack standing because, individually, they have not alleged that they have been or are imminently likely to be subject to

the challenged practices. *See Allen v. Wright*, 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984), (absent an allegation of a specific threat of being subject to the challenged practices, plaintiffs have no standing to ask for an injunction).

The individual Plaintiffs' claims here are based on alleged discriminatory treatment in the handling of the cases involving their deceased relatives and on their general status as residents of an Indian reservation. The individual Plaintiffs do not allege that they have been the subject of discriminatory law enforcement. They do not allege that they have been the target of an investigation or prosecution motivated by racial animus. Nor do they claim to be the victims of a crime that was either investigated or prosecuted due to racial animus. The injuries they have alleged are abstract, and not concrete, particularized, or actual or imminent. *See Horne v. Flores*, ___ U.S. ___, 129 S. Ct. 2579, 2592, 174 L. Ed. 2d 406 (2009). As a result, the requirements for standing have not been met with respect to these claims. *See, e.g., Allen*, 468 U.S. at 757 n.22, 104 S. Ct. 3315.

The interests of the individual Plaintiffs in the equal application of law enforcement and prosecutorial services on reservations is shared with thousands of tribal members throughout the country. The impact of any order of this Court on these particular Plaintiffs is too remote and too uncertain to permit the exercise of the powers of the federal judiciary. To decide the individual Plaintiffs' constitutional claims based solely on status as residents on an Indian reservation would not be to decide a judicial controver-

sy, but "to assume a position of authority over the governmental acts of another and co-equal department, an authority which [the Court] plainly do[es] not possess." *Hein v. Freedom From Religion Foundation, Inc.,* 551 U.S. 587, 600, 127 S. Ct. 2553, 168 L. Ed. 2d 424 (2007) (quoting *Frothingham v. Mellon,* 262 U.S. 447, 489, 43 S. Ct. 597, 67 L. Ed. 1078 (1923)).

> Plaintiffs seek to have the Judicial Branch compel the Executive Branch to act in conformity with the [due process clause of the Fifth Amendment], an interest shared by all citizens.... And that claimed nonobservance ... would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract injury.

See Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974).

Here, the line of causation between the injuries that the individual Plaintiffs allege and the alleged misconduct of the government or its employees is too attenuated to meet the standing requirements. *See Allen,* 468 U.S. at 757-60, 104 S. Ct. 3315. The injuries suffered by Plaintiffs are indirect and dependent upon the action of some third party not before the Court. It is speculative whether more thorough investigation and prosecution of crimes by these Defendants would result in a reduction in the crime rate on the Crow Reservation. It is also speculative whether more thorough investigation and prosecution of crimes by these Defendants would lessen the

impacts of historical trauma on these Plaintiffs. And, it is speculative that more thorough investigation and prosecution of crimes by these Defendants would reduce these Plaintiffs' risk of being victimized in the future by some unknown wrong-doer. *See e.g., Allen,* 468 U.S. at 757-60, 104 S. Ct. 3315. The chain of causation here is too weak and involves too many unknown third parties to sustain the individual Plaintiffs' standing.

All claims asserted individually by Plaintiffs Earline Cole, Cletus Cole, Precious Bearcrane, Veronica Springfield, and Velma Springfield must be dismissed for lack of standing.

B. Standing as to Representative Capacity Claims

The Magistrate Judge found that the Personal Representatives have standing to assert a claim. The Ninth Circuit in *Elliot-Park v. Manglona,* 592 F.3d 1003, 1006-07 (9th Cir. 2010), held that law enforcement officers cannot exercise their discretion in a discriminatory fashion. As in *Elliot-Park,* the Personal Representatives in this case are not basing their equal protection claims "on some general constitutional right to have an assailant arrested." *See Id.* at 1006. The Personal Representatives are alleging that their decedents' assailants were "given a pass by [law enforcement] because of the [agents'] alleged racial bias" not only in favor of the assailants but also against the decedents as Native Americans. *Id.*

The Ninth Circuit has made clear that law enforcement cannot "investigate and arrest blacks but

not whites, or Asians but not Hispanics." *Id.; see also Estate of Macias v. Ihde,* 219 F.3d 1018, 1028 (9th Cir. 2000) ("There is a constitutional right ... to have police services administered in a nondiscriminatory manner-a right that is violated when a state actor denies such protection to disfavored persons.").

The reasoning of the Ninth Circuit in *Elliot-Park* is applicable to the instant case. The controlling factor is not that the decedents received some police services; the controlling factor is that they allegedly would have received more if they were not Native American. The Personal Representatives have met their burden of showing they have standing.

II. Objections as to Failure to State a Claim

A. Bivens Claim Against Weyand

Plaintiffs have objected to the Magistrate Judge's findings that they have failed to state a claim against Defendant Weyand because they did not plead specific actions taken by Weyand that evidenced discriminatory motives.

Plaintiffs' allegations against Defendant Weyand, taken as true, do not permit this Court to reasonably infer a discriminatory motive on his part. Because there is no respondeat superior liability with respect to *Bivens* claims, Defendant Weyand can only be liable for his own actions. *Ashcroft v. Iqbal,* ___ U.S. ___, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868 (2009).

The allegations in Plaintiffs' Amended Complaint demonstrate at most that Defendant Weyand acquiesced in Defendant Oravec's allegedly discriminatory practices. Acquiescence alone is not sufficient to

find supervisory liability. *Id.* at 1949. They do not show that he personally acted with a discriminatory motive. The "sheer possibility" that he may have acted unlawfully is not sufficient to state a claim. *Id.* The claims asserted against Defendant Weyand must be dismissed because he is entitled to qualified immunity.

B. Equal Protection Claim Against Oravec

Defendant Oravec objects to the Magistrate Judge's finding that the allegations in the Amended Complaint allow the Court to infer a discriminatory motive.

After reviewing the allegations, this Court agrees that the factual allegations in the Amended Complaint create an inference that Defendant Oravec was motivated by racial animus when conducting his investigations into the deaths of Steven Bearcrane and Robert Springfield. Consequently, the equal protection claims asserted by the Personal Representatives against Oravec are not subject to dismissal at this time.

C. Equal Protection Claim Against the FBI and U.S. Attorney's Office

Plaintiffs object to the finding that they failed to state an equal protection claim against the FBI and the U.S. Attorney's Office. To state an equal protection claim against an agency, "plaintiffs must show that actions of the defendants had a discriminatory impact, and that defendants acted with an intent or purpose to discriminate based upon plaintiffs' membership in a protected class." *Committee Concerning*

Community Improvement v. City of Modesto, 583 F.3d 690, 702-03 (9th Cir. 2009) (citing *Lee v. City of Los Angeles,* 250 F.3d 668, 686-87 (9th Cir. 2001)).

The due process clause of the Fifth Amendment guarantees every person the equal protection of the law, "which is essentially a direction that all persons similarly situated should be treated alike." *Philips v. Perry,* 106 F.3d 1420, 1424-25 (9th Cir. 1997) (internal quotation marks and citations omitted). "Preferring members of one group for no reason other than race or ethnic origin is discrimination for its own sake," and is forbidden by the Constitution. *Regents of the University of California v. Bakke,* 438 U.S. 265, 307, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978).

The factual allegations against the FBI are not sufficient to state a claim. There no non-conclusory factual allegations showing that the FBI Salt Lake City Field Office has a pattern, policy or practice of discriminating against Native Americans. The recitation of facts by Plaintiffs concerning crime on Indian reservations do not pertain to the FBI Salt Lake City Field Office's activities on the reservation at issue here.

The factual allegations against the U.S. Attorney's Office in South Dakota are that there is "a pattern and practice of declining prosecutions in cases in which the victims of those crimes are Native Americans." Additionally, Bearcrane's Personal Representative makes an allegation that they "repeatedly asked defendant U.S. Attorney's Office ... to prosecute the person who shot their son[.]" These allegations to not allow the Court to reasonably infer that

the U.S. Attorney's Office in South Dakota was motivated by racial animus in its handling of these cases. Plaintiffs failed to state an equal protection claim against the FBI and U.S. Attorney's Office.

D. Substantive Due Process Claim Against the FBI and U.S. Attorney's Office

Plaintiffs object to the Magistrate Judge's finding that they failed to state a substantive due process claim against the FBI and U.S. Attorney's Office. The Supreme Court has long recognized that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dept. of Social Services,* 489 U.S. 189, 195, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). The due process clauses are phrased as limitations on the government's power to act, "not as a guarantee of certain minimal levels of safety and security." *Id.* The purpose of the clauses is to protect the people from the government, "not to ensure that the [government] protect[s] them from each other." *Id.* Consequently, as a general matter the government's failure to protect an individual against private violence does not give rise to a claim against the state for violation of the Due Process Clause. *Id.*

There are, however, certain limited circumstances when "the Constitution imposes upon the [s]tate affirmative duties of care and protection with respect to particular individuals." *Id.* at 198, 109 S. Ct. 998. A plaintiff falls into one of these exceptions when ei-

ther; (1) a special custodial relationship exists between the plaintiff and the state, or (2) when the state is responsible for creating the danger that ultimately injures the plaintiff. *Id.* at 197, 109 S. Ct. 998.

The Court concludes that the first exception does not apply because the relationship between the Tribes and the federal government is not the type of relationship contemplated by this exception. This exception is intended to apply when "the [s]tate takes a person into its custody and holds him there against his will." *Id.* at 199, 109 S. Ct. 998.

Plaintiffs also argue that the second exception applies, but the Court concludes it does not. The actions of the government in placing the plaintiff in danger must be affirmative. *Johnson v. City of Seattle,* 474 F.3d 634, 639 (9th Cir. 2007). Defendants took no affirmative action with respect to either of the decedents. Therefore, Plaintiffs' substantive due process claims are subject to dismissal.

E. Treaty and Trust Claims

Plaintiffs alleged that Defendants violated trust and treaty obligations to Plaintiffs as members of established tribes. The Magistrate Judge found that Plaintiffs failed to state a claim for such violations.

First, Plaintiffs have neither argued nor demonstrated that they can state an independent claim for breach of trust. In *Gros Ventre Tribe v. United States,* 469 F.3d 801 (9th Cir. 2006), the court held that unless there is a specific duty that has been placed on the government with respect to Indians,

the general trust responsibility is discharged by compliance with generally applicable regulations and statutes. *Id.* at 809-810 (*citing Morongo Band of Mission Indians,* 161 F.3d 569, 574 (9th Cir. 1998)). Plaintiffs have pointed to no specific trust duty owed to them. Consequently, Plaintiffs' trust claims must fail.

Second, with regard to the Treaty Claims made by Plaintiffs, the treaties cited provide for offenders to be tried and punished but Plaintiffs specifically state they are not seeking this relief. Plaintiffs are asking for the general prospective relief of a court order requiring nondiscriminatory investigation and prosecution in the future. Nothing in the treaties provides for this relief and Plaintiffs have cited no authority allowing it.

Further, this action is brought under the Administrative Procedure Act, which includes a presumption that agency decisions not to institute enforcement proceedings are unreviewable. 5 U.S.C. § 701(a)(2). The Supreme Court has held that an agency's decision not to prosecute or enforce is a decision generally committed to an agency's "absolute discretion." *Heckler v. Chaney,* 470 U.S. 821, 831, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985). The treaties cited by Plaintiffs do not provide a meaningful standard for the Court to apply in determining how the FBI or Attorney General should exercise discretion in deciding to investigate or prosecute claims in the future. *Id.* at 832-834, 105 S. Ct. 1649.

After a de novo review, the Court determines the Findings and Recommendation of Magistrate Judge

Ostby are well grounded in law and fact and HEREBY ORDERS they be adopted in their entirety.

Therefore, IT IS ORDERED that the Motion to Dismiss the Amended Complaint (Doc. 28) is GRANTED in part and DENIED in part. Counts I, II, IV and V are dismissed, and Count III is dismissed except as to the claims of the Personal Representatives against Defendant Matthew Oravec.

FINDINGS AND RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE ON MOTION TO DISMISS

CAROLYN S. OSTBY, United States Magistrate Judge.

This action arises from alleged discrimination against Native Americans in criminal investigations and prosecutions on or near the Crow Indian Reservation. Jurisdiction is based on 28 U.S.C. § 1331. Chief Judge Cebull has referred the case to the undersigned for all pretrial proceedings. Court Doc. 6.

Now pending is Defendants' Motion to Dismiss the Amended Complaint (Court Doc. 28). Having considered the parties' briefs and the applicable law, the Court enters the following Findings and Recommendations.

I. BACKGROUND

A. Parties

Plaintiffs are members of two separate families, which the Court will refer to as the Cole/Bearcrane family and the Springfield family. The Cole/Bearcrane plaintiffs include Earline and Cletus

Cole, the parents of Steven Bearcrane, deceased, and Precious Bearcrane, the minor daughter of Steven Bearcrane. Amended Complaint (Court Doc. 21-1) at 6, ¶ 18. Earline and Cletus Cole have filed this action both individually and as personal representatives of the Estate of Steven Bearcrane. Precious Bearcrane and Earline Cole are members of the Crow Tribe and current residents of Montana. Cletus Cole is a member of the Gros Ventre Tribe and also a Montana resident. *Id.* at 2, ¶¶ 1-3.

The Springfield plaintiffs include Veronica Springfield, the wife of Robert Springfield, deceased, and Velma Springfield, the minor daughter of Robert Springfield. *Id.* at 6, ¶ 18. Veronica Springfield brings this action both individually and as the personal representative of the Estate of Robert Springfield. Both Velma and Veronica Springfield are members of the Crow Tribe and are Montana residents. *Id.* at 2-3, ¶¶ 4-5.

The Defendants are: (1) the Federal Bureau of Investigations ("FBI"), Salt Lake City Field Office, (2) the United States Attorneys Office for South Dakota ("USAO-SD"), (3) Ernest Weyand, individually and in his official capacity as the Supervising Agent in the FBI's Billings, Montana, office; and (4) Matthew Oravec, individually and as a Special Agent in the FBI's Billings, Montana, office. *Id.* at 3-4, ¶¶ 6-10.

B. Fact Allegations[1]

1. Fact Allegations Against FBI, Weyand and Oravec

Contending that there is a "Policy of Discrimination Against Native Americans in Investigation and Prosecution of Crimes," the Amended Complaint alleges generally that "[c]rime is rampant and out of control in Indian Country...." *Id.* at 7, ¶ 21. To illustrate this statement, the Amended Complaint recites statistics along with statements from public officials about crime in Indian County. None of the statistics or statements mention either the Crow Tribe or the Gros Ventre Tribe. *Id.* at 7-12.

Plaintiffs allege that Defendants FBI, Oravec, and Weyand "engaged in a pattern and practice of selectively discriminating against Native Americans in providing police services and protection on the Crow reservation in Montana...." *Id.* at 13. With respect to Steven Bearcrane, the Amended Complaint alleges that he was shot in the head and killed by a non-Indian on February 2, 2005, at a ranch located on the Crow Indian Reservation. The coroner ruled the death a homicide; a non-Indian man admitted to shooting Bearcrane, claiming that he shot in self-defense during a dispute over a horse. Plaintiffs allege that Weyand and Oravec were assigned to investigate Bearcrane's death but, despite repeated requests, "refused to do anything but the most cursory investigation...." *Id.* at 14. Plaintiffs also allege that

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[1] The fact allegations in this section are taken from Plaintiffs' Amended Complaint. Court Doc. 21-1 at 5-30.

the FBI destroyed evidence in connection with this investigation. *Id.* at 13-15.

With respect to Robert Springfield, the Amended Complaint alleges that Velma Springfield reported her husband missing after a hunting trip, but Defendants FBI, Oravec, and Weyand refused to investigate his disappearance. After Mr. Springfield's body was found, it is further alleged that they failed to investigate his death and failed to positively identify his remains "even though there was compelling evidence for the identification." *Id.* at 15-16. Plaintiffs allege that this conduct is part of a pattern of conduct by the FBI of consistently closing cases involving Indian victims without adequate investigation. *Id.* at 16-17.

Plaintiffs also allege that Oravec has consistently shown animus against Native Americans, not only refusing to perform adequate investigations of crimes in which Native Americans were victims, but also acting affirmatively to hinder investigations of those crimes and to prevent victims from receiving assistance and other rights afforded crime victims under federal law. *Id.* at 18. When Defendant Weyand was alerted to this "egregious mishandling" of the Bearcrane and Springfield cases, he allegedly refused to remedy the situations. *Id.* at 19-20.

2. Fact Allegations Against the U.S. Attorney's Office

Only the Cole/Bearcrane plaintiffs bring claims against Defendant USAO-SD.[2] See Court Doc. 21. They allege that the USAO-SD, as part of a pattern and practice of declining prosecutions in cases with Native American crime victims, refused to prosecute the person who shot Steven Bearcrane.

3. Damage Claims

Plaintiffs claim the following injuries and damages. By Defendants' acts of discrimination in providing less law enforcement and prosecutorial services to them as Native Americans than to other citizens, Plaintiffs have suffered "severe psychological impacts." *Id.* at 22. And, they are more likely to be victimized by assault or other violent crime. They have been deprived of benefits and protections accorded to non-Native Americans under the Crime Victims' Rights Act, 18 U.S.C. § 3771. *Id.* at 23-26.

As a result of the actions of Oravec and Weyand, Plaintiffs claim to have suffered, and continue to suffer, emotional and physical damages, including depression and loss of family relations and structure. *Id.* at 26-27. In addition, Earline and Cletus Cole assert claims of economic damages, including but not limited to lost income, lost benefits, travel expenses incurred pleading with Defendants to adequately in-

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[2] Defendant Marty Jackley, former U.S. Attorney for the District of South Dakota, was dismissed from the case on October 30, 2009, with Plaintiffs' consent. Court Doc. 36.

vestigate and prosecute the murder of their son, and expenses involved with preparation of materials for presentation to Defendants. *Id.* at 27, ¶ 59.

In addition, Plaintiffs state that, by selectively providing less law enforcement and prosecutorial services to Native Americans than to other citizens, Defendants have violated treaty and trust obligations and responsibilities owed to Plaintiffs. *Id.* at 28-30.

C. Causes of Action

For their First Claim for Relief, Plaintiffs assert that the FBI, USAO-SD, and the individually named Defendants acting in their official capacities deprived them of their right to equal protection of the law required under the due process clause of the Fifth Amendment to the United States Constitution. They claim that Defendants engaged in a pattern and practice of selectively discriminating against Native Americans in providing law enforcement and prosecutorial services.

Plaintiffs' Second Claim for Relief asserts a violation of the due process clause of the Fifth Amendment to the United States Constitution.

Plaintiffs direct their Third and Fourth Claims only against Defendants Oravec and Weyand, individually. The Third Claim alleges that these Defendants: (1) denied Plaintiffs the same law enforcement services accorded to non-Native Americans, (2) denied them statutory benefits, (3) deprived them of equal protection of the law, and (4) intentionally and willfully refused to adequately investigate the deaths

of Steven Bearcrane and Robert Springfield. The Fourth Claim alleges that these actions violated the due process clause of the Fifth Amendment.

The Fifth Claim names all Defendants and alleges violations of treaty and trust obligations.

In their prayer for relief against the federal agencies and agency head Weyand in his official capacity, Plaintiffs seek a decree that the alleged conduct violates the United States Constitution and an injunction against further such violations. In their prayer for relief against Defendants Oravec and Weyand individually, they seek compensatory and punitive damages, attorneys' fees and costs, and a decree that the alleged misconduct violated the Constitution.

II. MOTION TO DISMISS

A. Defendants' Arguments

Defendants move to dismiss the Amended Complaint on the following grounds: (1) Standing, (2) Failure to State a Claim, (3) Qualified Immunity for Defendants Weyand and Oravec, and (4) Lack of subject matter jurisdiction over the United States or its employees sued in their official capacities.

Regarding standing, Defendants contend that Plaintiffs do not have standing to assert a cause of action against Defendants for an alleged failure to properly investigate and prosecute a third person. Defendants contend that Plaintiffs' claims are not justiciable because victims of crime do not have a constitutional right to secure a thorough investigation and prosecution of a third party. The government contends that causes of action asserting dis-

criminatory law enforcement may only be brought by litigants who are targets of unjust law enforcement. They contend that Plaintiffs' injuries are not fairly traceable to Defendants' conduct and that a favorable decision here would not redress their injuries. Finally, they argue that the wrongs alleged are not within the powers of the judiciary to redress. United States Memo. in Support of Motion to Dismiss (Court Doc. 29) at 6-21.

Defendants present several arguments in support of their contention that Plaintiffs fail to state a claim. First, they argue that the constitutional claims should be denied because a private citizen does not have a constitutional, statutory, or common-law right to compel an agency of the United States to investigate or prosecute a crime. *Id.* at 21-22. Next, they argue that Plaintiffs are not entitled to relief under the Crime Victims' Rights Act, the Victims' Rights and Restitution Act of 1990, or the Crime Control Act of 1990. None of these statutes, they contend, creates a cause of action for a crime victim. *Id.* at 22-24.

Defendants also deny that any cause of action can be based on treaty or trust obligations. They contend that the Attorney General is vested with discretion to prosecute and that authority is presumptively immune from judicial review. Unless a treaty, statute, or agreement imposes a specific duty or responsibility, the United States may not be compelled to act. *Id.* at 26-27.

Defendants Weyand and Oravec contend that they are entitled to qualified immunity because

Plaintiffs do not have a clearly-established right to an investigation of their relatives' death. *Id.* at 24-25.

Finally, Defendants contend that this Court lacks subject matter jurisdiction because the United States has not waived its sovereign immunity with respect to Plaintiffs' claims. *Id.* at 35-40.

B. Plaintiffs' Response

In response, Plaintiffs contend that they have adequately alleged violations of their constitutional rights to equal protection. Court Doc. 44 at 13. Plaintiffs clarify that they are not seeking to enforce a right to have a particular third party investigated and prosecuted, but instead seek to enforce their rights to a non-discriminatory law enforcement and prosecutorial system. Court Doc. 44 at 43-45. Plaintiffs argue that their right to the equal application and enforcement of the law, in addition to their right to non-discriminatory prosecutorial services, are well established. Court Doc. 44 at 14-15. Plaintiffs contend that because Defendants failed to adequately investigate the crimes committed against Steven Bearcrane and Richard Springfield due to racial animus, Plaintiffs have sufficiently alleged a violation of their right to equal protection. Court Doc. 44 at 15-16.

Plaintiffs further contend that because of their race they have been denied the basic security provided other citizens. They argue that this also violates their rights to equal protection. Court Doc. 44 at 27. Additionally, Plaintiffs contend that they have been denied access to various victim benefits and protections as a result of discriminatory law en-

forcement and prosecution on the reservation. They argue that this again violates their rights to equal protection. Court Doc. 44 at 32.

Additionally, Plaintiffs argue that they have adequately alleged violations of their constitutional rights to substantive due process. Court Doc. 44 at 35. While recognizing the general rule that there is no individual right to police investigation or prosecution, Plaintiffs argue that they fall within both of the recognized exceptions to this general rule. Consequently, Plaintiffs contend that they have stated a substantive due process claim as a result of the FBI's failure to protect them from injury. Court Doc. 44 at 35.

With regard to standing, Plaintiffs contend that they have alleged injuries in fact sufficient to sustain Article III standing. Court Doc. 44 at 38. Plaintiffs allege the following injuries in fact:

(1) receipt of fewer and less adequate law enforcement services than non-Native American citizens, which makes them less secure than other citizens;

(2) increased lawlessness on the reservation resulting in a severe emotional and economic impact on Plaintiffs, including historical trauma; and

(3) deprivation of benefits and services provided to other citizens under victim assistance statutes.

Court Doc. 44 at 40. Furthermore, by creating and perpetuating a "second-class system of investigation

and prosecution of crimes against Native Americans on reservations such as the Crow Reservation," Plaintiffs claim that Defendants have caused the above-mentioned injuries. Court Doc. 44 at 40.

Lastly, with respect to standing, Plaintiffs contend that their injuries are redressable by this Court by a declaration that the Defendants' actions are unconstitutional, and an injunction prohibiting Defendants from further discriminating against Native Americans in providing law enforcement and prosecutorial services. Additionally, Plaintiffs seek money damages from the individual defendants. Court Doc. 44 at 40-41.

Plaintiffs assert that they also meet the requirements for third-party standing because they have suffered an injury in fact, have a close relationship to the third-party, and the third-parties are hindered from protecting their own interests because they are deceased. Thus, they argue that they are entitled to represent their deceased relatives. Court Doc. 44 at 42.

Plaintiffs contend that Defendants Oravec and Weyand are not entitled to qualified immunity because Plaintiffs have adequately alleged violations of clearly established rights. Court Doc. 44 at 45-48.

Lastly, Plaintiffs have alleged violations of various treaty and trust obligations. Plaintiffs contend that, because the United States has waived sovereign immunity in this case for all claims, pursuant to the Administrative Procedures Act and because this Court possesses federal question jurisdiction, the FBI and the USAO-SD are both amenable to suit

for violations of treaty and trust obligations. Court Doc. 44 at 49. Plaintiffs contend that the relevant treaties provide meaningful law against which to judge Defendants' actions, and that the treaties provide them with a private right of action. Court Doc. 44 at 50.

III. STANDARD OF REVIEW

The Court evaluates Fed. R. Civ. P. 12(b)(6) motions to dismiss in light of Fed. R. Civ. P. 8(a), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." While "detailed factual allegations" are not required, Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal,* ___ U.S. ___, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (internal quotation marks and citations omitted). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do...." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (internal quotation marks and citation omitted). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal,* 129 S. Ct. at 1949 (citing *Twombly,* 550 U.S. at 557, 127 S. Ct. 1955).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Iqbal,* 129 S. Ct. at 1949 (citing *Twombly,* 550 U.S. at 570, 127 S. Ct. 1955). A claim is plausible on its face

when the facts pled "allow [ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly,* 550 U.S. at 556, 127 S. Ct. 1955). The claim need not be probable, but there must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* Facts that are "merely consistent with" a defendant's liability fall short of this standard. *Id.* Furthermore, the Court is not obligated to accept as true "legal conclusions" contained in the complaint. *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief.'" *Id.* at 1950.

IV. DISCUSSION

A. Standing

The Constitution "limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Standing is a threshold issue-"an essential and unchanging part of the case-or-controversy requirement of Article III." *Horne v. Flores,* ___ U.S. ___, ___, 129 S. Ct. 2579, 2592, 174 L. Ed. 2d 406 (2009) (quoting *Lujan,* 504 U.S. at 560-61, 112 S. Ct. 2130). "'[T]he irreducible constitutional minimum of standing contains three elements[,]' all of which the party invoking federal jurisdiction bears the burden of establishing." *Chandler v. State Farm Mut. Auto. Ins. Co.,* 598 F.3d 1115, 1122 (9th Cir. 2010) (citing *Lujan,* 504 U.S. at 560-61, 112 S. Ct. 2130).

> To establish standing, a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged action; and redressable by a favorable ruling.

Horne v. Flores, 129 S. Ct. at 2592 (citing *Lujan,* 504 U.S. at 560-61, 112 S. Ct. 2130); *Mayfield v. U.S.,* 599 F.3d 964 (9th Cir. 2010).

"The judicial power of the United States defined by Art[icle] III is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Hein v. Freedom From Religion Foundation, Inc.,* 551 U.S. 587, 598, 127 S. Ct. 2553, 168 L. Ed. 2d 424 (2007) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 471, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)). In light of the standing requirements above, the courts have repeatedly refused to recognize generalized grievances against allegedly illegal governmental conduct as sufficient for standing. *U.S. v. Hays,* 515 U.S. 737, 743, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995); *see also Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974); *Ex parte Levitt,* 302 U.S. 633, 58 S. Ct. 1, 82 L. Ed. 493 (1937) (per curiam). "[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Valley Forge Christian College,* 454 U.S. at 483, 102 S. Ct. 752. *See also Fairchild v. Hughes,* 258 U.S. 126, 129-30, 42 S. Ct.

274, 66 L. Ed. 499 (1922). In *Hein,* the Supreme Court explained:

> "[A] plaintiff raising only a generally available grievance about government-claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large-does not state an Article III case or controversy."

Hein, 551 U.S. at 601, 127 S. Ct. 2553 (quoting *Lujan,* 504 U.S. at 573-74, 112 S. Ct. 2130).

"The rule against generalized grievances applies with as much force in the equal protection context as in any other. *Allen v. Wright* [, 468 U.S. 737, 755, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)] made clear that even if a governmental actor is discriminating on the basis of race, the resulting injury accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct." *Hays,* 515 U.S. at 743-44, 115 S. Ct. 2431 (internal quotation marks and citations omitted). "A 'particularized' injury is one that 'affect[s] the plaintiff in a personal and individual way.'" *Thomas v. Mundell,* 572 F.3d 756, 760 (9th Cir. 2009) (quoting *Lujan,* 504 U.S. at 560 n. 1, 112 S. Ct. 2130). "Thus, a plaintiff normally does not have standing where the only asserted harm is a generalized grievance shared in substantially equal measure by all or a large class of citizens." *Id.* (internal quotation marks omitted, citing *Warth v. Seldin,* 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343

(1975); *U.S. v. Richardson,* 418 U.S. 166, 174-180, 94 S. Ct. 2940, 41 L. Ed. 2d 678 (1974)).

The Supreme Court recognized in *Allen* that determining standing requires a careful examination of the complaint's allegations to ascertain whether this "particular plaintiff is entitled to an adjudication of the particular claims asserted." 468 U.S. at 752, 104 S. Ct. 3315. The Court found the following questions relevant to this inquiry:

> Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?

Id. These questions must be answered with the "notion that federal courts may exercise power only in the last resort, and as a necessity, and only when adjudication is consistent with a system of separated powers and the dispute is one traditionally thought to be capable of resolution through the judicial process." *Id.* (internal quotation marks and citations omitted).

In the same vein, the injury suffered by the plaintiff must be actual or imminent, not merely speculative, conjectural, or hypothetical. *Summers v. Earth Island Institute,* ___ U.S. ___, ___, ___, 129 S. Ct. 1142, 1149, 1155, 173 L. Ed. 2d 1 (2009). "'[S]ome day' intentions-without any description of concrete plans, or indeed any specification of *when* the some day will be-do not support a finding of the 'actual or imminent' injury that our cases require." *Summers,*

129 S. Ct. at 1151 (citing *Lujan,* 504 U.S. at 564, 112 S. Ct. 2130) (emphasis in original).

The doctrine of standing requires federal courts to satisfy themselves that a plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant invocation of federal-court jurisdiction. U.S. Const. Art. 3, § 2, cl. 1. Plaintiffs bear the burden of showing that they have Article III standing for each type of relief sought. *Summers,* 129 S. Ct. at 1149.

1. Individual Capacity Claims

The Court first considers Plaintiffs' standing in their individual capacities. As in *O'Shea v. Littleton,* 414 U.S. 488, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974) and *Rizzo v. Goode,* 423 U.S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976), where the plaintiffs alleged official racial discrimination, Plaintiffs here lack standing because, individually, they have not alleged that they have been or are imminently likely to be subject to the challenged practices. *See Allen,* 468 U.S. at 755, 760, 104 S. Ct. 3315 (absent an allegation of a specific threat of being subject to the challenged practices, plaintiffs have no standing to ask for an injunction).[3]

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[3] As the Supreme Court noted in *Allen:*

> When transported into the Art. III context, that principle, grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive

The individual Plaintiffs' claims here are based on alleged discriminatory treatment in the handling of the cases of their deceased relatives and generally on their status as residents on an Indian reservation. The individual Plaintiffs do not allege that they have been the subject of discriminatory law enforcement. They do not allege that they have been the target of an investigation or prosecution motivated by racial animus. Nor do they claim to be the victims of a crime that was either investigated or prosecuted due to racial animus. The injuries they have alleged are abstract, and not concrete, particularized, or actual or imminent. *See Horne,* 129 S. Ct. at 2592. As a result, the requirements for standing have not been met with respect to these claims. *See, e.g., Allen,* 468 U.S. at 757 n.22, 104 S. Ct. 3315.

Plaintiffs' individual claims are generalized grievances and, as such, they are insufficient to invoke the power of the federal courts. The general nature of these claims is evidenced by the Plaintiffs' own pleading and briefing. For example, when describing their injuries, Plaintiffs state:

> 50. In discriminating against Native Americans by engaging in a pattern and practice of selectively providing less law enforcement and

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> Branch to fulfill its legal duties. The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3. We could not recognize respondents' standing in this case without running afoul of that structural principle.

Allen, 468 U.S. at 761, 104 S. Ct. 3315.

> prosecutorial services to them than are provided to other citizens, Defendants have created a situation in which Native Americans-who are under the protection of the United States-live on lawless reservations, where crime is rampant, the well documented result being that Native Americans living on reservations, including [Plaintiffs], suffer or have suffered severe psychological impacts, including "historical trauma," which severely impacts and cripples normal life activities.

Court Doc. 21 at 22, ¶ 50.

Plaintiffs also state:

> 53. In discriminating against Native Americans by engaging in a pattern and practice of selectively providing less law enforcement and prosecutorial services to them than provided to other citizens-and, thus, failing to identify crimes and victims of those crimes-Defendants deprive and have deprived Native Americans and their families of protections and benefits accorded other citizens under the Crime Victims' Rights Act, 18 U.S.C. § 3771, and, 42 U.S.C. § 10607 (Victims Rights and Restitution Act of 1990), including but not limited to emergency medical and social services, protection from a suspected offender and possible restitution and/or other payments.

Court Doc. 44 at 24, ¶ 53.[4]

Plaintiffs' own characterizations of their injuries make clear that the injuries asserted are shared in substantially equal measure by a large class of people-Native Americans living on reservations. The claimed injuries of historical trauma, lawlessness, and increased risk of being victimized are not indivi-

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[4] Plaintiffs have also claimed the denial of benefits under various crime victims' rights statutes as an injury-in-fact. Court Doc. 44 at 32-34. In Plaintiffs' words:

> Plaintiffs ... are not bringing a cause of action under either of the acts. Rather, they are arguing that the law is applied unevenly, that is, that because of the actions of the Defendants, Native Americans are not afforded the benefits provided under the Act, whereas, non-Native Americans are afforded such benefits.

Court Doc. 34 at 56. This alleged injury, however, does not meet the requirements for an injury-in-fact for standing purposes. The lost opportunities to receive benefits under the crime victims statutes are too speculative to give rise to an Article III injury. The receipt of benefits under the statutes is dependent upon many uncertainties. Even if the two relevant events were adequately investigated and reviewed for prosecution, assuming arguendo that they were not, there is no certainty that the Plaintiffs would have ever been entitled to benefits. Furthermore, because the crime victims' rights statutes specifically deny a cause of action under the statutes, Plaintiffs could not have enforced a claim to the benefits allegedly denied. *See* 18 U.S.C. § 3771(d)(6); 42 U.S.C. § 10607. Although Plaintiffs mention mandamus in their brief, no mandamus action has been properly plead. Consequently, the injury claimed is too attenuated to satisfy the requirements of Article III standing.

dualized or particularized to these Plaintiffs. As alleged, these Plaintiffs are no more or less at risk of suffering these injuries than any other Native American residing on a reservation. Their claims are based on their status as members of federally recognized tribes residing on reservations. Plaintiffs are not impacted by the allegedly unconstitutional actions of the FBI and USAO-SD in a more immediate way than any other Native American residing on a reservation.

The interests of the individual Plaintiffs in the equal application of law enforcement and prosecutorial services on reservations is shared with thousands of tribal members throughout the state and country. The impact of any order of this Court on these particular Plaintiffs is too remote and too uncertain to permit the exercise of the powers of the federal judiciary. To decide the individual Plaintiffs' constitutional claims based solely on status as residents on an Indian reservation would not be to decide a judicial controversy, but "to assume a position of authority over the governmental acts of another and co-equal department, an authority which [the Court] plainly do[es] not possess." *Hein v. Freedom From Religion Foundation, Inc.,* 551 U.S. 587, 600, 127 S. Ct. 2553, 168 L. Ed. 2d 424 (2007) (quoting *Frothingham v. Mellon,* 262 U.S. 447, 489, 43 S. Ct. 597, 67 L. Ed. 1078 (1923)).

> Plaintiffs seek to have the Judicial Branch compel the Executive Branch to act in conformity with the [due process clause of the Fifth Amendment], an interest shared by all citi-

> zens.... And that claimed nonobservance ... would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract injury.

See Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974).

Moreover, even if the Court were to find that the individual Plaintiffs asserted concrete, particularized injuries, they would still lack standing because the future injuries they fear are not fairly traceable to *these* defendants, and there is no showing that a favorable decision from the Court would redress their alleged injuries. "The 'fairly traceable' component of constitutional standing examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the 'redressability' component examines the causal connection between the alleged injury and the judicial relief requested." *Allen v. Wright,* 468 U.S. 737, 753, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984).

Here, the line of causation between the injuries that the individual Plaintiffs allege and the alleged misconduct of the government or its employees is too attenuated to meet the standing requirements. *See Allen,* 468 U.S. at 757-60, 104 S. Ct. 3315. The injuries suffered by Plaintiffs are indirect and dependent upon the action of some third party not before the Court. It is speculative whether more thorough investigation and prosecution of crimes by these Defendants would result in a reduction in the crime rate on the Crow Reservation. It is also speculative

whether more thorough investigation and prosecution of crimes by these Defendants would lessen the impacts of historical trauma on these Plaintiffs. And, it is speculative that more thorough investigation and prosecution of crimes by these Defendants would reduce these Plaintiffs' risk of being victimized in the future by some unknown wrong-doer. *See e.g., Allen,* 468 U.S. at 757-60, 104 S. Ct. 3315. The chain of causation here is too weak and involves too many unknown third parties to sustain the individual Plaintiffs' standing.

Consequently, all claims asserted individually by Plaintiffs Earline Cole, Cletus Cole, Precious Bearcrane, Veronica Springfield, and Velma Springfield should be dismissed for lack of standing.[5]

3. Representational Capacity Claims

Plaintiffs Earline and Cletus Cole seek relief in their capacities as Personal Representatives of the Estate of Steven Bearcrane. Plaintiff Veronica Springfield seeks relief in her capacity as Personal Representative of the Estate of Robert Springfield. For purposes of clarity, the Court will hereinafter refer to these Plaintiffs as PRs.

The PRs allege that Mr. Bearcrane and Mr. Springfield were both victims of crimes committed on the reservations. The Amended Complaint alleges that their deaths were investigated by the named

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[5] Because Plaintiffs have failed to allege an injury-in-fact, they also fail to meet the requirements for third party standing. *Serena v. Mock,* 547 F.3d 1051, 1054 (9th Cir. 2008).

FBI defendants, and that Mr. Bearcrane's case was referred to the USAO-SD for prosecution. Despite Defendants' arguments that the PRs lack standing because they do not have a legally protected interest in the investigation and/or prosecution of a third party, recent Ninth Circuit case law counsels otherwise.

The Ninth Circuit in *Elliot-Park v. Manglona,* 592 F.3d 1003, 1006-07 (9th Cir. 2010), held that law enforcement officers cannot exercise their discretion in a discriminatory fashion. As in *Elliot-Park,* the PRs here are not basing their equal protection claims "on some general constitutional right to have an assailant arrested." *See id.* at 1006. Like the plaintiff in *Elliot-Park,* the PRs are alleging that their decedents' assailants were "given a pass by [law enforcement] because of the [agents'] alleged racial bias" not only in favor of the assailants but also against the decedents as Native Americans. *Id.* The Ninth Circuit has made clear that law enforcement cannot "investigate and arrest blacks but not whites, or Asians but not Hispanics." *Id.; see also Estate of Macias v. Ihde,* 219 F.3d 1018, 1028 (9th Cir. 2000) ("There is a constitutional right ... to have police services administered in a nondiscriminatory manner-a right that is violated when a state actor denies such protection to disfavored persons.").

Defendants also argue that the PRs lack standing because "[t]hey do not claim that the FBI refused to investigate ... Instead, [P]laintiffs take issue with the *conclusions* reached by the FBI...." Court Doc. 29 at 26 (emphasis in original). The Court finds this argument unpersuasive. As the Ninth Circuit pointed

out in *Elliot-Park,* "diminished police services, like a seat at the back of the bus, don't satisfy the government's obligation to provide services on a nondiscriminatory basis." 592 F.3d at 1007 (citing *Navarro v. Block,* 72 F.3d 712, 715-17 (9th Cir. 1995) (alleged policy to treat domestic violence 911 calls less urgently could form the basis for an equal protection claim)). With respect to Elliot-Park's claims, the Ninth Circuit stated:

> Certainly the Government couldn't constitutionally adopt a policy to spend $20,000 investigating each murder of a white person but only $1,000 investigating each murder of a person of color. Likewise, it doesn't matter that Elliot received some protection; what matters is that she would allegedly have received more if she weren't Korean and [her assailant] weren't Micronesian.

The same reasoning applies here. The controlling factor is not that the decedents received some police services; the controlling factor is that they allegedly would have received more if they were not Native American.

For the foregoing reasons, the Court finds that the PRs have met their burden of showing that they have standing. Thus, the additional grounds asserted by Defendants in their motion to dismiss are addressed below, limited to the PRs claims against the Defendants.

B. Sovereign Immunity and Subject Matter Jurisdiction

The Court next turns to Defendants' argument that Plaintiffs have not met their burden or providing a waiver of sovereign immunity and that this Court lacks subject matter jurisdiction over the United States, its agencies, and its employees who were sued in their official capacity.

There is a complex relationship between sovereign immunity and subject matter jurisdiction. *U.S. v. Park Place Associates, Ltd.,* 563 F.3d 907, 923 (9th Cir. 2009). Although the courts have sometimes mistakenly equated sovereign immunity with a lack of subject matter jurisdiction, *id.* (citing *Powelson v. United States,* 150 F.3d 1103, 1104 (9th Cir. 1998)), they are distinct issues, *id.* (citing *Arford v. United States,* 934 F.2d 229, 231 (9th Cir. 1991)). "A waiver of sovereign immunity means the United States is amenable to suit in a court properly possessing jurisdiction; it does not guarantee a forum." *Id.* "Conversely, the mere existence of a forum does not waive sovereign immunity." *Id.* at 924. The party asserting a claim against the United States has the burden of "demonstrating an unequivocal waiver of immunity." *Id.* (quoting *Cunningham v. United States,* 786 F.2d 1445, 1446 (9th Cir. 1986)).

The first claim (5th Amendment, Equal Protection), second claim (5th Amendment, Substantive Due Process), and fifth claim (treaty and trust obli-

gations)[6] are stated against Defendants FBI, U.S. Attorney's Office, and Weyand in his official capacity. They bring this suit under the Administrative Procedures Act (APA), 5 U.S.C. §§ 702, 704. The APA provides, in relevant part, that:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.

5 U.S.C. § 702. This waiver of sovereign immunity applies "except to the extent that (1) statutes preclude judicial review, or (2) agency action is commit-

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[6] The remaining claims are *Bivens* claims stated against Oravec and Weyand in their individual capacities. Court Doc. 21-1 at 32-35.

ted to agency discretion by law." 5 U.S.C. § 701(a). The first exception applies where Congress has "expressed an intent to preclude judicial review." *Chaney,* 470 U.S. at 830, 105 S. Ct. 1649. The second exception, at issue here, applies where Congress has not affirmatively precluded review but a court would have no meaningful standard against which to judge the agency's exercise of discretion. *Id.*

> The Supreme Court has held that this provision applies only where "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," *Heckler v. Chaney,* 470 U.S. 821, 830, 105 S. Ct. 1649, 84 L. Ed. 2d 714 ... (1985), and has emphasized that such a situation only occurs in "rare instances." *Id.* (internal quotation marks omitted). Even where statutory language grants an agency "unfettered discretion," its decision may nonetheless be reviewed if regulations or agency practice provide "'a meaningful standard by which [a] court may review its exercise of discretion.'" *Socop-Gonzalez v. INS,* 208 F.3d 838, 844 (9th Cir. 2000).

Spencer Enterprises, Inc. v. U.S., 345 F.3d 683, 688 (9th Cir. 2003).

1. Claims against the FBI

Although investigation of crimes falls within the discretion of law enforcement personnel, that discretion is not unfettered. *Elliot-Park,* 592 F.3d at 1006-07; *Estate of Macias,* 219 F.3d at 1028. The courts have made clear that this discretion cannot be exer-

cised in a discriminatory fashion. *Elliot-Park,* 592 F.3d at 1006-07, 1008. And, while "agency refusals to institute investigative or enforcement proceedings" are presumed immune from judicial review under 5 U.S.C. § 701(a)(2), *Shoshone-Bannock Tribes,* 56 F.3d 1476, 1481 (1995) (citing *Chaney,* 470 U.S. at 832, 105 S. Ct. 1649), this presumption can be rebutted when meaningful standards exist for assessing the exercise of the agency's discretion, *id.*

The Ninth Circuit has recognized that law enforcement cannot deny law enforcement services on the basis of the crime victim's race. *Elliot-Park,* 592 F.3d at 1006-07, 1008. The PRs allege that, as victims of crimes, their decedents were denied equal investigation services by the FBI because the decedents were Native Americans. As the PRs point out, there are meaningful standards to apply with respect to the Due Process and Equal Protection provisions of the Fifth Amendment. Court Doc. 44 at 53. Consequently, the Court finds that the United States has waived sovereign immunity with respect to the remaining claims pursuant to the APA.

2. Claims Against the USAO-SD

As with law enforcement and investigatory services, "the Attorney General's authority to control the course of the federal government's litigation is presumptively immune from judicial review." *Shoshone-Bannock Tribes,* 56 F.3d at 1480. But, "[t]he Attorney General's power to supervise litigation in which the United States is interested or is a party has its limits. A federal attorney may not deliberately base a decision to prosecute on race, religion or the

exercise of protected statutory or constitutional rights." *Id.* at 1481.

As pointed out by Plaintiffs, meaningful standards exist for assessing whether the USAO-SD has exercised its discretion in accordance with the Equal Protection provisions of the Fifth Amendment. "It is appropriate to judge selective prosecution claims according to ordinary equal protection standards." *Wayte v. U.S.,* 470 U.S. 598, 608, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985). As a result, sovereign immunity has been waived with respect to claims against the USAO-SD.

C. Qualified Immunity

The Court next turns to Defendants Oravec and Weyand's claims that they are entitled to qualified immunity. The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan,* 555 U.S. 223, ___, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)).

Qualified immunity is an immunity from suit rather than a mere defense to liability. *Id.* In addressing qualified immunity claims, the Court's task is to determine (1) whether the facts that a plaintiff alleges make out a violation of a federally secured right and (2) whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Id.* at 815-16. The Court is permitted to exer-

cise discretion in deciding which of these two prongs should be addressed first, and turns first to the question whether the right at issue was clearly established at the time of the alleged misconduct.

Defendants Oravec and Weyand claim that they are entitled to qualified immunity because the PRs do not have a clearly established right to an investigation or prosecution of a third party. But this is not the right being asserted here. The PRs are not claiming a right to have a third-party investigated and prosecuted; they are claiming a right, on behalf of the decedents, to "have the Government enforce and apply laws in a non-discriminatory manner." Court Doc. 44 at 13. As previously established, it is clear that the PRs' decedents had a right to nondiscriminatory investigatory services. *See Elliot-Park,* 592 F.3d at 1007 ("The government may not racially discriminate in the administration of any of its services."). The right to non-discriminatory law enforcement and prosecutorial services is clearly established. *Id.* at 1008 ("The right to non-discriminatory administration of protective services is clearly established."). The Ninth Circuit reasoned that "[i]t hardly passes the straight-face test to argue at this point in our history that police could reasonably believe they could treat individuals disparately based on their race." *Id.* There need not be a prior case with materially similar facts in order for a right to be clearly established. *Id.* (citing *Flores v. Morgan Hill Unified School Dist.,* 324 F.3d 1130, 1136-37 (9th Cir. 2003)).

> This is especially true in equal protection cases because the non-discrimination principle is

> so clear. "The constitutional right to be free from such invidious discrimination is so well established and so essential to the preservation of our constitutional order that all public officials must be charged with knowledge of it."

Id. at 1008-09 (quoting *Flores v. Pierce,* 617 F.2d 1386, 1392 (9th Cir. 1980)).

The second factor to be applied is whether the facts alleged make out a violation of a federally secured right. Because the focus here is on the question whether the PRs have adequately stated a claim against Defendants, this factor is addressed in the following section.

D. Dismissal for Failure to State a Claim

As set forth in the Standard of Review section above, the United States Supreme Court in *Iqbal* articulated the pleading standards that govern a motion to dismiss. The Court explained:

> [A] pleading must contain sufficient factual matter, accepted as true to 'state a claim to relief that is plausible on its face.' 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.'

Iqbal, 129 S. Ct. at 1949 (citing *Twombly,* 550 U.S. at 570, 127 S. Ct. 1955). In *Iqbal,* the Court first identified the elements of the cause of action plead. Then, the Court analyzed the allegations in the complaint that were not entitled to the assumption of truth because they were too conclusory in nature. The Court next considered the factual allegations in the complaint to determine if they plausibly suggest an entitlement to relief. The court here will follow the same procedure.

1. Equal Protection Claims

(a) Bivens Claim

In *Iqbal,* the Court concluded that its decisions "make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose." 129 S. Ct. at 1948. And liability cannot be based on a theory of respondeat superior. A plaintiff must plead "that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.* at 1948.

The Court next considers the allegations at issue here, including first whether Plaintiffs have made conclusory allegations that are not entitled to an assumption of truth. *Iqbal,* 129 S. Ct. at 1951. Here, Plaintiffs make numerous such conclusory allegations. Plaintiffs allege, for example, that "Defendants FBI, Oravec and Weyand have adopted and engaged in a pattern and practice of selectively discriminating against Native Americans in providing police

services and protection on the Crow reservation in Montana...." Court Doc. 21-1 at 13, ¶ 27. These bare assertions are akin to the conclusory allegations made in *Iqbal,* and, likewise, "amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim." *See Iqbal,* 129 S. Ct. at 1951. As such, they are not entitled to be assumed true.

The Court next turns to the factual allegations contained in the Amended Complaint that are entitled to a presumption of truth, in order to determine if they "plausibly suggest an entitlement to relief." *Id.* Plaintiffs present many general allegations that do not specifically address conditions on the Crow Reservation, the decedents, or these particular Defendants. For example, Plaintiffs allege that:

> 21. Crime is rampant and out of control in Indian Country[.]
>
> [21]a. The most recent Bureau of Justice Statistics report showed that: (i) from 1976 to 2001 an estimated 3,738 American Indians were murdered; (ii) among American Indians age 25-34, the rate of violent crime victimizations was more than 2 1/2 times the rate for all persons the same age; and (iii) rates of violent victimization for both males and females were higher for American Indians than for all races.
>
> * * *
>
> 22. Native American women experience the highest rate of violence of any group in the United States.

* * *

> [23]b. John Barrosso, a United States Senator from Wyoming, has noted the federal 'neglect' of law and order on Indian reservations, which has led to unacceptable law enforcement statistics in Indian Country.
>
> * * *
>
> [24]a. Between 2004 and 2007, the U.S. declined to prosecute 62% of Indian Country criminal cases referred to federal prosecutors.
>
> [24]b. According to the Chairman of the Fort Hall Business Council [for the Shoshone-Bannock Tribes], "In many cases, the lack of prosecution by federal and state authorities remains unexplained to Tribal leaders and the crime victims."
>
> * * *
>
> [24]d. A review by *The Denver Post* of dozens of criminal cases on more than 20 reservations substantiates widely-held concerns among American Indians that the system as it now stands functions poorly, including investigations that are chronically delayed or dropped, and serious crimes never prosecuted as felonies.

Court Doc. 21-1 at 11-12, ¶¶ 24(d). While troubling and entitled to an assumption of truth, these allegations allow the Court to reasonably infer no more than a mere possibility that Defendants here acted unlawfully.

To support their discrimination claims against Oravec and Weyand, Plaintiffs allege that "[D]efendant FBI and individual defendants Oravec and Weyand consistently closed cases involving Indian victims without adequate investigation, especially sexual and other assaults involving Indian children and women[;]" that "Defendant Oravec has been heard to say that female Native American victims of sexual assault were asking for assault or words to that effect[;]" and that "Defendant Oravec ... acted affirmatively to hinder the investigation of those crimes and to prevent victims from receiving assistance and other rights afforded crime victims under federal law[.]" *Id.* at ¶¶ 36, 39-40. Additionally, Plaintiffs allege that when the Coles visited the FBI offices to inquire into the investigation of their son's death, "defendant Oravec attempted to intimidate Cletus Cole by taking Mr. Cole out of the range of cameras and showing Mr. Cole his gun." *Id.* at 40(a). They allege that Defendant Weyand, as the supervisor of the Billings FBI office once alerted to the "egregious mishandling of the Bearcrane and Springfield cases "refus[ed] to remedy the situations." *Id.* at ¶ 42.

With respect to the death of Steven Bearcrane, the Bearcrane/Cole Plaintiffs allege that they "repeatedly asked the defendants [sic] FBI and the individual defendants Oravec and Weyand to do an adequate investigation ... to no avail." Court Doc. 21-1 at 13, ¶ 30. They also allege that Defendants Oravec and Weyand "refused to do anything but the most cursory investigation" despite Bearcrane's death being ruled a homicide, the admission of a non-

Indian man to shooting Bearcrane, and the existence of evidence contrary to a self-defense motive. *Id.* at ¶ 30(b).

Regarding the disappearance and death of Robert Springfield, the Springfield Plaintiffs allege that they "repeatedly asked defendant FBI and the individual defendants Oravec and Weyand to do an adequate investigation ... to no avail," *id.* at ¶ 35, and, in fact, after Springfield's disappearance was reported Defendants Weyand and Oravec "refused to investigate ... even though many witnesses were available and desired to be interviewed," *id.* at ¶ 35(a)-(b). The Springfield Plaintiffs also allege that "Defendants FBI, Oravec and Weyand failed to positively identify the remains of Robert Springfield even though there was compelling evidence for the identification." *Id.* at ¶ 35(c).

These allegations against Defendant Weyand, taken as true, do not permit the Court to reasonably infer a discriminatory motive on his part. Because there is no *respondeat superior* liability with respect to *Bivens* claims, Defendant Weyand is only liable for his own actions. *Iqbal,* 129 S. Ct. at 1948. Acquiescence alone is not sufficient to find supervisory liability. *Id.* at 1949. Other than conclusory allegations, the allegations in Plaintiffs' Amended Complaint demonstrate at most that Defendant Weyand acquiesced in Defendant Oravec's allegedly discriminatory practices. They do not show that he personally acted with a discriminatory motive. The "sheer possibility" that he may have acted unlawfully is not sufficient to state a claim. *Iqbal,* 129 S. Ct. at 1949.

Therefore, the claims asserted against Defendant Weyand are subject to dismissal because he is entitled to qualified immunity.[7]

But the Court concludes that these allegations do allow the Court to infer a discriminatory motive with respect to Defendant Oravec. The allegations contained in the Amended Complaint allow the Court to reasonably infer that Defendant Oravec was motivated by racial animus when conducting his investigation into the death of Steven Bearcrane. The circumstances of Bearcrane's death-that it was ruled a homicide, that a non-Indian did the shooting, that the investigation was allegedly insufficient due to Oravec's discriminatory motives-allow the Court to infer at this early stage of the proceedings that a claim is plausible. Similarly, although the allegations regarding Robert Springfield are more sparse, they do charge that Oravec's refusal to investigate the Springfield death was due to racial animus. See Amended Complaint, Court Doc. No 21-1 at 15-16. The Court recognizes that law enforcement agencies frequently must make difficult decisions about where to allocate limited resources, and that there may be alternative explanations for Oravec's decisions. Nonetheless, under the rules governing the Court's anal-

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[7] Moreover, Plaintiffs' equal protection claims against Defendant Weyand in his official capacity collapse into their claims against the FBI. *Kentucky v. Graham,* 473 U.S. 159, 166, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985) (official capacity claims are merely "another way of pleading an action against an entity of which an officer is an agent."). Accordingly, this claim is dismissed as redundant.

ysis at this stage of the proceedings, the Court concludes that the complaint does contain non-conclusory factual allegations sufficient to plausibly suggest that Oravec acted with a discriminatory state of mind. Consequently, the equal protection claims asserted by the PRs against Oravec are not subject to dismissal at this time.

(b) Equal Protection Claims against FBI and USAO-SD

To state an equal protection claim against an agency, "plaintiffs must show that actions of the defendants had a discriminatory impact, and that defendants acted with an intent or purpose to discriminate based upon plaintiffs' membership in a protected class." *Committee Concerning Community Improvement v. City of Modesto,* 583 F.3d 690, 702-03 (9th Cir. 2009) (citing *Lee v. City of Los Angeles,* 250 F.3d 668, 686-87 (9th Cir. 2001)). "[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.'" *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 264-65, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (cited in *Modesto,* 583 F.3d at 703).

The central mandate of the equal protection clause "is racial neutrality in governmental decision making." *Johnson v. California,* 321 F.3d 791, 796 (9th Cir. 2003) (overruled on other grounds) ("*Johnson I*"). "[D]istinctions between citizens solely because of their ancestry are by their very nature

odious to a free people whose institutions are founded upon the doctrine of equality[.]" *Id.* (internal citations and quotation marks omitted). "Race discrimination is 'especially pernicious in the administration of justice[,]'" *Johnson v. California,* 543 U.S. 499, 511, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005) (quoting *Rose v. Mitchell,* 443 U.S. 545, 555, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979)) ("*Johnson II*"), "[a]nd public respect for our system of justice is undermined when the system discriminates based on race[,]" *id.*

The due process clause of the Fifth Amendment guarantees every person the equal protection of the law, "which is essentially a direction that all persons similarly situated should be treated alike." *Philips v. Perry,* 106 F.3d 1420, 1424-25 (9th Cir. 2007) (internal quotation marks and citations omitted). "Preferring members of one group for no reason other than race or ethnic origin is discrimination for its own sake," and is forbidden by the Constitution. *Regents of the University of California v. Bakke,* 438 U.S. 265, 307, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978).

The Court concludes here, however, that the factual allegations against the FBI are not sufficient to state a claim. There are no non-conclusory factual allegations showing that the FBI Salt Lake City Field Office has a pattern, policy or practice of discriminating against Native Americans. The recitation of facts concerning crime on Indian reservations does not pertain to the FBI Salt Lake City Field Office's activities on the reservation at issue here.

Plaintiffs also allege, in a conclusory fashion, that "Defendant U.S. Attorney's Office in South Dakota

historically has a pattern and practice of declining prosecutions in cases in which the victims of those crimes are Native Americans." Court Doc. 21-1 at 20, ¶ 44. The Bearcrane PRs allege, with respect to Steven Bearcrane, that they "repeatedly asked defendant U.S. Attorney's Office ... to prosecute the person who shot their son[.]" *Id.* at ¶ 47. They claim that the USAO-SD refused to prosecute despite the Bearcrane/Cole Plaintiffs meeting with the USAO-SD repeatedly and sending many letters, warning that the underlying investigation was inadequate, and advising the USAO-SD of the "flaws in the decision not to prosecute." Additionally, they allege that despite year-old promises to review the Bearcrane case and "get back to the Coles with the results[,]" the USAO-SD has yet to reevaluate the case or get back to them. *Id.* at ¶¶ 47-49.

These allegations do not allow the Court to reasonably infer that the USAO-SD was motivated by racial animus in its handling of the Bearcrane case. While Plaintiffs have alleged that 62% of Indian Country criminal cases referred to the United States Attorney's Office are declined for prosecution, they have not made any allegations, entitled to a presumption of truth, that would allow the Court to reasonably infer that Native Americans are being treated differently than similarly situated non-Native Americans. Furthermore, there is no indication from Plaintiffs' factual allegations that the USAO-SD had a discriminatory motive when reviewing the Bearcrane case. Consequently, these claims against the USAO-SD are subject to dismissal.

2. Substantive Due Process Claims

Plaintiffs also allege substantive due process violations. The Supreme Court has long recognized that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dept. of Social Services,* 489 U.S. 189, 195, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). The due process clauses are phrased as limitations on the government's power to act, "not as a guarantee of certain minimal levels of safety and security." *Id.* The purpose of the clauses is to protect the people from the government, "not to ensure that the [government] protect[s] them from each other." *Id.* Consequently, as a general matter the government's failure to protect an individual against private violence does not give rise to a claim against the state for violation of the Due Process Clause.[8] *Id.*

There are, however, certain limited circumstances when "the Constitution imposes upon the [s]tate affirmative duties of care and protection with respect to particular individuals." *Id.* at 198, 109 S. Ct. 998. A plaintiff falls into one of these exceptions when either: (1) a special custodial relationship exists be-

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[8] As discussed in more detail above, the general premise that the state does not have an affirmative duty to protect an individual from private violence does not mean that the state can "selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *DeShaney,* 489 U.S. at 197 n.3, 109 S. Ct. 998.

tween the plaintiff and the state, or (2) when the state is responsible for creating the danger that ultimately injures the plaintiff. *Id.* at 197, 109 S. Ct. 998.

Here, Plaintiffs argue that both exceptions apply. First, they argue that a "special custodial relationship" exists between the Tribes and the federal government placing them within the custodial exception. Court Doc. 44 at 37. The Court concludes, however, that the relationship between the Tribes and the federal government is not the type of relationship contemplated by this exception. This exception was carved out to apply when "the [s]tate takes a person into its custody and holds him there against his will." *Id.* at 199, 109 S. Ct. 998. "The affirmative duty to protect arises not from the [s]tate's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id.* at 200, 109 S. Ct. 998.

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf-through incarceration, institutionalization, or other similar restraint of personal liberty-which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id. Clearly, the federal government did not have either of the decedents in custody when they were al-

legedly victimized. As a result, Plaintiffs do not fall within this exception.

Plaintiffs argue that the "danger-creation" exception also applies here.

> The danger-creation exception to *DeShaney* does not create a rule that makes state officials liable ... whenever they increase the risk of some harm to members of the public. Rather, the danger-creation plaintiff must demonstrate, at the very least, that the state acted affirmatively and with deliberate indifference in creating a foreseeable danger to the plaintiff leading to the deprivation of the plaintiff's constitutional rights.

Huffman v. County of Los Angeles, 147 F.3d 1054, 1061 (9th Cir. 1998) (internal citations omitted). The actions of the government in placing the plaintiff in danger must be affirmative. *Johnson v. City of Seattle,* 474 F.3d 634, 639 (9th Cir. 2007). This means that "state action creates or exposes an individual to a danger which he or she would not have otherwise faced." *Id.* Here, as in *Johnson,* Defendants took no affirmative action with respect to either of the decedents. As a result, the Court concludes that Plaintiffs do not fall within the danger-creation exception. Accordingly, Plaintiffs' substantive due process claims are subject to dismissal.

3. Treaty and Trust Claims

Plaintiffs' fifth claim for relief alleges violation of treaty and trust obligations against the FBI, USAO-SD, and Weyand in his official capacity. Court Doc.

21-1 at 35-36. The Amended Complaint alleges that, by "selectively providing less law enforcement and prosecutorial services to Native Americans than provided to other citizens," these defendants violated Article 5 of the Treaty with the Crow Tribe,[9] and Article 1 of the Treaty Between the United States and the Crow Tribe.[10] *Id.* at 28-29.

In their Prayers for Relief, Plaintiffs do not specifically seek any relief for treaty or trust violations, although they do seek "such other, further and different relief as this Court deems just and proper." *Id.* at 37-38. In their brief opposing the Motion to Dismiss, they make clear that they "are not asking that the Government prosecute a particular individual or case." Court Doc. 44 at 49 (emphasis in original). Rather, they state that they are simply asking that, in the future, "the Government investigate and prosecute without regard to the race or national origin of

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[9] Article 5 provides in pertinent part: "[I]f any robbery, violence, or murder, shall be committed on any Indian or Indians belonging to the said tribe, the person or persons so offending shall be tried, and, if found guilty, shall be punished in like manner as if the injury had been done to a white man." 7 Stat. 266.

[10] Article 1 provides in pertinent part: "If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained." 15 Stat. 649.

the victim, and in accordance with its obligations under the Treaties." *Id.* at 49-50.

Turning first to the trust claims, the Court concludes that Plaintiffs have neither argued nor demonstrated that they can state an independent claim for breach of trust. In *Gros Ventre Tribe v. United States,* 469 F.3d 801 (9th Cir. 2006), the court held that unless there is a specific duty that has been placed on the government with respect to Indians, the general trust responsibility is discharged by compliance with generally applicable regulations and statutes. *Id.* at 809-810 (citing *Morongo Band of Mission Indians,* 161 F.3d 569, 574 (9th Cir. 1998)). Plaintiffs have pointed to no specific trust duty owed to them. Consequently, Plaintiffs' trust claims must fail.

Turning to Plaintiffs' Treaty Claims, the Court finds several difficulties. First, the treaties cited provide for offenders to be tried and punished but Plaintiffs specifically state that they are not seeking this relief, but are asking only for the general prospective relief of a court order requiring nondiscriminatory investigation and prosecution in the future. Nothing in the treaties provides for this relief and the Plaintiffs have cited no authority allowing it. Furthermore, the Court has been unable to find any authority providing the treaty remedy sought by Plaintiffs. Compare *Hebah v. United States,* 192 Ct. Cl. 785, 428 F.2d 1334 (1970) (Court of Claims denied government's motion to dismiss treaty-based claim for wrongful death).

Second, as Plaintiffs acknowledge, this action is brought under the Administrative Procedure Act, which includes a presumption that agency decisions not to institute enforcement proceedings are unreviewable. 5 U.S.C. 701(a)(2). The Supreme Court has held that an agency's decision not to prosecute or enforce is a decision generally committed to an agency's "absolute discretion." *Heckler v. Chaney,* 470 U.S. 821, 831, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985). The Court explained:

> The reasons for this general unsuitability (for judicial review) are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.
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> * * *
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> In addition to these administrative concerns, we note that when an agency refuses to act it

> generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency does act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers.... Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict-a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3.

Id. at 831-32, 105 S. Ct. 1649.

Although the APA's section 701(a)(2) general exception to reviewability for action "committed to agency discretion" remains a narrow exception, "within that exception are included agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise." *Id.* at 838, 105 S. Ct. 1649. *See also Shoshone-Bannock Tribes v. Reno,* 56 F.3d 1476, 1480-81 (D.C. Cir. 1995) (holding that the Attorney General acted within her discretion under the statutes and Fort Bridger Treaty in refusing to assert tribes' claims to off-reservation wa-

ter rights, and that judicial review consequently was unavailable). Plaintiffs have not cited to a treaty provision that requires either the FBI or the Department of Justice to investigate or prosecute at the request of a tribe or individual Native Americans.

As set forth above, neither the FBI nor the USAO-SD may deliberately base their professional decisions on race, religion, or the exercise of protected statutory or constitutional rights. *Id.* at 1481 (*citing Wayte v. United States,* 470 U.S. 598, 608, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985)). These constitutional rights are raised under Counts 1 through 4, discussed above. But the treaties cited by Plaintiffs do not themselves provide a "meaningful standard" for the Court to apply in determining how the FBI or the Attorney General should exercise discretion in deciding to investigate or prosecute claims in the future. *Chaney,* 470 U.S. at 832-834, 105 S. Ct. 1649. *See also Newman v. United States,* 382 F.2d 479, 480 (D.C. Cir. 1967) ("Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made ...").

Accordingly, Plaintiffs have failed to state a claim for the alleged trust and treaty violations and these claims must be dismissed.

V. CONCLUSION

Based on the foregoing,

IT IS RECOMMENDED that the Motion to Dismiss the Amended Complaint (Court Doc. 28) be

GRANTED in part and DENIED in part. The Court recommends that:

(A) Counts I, II, IV and V be dismissed, and

(B) Count III be dismissed except as to the claims of the Personal Representatives against Defendant Matthew Oravec.

NOW, THEREFORE, IT IS FURTHER ORDERED that the Clerk shall serve a copy of the Findings and Recommendations of U.S. Magistrate Judge upon the parties. The parties are advised that pursuant to 28 U.S.C. § 636, any objections to the findings and recommendations must be filed with the Clerk of Court and copies served on opposing counsel within fourteen (14) days after receipt hereof, or objection is waived.

DATED this 25th day of May, 2010.

APPENDIX C

United States Court of Appeals
For the Ninth Circuit

EARLINE COLE, as an individual and as personal representative of the Estate of Steven Bearcrane; CLETUS COLE, as an individual and as personal representative of the Estate of Steven Bearcrane; VERONICA SPRINGFIELD, as an individual representative of the Estate of Robert Springfield; P.B., minor child; v.S., minor child,
Plaintiffs-Appellees
v.

MATTHEW ORAVEC, in his individual capacity,
Defendant-Appellant.

No. 10-35710
D.C. No. 1:09-cv-00021-RFC-CSO
May 21, 2012, Filed

Before: SCHROEDER and M. SMITH, Circuit Judges, and BENITEZ, District Judge*

The panel has voted to deny Defendant-Appellant's petition for panel rehearing. Judge M. Smith has voted to deny the petition for rehearing en banc, and Judges Schroeder and Benitez have so recommended.

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* The Honorable Roger T. Benitez, United States District Judge for the Southern District of California, sitting by designation.

The full court has been advised of Defendant-Appellant's petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Defendant-Appellant's petition for panel rehearing and petition for rehearing en banc are denied. Further petitions for rehearing and rehearing en banc shall not be entertained.

APPENDIX D

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

EARLINE COLE, as an individual and as personal representative of the ESTATE OF STEVEN BEARCRANE, CLETUS COLE, as an individual and as personal representative of the ESTATE OF STEVEN BEARCRANE, CIOUS BEARCRANE, minor child VERONICA SPRINGFIELD, as an individual and as personal representative of the ESTATE OF ROBERT SPRINGFIELD, and VELMA	)	Case No: CV-09-21-BLG-RFC-CFO AMENDED PRE-COMPLAINT Jury Trial Demanded

SPRINGFIELD, minor child	)
Plaintiffs,	)
v.	)
	)
FEDERAL BUREAU OF	)
INVESTIGATIONS,	)
SALT LAKE CITY FIELD	)
OFFICE,	)
UNITED STATES	)
ATTORNEYS OFFICE,FOR	)
SOUTH DAKOTA,	)
MARTY J. JACKLEY, in his	)
official capacity, ERNEST	)
WEYAND, in his individual	)
and official capacity, and	)
MATTHEW ORAVEC, in his	)
individual capacity,	)
Defendants	)
	)

Precious Bearcrane, Cletus Cole, Earline Cole, Velma Springfield and Veronica Springfield, by and through their undersigned attorneys, hereby bring this Amended Complaint against the above-named defendants.

PARTIES

1. Precious Bearcrane ("Bearcrane") is a minor child, currently age seven (7), the daughter of Steven Bearcrane, a member of the Crow Tribe, and a current resident of Montana.

2. Cletus Cole ("Cletus Cole") is an individual, married to Earline Cole, and a member of the Gros Ventre Tribe, and a current resident of Montana.

3. Earline Cole ("Earline Cole") is an individual, married to Cletus Cole and a member of the Crow Tribe, and a current resident of Montana.

4. Velma Springfield is a minor child, currently age six (6), the daughter of Robert Springfield, a member of the Crow Tribe, and a current resident of Montana.

5. Veronica Springfield ("Springfield") is an individual, and a member of the Crow Tribe, and a current resident of Montana.

6. The Federal Bureau of Investigations, Salt Lake City Field Office ("FBI") is a federal agency of the United States Department of Justice, with its principal offices located at 257 East 200 South, Suite 1200, Salt Lake City, Utah 84111.

7. The United States Attorney's Office for South Dakota ("U.S. Attorney's Office") is a federal agency of the United States Department of Justice, with its principal office at 201 Federal Building, 515 9th Street, Rapid City, South Dakota 57701.

8. Marty J. Jackley ("Jackley") is currently the United States Attorney for South Dakota, whose business address is 201 Federal Building, 515 9th Street, Rapid City, South Dakota 57701.

9. Ernest Weyand ("Weyand") is an individual and was, at times relevant to this complaint, the Supervising Agent in the Billings, Montana office of the FBI, whose business address is 2929 3rd Avenue North, Room 205, Billings, Montana 59101.

10. Matthew Oravec ("Oravec") is an individual and was, at all times relevant to this complaint, a Special Agent in the Billings, Montana office of the FBI, whose business address is 2929 3rd Avenue North, Room 205, Billings, Montana 59101.

JURISDICTION

11. The purpose of this action is to redress and restrain acts or practices by Defendants that federal law deems unlawful.

12. The Court has original jurisdiction over the subject matter of these claims pursuant to, 28 U.S.C. §1331, and under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

13. Venue for this action properly lies in the District of Montana pursuant to 28 U.S.C. § 1391(b).

WAIVER OF SOVEREIGN IMMUNITY

14. The United States has waived its sovereign immunity for this action under the Administrative Procedure Act, 5 U.S.C. §§702-706.

NATURE OF THIS ACTION

15. In this case, Plaintiffs bring claims, on behalf of themselves, Steven Bearcrane and Robert Springfield and their estates, under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), against defendant Oravec for intentionally failing to accord Precious Bearcrane, Cletus Cole, Earline Cole, Velma Springfield, and Veronica Springfield, as well as other members of federally-recognized Indian tribes, including their family members Steven Bearcrane and Robert Springfield, the equal protection of

the law required under the Constitution of the United States, by failing to provide police services to Native Americans on and in the vicinity of the Crow Reservation because they are Native American.

16. Plaintiffs also bring claims, on behalf of themselves, Steven Bearcrane and Robert Springfield and their estates, against the United States, specifically, Department of Justice agencies the Federal Bureau of Investigation and the United States Attorneys Office, to enjoin their policy and practice of failing to accord the equal protection of the law required under the Constitution of the United States, by failing to provide police and prosecutorial services to Native Americans, including Precious Bearcrane, Cletus Cole, Earline Cole, Velma Springfield, and Veronica Springfield, as well as other members of federally-recognized Indian tribes, including their family members Steven Bearcrane and Robert Springfield, on and in the vicinity of the Crow Reservation because they are Native American.

FACTUAL ALLEGATIONS

Background

17. The Plaintiffs are members of the Crow Tribe or other federally-recognized Indian tribes and reside on or near the Crow Reservation.

18. The Plaintiffs each had close relatives who were victims of serious crimes and each would qualify as a "victim," entitled to protection and benefits accorded under the Crime Victims' Rights Act, 18 U.S.C. §3771, and, 42 U.S.C. §10607 (Victims Rights and Restitution Act of 1990):

a. Earline Cole was the mother and Cletus Cole was the father of Steven Bearcrane, a young man murdered on a ranch within the Crow Reservation.

b. Precious Bearcrane is the daughter of Steven Bearcrane, a young man murdered on a ranch within the Crow Reservation.

c. Veronica Springfield was the wife of Robert Springfield, a member of the Crow Tribe who died under suspicious circumstances on the Crow Reservation.

d. Velma Springfield is the daughter of Robert Springfield, a member of the Crow Tribe who died under suspicious circumstances on the Crow Reservation.

19. Earline Cole and Cletus Cole were appointed the personal representatives of the Estate of Steven Thomas Bearcrane, their son.

20. Veronica Springfield is the personal representatives of the Estate of Robert Springfield, her husband.

Policy of Discrimination
Against Native Americans in
Investigation and Prosecution of Crimes

21. Crime is rampant and out of control in Indian Country, as admitted by the United States, for example:

a. The most recent Bureau of Justice Statistics report showed that: (i) from 1976 to 2001 an estimated 3,738 American Indians were mur-

dered; (ii) among American Indians age 25 to 34, the rate of violent crime victimizations was more than 2½ times the rate for all persons the same age; and (iii) rates of violent victimization for both males and females were higher for American Indians than for all races. See American Indians and Crime: A BJS Statistical Profile, 1992-2002, 12/04 NCJ 203097.

b. The highest crime rate per capita occurs on Indian reservations. Testimony of Hon. Anthony Brandenburg, Chief Judge., Intertribal Court of Southern California before the Senate Committee on Indian Affairs, regarding a Legislative Hearing on S. 797, the Tribal Law Enforcement Act of 2009, June 25, 2009.

c. Secretary of the Interior, Ken Salazar, has stated that "the rule of law [has been] essentially abandoned" on reservations. Hearing Before the Committee on Indian Affairs, United States Senate, February 12, 2009.

d. There has been a serious increase of late in violent crime on reservations. Larry EchoHawk, Assistant Secretary for Indian Affairs, before the Senate Committee on Indian Affairs, regarding a Legislative Hearing on S. 797, the Tribal Law Enforcement Act of 2009, June 25, 2009.

22. Native American women experience the highest rate of violence of any group in the United States. *Native American Women and Violence*, Lisa Bhungalia, National NOW Times, Spring, 2001.

a. A report released by the Department of Justice, American Indians and Crime, found that Native American women suffer violent crime at a rate three and a half times greater than the national average. *Native American Women and Violence*, Lisa Bhungalia, National NOW Times, Spring, 2001. National researchers estimate that this number is actually much higher than has been captured by statistics; according to the Department of Justice over 70% of sexual assaults are never reported. *Id.*

b. Native American women also experience the highest levels of sexual and domestic abuse of any group. A report from the American Indian Women's Chemical Health Project found that three-fourths of Native American women have experienced some type of sexual assault in their lives.

c. One in three Native American women will be raped in their lifetime and 75 percent of perpetrators of those crimes are non-Indian. *See American Indians and Crime: A BJS Statistical Profile*, 1992-2002, 12/04 NCJ 203097; Statement Of Hon. Tom Udall, U.S. Senator from New Mexico, Hearing Before the Committee on Indian Affairs, United States Senate, February 12, 2009. Representatives of the Department of the Interior characterized violence against Indian women as being at "crisis level."

23. Refusal of federal agencies, such as defendant FBI, to provide the same law enforcement services to Native Americans as provided to non-Native

Americans has played a major part in creating the serious crime problem in Indian Country, for example:

a. The Chair of the Fort Hall Business Council said: "The present status of Indian Country law enforcement has resulted in unsafe communities, victimization of reservation families, promoted drug trafficing, and has deterred economic development." Statement of Alonzo Colby, Chairman of the Fort Hall Business Council for the Shoshone-Bannock Tribes, for the Senate Committee on Indian Affairs, regarding a Legislative Hearing on S. 797, the Tribal Law Enforcement Act of 2009, June 25, 2009.

b. John Barrasso, a United States Senator from Wyoming, has noted the federal "neglect" of law and order on Indian reservations, which has led to "unacceptable" law enforcement statistics in Indian Country. Statement of John Barrasso, U.S. Senator from Wyoming,. Hearing Before the Committee on Indian Affairs, United States Senate, February 12, 2009.

c. At a Senate hearing in North Dakota, the chairman of the Standing Rock Sioux, Ron His Horse Is Thunder, said that there had been nine suicides and 50 attempted suicides in the small villages of the reservation since January, a phenomenon he linked directly to rising crime and hopelessness. *Obama to Address Breakdown of Reservation Justice*, Michael Riley, Denver Post, 7/04/09

24. Refusal of federal agencies, such as defendant U.S. Attorney's Office, to provide the same prosecutorial services to Native Americans as are provided to non-Native Americans has played a major part in creating the serious crime problem in Indian Country, for example

a. Between 2004 and 2007, the U.S. declined to prosecute 62% of Indian country criminal cases referred to federal prosecutors. U.S. Senate Committee on Indian Affairs Press Release, April 3, 2009. The Senate Committee on Indian Affairs recognizes that those statistics are unacceptable and is reviewing legislation to deal with the lack of prosecution in Indian Country.

b. According to the Chairman of the Fort Hall Business Council, "In many cases, the lack of prosecution by federal and state authorities remains unexplained to Tribal leaders and the crime victims." Statement of Alonzo Colby, Chairman of the Fort Hall Business Council for the Shoshone-Bannock Tribes, for the Senate Committee on Indian Affairs, regarding a Legislative Hearing on S. 797, the Tribal Law Enforcement Act of 2009, June 25, 2009.

c. Alonzo Colby also said that "The unexplained failures to prosecute serious felonies on the Reservations gives the tribal membership the impression that it is OK to commit serious crimes against Indian people on the Reservation." *Id.*

d. A review by *The Denver Post* of dozens of criminal cases on more than 20 reservations substantiates widely-held concerns among Ameri-

can Indians that the system as it now stands functions poorly, including investigations that are chronically delayed or dropped, and serious crimes never prosecuted as felonies. *Promises, Justice Broken*, Michael Riley, Denver Post, 11/11/07. The Reporter pointed out a situation on a reservation in Montana: On the Fort Peck reservation in Montana, a man recently assaulted his girlfriend and broke her jaw, a result that didn't count as "serious bodily injury," according to the U.S. attorney, who therefore declined the case. According to the tribal prosecutor, who was forced to charge the suspect in tribal court, the same man has since committed several other crimes, "literally wreaking havoc here," she said.

25. The United States has admitted disparate treatment of Native Americans in law enforcement, for example, Senator John Barrasso said: "Mr. Chairman, I'm sure that you would agree that non-Indian communities would not tolerate such a low level of protection. There is no reason that Indian communities should expect anything less than other communities in the way of law and order and public safety." Statement of John Barrasso, U.S. Senator from Wyoming, Hearing Before the Committee on Indian Affairs, United States Senate, February 12, 2009.

FBI Discrimination Against Native Americans in Investigation of Crimes

26. Defendant FBI was and is the federal law enforcement agency assigned to investigate major crimes on the Crow Reservation; specifically, the Billings, Montana Office of the Salt Lake City Field Office, which office was supervised by defendant Weyand, and is now supervised by Eric Barnhardt.

27. Defendants FBI, Oravec and Weyand have adopted and engaged in a pattern and practice of selectively discriminating against Native Americans in providing police services and protection on the Crow reservation in Montana; such pattern and practice including, but not limited to the failure to adequately investigate crimes in which Native Americans are victims.

Death of Steven Bearcrane

28. An example of the defendants' pattern and practice of selectively discriminating against Native Americans in providing police services and protection in and around the Crow reservation in Montana is the failure to adequately investigate the death of Steven Bearcrane.

29. The FBI agents assigned to investigate Mr. Bearcrane's death were defendants Oravec, a senior agent in the FBI Billings, Montana Office, and defendant Weyand.

30. Plaintiffs Earline and Cletus Cole repeatedly asked the defendants FBI and the individual defendants Oravec and Weyand to do an adequate in-

vestigation of the crimes against their close relatives, to no avail:

a. It is undisputed that Steven Bearcrane, a member of the Crow Nation, was shot in the head and killed by a non-Indian on February 2, 2005, at a ranch located on the Crow Indian Reservation.

b. Defendant Oravec, who was the special agent in charge of investigating the murder of Steven Bearcrane; and defendant Weyand, who was the supervising agent, refused to do anything but the most cursory investigation, despite compelling facts, among others:

(i) The Coroner ruled Mr. Bearcrane's death a homicide;

(ii) A non-Indian man admitted to shooting Mr. Bearcrane;

(iii) Upon information and belief, the same non-Indian man admitted to a third party that he had shot Mr. Bearcrane in the head during a dispute over a horse;

(iv) The evidence appears to counter the self-defense claim made by the non-Indian man;

(v) There is no evidence that the FBI performed or used common investigative tests and data-gathering, including but not limited to fingerprint evidence, blood spatter

analysis, criminal and military background information, and crime scene photographs, in investigating the death of Steven Bearcrane;

c. Defendants FBI, Oravec and Weyand destroyed some evidence in the case, rather than preserving it, even though they have refused to return personal belongings, saying that the belongings were needed for the on-going investigation.

31. Plaintiffs Earline and Cletus Cole repeatedly told defendant Weyand that defendant Oravec was failing to perform an adequate investigation, Plaintiffs (a) asking that another agent be appointed to investigate the case, (b) asking that defendant Oravec be given assistance and (c) offering to hire a private investigator, all of which defendant Weyand refused.

32. Not only did plaintiffs Earline and Cletus Cole complain about the inadequate investigation done by defendants FBI, Oravec and Weyand into Steven Cole's death, but the U.S. Commission on Civil rights complained and asked that the defendants perform an adequate investigation also.

Death of Robert Springfield

33. Another example of the defendants' pattern and practice of selectively discriminating against Native Americans in providing police services and protection in and around the Crow reservation in Mon-

tana is the defendants' failure to investigate the disappearance and death of Robert Springfield.

34. The FBI agents assigned to investigate Mr. Springfield's disappearance and death were defendants Oravec, a senior agent in the FBI Billings, Montana Office, and defendant Weyand.

35. Plaintiff Springfield repeatedly asked defendant FBI and the individual defendants Oravec and Weyand to do an adequate investigation into Mr. Springfield's disappearance and death, to no avail:

a. Defendant Springfield reported her husband, Robert Springfield, missing after a hunting trip, but defendants FBI, Oravec and Weyand refused to investigate his disappearance.

b. After Mr. Springfield's body was found, defendants FBI, Oravec and Weyand failed to investigate his death, even though many witnesses were available and desired to be interviewed.

c. Defendants FBI, Oravec and Weyand failed to positively identify the remains of Robert Springfield even though there was compelling evidence for the identification.

Other Cases

36. Upon information and belief of sources within the law enforcement community in or around the Crow Tribe, defendant FBI and individual defendants Oravec and Weyand consistently closed cases involving Indian victims without adequate investigation, especially sexual and other assaults involving Indian children and women.

37. The lack of attention to sexual abuse cases by defendants Oravec and Weyand is an example of the general discriminatory manner in which sexual assaults are treated by defendant FBI on Indian reservations in general:

a. The human rights group "Amnesty International" has documented the deplorable lack of investigation and prosecution of sexual abuse involving Native Americans. *See, for example*, http://www.amnestyusa.org/document.php?idENGAMR510352007.

b. The problem of violence against Native American women is exacerbated by federal apathy in law enforcement, along with other factors. *Native American Women and Violence*, Lisa Bhungalia, National NOW Times, Spring, 2001.

Animus on the Part of Defendants Oravec and Weyand

38. Defendants Oravec and Weyand have consistently shown animus against Native Americans, such that it may be inferred that their animus was a motivating factor in their discriminatory treatment of investigations involving Native Americans.

39. Defendant Oravec has been heard to say that female Native American victims of sexual assault were asking for assault or words to that effect.

40. Defendant Oravec not only refused to perform adequate investigations of crimes in which Native Americans were victims, but acted affirmatively to hinder the investigation of those crimes and to

prevent victims from receiving assistance and other rights afforded crime victims under federal law, for example:

a. When Earline and Cletus Cole visited the FBI offices to ask about the investigation into their son's murder, defendant Oravec attempted to intimidate Cletus Cole by taking Mr. Cole out of the range of cameras and showing Mr. Cole his gun;

b. Defendant Oravec told the state crime victims compensation office that Mr. Bearcrane-Cole had caused his own death;

c. On many occasions, defendant Oravec actively interfered with the work of county officials, including the county coroner, regarding Indian cases, including the case of Steven Bearcrane-Cole and Richard Springfield; and

d. Defendant Oravec refused, without reason, to return some remains and to provide relevant documents and other information about Mr. Springfield to his wife, plaintiff Springfield.

41. Defendant Oravec not only refused to perform adequate investigations of crimes in which Native Americans were victims, but acted to prevent victims from receiving assistance and other rights afforded crime victims under federal law, for example:

a. Defendant Oravec told the state crime victims compensation office that Mr. Bearcrane had caused his own death, thus making Mr. Bear-

crane's close relatives ineligible for benefits and other rights afforded by federal law;

b. Despite the fact that the Victim's Advocate Specialist is the FBI's normal contact with the state crime victims compensation office, upon information and belief, defendant Oravec told that office to contact him directly about anything related to benefits or assistance in the Bearcrane case; and

c. Defendant Oravec failed to positively identify the remains of Robert Springfield, even though there was compelling evidence for the identification, failed to provide plaintiff Springfield with necessary information; and delayed getting a death certificate to plaintiff Veronica Springfield, thereby denying plaintiff Springfield, and her children, including Velma Springfield, benefits and protections available and due to them.

42. Plaintiffs Earline and Cletus Cole alerted defendant Weyand, as the supervisor of the Billings FBI office, to the egregious mishandling of Mr. Bearcrane and Mr. Springfield's cases, as well as other cases involving Native Americans; defendant Weyand refusing to remedy the situations.

43. Defendants FBI, Oravec and Weyand destroyed some evidence in the case, rather than preserving it, even though they have refused to return personal belongings, saying that the belongings were needed for the on-going investigation.

U.S. Attorney's Office Discrimination Against Indians in Prosecution of Crimes

44. Defendant U.S. Attorney's Office in South Dakota historically has a pattern and practice of declining prosecutions in cases in which the victims of those crimes are Native Americans. See, for example, http://www.usccr.gov/pubs/sac/sd0300/ ch2.htm.

45. An example of defendant U.S. Attorney's Office's discriminatory treatment of cases in which the victims were Native Americans is the declination of prosecution in the death of Steven Bearcrane, the case of the murder of Steven Bearcrane having been referred to the U.S. Attorney's Office in South Dakota because of a conflict on the part of the U.S. Attorney's Office for Montana.

46. The Assistant U.S. Attorney assigned to review a prosecution in the Bearcrane case was Maura Kohn, who had worked with defendant Weyand for a significant time in South Dakota.

47. Plaintiffs Cletus Cole, Earline Cole and others have repeatedly asked defendant U.S. Attorney's Office and defendant Jackley to prosecute the person who shot their son, Steven Bearcrane, including, but not limited to:

a. Meeting personally and repeatedly with the Assistant United States Attorney assigned to the case, Ms. Kohn, as well as sending many letters to defendant United States Attorney's Office;

b. Repeatedly warning Ms. Kohn and defendant U.S. Attorney's Office that defendants

FBI, Oravec and Weyand would not performing an adequate investigation; and

c. In April of 2008, traveling to Rapid City, South Dakota to meet with defendant Jackley and Maura Kohn to personally inform them about the inadequate and discriminatory investigation of their son's murder, and the flaws in the decision not to prosecute the murderer.

48. In the April, 2008, meeting, defendant Jackley told Earline and Cletus Cole that the murder of Steven Bearcrane was still an open case, that defendant U.S. Attorney's Office would review the case again, and defendant Jackley committed to get back to the Coles with the results of his review.

49. Despite the pleas of Earline and Cletus Cole and their presentation of substantial evidence, and despite defendant Jackley's commitment, over a year ago, to re-evaluate the case and get back to the Coles, defendants U.S. Attorney's Office, and Jackley have not gotten back to the Coles with the results of any review, or with any explanation, and have not initiated any prosecution of the person who has admitted to shooting Steven Bearcrane.

Injuries to Plaintiffs

50. In discriminating against Native Americans by engaging in a pattern and practice of selectively providing less law enforcement and prosecutorial services to them than are provided to other citizens, Defendants have created a situation in which Native Americans — who are under the protection of the United States — live on lawless reservations, where

crime is rampant, the well-documented result being that Native Americans living on reservations, including Precious Bearcrane, Earline and Cletus Bearcrane, Velma Springfield, Veronica Springfield, Steven Bearcrane and Robert Springfield, suffer or have suffered severe psychological impacts, including "historical trauma," which severely impacts and cripples normal life activities.

51. In discriminating against Native Americans by engaging in a pattern and practice of selectively providing less law enforcement and prosecutorial services to them than are provided to other citizens, Defendants have created a situation in which Native Americans — who are under the protection of the United States — live on lawless reservations, where crime is rampant, the well-documented result being that: (a) Native Americans living on reservations, including Steven Bearcrane and Robert Springfield, are victimized by violent crime in much greater numbers than non-Native Americans, and (b) Native Americans living on reservations, including Precious Bearcrane, Earline and Cletus Bearcrane, Velma Springfield, Veronica Springfield, will be victimized by violent crime in much greater numbers than non-Native Americans.

52. As admitted by the United States and Native American leaders, by selectively providing less law enforcement and prosecutorial services to Native Americans — who are under the protection of the United States — than are provided to other citizens, defendants have (a) deprived the Plaintiffs, Steven Bearcrane and Robert Springfield of the security and

protection accorded non-Native American citizens, and, thus, (b) denied them the existence of an organized society maintaining public order that is implied in the constitutional guarantee of liberty, and that is provided to other citizens; (c) resulting in the situation in which Native American children, such as Precious Bearcrane and Velma Springfield will have a one-in-three chance of being sexually assaulted in her lifetime, making her twice as likely to experience sexual assault crimes than children of other races.

53. In discriminating against Native Americans by engaging in a pattern and practice of selectively providing less law enforcement and prosecutorial services to them than provided to other citizens — and, thus, failing to identify crimes and victims of those crimes — Defendants deprive and have deprived Native Americans and their families of protections and benefits accorded other citizens under the Crime Victims' Rights Act, 18 U.S.C. § 3771, and, 42 U.S.C. § 10607 (Victims Rights and Restitution Act of 1990), including but not limited to emergency medical and social services, protection from a suspected offender and possible restitution and/or other payments.

54. In the case of Steven Bearcrane, by refusing to investigate his death as a murder — even though every indication was that it was a crime — and affirmatively identifying his death as a non-crime to victim assistance personnel, defendants FBI, Oravec and Weyand deprived daughter Precious Bearcrane, mother Earline Cole, and father Cletus Cole of benefits and protections accorded non-Native-Americans

under the Crime Victims' Rights Act, 18 U.S.C. § 3771, and, 42 U.S.C. § 10607 (Victims Rights and Restitution Act of 1990), for example, on at least one occasion, Earline Cole and Mr. Beacrane's daughter, Precious, as well as other family members, encountered Mr. Bearcrane's murderer in a local store.

55. In the case of Robert Springfield, by refusing to investigate his disappearance as a crime and to investigate his death as a murder, defendant FBI and individual defendants Oravec and Weyand deprived plaintiffs Veronica Springfield and Velma Springfield of benefits and protections accorded non-Native-Americans under the Crime Victims' Rights Act, 18 U.S.C. § 3771, and, 42 U.S.C. § 10607 (Victims Rights and Restitution Act of 1990), for example, emergency medical and social services

56. In the case of Steven Bearcrane, by refusing to prosecute his murder because he was a Native American, defendants U.S. Attorney's Office and Jackley deprived plaintiffs Precious Bearcrane, Earline Cole, and Cletus Cole of benefits and protections accorded non-Native-Americans under the Crime Victims' Rights Act, 18 U.S.C. § 3771, and, 42 U.S.C. § 10607 (Victims Rights and Restitution Act of 1990), including but not limited to emergency medical and social services, protection from a suspected offender and possible restitution and/or other payments, for example, on at least one occasion, Earline Cole and Mr. Beacrane's daughter, Precious, as well as other family members, encountered Mr. Bearcrane's murderer in a local store.

57. By (a) selectively providing less law enforcement and prosecutorial services to Native Americans than other citizens, and (b) creating a situation in which they live on lawless reservations where crime is higher than in any other community in the United States, thus, (c) depriving Plaintiffs, Steven Bearcrane and Robert Springfield of the security and protection accorded non-Native American citizens, and (c) denying them the existence of an organized society maintaining public order that is implied in the constitutional guarantee of liberty, and that is provided to other citizens, (d) defendants FBI, U.S. Attorney's Office, Jackley and Weyand have violated treaty and trust obligations and responsibilities owed the Plaintiffs, Steven Bearcrane and Robert Springfield.

Damages Resulting From Actions of Defendants Oravec and Weyand

58. As a result of the actions of defendants Oravec and Weyand, Earline Cole has suffered and continues to suffer severe emotional and physical damages, including, but not limited to depression, loss of sleep, loss of appetite, loss of enjoyment of life, stomach problems, severe headaches, and loss of family relations and structure; while Cletus Cole has suffered and continues to suffer depression, loss of appetite and weight, severe stomach aches, loss of enjoyment of life, and loss of family relations and structure, and Precious Bearcrane has suffered and continues to suffer severe emotional and physical damages, including but not limited to depression and loss of family relations and structure.

59. Earline and Cletus Cole have suffered and continue to suffer economic damages from the actions of the defendants Oravec and Weyand, including, but not limited to lost income, lost benefits, travel expenses to plead with defendants to adequately investigate and prosecute the murder of their son, and expenses involved with preparation of materials for presentation to defendants.

60. As a result of the actions of defendants Oravec and Weyand, Veronica Springfield has suffered and continues to suffer severe emotional and physical damages, including, but not limited to depression, loss of sleep, loss of appetite, loss of enjoyment of life, stomach problems, severe headaches, and loss of family relations and structure, and Velma Springfield has suffered and continues to suffer severe emotional and physical damages, including but not limited to depression and loss of family relations and structure.

61. All of the Plaintiffs have suffered loss of assistance and benefits provided them under the Crime Victims' Rights Act, 18 U.S.C. § 3771, and, 42 U.S.C. § 10607 (Victims Rights and Restitution Act of 1990), as well as other federal and state statutes because of delay, and/or failure on the part of defendant Oravec to adequately investigate crimes against their close relatives.

Violations of Treaty and Trust Obligations

62. The United States has treaty and trust responsibilities and obligations to provide protection to Native Americans, including members of the Crow

Tribe and other federally-recognized Tribes, which treaty and trust obligations apply to all agencies of the federal government. Statement of Hon. Byron L. Dorgan, U.S. Senator from North Dakota, Hearing Before the Committee on Indian Affairs, United States Senate, February 12, 2009.

63. For example, in the Treaty with the Crow Tribe of 1825 (The Treaty of Friendship), the United States agreed to the following:

> *That the friendship which is now established between the United States and the Crow tribe, should not be interrupted by the misconduct of individuals, it is hereby agreed, that for injuries done by individuals, no private revenge or retaliation shall take place, but instead thereof, complaints shall be made, by the party injured, to the superintendent or agent of Indian affairs, or other person appointed by the President; and it shall be the duty of said Chiefs, upon complaint being made as aforesaid, to deliver up the person or persons against whom the complaint is made, to the end that he or they may be punished, agreeably to the laws of the United States.* ***And, in like manner, if any robbery, violence, or murder, shall be committed on any Indian or Indians belonging to the said tribe, the person or persons so offending shall be tried, and, if found guilty, shall be punished in like manner as if the injury had been done to a white man.***

Article 5 of the Treaty with the Crow Tribe, 7 Stat. 266 (emphasis added).

64. In the Treaty Between the United States of America And the Crow Tribe of Indians, May 7,1868 (the Second Treaty of Fort Laramie), 15 Stat. 649, the United States committed to the following:

> *If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.*

15 Stat. 649, Article I.

65. The Senator from North Dakota, and Chair of the Senate Committee on Indian Affairs, Byron L. Dorgan, recognized the treaty and trust obligations that were created under the Treaty of Fort Laramie for reservations in Wyoming, North and South Dakota and Montana. The United States, through Senator Dorgan, admitted that the United States had failed to meet those obligations. Statement of Hon. Byron L. Dorgan, U.S. Senator from North Dakota, Hearing Before the Committee on Indian Affairs, United States Senate, February 12, 2009.

66. By selectively providing less law enforcement and prosecutorial services to Native Americans than provided to other citizens, thus creating a crisis of lawlessness on Indian Reservations, defendants violated treaty and trust obligations and responsibil-

ities owed the Plaintiffs, Steven Bearcrane and Robert Springfield.

VIOLATIONS

67. As to the following claim for relief, paragraphs 1 through 66 above are incorporated by reference and re-alleged as if fully set forth in the claim.

FIRST CLAIM FOR RELIEF

(Violation of Fifth Amendment-Equal Protection)
[Against defendants FBI, and
U.S. Attorney's Office, and Jackley
and Weyand, in their official capacities]

68. The Defendants are federal agencies or heads of federal agencies.

69. Through the actions described above, especially the actions of:

a. Defendant agencies and agency heads engaging in a pattern and practice of selectively discriminating against Native Americans in providing law enforcement protection and/or services and prosecution;

b. Defendants FBI, Weyand and Oravec refusing, in particular, to investigate and/or to adequately investigate the murder of Steven Bearcrane, and disappearance and murder of Robert Springfield;

c. Defendants U.S. Attorneys Office, and Jackley refusing, in general, to prosecute crimes that involve Native American victims;

d. Defendants U.S. Attorneys Office, and Jackley refusing, in particular, to prosecute the murder of Steven Bearcrane;

e. Defendant Oravec interfering with adequate investigations and/or prosecutions of crimes on the Crow Reservation that involve Native American victims; and

f. Defendant Oravec acting to prevent Native American victims from receiving assistance and other rights afforded crime victims under federal law; among other actions,

Defendant agencies and heads of agencies, FBI, U.S. Attorney's Office, and Jackley and Weyand, in their official capacities, (a) denied the Plaintiffs, Steven Bearcrane and Robert Springfield the same law enforcement and prosecutorial protection and services enjoyed by other citizens, (b) deprived the Plaintiffs, Steven Bearcrane and Robert Springfield, of the security and protection accorded non-Native American citizens, and, thus, (c) denied them the existence of an organized society maintaining public order that is implied in the constitutional guarantee of liberty, that is provided to other citizens; and (d) denied Plaintiffs the protection and benefits accorded other citizens under the Crime Victims' Rights Act, 18 U.S.C. § 3771, and, 42 U.S.C. § 10607 (Victims Rights and Restitution Act of 1990), thus depriving the Plaintiffs, Steven Bearcrane and Robert Springfield of the equal protection of the law required under the due process clause of the Fifth Amendment to the United States Constitution.

SECOND CLAIM FOR RELIEF

(Violation of Fifth Amendment-Substantive Due Process)
[Against defendants FBI, and U.S. Attorney's Office, and Jackley and Weyand, in their official capacities]

70. The Defendants are federal agencies or heads of federal agencies.

71. Through the actions described above, especially the actions of Defendant agencies and agency heads engaging in a pattern and practice of selectively discriminating against Native Americans – who are under the protection of the United States – in providing law enforcement protection and/or services and prosecution; among other actions, Defendant agencies and heads of agencies, FBI, failed to protect Steven Bearcrane and Robert Springfield, thus violating the due process clause of the Fifth Amendment to the United States Constitution.

THIRD CLAIM FOR RELIEF

(Bivens-Violation of Equal Protection)
[Against Individual Defendants Oravec and Weyand]

72. Defendants Oravec and Weyand are employees of the United States Department of Justice.

73. Through the actions described above, especially the actions of defendants Oravec and Weyand in:

a. Engaging in a pattern and practice of selectively discriminating against Native Ameri-

cans in providing law enforcement protection and/or services;

b. Refusing, in particular, to investigate and/or to adequately investigate the murder of Steven Bearcrane and the disappearance and murder of Robert Springfield;

c. Interfering with adequate investigations and/or prosecutions of crimes on the Crow Reservation that involve Native American victims; and

d. Acting to prevent Native American victims from receiving assistance and other rights afforded crime victims under federal law; among other actions,

Defendants Oravec and Weyand (a) denied the Plaintiffs, Steven Bearcrane and Robert Springfield the same law enforcement and prosecutorial protection and services enjoyed by other citizens, (b) deprived the Plaintiffs, Steven Bearcrane and Robert Springfield, of the security and protection accorded non-Native American citizens, and, thus, (c) denied them the existence of an organized society maintaining public order that is implied in the constitutional guarantee of liberty, that is provided to other citizens; and (d) denied Plaintiffs the protection and benefits accorded other citizens under the Crime Victims' Rights Act, 18 U.S.C. § 3771, and, 42 U.S.C. § 10607 (Victims Rights and Restitution Act of 1990), thus depriving the Plaintiffs of the equal protection of the law required under the due process clause of the Fifth Amendment to the United States Constitution.

74. In their actions, defendants Oravec and Weyand acted intentionally, and in a willful and wanton manner, for example, despite the pleas of Earline and Cletus Cole, and Veronica Springfield and their presentations of substantial evidence, defendants Oravec and Weyand refused to adequately investigate the murder of Steven Bearcrane, and/or the disappearance and death of Robert Springfield, among other actions.

75. As a result of the actions of defendants Oravec and Weyand, Plaintiffs have been deprived of due process of the law, and have suffered damages to their person and property, including but not limited to those damages described above.

FOURTH CLAIM FOR RELIEF

(Bivens-Violation of Substantive Due Process)
[Against Individual Defendants
Oravec and Weyand]

76. Defendants Oravec and Weyand are employees of the United States Department of Justice.

77. Through the actions described above, especially the actions of defendants Oravec and Weyand in engaging in a pattern and practice of selectively discriminating against Native Americans — who are under the protection of the United States — in providing law enforcement protection and/or services; among other actions, Defendants Oravec and Weyand failed to protect Steven Bearcrane and Robert Springfield, thus violating the due process clause of the Fifth Amendment to the United States Constitution.

78. In their actions, defendants Oravec and Weyand acted intentionally, and in a willful and wanton manner, knowingly refusing to investigate cases involving Native Americans.

79. As a result of the actions of defendants Oravec and Weyand, Steven Bearcrane and Robert Springfield have suffered damages to their person and property, including the loss of their lives.

FIFTH CLAIM FOR RELIEF

(Violation of Treaty and Trust Obligations)
[Against defendants FBI, and U.S. Attorney's Office, and Jackley and Weyand, in their official capacities]

80. The United States and its agencies have treaty and trust obligations and responsibilities to Native Americans, including members of the Crow Tribe, including but not limited to Treaty with the Crow Tribe of 1825 (The Treaty of Friendship), 7 Stat. 266, and the Treaty Between the United States of America and the Crow Tribe of Indians, May 7, 1886, 15 Stat. 649.

81. Through the actions described above, especially the actions of:

a. Defendant agencies and agency heads engaging in a pattern and practice of selectively discriminating against Native Americans in providing law enforcement protection and/or services and prosecution;

b. Defendants FBI, Weyand and Oravec refusing, in particular, to investigate and/or to

adequately investigate the murder of Steven Bearcrane, and disappearance and murder of Robert Springfield;

c. Defendants U.S. Attorneys Office, and Jackley refusing, in general, to prosecute crimes that involve Native American victims;

d. Defendants U.S. Attorneys Office, and Jackley refusing, in particular, to prosecute the murder of Steven Bearcrane;

e. Defendant Oravec interfering with adequate investigations and/or prosecutions of crimes on the Crow Reservation that involve Native American victims; and

f. Defendant Oravec acting to prevent Native American victims from receiving assistance and other rights afforded crime victims under federal law; among other actions,

Defendant agencies and heads of agencies, FBI, U.S. Attorney's Office, and Jackley and Weyand, in their official capacities, violated the treaty and trust obligations owed to the Plaintiffs, Steven Bearcrane and Robert Springfield.

PRAYERS FOR RELIEF

As To Claims Against Federal Agencies, FBI And U.S. Attorney's Office, And Agency Heads , Jackley and Weyand

A. In view of all of the preceding, Plaintiffs respectfully request that this Court award, adjudge and decree that the conduct alleged is violative of the Constitution of the United States and of Plain-

tiffs' rights thereunder; and enjoin further such violations, and

B. Plaintiffs have such other, further and different relief as this Court deems just and proper.

As To Claim Against
Defendants Oravec and Weyand

A. In view of all of the preceding, Plaintiffs respectfully request that this Court award, adjudge and decree that:

(1) The conduct alleged is violative of the Constitution of the United States and of Plaintiffs' rights thereunder;

(2) In accordance with federal law, including, but not limited to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971),

(a) Individual defendant Oravec pay to plaintiffs an amount – the exact total of which is presently undetermined – comprised of

(I) The actual damages they have sustained as a result of such violations, economic and emotional, and

(II) Exemplary or punitive damages;

(b) Plaintiffs be awarded their costs of suit, including reasonable attorneys' fees and costs;

(c) Interest on the above; and

B. Plaintiffs have such other, further and different relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

In accordance with Fed. R. Civ. P. 38(b), Plaintiffs hereby demand a trial by jury.

DATED this 4th day of September, 2009.

Respectfully submitted:

s/Jean Bearcrane
Jean Bearcrane

s/Patricia S. Bangert
Patricia S. Bangert

Attorneys for Plaintiff

Address of Plaintiffs:

Cletus and Earline Cole and Precious Bearcrane
8416 Hwy 87 East
Billings, Montana 59101

Veronica and Velma Springfield
P.O. Box 674
Lodge Grass, Montana 59050

PLAINTIFF'S DECLARATION

A. I understand that I must keep the Court informed of my current mailing address and that my failure to do so may result in the dismissal of this Complaint without actual notice to me.

B. I declare under penalty of perjury that I am the plaintiff in the above action, that I have read the above complaint, and that the information that I have set forth within it is true and correct. 28 U.S.C. § 1746; 18 U.S.C. § 1621.

Executed at 8416 Hwy 87 East, Billings, Montana 59101on this 4th day of September, 2009.

s/Earline Cole
Earline Cole

s/Precious Bearcrane by
Earline Cole
Earline Cole

PLAINTIFF'S DECLARATION

A. I understand that I must keep the Court informed of my current mailing address and that my failure to do so may result in the dismissal of this Complaint without actual notice to me.

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Executed at 8416 Hwy 87 East, Billings, Montana 59101 on this 4th day of September, 2009.

s/Cletus Cole
Cletus Cole

PLAINTIFF'S DECLARATION

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B. I declare under penalty of perjury that I am the plaintiff in the above action, that I have read the above complaint, and that the information that I have set forth within it is true and correct. 28 U.S.C. § 1746; 18 U.S.C. § 1621.

Executed at P.O. Box 674, Lodge Grass, Montana 59050 on this 4th day of September, 2009.

s/Veronica Springfield
Veronica Springfield

s/Velma Springfield by
Veronica Springfield
Veronica Springfield