NATALIE K. WIGHT, OSB #035576
United States Attorney
DIANNE SCHWEINER, CSB #188013
Assistant United States Attorney
United States Attorney's Office
1000 SW Third Ave., Suite 600
Portland, Oregon 97204-2936
Telephone: (503) 727-1102
dianne.schweiner@usdoj.gov

Attorneys for Defendants,
in their official capacities only

THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DR. HENRY EALY III; SENATOR DENNIS LINTHICUM; SENATOR KIM THATCHER,

Plaintiffs,

v.

ROBERT REDFIELD, former Director of the US Center for Disease Control, in his individual capacity; ROCHELLE WALENSKY, in her individual capacity and in her official capacity as Director for the US Center for Disease Control, ALEX AZAR, former Secretary of the US Department of Health and Human Services, in his individual capacity; XAVIER BECERRA, in his individual capacity and in his official capacity as Director of the US Department of Health and Human Services; BRIAN MOYER, in his individual capacity and in his official capacity as Director of the National Center for Health Statistics; and DOES 1-25,

Defendants.

Case No.: 3:22-cv-356-HZ

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CORRECTED PETITION TO IMPANEL SPECIAL GRAND JURY

MOTION

Defendants, in their official capacities only,[1] by and through their attorneys, Natalie K. Wight, United States Attorney for the District of Oregon, and Dianne Schweiner, Assistant United States Attorney, move this Court to dismiss this action under Federal Rules of Civil Procedure 4, 8, 12(b)(1), and 12(b)(6).

MEMORANDUM IN SUPPORT OF MOTION

I.

INTRODUCTION

Plaintiffs are three Oregon State Senators who ask this Court to force the federal government, through the heads of certain federal agencies, to impanel a federal grand jury and prosecute "crimes that have been committed against the citizens of the United States" relating to the government's handling of the Covid-19 pandemic. (ECF 5). Plaintiffs' lawsuit purports to allege a *Bivens* claim due to the fact they name some of the individual defendants in their individual capacities, they have attempted to serve these individuals with process at their personal homes, and the only avenue within which to sue an individual federal employee is through a *Bivens* action. However, Plaintiffs' claim fails for multiple reasons. First, neither the three named Plaintiff/Senators (nor their "constituents") have standing to sue in this action and force the U.S. Attorney's Office to impanel a grand jury or prosecute any particular crime. Second, Plaintiffs have failed to state a valid claim under Federal Rules of Civil Procedure 8, 12(b)(1), or 12(b)(6) as they have failed to pled a proper claim under *Bivens* or the FTCA, the only avenues under which their claims could survive against the named Defendants. Third, Plaintiffs have failed to effectuate proper service against at least one of the named Defendants under Rule 4. As explained in more

[1] Because Plaintiffs have failed to state a *Bivens* claim against the named Defendants in their individual capacities (the only claim under which a plaintiff can sue individual federal employees in federal court), the U.S. Department of Justice has not undertaken the task of granting individual representation for the Defendants sued in their individual capacities. Only if the Court determines that a proper individual capacity claim has been pled will representation by DOJ be at issue.

detail below, Plaintiffs' lawsuit should be dismissed with prejudice as any amendment based on Plaintiffs' unintelligible claims would be futile.

II.

PLAINTIFFS LACK STANDING

In their Corrected Petition, "Petitioners seek to have either the Court or a US Attorney, or an AUSA Pro Hac Vice, recommended by Petitioners, present the entirety of this petition, including all exhibits, directly to the grand jury for consideration of investigation on behalf of the people of the United States without delay." ECF 5, at 9. But the three Oregon State Senator Plaintiffs in this case lack standing to sue because any private citizen lacks standing to compel or challenge the investigation or prosecution of another person. *See Graves-Bey v. City & Cty. of San Francisco*, 669 F. App'x 373, 373 (9th Cir. 2016); *Linda R.S. v. Richard D.,* 410 U.S. 614, 619 (1973) (holding the Supreme Court's "prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution," and "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another").

On this point, one Court recently explained:

> The Supreme Court has reaffirmed the holding in *Linda R.S*, stating that "concerns for state autonomy...deny private individuals the right to compel a State to enforce its laws." *Diamond v. Charles*, 476 U.S. 54, 65 (1986). *See also Town of Castle Rock v. Gonzales*, 545 U.S. 748, 767 n.13 (2005)….Decisions by the Ninth Circuit have followed the same approach. *See, e.g., Graves-Bey v. City and Cnty. of San Francisco*, 669 F. App'x 373, 374 (9th Cir. 2016) ("Dismissal of [plaintiff's] request for a criminal investigation and prosecution of defendants was proper because [plaintiff] lacks standing to compel the investigation or prosecution of another person."); *Robinson v. Cunan*, 489 F. App'x 187, 187 (9th Cir. 2012) ("[T]o the extent that Robinson seeks the issuance of an arrest warrant or to compel the prosecution of another person…he lacks standing."); *Tia v. Criminal Investigation Demanded as Set Forth*, 441 F. App'x 457, 458 (9th Cir. 2011) ("The district court properly denied Tia's request for a criminal investigation…because Tia lacks standing to compel an investigation or prosecution of another person."); *Carr v. Reed*, 316 F. App'x 588, 589 (9th Cir. 2009) ("The district court properly determined that Carr lacked standing to challenge the Commission on Judicial Conduct's alleged failure to

> consider his complaints against judges and justices of the State of Washington because 'a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.'"); *Larry v. Uyehara*, 270 F. App'x 557, 558 (9th Cir. 2008) ("[T]he district court properly dismissed this action because Larry lacks standing to initiate a criminal prosecution.").

Doe v. Newsom, No. LA CV20-04525 JAK (PVCx), 2021 U.S. Dist. LEXIS 67742, at *11-12 (C.D. Cal. Mar. 26, 2021).

Courts have consistently denied similar requests of plaintiffs attempting to force federal criminal proceedings and grand jury indictments against named defendants. *See Willis v. Portland City Auditor*, No. 3:21-cv-01884-JR, 2022 U.S. Dist. LEXIS 18286, *3 (D. Or. Jan. 31, 2022) (dismissing §1983 case due to the fact plaintiff, a private citizen, lacked standing in the prosecution of another and holding "because it is clear the deficiencies of plaintiff's Complaint cannot be cured, the Court does not grant leave to amend"); *Garcia v. Cty. of Riverside*, No. 5:21-cv-00313-VAP-JC, 2021 U.S. Dist. LEXIS 258926, *11 (C.D. Cal. Nov. 15, 2021) (denying plaintiff's request for an order referring defendants "to a federal grand jury and the Department of Justice for investigation and criminal prosecution"); *Rykiel v. Salvation Army*, No. CV 19-00040-BU-BMM-KLD, 2019 U.S. Dist. LEXIS 195308, *9 (D. Mont. Oct. 9, 2019) (holding a plaintiff lacks standing to request as relief the criminal investigation or prosecution of a defendant….only the United States Attorney can initiate federal criminal charges"); *Pusateri v. Klamath Cty. Sheriffs Office*, No. 1:18-cv-00060-AA, 2018 U.S. Dist. LEXIS 5880, *9 (D. Or. Jan. 12, 2018); *Henry v. Tholberg*, No. 1:18-cv-00868-CL, 2018 U.S. Dist. LEXIS 89663 (D. Or. May 30, 2018); *James v. Emmens*, No. 16-cv-2823-WQH-NLS, 2017 U.S. Dist. LEXIS 148639, *4 (S.D. Cal. Sep. 12, 2017); *Simpson v. Reno*, 902 F. Supp. 254, 1995 U.S. Dist. LEXIS 15417 (D.D.C. 1995), aff'd sub nom. *Brown v. Reno*, 1996 U.S. App. LEXIS 30533 (D.C. Cir. Sept. 25, 1996) ("Writ of mandamus will not issue against U.S. Attorney General and U.S. Attorneys compelling them to impanel special grand jury so plaintiffs may appear before it and present evidence of alleged criminal conduct because 18 USCS § 3332 does not grant right to individual to appear before special grand jury; rather, individual may

appear only at invitation of grand jury, prosecutor, or court in its supervisory capacity"); *Banks v. Buchanan*, 336 Fed. Appx. 122, 2009 U.S. App. LEXIS 14996 (3d Cir. 2009) (unpublished decision) (dismissing writ of mandamus because plaintiff lacked U.S. Const. Art. III standing to compel United States Attorney to present evidence to grand jury under 18 USCS §1332 concerning alleged criminal wrongdoing); *Zaleski v. Burns*, 606 F.3d 51 (2d Cir. 2010), cert. denied, 562 U.S. 1102 (2010) ("It was not entirely clear from plaintiff's complaint what form of judicial remedy he meant to request, but whatever it may have been, he failed to demonstrate standing to invoke power of federal courts because plaintiff had not alleged that he ever requested that Southern District U.S. Attorney's Office present his information to grand jury").

In their Corrected Petition, Plaintiffs cite to only one case for the proposition that they can somehow compel the U.S. Attorney's Office to impanel a grand jury at their command. *In re Grand Jury Application,* 617 F. Supp. 199, 201 (S.D.N.Y. 1985). But in addition to the fact that case is an out of circuit, non-binding district court case from 37 years ago, one court last year noted that the case is no longer good law:

> *In re Grand Jury Application*, 17 F.Supp.199, 201 (S.D.N.Y 1985) appears to be the only case that has held that "18 U.S.C. § 3332(a) creates a duty on the part of the United States Attorney that runs to [a private party], and [that] the breach of that duty gives [that private party] standing to seek its enforcement." As a result of the Second Circuit's contrary holding in *Zaleski*, *In re Grand Jury Application* is no longer good law.

Lawyers Comm. for 9/11 Inquiry, Inc. v. Barr, 2021 U.S. Dist. LEXIS 55753, *15, fn 5 (S.D.N.Y. Mar. 24, 2021). Based on this abundant and unequivocal case law establishing that private citizens like Plaintiffs here cannot compel the U.S. Attorney's Office to impanel a grand jury or prosecute a particular case, Plaintiffs' lawsuit must be dismissed.

III.

PLAINTIFFS' ACTION IS BARRED UNDER RULES 8, 12(B)(1) AND 12(B)(6)

In addition to their lack of standing to pursue this case, Plaintiffs have failed to state a valid claim or articulate a basis for subject matter jurisdiction under Rules 8, 12(b)(1), and 12(b)(6).

Rule 8(a) requires that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint must therefore provide a defendant with "fair notice" of the claims against it and the grounds for relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). As the Supreme Court made clear in *Iqbal*, to survive a motion to dismiss, claims against government officials must contain factual allegations plausibly suggesting their direct involvement in a constitutional violation. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

Rule 12(b)(1) requires that a plaintiff allege and establish subject matter jurisdiction over his claims and a court may dismiss a complaint for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). There is no presumption of jurisdiction in federal court, and the courts "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Accordingly, "[i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.*; *Chandler v. State Farm Mut. Auto. Ins. Co.,* 598 F.3d 1115, 1122 (9th Cir. 2010). "The defense of lack of subject matter jurisdiction cannot be waived, and the court is under a continuing duty to dismiss an action whenever it appears that the court lacks jurisdiction." *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983).

Rule 12(b)(6) also authorizes a court to dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Under *Iqbal*, a complaint will only survive a motion to dismiss if it states a plausible claim for relief. *Id.* 556 U.S. at 679. A plaintiff must plead facts that demonstrate to the Court that the

defendant is liable for the misconduct alleged. *Id.* at 678. And, a complaint must do more than simply plead a "sheer possibility that a defendant has acted unlawfully," and legal conclusions must be supported by factual allegations. *Id*. The Ninth Circuit has similarly held that a complaint may be dismissed when there is "either a lack of a cognizable theory or the absence of sufficient facts alleged under a cognizable legal claim." *Center for Community Action and Environmental Justice v. BNSF Railway Co*., 764 F.3d 1019, 1023 (9th Cir. 2014).

A. Plaintiffs Have Failed to Plead a Short and Plain Statement Under Rule 8

In the present case, Plaintiffs' Corrected Petition does not even meet the threshold standards required under Rule 8. Plaintiffs' 63-page Petition is largely unintelligible and fails to articulate the elements of any particular cause of action which would afford relief or provide liability against the named Defendants, who are current and former heads of certain federal agencies. Without the benefit of an actual claim properly pled under Rule 8, Defendants have been left to guess as to what express waiver of sovereign immunity Plaintiffs believe apply in this instance.

B. Plaintiffs Have Failed to State a *Bivens* Claim

To the extent Plaintiffs' Corrected Petition purports to allege a *Bivens* claim, it fails for multiple reasons. First, the claim is legally insufficient for the simple reason that it does not seek damages. Plaintiffs do not seek any relief from the individuals, but rather it appears they request some sort of mandatory injunction requiring the U.S. Attorney's Office, which is not even named as a defendant, to impanel a criminal grand jury.

In *Bivens*, the Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *See Iqbal*, 556 U.S. at 675-76 (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001)). A key component to a *Bivens* claim is a demand for damages. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (the central question in any case extending *Bivens* is "who should decide whether to provide for a damages remedy, Congress or the courts?");

see also id. at 1869 ("[T]he question with respect to the *Bivens* claims is whether to allow an action for money damages in the absence of congressional authorization"). Since Plaintiffs do not seek damages, precedent compels dismissal of their Corrected Petition as it does not sufficiently allege a *Bivens* claim.

In *Ministerio Roca Solida v. McKelvey*, 820 F.3d 1090, 1091 (9th Cir. 2016), the Ninth Circuit squarely addressed whether a federal officer can be sued in her individual capacity under *Bivens* without seeking damages. The court's answer was an unequivocal no: "[i]n answering no, we join our sister circuits in holding that relief under *Bivens* does not encompass injunctive and declaratory relief where, as here, the equitable relief sought requires official government action." *Id*. at 1093 (citing *Higazy v. Templeton*, 505 F.3d 161, 169 (2d Cir. 2007) ("The only remedy available in a *Bivens* action is an award for monetary damages from defendants in their individual capacities"). The court also noted that the Supreme Court has "continued to emphasize that money damages is the remedy under *Bivens*." *Id*. (citing *Carlson v. Green*, 446 U.S. 14, 18 (1980) and *Butz v. Economou*, 438 U.S. 478, 504 (1978)); *see also Higazy,* at 169; *Winifred Jiau v. Tews*, 2017 WL 3491958, at *4 (N.D. Cal. Aug. 15, 2017) ("[T]he only available relief in a *Bivens* action is an award of money damages for any injuries caused by a defendant acting in his or her individual capacity).

Moreover, the Ninth Circuit in *McKelvey* reasoned that "*Bivens* is both inappropriate and unnecessary for claims seeking solely equitable relief against actions by the federal government…[because] *Bivens* suits are individual capacity suits and thus cannot enjoin official government action." *Id*. Thus, the court ordered the *Bivens* claim "dismiss[ed] for failure to state a claim." *Id*. at 1096. The same result is required here.

Second, Plaintiffs' Corrected Petition cannot be salvaged by construing it as an official-capacity claim relating to any of the named Defendants. Any such claim would still be subject to dismissal for lack of subject matter jurisdiction "because the United States has not consented to its officials being sued in their official capacities" under *Bivens*. *See*

McKelvey, 820 F.3d at 1095 (quoting *Consejo De Desarrollo Economico De Mexicali, A.C. v. United States*, 482 F.3d 1157, 1173 (9th Cir. 2007)). "*Bivens* is both inappropriate and unnecessary for claims seeking solely equitable relief against actions by the federal government. By definition, *Bivens* suits are individual capacity suits and thus cannot enjoin government action." *Id*. at 1094; *see also Malesko*, 534 U.S. at 74 ("core purpose" of *Bivens* is to "deter[ ] individual officers from engaging in constitutional wrongdoing" – it is not a proper vehicle for altering an entity's policy).

Third, a *Bivens* claim cannot lie in this case as the Supreme Court has made it abundantly clear, even as recently as two months ago, that (a) courts should not extend *Bivens* to new contexts unless special factors counsel hesitation, (b) *Bivens* is a disfavored remedy, (c) if decided today, *Bivens* would likely be decided differently, and (d) extending a *Bivens* remedy in any case beyond the specific facts present in *Bivens*, *Davis* and *Carlson* should be left to Congress, not the judiciary. *See Egbert v. Boule*, 142 S. Ct. 1793 (2022); *Hernández v. Mesa*, 140 S. Ct. 735 (2020); *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). Neither the Supreme Court, nor any court, has ever recognized a *Bivens* claim for the wrongs alleged in Plaintiffs' Corrected Petition here.

Fourth, even if Plaintiffs were to overcome all of the above hurdles and somehow be allowed to allege a *Bivens* claim, the named Defendants would be subject to qualified immunity as the law was not clearly established that any actions they took violated any constitutional right. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (a court will grant a government actor qualified immunity if the actor's conduct satisfies either prong of the two-step test for qualified immunity outlined by the Supreme Court in *Saucier v. Katz,* 533 U.S. 194, 201 (2001)); *Pearson v. Callahan*, 555 U.S. 223, 241 (2009).

For these reasons, Plaintiffs' Corrected Petition fails to state a claim under *Bivens* to the extent they were attempting to do so.

C. Plaintiffs Have Failed to State a Claim under the Federal Tort Claims Act

The United States, as sovereign, is immune from suit except to the extent that it consents to be sued. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Testan*, 424 U.S. 392, 399 (1976); *Reed v. U.S. Dept. of Interior*, 231 F.3d 501, 504 (9th Cir. 2000). Any waiver of immunity cannot be implied, but must be unequivocally expressed. *United States v. Mitchell,* 445 U.S. 535, 538 (1980).

A suit against the federal government under the FTCA is not permitted unless an administrative claim has first been filed with the appropriate federal agency involved in the suit. *Avery v. United States*, 680 F.2d 608, 609 (9th Cir. 1982). Exhaustion of the claims procedures established under the FTCA is a prerequisite to district court jurisdiction. 28 U.S.C. § 2401(b) and 2675(a); *Cadwalder v. United States*, 45 F.3d 297, 300 (9th Cir. 1995); *Johnson v. United States*, 704 F.2d 1431, 1442 (9th Cir. 1983). Failure to file a valid administrative claim divests a district court of jurisdiction altogether. 28 U.S.C. § 2675(a); *McNeil v. United States*, 508 U.S. 106, 110-12 (1993); *Burns v. United States*, 764 F.2d 722, 724 (9th Cir. 1985); *Avila v. I.N.S.,* 731 F.2d 616, 618 (9th Cir. 1984).

Here, Plaintiffs' Corrected Petition cannot be said to allege an FTCA claim because (a) Plaintiffs have not named nor served the United States in this case, the only proper defendant in an FTCA case, and (b) Plaintiffs have failed to exhaust their administrative remedies in any event and have not alleged to have exhausted such remedies. Therefore, Plaintiffs' Corrected Petition fails to state a claim under the FTCA.

Since Plaintiffs have failed to satisfy the requirements for alleging a *Bivens* claim against any individual defendants, have failed to allege an official capacity claim against any defendants, and have failed to plead an FTCA claim against the United States, Plaintiffs have failed to plead any cognizable claim or otherwise establish any waiver of sovereign immunity. For these reasons, in addition to Plaintiffs' lack of standing to bring suit in the first place, their action should be dismissed with prejudice.

IV.

PLAINTIFFS HAVE FAILED TO EFFECTUATE PROPER SERVICE ON DEFENDANT REDFIELD

Plaintiffs have not properly served Defendant ROBERT REDFIELD with process in this action under Federal Rule of Civil Procedure 4. Plaintiffs' Affidavit of Process Server reflects that a female was served at an address wherein the former Director of the CDC does not live. (ECF 14-1). Therefore, Defendant REDFIELD has not been properly served under Rule 4 and no responsive pleading is due on his behalf.

V.

CONCLUSION

For the reasons stated herein, Defendants respectfully request the Court dismiss Plaintiffs' unintelligible claim, without leave to amend, since any amendment by these Plaintiffs would be futile.

Dated this 26th day of August, 2022.

Respectfully Submitted,

NATALIE K. WIGHT
United States Attorney
District of Oregon

/s/ Dianne Schweiner
DIANNE SCHWEINER
Assistant United States Attorney
Attorneys for Defendants