ORAL ARGUMENT IS REQUESTED

15-1174

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BIG CATS OF SERENITY SPRINGS, INC., doing business as Serenity Springs Wildlife Center, NICK SCULAC, JULIE WALKER, and JULES INVESTMENT, INC.,

Plaintiffs-Appellees.

v.

CINDY RHODES and TRACY THOMPSON,

Defendants-Appellants,

and

THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture, and OTHER UNNAMED USDA EMPLOYEES,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(ROBERT E. BLACKBURN, J.)

REPLY BRIEF

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GLOSSARY

Abbreviation	Definition
APA	Administrative Procedure Act
APHIS	Animal and Plant Health Inspection Service
AWA	Animal Welfare Act
USDA	U.S. Department of Agriculture

INTRODUCTION AND SUMMARY OF ARGUMENT

In the Animal Welfare Act (AWA), Congress gave regulated entities a set of administrative and judicial remedies for agency actions taken against them. A party that is aggrieved by an inspection report may seek administrative review and, if dissatisfied, judicial review under the Administrative Procedure Act (APA). The APA permits a party to raise any constitutional objections to the agency action.

This Court and others have held that when a statute provides for judicial review of agency action under the APA, a party who claims that the action violated its constitutional rights may not pursue a Bivens remedy: "The APA is the proper avenue for reviewing an agency's action or decision. If Appellant attempted to hold Defendants liable for alleged constitutional violations committed while reaching a final agency decision, a Bivens action would not be available." Robbins v. Wilkie, 300 F.3d 1208, 1212 (10th Cir. 2002); see also Wilkie v. Robbins, 551 U.S. 537, 553-54 (2007) ("Robbins has an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints" since "final agency action, as in canceling permits, for example, was open to administrative and judicial review"); Western Radio Servs. Co. v. U.S. Forest Serv., 578 F.3d 1116, 1122-23 (9th Cir. 2009), cert. denied, 559 U.S. 1106 (2010) ("the design of the APA raises the inference that Congress expected the Judiciary to stay its Bivens hand") (internal quotation marks omitted); Sinclair v. Hawke, 314 F.3d 934, 940 (8th Cir.

2003) ("When Congress has created a comprehensive regulatory regime, the existence of a right to judicial review under the Administrative Procedure Act is sufficient to preclude a Bivens action."); Miller v. U.S. Dep't of Agric. Farm Servs. Agency, 143 F.3d 1413, 1416-17 (11th Cir. 1998).

The plaintiffs do not dispute this case law; indeed, they never discuss it at all. Their position, at its core, is that the remedies that Congress provided in the AWA are irrelevant to whether a Bivens remedy is available. To them, all that matters is that theirs is a Fourth Amendment case, as in Bivens. At the same time, however, they candidly admit that the availability of a Bivens remedy is not decided on an amendment-by-amendment basis. Their position that alleging a Fourth Amendment violation is enough, without more, to support a Bivens remedy is flatly inconsistent with the last 30 or so years of Supreme Court jurisprudence in this area. When there is an "alternative, existing process for protecting the interest," Wilkie, 551 U.S. at 550, a Bivens action may not be maintained, regardless of the amendment on which the claim is based. Here, there is an "alternative, existing process for protecting the interest" – an action for judicial review under the APA.

If, however, this Court accepts the district court's creation of a Bivens remedy in this context, it should still reverse the order below on the ground that the two federal inspectors are entitled to qualified immunity. The plaintiffs' theory for a Fourth Amendment violation turns on whether it was clearly established by Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), that persons

authorized to conduct an administrative inspection are barred from making a forcible entry unless authorized to do so by statute. But here, the inspectors followed a federal regulation, authorized by federal statute, that required them to seek help from local law enforcement to enter the Big Cats premises for a potential emergency confiscation of two injured tiger cubs who were not being adequately cared for. Relying entirely on Colonnade, the plaintiffs cite no case law that authorization for entry may derive only from a statute, as opposed to a federal regulation specifically authorized by statute. Reasonable officials could have believed that the regulation, 9 C.F.R. 2.129, gave them authority to act as they did. The inspectors are, accordingly, entitled to qualified immunity.

Finally, the plaintiffs attempt to defend the district court's holding that the federal inspectors' conduct in directing the sheriff's deputies to cut the locks at the Big Cats facility was done under color of state law. The plaintiffs characterize this lock-cutting as "joint action" between the federal inspectors and the sheriff's deputies, but the complaint refutes that characterization. It alleges that the lock-cutting was done "[a]t the direction of the [U.S. Department of Agriculture] inspectors." Aplt. App. 55 ¶ 40. The federal inspectors, acting with federal authority and following a process mandated by a federal regulation, did not somehow act under color of state law.

The order of the district court should be reversed.

ARGUMENT

I. A BIVENS ACTION SHOULD NOT BE CREATED IN LIGHT OF THE COMPREHENSIVE REMEDIAL SCHEME OF THE ANIMAL WELFARE ACT, WHICH PROVIDES FOR ADMINISTRATIVE AND JUDICIAL REVIEW OF AGENCY ACTION.

As we explained in our opening brief (pp. 21-23), the Supreme Court has cut back on the availability of the Bivens remedy over the past 35 years. In Wilkie v. Robbins, 551 U.S. 537 (2007), the Court set forth its two-part test for whether a Bivens remedy should be permitted in a particular context: a court must consider, first, whether any alternative, existing process protects the interest asserted, and, second, whether any special factors suggest that the judiciary should hesitate in permitting the remedy. Id. at 550.

We pointed out (pp. 25-28) that this case is not a typical Fourth Amendment case, like those brought against law-enforcement officers who engage in a search or seizure in connection with a possible crime; it is a Fourth Amendment case involving an administrative inspection of an entity regulated under the Animal Welfare Act, which offers a special statutory remedy as part of its elaborate remedial scheme: administrative and judicial review of the agency's actions. This Court and others have held that the administrative and judicial review of agency action, similar to the type of review available under the AWA, forecloses a plaintiff from pursuing a Bivens action.

In light of Congress's choice of that elaborate remedy, the district court erred

in assuming that Bivens applied of its own force, simply because the claim was based on the Fourth Amendment. The Supreme Court's Bivens decisions do not permit that kind of simplistic analysis.

In response, the plaintiffs offer four arguments, none of which has merit.

A. The plaintiffs first argue that a Bivens remedy is available to them simply by virtue of their having pleaded a Fourth Amendment claim, as the district court held. Br. 19-20. But at the same time, they readily admit that the availability of a Bivens remedy is not determined on an amendment-by-amendment basis. Br. 21.[1]

Although it is obvious that a Bivens remedy is generally available to challenge searches and seizures in the criminal investigative context, that is not what the plaintiffs are attempting to do here. In this case, they challenge an administrative inspection, where a specific statute governs the administrative searches and a specific remedial scheme exists under which parties who feel

[1] This Court's suggestion in a footnote in Smith v. United States, 561 F.3d 1090, 1101 n.11 (10th Cir. 2009), cert. denied, 558 U.S. 1148 (2010), that Wilkie supports treating claims on an amendment-by-amendment basis, appears to be dictum, and it is, in any event, inconsistent with Wilkie and other Supreme Court precedent. It is also inconsistent with Bagola v. Kindt, 131 F.3d 632 (7th Cir. 1997), the reasoning of which the Court "adopt[ed]." Smith, 561 F.3d at 1103. In Bagola, the Seventh Circuit held that a decision permitting a Bivens action under the Eighth Amendment "does not settle the question" whether such an action may be brought in the context of an Eighth Amendment case in which there is a statutory remedy. 131 F.3d at 640.

aggrieved by those actions may challenge them administratively and judicially and may raise any constitutional objections they deem appropriate.

That makes this a different context from Bivens itself. See Daul v. Meckus, 897 F. Supp. 606, 610 n.3 (D.D.C. 1995), aff'd, 107 F.3d 922 (D.C. Cir. 1996) ("Furthermore, while the government has not made this argument, Supreme Court precedent suggests that a Bivens action is not available to plaintiff because Congress has provided in the AWA itself for an elaborate process, including multi-level administrative procedures and judicial review, to preserve one's license and protect one's rights under the statute and regulations. Because Congress has provided such a statutory remedy, it may be that plaintiff's Bivens action should be dismissed for that reason alone.") (citations omitted).

B. Second, the plaintiffs argue that a court first has to determine whether the case presents a new context, before even considering the Supreme Court's analysis in Wilkie. Br. 22-25. To the contrary, the two-part Wilkie analysis is itself the framework for determining whether the case presents a new context.

Here, the new context is provided by an alternative remedial scheme; in Bivens itself, there was no alternative remedy. This is the first part of the Wilkie analysis. See also Schweiker v. Chilicky, 487 U.S. 412, 423 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens

remedies."); Bagola v. Kindt, 131 F.3d 632, 640 (7th Cir. 1997) ("Given that we have been admonished repeatedly by the Supreme Court to proceed cautiously in extending Bivens into new contexts, we must consider [the statutory remedy] in light of this refined 'special factors' inquiry, notwithstanding the fact that the Eighth Amendment has already been held by the Supreme Court to support some Bivens claims.") (citation omitted).

For similar reasons, a Fourth Amendment case like this one with an alternative remedial scheme represents a new context. In fact, the Fifth Circuit recently held in a Fourth Amendment arrest case that a Bivens remedy would not be created, precisely because there was an alternative statutory remedial scheme. Garcia de la Paz v. Coy, 786 F.3d 367, 375 (5th Cir. 2015) ("Because the [Immigration and Nationality Act] comprises just such an elaborate remedial scheme, it precludes creation of a Bivens remedy."). While the specific statutory scheme in Garcia de la Paz differs from that of the AWA, the conclusion is the same: An alternative remedy in a Fourth Amendment case presents a new context from that in the original Bivens decision. Id. at 372 ("Instead of an amendment-by-amendment ratification of Bivens actions, courts must examine each new context * * *."). Separation of powers requires that the choice of remedies be left to legislative judgment. Id. at 378 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004)).

The plaintiffs make an argument about context that is utterly baseless – that before the court even thinks about the two-part analysis of Wilkie, it must deter-

mine whether there is a new context, and if there is not, it can safely ignore Wilkie and the rest of the Supreme Court's Bivens jurisprudence. Br. 25. For this remarkable proposition, the plaintiffs cite the Second Circuit's recent decision in Turkmen v. Hasty, 789 F.3d 218, 234 (2d Cir. 2015). This cannot be what Turkmen really means, and if it is, the decision is flatly wrong and should not be followed. The way a court decides whether a new context is presented is to engage in the Wilkie analysis: Is there an alternative remedy or process (part one) or are there special factors counseling hesitation (part two)?

Oddly, the plaintiffs go on to assert, Br. 25, that this case does not involve an alternative remedy at all, because they are seeking the same remedy as in Bivens – i.e., money damages. But when the Supreme Court speaks of an alternative remedy, it is not referring to the remedy sought in the complaint; every action under Bivens seeks money damages. The Court is referring to the alternative remedy provided by a statute enacted by Congress (or in some cases a remedy under state law) that may address the plaintiff's grievance. Here, we are dealing with the AWA, which provides administrative and judicial review of agency actions, including the May 7 inspection report at issue in this case, and permits an affected party to raise constitutional claims. See 5 U.S.C. 706(2)(B).

C. The plaintiffs' third argument is that the statutory remedy under the AWA is inadequate, because it (supposedly) does not allow them to raise their constitutional claim. Br. 26-29. This is simply not correct. First, the plaintiffs did

in fact file an appeal to the Regional Director of the May 7 inspection report, and in their appeal, they expressly argued that the forced entry into their facility was unlawful: "The inspection report should be removed based upon the agents' unlawful actions alone * * *." Aplt. App. 32. Second, had the plaintiffs availed themselves of their right to judicial review, they would have been entitled to raise their constitutional arguments there. 5 U.S.C. 706(2)(B). APA judicial review of an agency action under the AWA forecloses a Bivens action. Robbins v. Wilkie, 300 F.3d 1208, 1212 (10th Cir. 2002) ("If Appellant attempted to hold Defendants liable for alleged constitutional violations committed while reaching a final agency decision, a Bivens action would not be available."); Sinclair v. Hawke, 314 F.3d 934, 940 (8th Cir. 2003) ("When Congress has created a comprehensive regulatory regime, the existence of a right to judicial review under the Administrative Procedure Act is sufficient to preclude a Bivens action."). The plaintiffs do not argue otherwise.

Although the plaintiffs complain they have no "redress" for their constitutional claim, Br. 27, all they mean is that an action for judicial review under the APA will not award them damages, even if they prove their case. But they are not entitled to a Bivens remedy simply because the alternative remedial process does not provide their preferred remedy, money damages. Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 69 (2001) ("So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition

of a new substantive liability.") (emphasis added); Garcia de la Paz, 786 F.3d at 377 ("The absence of monetary damages in the alternative remedial scheme is not ipso facto a basis for a Bivens claim.").

The plaintiffs say that the APA remedy that Congress has provided them is of no use to them, because they are not seeking to appeal an adverse inspection report. Br. 26. But in fact, they have appealed that adverse report, and in their appeal they have raised constitutional concerns about the agency's behavior. For some reason, they did not pursue judicial review of the agency's action, as they are entitled to. In both the administrative process and during judicial review, if the plaintiffs were successful in showing that the inspectors' entry was unlawful, any evidence obtained as a result of that entry could be ignored in determining the plaintiffs' compliance. Cf. Garcia de la Paz, 786 F.3d at 376 (discussing suppression in immigration proceedings). Contrary to the plaintiffs' contention, Br. 27, the alleged constitutional violation does not have to provide a "defense" for the licensee to a charge brought by the agency; it merely has to be capable of being addressed in the remedial process. Wilkie, 551 U.S. at 553 ("Robbins has an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints.").

Dissatisfied with the remedy that Congress gave them, the plaintiffs imagine that in some future case malicious agency employees not only will violate their constitutional rights but will act deviously and decline to file a report, thereby

depriving them of a means to challenge the employees' actions. Br. 28-29. The short response to this speculation is that nothing in the history of conduct between APHIS and the plaintiffs suggests that such behavior – a refusal to act in order to avoid review – might occur. And if it did, or if the plaintiffs thought it did, they could explore an action under the APA to force the agency to take action. See 5 U.S.C. 706(1) (authorizing suit to "compel agency action unlawfully withheld or unreasonably delayed").

D. Finally, the plaintiffs argue that the alternative remedy is inadequate, because it provides no formal administrative appeal process. Br. 29-30. This argument fails, because (1) there is a publicly available explanation of how the process for administrative appeals works, as we explained in our opening brief (pp. 26-27), and (2) the plaintiffs actually availed themselves of this very process. Aplt. App. 26-35. Apparently, the process was sufficiently formal for the plaintiffs to understand it and use it.[2]

[2] The plaintiffs also appear to suggest that their administrative appeal was never decided. Br. 30. That is not the case. Their appeal of the May 7 inspection report was denied on August 7, 2013. (The denial letter is not part of the record in this case, but we can make it available to the Court upon request.) They did not seek further administrative review, and they did not seek judicial review. See Wilkie, 551 U.S. at 544, 545, 546, 551, 552 (Robbins did not avail himself of judicial review of the agency action).

II. THE INSPECTORS ARE ENTITLED TO QUALIFIED IMMUNITY ON THE BIVENS CLAIM.

The federal inspectors are entitled to qualified immunity on the Fourth Amendment Bivens claim, because they relied on a federal regulation that requires them to seek the help of local law enforcement to enter a locked facility when they are authorized to confiscate animals. This confiscation scenario is fully consistent with the factual allegations of the complaint, and the plaintiffs have to invoke matters outside their complaint to argue that it did not happen that way.

Reasonable officials in the position of the defendant inspectors could have believed that an entry based on the regulation did not violate the Fourth Amendment. Nothing in the plaintiffs' brief shows that a contrary conclusion was "beyond debate" and that "every" reasonable official would have known that this conduct was unlawful. Ashcroft v. al-Kidd, 563 U.S. 731, ___, 131 S. Ct. 2074, 2083 (2011).

A. The Inspectors Reasonably Could Have Believed That The Confiscation Regulation Authorized Their Entry Into The Facility With The Assistance Of Local Law Enforcement.

1. As we explained in our opening brief (pp. 40-41), Congress directed the Secretary of Agriculture to issue such regulations "as he deems necessary to permit inspectors to confiscate or destroy in a humane manner any animal found to be suffering as a result of a failure to comply" with the statute and regulations. 7 U.S.C. 2146(a). The Secretary then promulgated a regulation that authorizes an

inspector – if the conditions are met – to "confiscate the animal(s) for care, treatment, or disposal." 9 C.F.R. 2.129(a). If a responsible person at the facility cannot be located, the inspector is required to "contact a local police or other law officer to accompany him to the premises and [to] provide for adequate care when necessary to alleviate the animal's suffering." 9 C.F.R. 2.129(b). Moreover, if "the condition of the animal(s) cannot be corrected by this temporary care, the APHIS official shall confiscate the animals." Id.

The complaint sets forth just such a scenario: On May 6, the inspectors found that Maverick was limping and had a swollen right hind leg and that Baxter was also limping. Aplt. App. 29, 30. They directed that a veterinarian examine the cubs the next morning, "no later than 8:00." Aplt. App. 52 ¶ 27. Early in the morning of May 7, Sculac took the cubs away from the Big Cats facility to a veterinary clinic. Aplt. App. 53-54 ¶¶ 28-29, 32. At about 8:00 a.m., the inspectors arrived at the Big Cats facility, only to find that Sculac was not there, and they were unable to make contact either with him (he was still at the veterinary clinic) or with the employee at the facility, which was locked. Aplt. App. 54 ¶ 35; Aplt. App. 56 ¶ 42. Inspector Thompson therefore called the El Paso County Sheriff's Office at around 8:45 a.m., and two sheriff's deputies arrived at the facility. Aplt. App. 54-55 ¶¶ 36-37.

The phone call to the Sheriff's Office was exactly what was required under 9 C.F.R. 2.129(b) if the inspectors were planning to provide temporary care for the

injured tiger cubs in contemplation of possible confiscation, as the complaint itself suggests. In fact, the complaint alleges that the inspectors told the deputies that they had "'court orders'"[3] to "seize" the two cubs – that is, to confiscate them – and that they were authorized to enter the facility to allow "seizure." Aplt. App. 54 ¶ 37(a) & (c). It was then, according to the complaint, that the sheriff's deputies cut the outer locks and then the inner locks. Aplt. App. 55 ¶¶ 39-40.

2. The plaintiffs make two principal arguments against qualified immunity: first, that Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), "clearly and unmistakably put federal agents on notice that they cannot forcibly enter a locked facility in order to conduct a warrantless, administrative search absent congressional authority permitting forcible entry," Br. 33, and second, that the statute and regulation on which the inspectors relied do not apply, because the inspectors were only there for an inspection. Neither argument is correct.

a. In Colonnade, the Court noted that Congress had chosen to make it an offense to refuse access to a liquor inspector and not to authorize forcible, warrantless entry. 397 U.S. at 77. Here, in contrast, Congress expressly directed the Secretary to issue regulations for the confiscation of "any animal found to be suffering as a result of" an exhibitor's failure to comply with the statute and regulations. 7

[3] As we noted in our opening brief (p. 10 n.3), confiscation is authorized not by court order but rather by notice approved by the Administrator. The sheriff's deputies appear to have misunderstood what the inspectors told them.

U.S.C. 2146(a). The Secretary, in turn, issued a confiscation regulation that requires the inspector to "provide for adequate care when necessary to alleviate the animal's suffering." 9 C.F.R. 2.129(b). Recognizing that the inspector may sometimes be unable to obtain entry (because, for example, a responsible person is not present at the facility), the regulation directs the inspector to "contact a local police or other law officer to accompany him to the premises" to permit him to provide that "adequate care." Id. The regulation addresses an emergency situation in which the health of injured animals is at stake. The obvious function of the law enforcement officer is to help the inspector get inside the facility to attend to the animal; if the inspector cannot get into the facility, it is impossible to provide the required care and impossible to confiscate the animal.

The plaintiffs argue that this legal authority is insufficient. We disagree, but that is not the issue here. Our argument is focused on the second part of the qualified-immunity inquiry, not the first. The issue here is simply whether reasonable inspectors could have believed that they had sufficient legal authority to ask the sheriff's deputies to help them enter the Big Cats facility – whether or not a court might ultimately find that the authority was sufficient. The plaintiffs cite no case law holding that an authorizing federal statute and a federal regulation are insufficient authority under Colonnade; their argument is that Colonnade itself clearly establishes the law. It does not. "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." al-Kidd, 563 U.S. at __, 131

S. Ct. at 2083 (emphasis added). Because there is an open question whether 7 U.S.C. 2146(a) and 9 C.F.R. 2.129(b) are sufficient to authorize an inspector to ask local law enforcement to make a forced entry, Inspectors Rhodes and Thompson are entitled to qualified immunity.[4]

b. The plaintiffs also dispute that this case involved a confiscation at all. They claim that the inspectors did not follow the rules for a confiscation, Br. 48-51, but to make that argument, they have to go well beyond the allegations of their complaint in this action.

They first contend that the complaint repeatedly refers to the May 7 visit as a routine inspection, Br. 49, but it does not. Other inspections were routine, perhaps, but May 7 was different, and most of the paragraphs they cite from the complaint have to do with other inspections. It is true that Maverick and Baxter were not actually seized once the inspectors entered, spoke to Devries, and learned that the cubs were with Sculac at the veterinary clinic, Aplt. App. 56 ¶ 44, but a decision not to seize them obviously assumes that seizing them was earlier contemplated. Indeed, the complaint itself alleges that the inspectors intended to seize the cubs

[4] The Animal Welfare Inspection Guide cited by the plaintiffs does not put inspectors "on 'notice'" that forcible entry for a confiscation is unlawful. Br. 33, 41. The Guide addresses ordinary inspections, see, e.g., Aple. Supp. App. 13 ("When conducting an inspection * * *."), and it is undisputed that forcible entry is not permitted for such inspections. The issue here is whether reasonable officials could believe a forcible entry is authorized for a confiscation in light of the statute and regulation.

but that they lied about having a court order to do so. Aplt. App. 54-55 ¶ 37(a) & (c).

For this reason, the plaintiffs' contention that the inspectors violated the statutory safeguards that substitute for a search warrant, Br. 36-42, is misdirected. Their position erroneously assumes that the inspectors' entry was based on the authority for an ordinary inspection. They cite two safeguards that are "particularly relevant" – first, the Animal Welfare Guide's rule that in ordinary inspections an inspector must have prior approval from the facility to enter locked gates, Br. 38 & n.5, and second, the requirement that a responsible adult must be present to accompany an inspector on an ordinary inspection. Br. 39 (citing 9 C.F.R. 2.126(b)). Neither of these "safeguards" applies to a confiscation under 9 C.F.R. 2.129, and as the complaint indicates, the inspectors at some point during the morning of May 7 decided they would have to use confiscation procedures and then called in the sheriff's deputies.

The plaintiffs also argue that reliance on the AWA and the regulation does not make the entry "per se" reasonable. Br. 49. That is not our argument. At step two of qualified immunity, the question is whether reasonable officers could have believed the conduct was lawful, and, as the plaintiffs themselves concede, "the existence of a statute or ordinance authorizing particular conduct is a factor which militates in favor of the conclusion that a reasonable official would find that conduct constitutional." Id. (citation and internal quotation marks omitted).

Although their complaint alleges that the inspectors declared their plan was to seize the cubs, the plaintiffs go far outside the complaint to argue that the inspectors failed to follow the rules for confiscations. Br. 50-51. There is no factual basis in the complaint to support that argument.

B. The Conduct Of The Inspectors Consistent With The Statutory Scheme Is Not Subject To A Separate Fourth Amendment Challenge.

When the plaintiffs move on to argue that administrative searches may be challenged "as applied," Br. 44-48, they simply talk past us. Our argument, as we expressed it in our opening brief is (1) that the plaintiffs have conceded that the statutory scheme under the AWA is constitutional under New York v. Burger, 482 U.S. 691 (1987), and (2) that "[r]easonable inspectors in the position of Rhodes and Thompson could have believed that, when the overall statutory inspection scheme is consistent with the Constitution, their own actions in conformance with that statutory scheme are necessarily consistent with the Constitution" (p. 36). We discussed the decision in LeSueur-Richmond Slate Corp. v. Fehrer, 666 F.3d 261 (4th Cir. 2012), that the plaintiffs relied on below but have abandoned as authority on appeal. We pointed out that the Fourth Circuit recognized that "the [Supreme] Court's jurisprudence on warrantless administrative searches has never inquired into conduct," and that, under Burger, "if an agent is acting pursuant to a statute and the statute is constitutional, the agent's conduct necessarily is constitutional as well." Id. at 268 n.3.

That is exactly the situation we have in this case. The factual allegations of the complaint indicate actions by the inspectors that are fully consistent with the statutory scheme.

While there are legal conclusions in the complaint about the legality of the inspectors' actions, those conclusions are not credited on a motion to dismiss. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Khalik v. United Air Lines, 671 F.3d 1188, 1190 (10th Cir. 2012). The plaintiffs' confusion between ordinary inspections and potential confiscation does not alter their factual allegations. Despite having amended their complaint twice, the plaintiffs have failed to allege facts supporting a claim that the inspectors violated the requirements for entry under the confiscation regulation, 9 C.F.R. 2.129.

III. THE DISTRICT COURT ERRED IN ALLOWING THE SECTION 1983 CLAIM TO PROCEED.

As we showed in our opening brief (pp. 42-47), the complaint fails to state a claim for relief under section 1983 against federal officials acting under color of federal law.

The plaintiffs agree with us on two important points: First, they agree that in analyzing whether there was state action, federal officials should not be treated the same as private individuals. Br. 55. The idea that they should be treated the same is, as we explained, the central flaw of Kletschka v. Driver, 411 F.2d 436 (2d Cir. 1969), the decision on which all cases finding state action by federal officials are

ultimately based. The plaintiffs, however, do not respond to our demonstration that Kletschka was wrongly decided. Second, the plaintiffs agree with us that the Supreme Court has never accepted the idea that federal officials can engage in action under color of state law. Br. 55. Nor, we might add, has this Court.

The plaintiffs' disagreement with us is predicated on the notion that when the federal inspectors asked the local sheriff's deputies to cut the locks at Big Cats, the inspectors were somehow acting under color of state law, and not federal law. Br. 54. The plaintiffs argue that the federal inspectors were acting jointly with local law enforcement, but that is not what the complaint alleges at all. The complaint alleges that the sheriff's deputies acted "[a]t the direction of the USDA inspectors." Aplt. App. 55 ¶ 40. See Aplt. App. 55 ¶ 39 ("Relying upon the USDA's representations, the deputies cut the chains on the external gate * * *."). Thus, the federal inspectors were in charge of the entire operation, not acting jointly with the sheriff's deputies. They called in the sheriff's deputies, and they asked them to cut the locks, pursuant to a federal regulation (ignored by the plaintiffs) that required the inspectors to seek help from local law enforcement. 9 C.F.R. 2.129(b). If anything, it would be far more accurate to say that the sheriff's deputies were acting under color of federal law than that the federal inspectors were acting under color of state law. (The plaintiffs, incidentally, have not sued the deputies, who supposedly were acting jointly with the federal inspectors.)

The theory that the federal inspectors acted under color of state law is

entirely inconsistent with the plaintiffs' Bivens claim, which is based on the idea that the inspectors were acting under color of federal law. The function of the color-of-state-law theory is simply to bootstrap the plaintiffs into a claim for attorney's fees, which cannot be awarded in Bivens actions. See Kreines v. United States, 33 F.3d 1105 (9th Cir. 1994), cert. denied, 513 U.S. 1148 (1995).

The inspectors are entitled to qualified immunity on the section 1983 claim.

CONCLUSION

For the foregoing reasons and those in the opening brief, the district court's order should be reversed. The case should be remanded with instructions to dismiss the Bivens claims and the section 1983 claim and to proceed further on the remaining declaratory claims.

Respectfully submitted,

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OCTOBER 2015

CERTIFICATE OF COMPLIANCE

I certify that this brief is proportionately spaced, using Times New Roman, 14 point type. Based on a word count under Microsoft Word 2010, this brief contains 5,319 words, including the footnotes, but excluding the tables, statement of related appeals, certificates, and addenda.

/s/ Edward Himmelfarb

_____

Edward Himmelfarb
Attorney for the Appellants

CERTIFICATE OF DIGITAL SUBMISSION

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/s/ Edward Himmelfarb

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2015, I served the foregoing Reply Brief on the following by filing the brief through the ECF system, with which counsel are registered:

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I also certify that I filed the brief by causing seven copies to be sent by Federal Express, for overnight delivery, to the Clerk of the United States Court of Appeals for the Tenth Circuit.

/s/ Edward Himmelfarb

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