Case No. 81513

IN THE SUPREME COURT OF THE STATE OF NEVADA

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SONJIA MACK,

Appellant,

vs.

BRIAN WILLIAMS; JAMES DZURENDA;

ARTHUR EMLING, Jr.; and MYRA LAURIAN;

Respondents.

On Response to Order Accepting Certified Questions from the

U.S. District Court for the District of Nevada

Case No. 2:18-cv-00799-APG-VCF

Honorable Judge Andrew P. Gordon, U.S. District Court Judge

APPELLANT'S REPLY BRIEF

TRAVIS N. BARRICK, Esq.,
Nevada Bar No. 9257
NATHAN E. LAWRENCE, Esq.,
Nevada Bar No. 15060
GALLIAN WELKER & BECKSTROM, L.C.
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Attorneys for Appellant Sonjia Mack

Docket 81513 Document 2021-36659

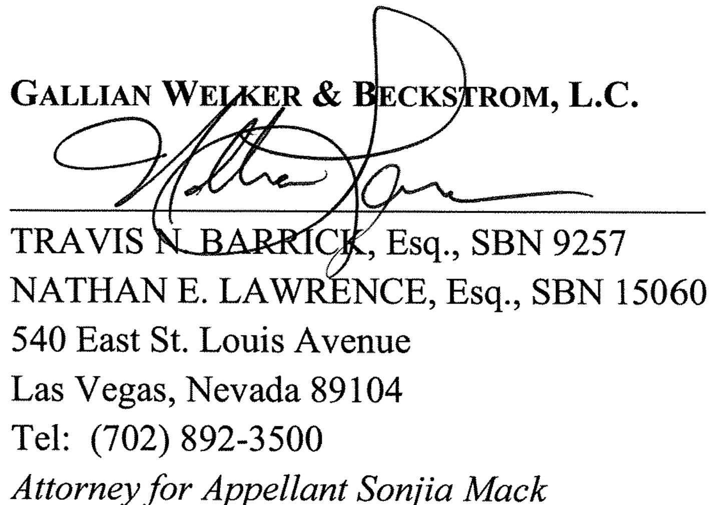
NEVADA RULES OF APPELLATE PROCEDURE
RULE 26.1 ("NRAP 26.1") DISCLOSURE

The undersigned counsel of record certifies the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. The Appellant, SONJIA MACK ("Ms. Mack"), is an individual to whom the corporate ownership disclosures under NRAP 26.1(a) are inapplicable. Ms. Mack is appearing under her proper name and is not using any pseudonym.
2. The undersigned counsel of record has appeared in this matter before the U.S. District Court, and there are no prior proceedings in this matter in the courts of the State of Nevada.

DATED this 22nd day of December 2021.

GALLIAN WELKER & BECKSTROM, L.C.



TRAVIS N. BARRICK, Esq., SBN 9257
NATHAN E. LAWRENCE, Esq., SBN 15060
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Tel: (702) 892-3500
Attorney for Appellant Sonjia Mack

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I. STATEMENT OF THE CASE.

As fully articulated in prior briefs, this matter is before the Court to address certain questions certified to the Court by the U.S. District Court for the District of Nevada, namely:

1. Is there a private right of action under the Nevada Constitution, Article 1, § 8?
2. Is there a private right of action under the Nevada Constitution, Article 1, § 18?
3. If there is a private right of action, what immunities, if any, can a state actor defendant raise as a defense?
4. If there is a private right of action, what remedies are available to a plaintiff for these claims?

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY.

The facts and procedural posture of the case have been thoroughly and adequately stated in prior briefing, and reiteration here is unnecessary. While the State, on behalf of Respondents, urges the Court to disregard Appellant's prior statement of facts due an assertion of procedural error, Appellant maintains that justice is best served by the Court's consideration of all relevant facts, though, of course, the issue before the Court is most narrowly a pure question of law, for which the facts herein are not dispositive.

III. SUMMARY OF ARGUMENT.

Unsurprisingly, the primary question before the Court falls quite precisely and analogously into the analysis first undertaken in *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971), which found, unequivocally, that an implied private cause of action for damages does exist for a violation of the federal constitution by federal employees acting under color of their authority. Almost exactly fifty-one years on from *Bivens*, it is equally unsurprising that a great cloud of caselaw has subsequently developed related thereto, including a substantial number of state level analyses virtually identical to the instant matter, many having arrived in the state counterparts exactly like *Mack*, by way of certification from various U.S. District Courts. Appellant SONJIA MACK ("Appellant" or "Ms. Mack") relied notably on *Bivens* in her Opening Brief, to which Respondents duly answered, seeking to distinguish the *Bivens* arguments (both the original and comparable successes in other states) and preclude adoption of its core holding in Nevada.

Just as the question before the Court is not generally a novel one, neither are Respondents' arguments, drawn seemingly verbatim from the defeated opposition in *Bivens*, citing to the need for enabling statutes, legislative imprimatur, and deference to state budgetary implications, the latter seemingly predicated on the untenable position that it would be too costly for the State to have to compensate the volume of ongoing violations of the state constitution by various state actors. In addition to

not being novel, Respondents arguments are ultimately in error and detrimental to the rights of Nevada citizens. As Respondents reference, there has been minimal federal expansion of *Bivens,* and many other states have also not incorporated *Bivens* at the state level; however, contrary to the impression Respondents wish to create, a great number of states have created *Bivens*-analogous state actions, and while expansion of *Bivens* is not federally embraced, the premise and caselaw has been affirmed in the arena of law enforcement, not reduced to a broadly disfavored recourse like, incidentally, qualified immunity, a strictly judicial creation which Respondents <u>do</u> wish to incorporate.

Baldonado v. Wynn Las Vegas, LLC, 124 Nev. 951 (2008) (as previously addressed and not argued again herein) should not be read so broadly as to limit a cause of action for deprivation of an important constitutional right, seeing as it only ever spoke to causes of action being inferred from statutory schemes. Equally, the failure of any other state courts, whose conclusions clearly possess no binding effect on this Court, to properly protect their own constitutions and constituents should also not be given undue influence with respect to limiting this Court's decision in ruling that the principles of *Bivens* apply in Nevada for the protection of Nevada citizens who are wrongfully deprived of their Nevada constitutional rights by state employees acting under color of their authority.

The limiting factors for *Bivens*, which caselaw is generally denied expansion

where the court finds "alternative remedies," do not hold sway here, where there are no remedies for the Nevada constitutional violations as described. The provisions of Nevada Constitution, Article 1, §§ 8 and 18 are "self-executing," imparting the right of action by their own clear text, without any necessity for legislative action. To deny a state level cause of action and limit aggrieved individuals' recourse for constitutional violations solely to the federal court system and federal claims under 42 U.S.C. § 1983 is an untenable and gross diminution of the Constitution of the State of Nevada and Nevada courts, generally. Accordingly, this court should confirm the existence of private rights of action under the Nevada Constitution, Article 1, §§ 8 and 18.

IV. ARGUMENT.

a. *Bivens*, even in light of recent federal judicial reluctance to expand, is in force and applicable in the current context, and an analogous "*Mack* action" should be established in Nevada.

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 1 Cranch 137, 163 (1803). "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. 678, 684, 66 S. Ct. 773, 777 (1946). In keeping with the sacred principles above,

the *Bivens* court held that "violation of [a constitutional right] by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct." *Bivens*, 403 U.S. at 389 (1971). The Supreme Court additionally found similar implied causes of action for the Fifth Amendment Due Process Clause (*see Davis v. Passman*, 442 U. S. 228 (1979)) and the Eighth Amendment Cruel and Unusual Punishments Clause (*see Carlson v. Green*, 446 U. S. 14 (1980)), and even under certain federal statutes (*see Cannon v. University of Chicago*, 441 U. S. 677 (1979)).

Further expansion of *Bivens* at the federal level has been limited, reflective of possibly misplaced deference by the Supreme Court to Congressional action or the lack thereof, citing to the concept that "[i]t is logical, then, to assume that Congress will be explicit if it intends to create a private cause of action [under a statute, while allowing that] [w]ith respect to the Constitution, however, there is no single, specific congressional action to consider and interpret." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017). Such deference to legislative imprimatur fails to acknowledge that it is "impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." *Johnson v. Transportation Agency, Santa Clara Cty., Cal.*, 480 U.S. 616, 672 (1987).

Even so, with the high court's uncertainty as to which position it prefers to maintain, the *Ziglar* court noted that "it must be understood that [the *Ziglar*] opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose. *Bivens* does vindicate the Constitution by allowing some redress for injuries [, and] [t]he settled law of *Bivens* [and *Davis*] in this common and recurrent sphere of law enforcement [and, by extension, to include departments of correction]... are powerful reasons to retain it in that sphere." *Ziglar*, 137 S. Ct. at 1856-1857 (2017).

Here, there is no confusion as to what the Nevada Constitution directs, with respect to the protections its enumerated sections assure: "No person shall be deprived of life, liberty, or property, without due process of law." Nevada Constitution, Article 1, § 8. Further, "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches shall not be violated." Nevada Constitution, Article 1, § 18. These provisions analogize directly to the Fifth and Fourth Amendments to the U.S. Constitution, respectively, and, as *Bivens* and *Davis* are both still entirely applicable <u>and</u> even necessary with respect to the federal analogies, a similar applicability and necessity should be recognized in the instant matter. A "*Mack* action" is not only an available remedy, it is also a necessary one in this particular arena, providing a singular recourse for violation in the search-and-seizure context of <u>state</u> constitutional rights by law

enforcement, for which no other remedy exists, as detailed below. Paraphrasing *Bivens*, a "violation of [a state constitutional right] by a [state] agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct."

b. Nevada Constitution, Article 1, §§ 8 and 18 are self-executing, for which a cause of action is inherent; further, there are no alternative remedies for a "*Mack* action" which would preclude the acknowledgement of same by this Court.

In allowing that the principle of *Bivens* holds particular value, notably in law enforcement and, by rational analogy, departments of corrections, the Supreme Court chose only to limit its expansion to other constitutional issues where there are "special factors counselling hesitation," which, while undefined, is understood to be "a factor [which] must cause a court to hesitate before answering that question [allowing a damage actions to proceed] in the affirmative." *Id.* at 158. A better guide for this limitation is found in *Wilkie v. Robbins*, 551 U.S. 537 (2007), in which the following two-step Bivens inquiry is proposed: "In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. But even in the absence of an alternative… 'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors

counselling hesitation before authorizing a new kind of federal litigation.'" *Id.* at 550 (2007).

When individual states analyze similar questions to that presently before this Court, much stock is often placed in the "alternative remedies," as cited by Respondents in *Fields v. Mellinger*, 851 S.E.2d 789 (2020), in which the West Virginia Supreme Court of Appeals declined to acknowledge a private right of action in support of its state's constitutional protections against unreasonable searches and seizures. Appellant agrees with Justice Workman, in dissent, that the *Fields* case was wrongly decided, relying, as it did, almost exclusively on the idea that alternate remedies were available to claimant under 42 U.S.C. § 1983, even though 42 U.S.C. § 1983 generally only "creates a remedy for violations of <u>federal</u> rights committed by persons acting under color of state law" with other limitations related to defendants (individually or in official capacity) and scope of remedy. *Zullo v. State*, 205 A.3d 466, 485 (2019) (emphasis added). The court in *Zullo* expanded its reasoning, noting that "[w]hile certain wrongs may find redress under federal law, we recognize the inherent and independent value in the rights and protections enshrined in our own constitution [, and] the federal statutory remedy... generally creates no impediment to judicial recognition of a damages remedy under the state constitution, as the civil rights statute is limited to violations of federal law, and the state constitution may protect broader interests than those under the federal

constitution." *Id.* at 486 (internal citations and quotation marks omitted). Additionally, "adjudication of constitutional torts has played a critical role in establishing specific constitutional limits on governmental power in a way that could not be provided by injunctive relief or common law actions." *Id.* at 488.

The *Zullo* outcome is further bolstered for "self-executing" provisions of a state constitution, where no further legislative action is needed for the constitutional provision to become operative. *Id.* at 484 (search-and-seizure provisions are the paradigmatic self-executing provisions, referencing *Bivens*). *See also Brown v. State*, 674 N.E.2d 1129 (1996) (concluding that state constitutional search-and-seizure clause is manifestly self-executing and that direct cause of action to recover damages may be asserted against state for violation of clause). In contrast to Respondents' argument that legislative direction is required to create a cause of action for Nevada Constitution, Article 1, §§ 8 and 18, "the absence of a legislative directive supports a conclusion that [both] provision[s are] self-executing." *Zullo*, 205 A.4d at 484 (2019). Following this line of argument and rationale, in this and the prior paragraph, roughly half of the states in the union have recognized an implied cause of action for numerous state constitutional violations. *See Fields*, 851 S.E.2d at 805 (2020).

Here, incorporating all elements of the astute analysis in *Zullo*, there is a step before the *Bivens* two-step, to which Respondents and other states seek to

prematurely dance. While a federal *Bivens* action may automatically compel the noted two-step analysis, this Court need not even reach that. The fundamental question must first be addressed: are Nevada Constitution, Article 1, §§ 8 and 18 "self-executing," such that a private right of action will automatically lie? Without unduly belaboring the legal arguments above, the obvious and unequivocal answer to that question is yes. Insofar as the respective provisions unequivocally set forth specific right of the people to be free from unwarranted searches and seizures of their persons, possessions, and property, as well as freedom from deprivation of life, liberty, or property, without due process of law, each provision is manifestly self-executing. Accordingly, no legislative action is necessary for Nevada Constitution, Article 1, §§ 8 and 18 to be operative, and a cause of action lies.

To the extent that an "alternative remedies" analysis is necessary, the *Zullo* analysis should also inform and guide this Court. While the respective provisions of Nevada Constitution, Article 1, §§ 8 and 18 may find certain federal analogs, they are each specific state constitutional provisions which were deemed crucial and necessary to the citizens of the state at the time of its founding. If no particular intent was envisioned for acknowledging these specifically enumerated protections, they could have easily been elided in deference to the existing federal analogs. Like the state of Vermont (where "freedom" finds it way even into the state motto) in *Zullo*, this Court should "recognize the inherent and independent value in the rights and

protections enshrined in our own constitution." An action under 42 U.S.C. § 1983 does <u>not</u> address a violation of Nevada's constitution, and, as such, it is <u>no</u> remedy for a violation of Nevada Constitution, Article 1, §§ 8 and 18. In combination with the limits imposed on actions under 42 U.S.C. § 1983, which may or may not be imposed on a state cause of action, a federal 42 U.S.C. § 1983 action provides no adequate remedy to a recognized state action.

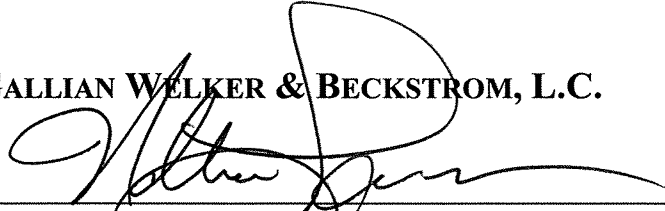
Additionally, a state tort action (*e.g.*, battery) which does not fully contemplate the nature of such a battery being inflicted by a state actor purportedly acting with the authority of the state is also no adequate remedy for a constitutional deprivation. Equally, injunctive or prospective relief is inadequate or even no remedy at all for Ms. Mack or similarly injured persons, since such relief is entirely unable to obviate the harm forced upon her. *See Brown v. State*, 674 N.E.2d 1129 (1996).

V. CONCLUSION.

For the reasons set forth above, it is clear that *Bivens* (and comparable state actions finding a private cause of action) provides the best paradigm and path for the State of Nevada and this Court to follow, particularly with respect to the narrow questions before the Court, in the context of search-and-seizure and due process. Ms. Mack respectfully requests that this Court confirm the existence of private rights

of action under the Nevada Constitution, Article 1, §§ 8 and 18.

DATED this 22nd day of December 2021.



Gallian Welker & Beckstrom, L.C.

TRAVIS N. BARRICK, Esq., SBN 9257
NATHAN E. LAWRENCE, Esq., SBN 15060
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Tel: (702) 892-3500
Attorney for Appellant Sonjia Mack

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the typestyle requirements of NRAP 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 font, Times New Roman type face.

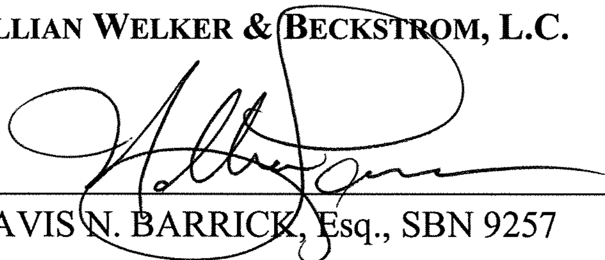
2. I further certify that this brief complies with the page- or type-volume limitations in NRAP 32(a)(7)(A)(i) because, exclusive of those sections excluded under NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points, and contains approximately 3,070 words within 15 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e)(1), which requires that every assertion in the brief regarding matters in the record be supported by reference to the page and volume number, if any, of the Appendix.

4. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 22nd day of December 2021.

GALLIAN WELKER & BECKSTROM, L.C.



TRAVIS N. BARRICK, Esq., SBN 9257
NATHAN E. LAWRENCE, Esq., SBN 15060
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Tel: (702) 892-3500
Attorney for Appellant Sonjia Mack

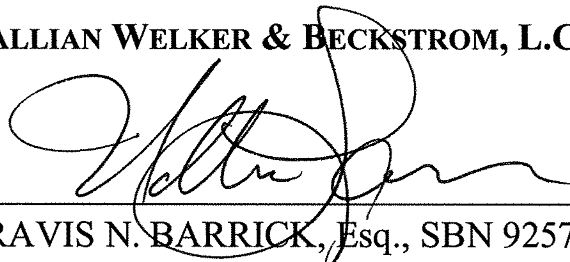
CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 22nd day of December 2021, I served a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** as filed, by way of the Supreme Court's electronic filing system to the following:

AARON D. FORD, Attorney General
Kiel B. Ireland (Bar No. 15368C)
Deputy Attorney General, Office of the Attorney General
555 East Washington Avenue, Suite 3900
Attorney for Respondents

DATED this 22nd day of December 2021.

GALLIAN WELKER & BECKSTROM, L.C.



TRAVIS N. BARRICK, Esq., SBN 9257
NATHAN E. LAWRENCE, Esq., SBN 15060
540 East St. Louis Avenue
Las Vegas, Nevada 89104
Tel: (702) 892-3500
Attorney for Appellant Sonjia Mack