No. 24-____

IN THE

Supreme Court of the United States

GABINO RAMOS HERNANDEZ,

Petitioner,

v.

PHILLIP CAUSEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 4, 2025

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QUESTION PRESENTED FOR REVIEW

1. Is the rule expressed in *Lugar v Edmondson Oil Co.,* 457 U.S. 922, 102 S. Ct.2744, 73 L. Ed. 2d 482 (1982), that a challenged activity is deemed state action when it results from "willful participation with the State or its agents", still controlling law, or is the rule now, as determined by the Fifth Circuit, that "*willful participation alone is insufficient*", that a plaintiff must plead "facts showing *an agreement* between the state actor and the private actor *to engage in a conspiracy* to deprive the plaintiff of a constitutional right, ***and*** that the private actor was a willing participant in joint activity with the state or its agents"?

2. In an action under 42 U.S.C. 1983, is the determination of whether an individual's acts are fairly attributable to the State different for federal employees simply by virtue of their employment, or does the source of authority for the individual's act control rather than the identity of the individual's employer?

3. In determining when the acts of a federal employee are fairly attributable to the State, does the source of authority for the acts of a federal employee emanate from "a person for whom the State is responsible" if, *and only if*, there is an agreement between the federal employee and State official to conspire to deprive an individual of constitutional rights?

4. Are courts at liberty to *judicially legislate* some form of policy-based presumption for federal officials in an action under 42 U.S.C. §1983, not available for any other non-state actor, that to be deemed acting under the color of state law there must be an agreement to conspire with the state officials to deprive an

individual of constitutional rights in addition to joint participation with the state officials?

5. If a federal officer willingly participates in a local law enforcement activity in a search-and-seizure context, but is deemed to be acting under federal law, does *Bivens* remain a continued force and fixed principle of law in the sphere of law enforcement as admonished in *Ziglar v. Abbasi*, 582 U.S. 120, 134, 137 S. Ct. 1843, 1856-1857, 198 L. Ed. 2d 290, 308, (2017)?

PARTIES TO AND LIST OF THE PROCEEDINGS

The parties to the proceedings are as follows:

Gabino Ramos Hernandez, Plaintiff/Petitioner.

Phillip Causey, Defendant/Respondent.

Gabino Ramos Hernandez v Phillip Causey, No. 2:17-cv-123, Southern District of Mississippi. Judgment entered on February 14, 2024.

Gabino Ramos Hernandez v Phillip Causey, No. 24-60800, Fifth Circuit Court of Appeals. Judgment entered on December 23, 2024.

Gabino Ramos Hernandez v Phillip Causey, No. 24 -60800, Fifth Circuit Court of Appeals. Judgment denying Rehearing and Rehearing en banc entered on January 28, 2025.

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PETITION FOR A WRIT OF CERTIORARI

Gabino Ramos Hernandez respectfully petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Fifth Circuit.

CITATIONS OF OPINIONS BELOW

Opinion of the United States District Court for the Southern District of Mississippi, reported at 2024 WL 5200178, 2024 U.S. LEXIS 232676. Judgment issued on February 14, 2024.

Opinion of the Fifth Circuit Court of Appeals, Case No. 24-60080, reported at 135 F.4th 234 (2024). Judgment issued on December 23, 2024.

Fifth Circuit Court of Appeals, Denial of Petition for Rehearing and Rehearing reported at 2025 U.S. App. LEXIS 1962. Judgment issued on January 28, 2025

JURISDICTION

The Fifth Circuit Court of Appeals denied Plaintiff's Petition for Rehearing En Banc on January 28, 2025. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 2679(b) provides in pertinent part:

(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title [28 USCS §§ 1346(b) and 2672] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

28 U.S.C. §2680(h) provides:

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title [28 USCS § 1346(b)] shall apply to any claim arising, on or after the date of the enactment of this proviso [enacted March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

8 C.F.R. 287.8 provides in pertinent part:

The following standards for enforcement activities contained in this section must be adhered to by every immigration officer involved in enforcement activities. Any violation of this section shall be reported to the

Office of the Inspector General or such other entity as may be provided for in 8 CFR 287.10.

. . .

(b) Interrogation and detention not amounting to arrest.

(1) Interrogation is questioning designed to elicit specific information. An immigration officer, like any other person, has the right to ask questions of anyone as long as the immigration officer does not restrain the freedom of an individual, not under arrest, to walk away.

(2) If the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning.

(3) Information obtained from this questioning may provide the basis for a subsequent arrest, which must be effected only by a designated immigration officer, as listed in 8 CFR 287.5(c). The conduct of arrests is specified in paragraph (c) of this section.

(c) Conduct of arrests —

(1) Authority. Only designated immigration officers are authorized to make an arrest. The list of designated immigration officers may vary depending on the type of arrest as listed in § 287.5(c)(1) through (c)(5).

(2) General procedures.

(i) An arrest shall be made only when the designated immigration officer has reason to believe that the person to be arrested has committed an offense against the United States or is an alien illegally in the United States.

Federal Employees Liability Reform and Tort Compensation Act of 1988, Public Law 100-694—NOV. 18, 1988, 102 STAT. 4563, provides in pertinent part:

An Act

To amend title 28, United States Code, to provide for an exclusive remedy against the United States for suits based upon certain negligent or wrongful acts or omissions of United States employees committed within the scope of their employment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Employees Liability Reform and Tort Compensation Act of 1988".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS. — The Congress finds and declares the following:

(1) For more than 40 years the Federal Tort Claims Act has been the legal mechanism for compensating persons injured by

negligent or wrongful acts of Federal employees committed within the scope of their employment.

(2) The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment.

(3) Because Federal employees for many years have been protected from personal common law tort liability by a broad based immunity, the Federal Tort Claims Act has served as the sole means for compensating persons injured by the tortious conduct of Federal employees.

(4) Recent judicial decisions, and particularly the decision of the United States Supreme Court in Westfall v. Erwin, have seriously eroded the common law tort immunity previously available to Federal employees.

(5) This erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.

(6) The prospect of such liability will seriously undermine the morale and well-being of Federal employees, impede the ability of agencies to carry out their mis-

sions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts.

(7) In its opinion in Westfall v. Erwin, the Supreme Court indicated that the Congress is in the best position to determine the extent to which Federal employees should be personally liable for common law torts, and that legislative consideration of this matter would be useful.

(b) PURPOSE. — It is the purpose of this Act to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States.

. . .

SEC. 5. EXCLUSIVENESS OF REMEDY.

Section 2679(b) of title 28, United States Code, is amended to read as follows:

"(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any

> other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.
>
> "(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—
>
> "(A) which is brought for a violation of the Constitution of the United States, or
>
> "(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.".

STATEMENT OF THE CASE

Plaintiff's Petition is principally directed to Plaintiff's claims under 42 U.S.C. §1983, where the Fifth Circuit held the Defendant, by virtue of his status as a federal officer, was not acting under the color of state law when he shot Plaintiff, with which Plaintiff disagrees. Alternatively, should Defendant be deemed to have been acting under the color of federal law, Plaintiff submits that this matter arose in the sphere of law enforcement in the context of search-and-seizure, in which *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971) arose and which remains a controlling principle of law. *Ziglar v. Abbasi*, 582 U.S. 120, 134, 137 S. Ct. 1843, 1856-1857, 198 L. Ed. 2d 290, 308 (2017).

A. Proceedings and Dispositions Below.

Plaintiff's claims against Phillip Causey were under 42 U.S.C. §1983, or alternatively under *Bivens, supra*, *Bivens* being the federal analog to claims under §1983. *Ashcroft v. Iqbal*, 556 U.S. 662, 675, 129 S. Ct. 1937, 1948, 173 L. ED. 868, 882 (2009). Accordingly, federal question jurisdiction existed in the district court.

Plaintiff alleged that Causey was acting under the color of state law by working jointly with local police officers who enlisted his assistance to pursue and seize Plaintiff in a purely local matter, and that while acting under the color of state law, Defendant unreasonably used deadly force when he shot Plaintiff. Alternatively, based on the same operative facts, Plaintiff asserted a *Bivens* claim for Defendant's unreasonable use of deadly force.

On October 19, 2020, Defendant file a Motion for Summary Judgment, addressing only Plaintiff's *Bivens* claim, which was denied by the District Court on May 4, 2021. On June 18, 2021, Defendant, Causey filed a Motion to Reconsider the Court's ruling on his Motion for Summary Judgment. On September 29, 2022, the District Court dismissed with prejudice Plaintiff's *Bivens* claim against Causey.

Defendant moved to Dismiss All Remaining Claims against Defendant on November 2, 2022, which were Plaintiff's §1983 claim and a claim under state law. On July 13, 2023, the District Court granted in part and denied in part Defendant's motion and allowed Plaintiff to file a Motion to Amend his Complaint to further articulate Plaintiff's claim that Causey acted under the color of state law. Plaintiff filed his Motion for Leave to Amend with a proposed Fourth Supplemental and Amended Complaint on July 24, 2023.

On February 14, 2024, the District Court denied Plaintiff's Motion for Leave to Amend, dismissing Plaintiff's §1983 claims against Defendant with prejudice, finding that the amendment was futile because federal officers were different than "private actors", and that to establish liability against a federal officer under §1983 one must allege, in addition to joint participation with state officials, a prior agreement with state officials to conspire to deprive Plaintiff of constitutional rights.

Plaintiff timely appealed. On December 23, 2024, the panel majority agreed with the lower Court, with one judge dissenting, that a federal officer was different than a "private actor", that a cause of action under §1983 against either a private actor or a federal officer exists only if the pleadings established, in addition to joint participation with state officials, an agreement between the state actor and the non-state actor "to engage in a conspiracy to deprive the plaintiff of a constitutional right", and that the conspiracy or agreement had to have been to commit the particular act by the private actor that violated plaintiff's rights. In this case the agreement between state officials and defendant had to have been to shoot the Plaintiff.

On December 30, 2024, Plaintiff filed a Petition for Rehearing and Rehearing En Banc, which was denied on January 28, 2025.

B. Statement of Facts.

***Bivens* Cause of Action.**

The evidence submitted on the motion to dismiss Plaintiff's *Biven*'s claim established that local police officer, Jake Driskel, initially stopped Jose Mendoza, Plaintiff's brother, for a traffic violation. Driskel pulled Mendoza over in an alley behind where

Mendoza and Hernandez lived. When Mendoza exited his car, Driskel suspected he was driving under the influence. Driskel asked how much he had to drink, to which Mendoza replied, "Too much".

Driskel then frisked and briefly spoke with Mendoza, in Spanish and English, obtaining Mendoza's car keys and telling him in Spanish to sit against the car, which Mendoza did. Without any further interaction with or questioning of Mendoza, Driskel called Michael McGhee, an Immigration and Customs Enforcement (ICE) deportation officer. Immediately before he called, Driskel reported "Code 4" to his dispatch, indicating that no assistance was needed. Driskel began the conversation with McGhee with a statement of his location, and without pausing, further described his location in detail, naming the streets he was between, after which he added "if y'all could assist me – with some Spanish". Immediately after hanging up with McGhee, Driskel called Rodney Sharff, another ICE agent, and made the same request for assistance with Spanish and again provided detailed instructions to his location.

While Driskel was making these initial calls, Plaintiff came into the alleyway and approached Driskel. He asked Driskel what the problem was, to which Driskel replied, "He's [Mendoza] drunk." Driskel and Plaintiff conversed for a short time, until Driskel told to him to stand to the side and that he had someone coming who could speak Spanish. Hernandez was never told by Driskel not to leave the area, was not asked for driver's license or identification, or told that he was to be cited for anything.

Sometime after the exchange between Plaintiff and Driskel but before McGhee arrived, Hernandez left the alleyway and went under his front carport.

Hernandez, saw two ICE agents drive by and started running towards his uncle's house, but began walking when he reached the intersection of 11th Street, about a hundred feet from his house. Another local officer, Wade Robertson asked Driskel if he wanted him "to go get him", to which Driskel affirmatively replied. When Hernandez reached the intersection of 11th Street, he turned the corner and walked toward two individuals. He felt these were likely ICE agents and was trying to turn himself in. These two were Defendant, Causey, and ICE agent, Kyle Le.

There was no reason to pursue Hernandez or question him. From the time Hernandez first tried to speak with Driskel about his brother until he was shot, neither he nor Driskel said or did anything to suggest Plaintiff was suspected of any criminal activity, had violated traffic laws, or anything to suggest he was a danger to anyone. Causey admitted that he had not been told anything to suggest Plaintiff had committed a crime or was armed or dangerous.

Le and Causey walked up 11th Street, with their weapons drawn, toward the Plaintiff, who was walking toward them. Robertson, following Hernandez, turned the corner but jumped out of the line of fire because he was directly behind Hernandez, on whom Causey and Le had their weapons aimed and ready to fire. At a distance of about ten to fifteen feet, Causey shot Hernandez. At the time he was shot, Plaintiff's arms were raised. Medical records establish that the bullet struck Hernandez on the palm side of his right forearm, consistent with Hernandez's testimony that his hands were raised when he was shot. In a videotaped interview, Driskel volunteered that Robertson later said he saw Hernandez with his hands raised. Le testified that when he first saw Hernandez "down the

hill" he did not think anything was in his hands, and that when Hernandez got close and was under a streetlight, he could clearly see that Hernandez had nothing in his hands.

Earlier that day the same thing had occurred when Driskel asked for assistance with another Hispanic male he stopped, and the same team of ICE agents, including Causey, responded. Driskel testified that ICE took custody of that Hispanic male, which Le also recalled. McGehee recalled the incident but not what happened with the Hispanic male.

42 U.S.C. §1983 Cause of Action.

Relevant to Plaintiff's §1983 cause of action, Plaintiff alleged in both his First Amended Complaint and his proposed Fourth Amended Complaint that Defendant was a deportation officer with ICE who responded to a request from officer Driskel for translation assistance with a traffic stop; that when Causey arrived on the scene he was enlisted to aid in the pursuit of Plaintiff, that Driskel sent another local police officer, Roberson, after Plaintiff and directed Causey to Plaintiff by shinning his flashlight on him. Plaintiff alleged that Causey joined in and actively participated with both local officers to pursue and seize Plaintiff in this purely local matter. Plaintiff alleged that while jointly participating with local police in the pursuit of Hernandez, he used excessive force by shooting Plaintiff when his hands were raised in surrender.

The Proposed Fourth Amended Complaint alleged many additional facts of the active participation with local police in the pursuit and seizure of Hernandez, essentially tracking the evidence submitted on the summary judgment hearing of Plaintiff's *Bivens* claim. This included allegations of Causey being a willing

participant in this state action to pursue and seize Hernandez, "tacitly coming to an understanding and a meeting of the minds with Officers Robertson and Driskell to assist and work with them in pursuing, locating, and seizing Hernandez for the benefit of local police", that Officer Driskel considered the ICE agents "an additional tool in is toolbox", they would provide him "safety in numbers", that upon arriving at the scene the five ICE agents all began working with Driskel and Robertson "as one cohesive unit" to pursue and stop Hernandez, with two other ICE agents first stopping another individual on the street, with which Robertson turned to assist until Driskel shouted they had the wrong person, that these two ICE agents handcuffed that individual so as to neutralize him during the pursuit of Hernandez, which continued, that Causey and Le approached Hernandez with guns drawn while Officer Robinson came up from the rear, ultimately seizing Hernandez when Causey shot him. See ¶¶ IIII, IV, V, and XXIII Proposed Amended Complaint. (*Pet. App. E pp. 74a-76a, 87a*).

REASONS FOR GRANTING PETITION

I. §1983 CAUSE OF ACTION.

The issue before the appellate court was whether the acts of defendant, a federal officer, who participated in a local police matter at the request of a local policeman, were fairly attributable to the State under 42 U.S.C. 1983. Implicit in the Fifth Circuit's decision was that federal employees are "federal actors", not "private actors", and are treated differently than "private actors". However, in reaching that decision the Fifth Circuit fashioned a rule for "private actors" that conflicts with decisions of this Court, although it seems to have ascribed a similar if not identical test

for federal officials. Plaintiff submits the issue that first needs to be addressed is the proper rule for when acts of "private actors" are fairly attributable to the State. The next question, then, is whether that rule is different for federal employees.

A. Fifth Circuit Decision Conflicts with Decisions of This Court.

In determining whether the acts of defendant, who actively participated in a local matter with city police officers, were fairly attributable to the State, the Fifth Circuit departed significantly from the holdings of this Court for a "private actor", most notably that in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2nd 482 (1982), which did not involve a conspiracy. The Fifth Circuit fashioned a "joint action test" in which "*willful participation alone is insufficient*", additionally requiring an "*an agreement or meeting of the minds between the state actor and the private actor to engage in a conspiracy to deprive the plaintiff of constitutional rights*".

> Even if we were to apply Hernandez's proposed "joint action test," which is applicable to private actors not federal actors, to determine ICE Agent Causey's liability, willful participation alone is insufficient. We have held that, to satisfy the joint action test for a private actor, a plaintiff must plead "facts showing an agreement or meeting of the minds between the state actor and the private actor to engage in a conspiracy to deprive the plaintiff of a constitutional right, and that the private actor was a willing participant in joint activity with the state or its agents."

(*Pet. App. A p.17a*).

> Federal officers who are called in to assist a state officer can be liable under §1983 when there is *evidence of a conspiracy to deprive* and the constitutional deprivation "ha[s] its source in state authority." *Lindke*, 601 U.S. at 198 (quoting *Lugar*, 457 U.S. at 939). But because Causey *did not act under color of state law*, and because Hernandez has alleged *neither details of a conspiracy* between Causey and the state officials nor any agreement with them *to use excessive force*, much less any state authority directive to do so, the district court properly dismissed Hernandez's §1983 claims.

(*Pet. App. A p.20a*, emphasis added).

The Fifth Circuit's "joint action test" is directed to the rule expressed in *Adickes S. H, Kress & Co*., 398 U.S. 144, 152, 90 S. Ct. 1598, 1605-1606, 26, L. Ed. 2 142, 151 (1970), reiterated by this Court in *Lugar, supra*, that "willful participant in joint activity with the State or its agents," is sufficient to render the individual a state actor.

> As is clear from the discussion in Part II, we have consistently held that *a private party's joint participation with state officials* in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the Fourteenth Amendment. The rule in these cases is the same as that articulated in *Adickes v. S. H. Kress & Co*., supra, at 152, in the context of an equal protection deprivation:
>
> > "'Private persons, *jointly engaged with state officials* in the prohibited action,

> *are acting* 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. *It is enough that he is a willful participant in joint activity with the State or its agents*.'"

Lugar, 457 U.S. at 941, emphasis added.

See also, *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 296, 121 S. Ct. 924, 930, 148 L. Ed. 2d 807, 817 (2001), citing *Lugar*, 457 U.S., at 941, ("challenged activity may be state action when it results from . . . 'willful participation with the state or its agent'"); *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809, 139 S. Ct. 1921, 1928, 204 L. Ed. 2d 405, 412 (2019), citing *Lugar*, 587 U.S. at 941, (private entity can qualify as a state actor, "for example . . . when the government acts jointly with the private entity").

Plaintiff asserted that under the rule expressed in *Lugar*, that Causey's joint participation with local police officers in the pursuit and seizure of Plaintiff, was sufficient to characterize Causey as a state actor. The seizure of Hernandez and the manner in which he was seized were the disputed acts here. As such, Plaintiff claimed that Causey was acting under the color of state law when he deprived Plaintiff of rights guaranteed by the Constitution, thus establishing a cause of action under §1983.

However, the Fifth Circuit fashioned a different "joint action test" for "private actors", notwithstanding the decisions of this Court. Under the Fifth Circuit's holding it is *not enough* that a private actor is a willful participant in joint activity with the State or its agents. "*Willful participation alone is insufficient*".

Individuals who jointly engage with state officials in a state action, *are not acting* "under color" of law for purposes of the statute, under the Fifth Circuit's decision here, unless there is some agreement with the state officers to "*engage in a conspiracy to deprive the plaintiff of a constitutional right*". (*Pet. App. A p.17a*). It bears emphasizing the joint participation rule expressed in *Lugar*, did not include, rely on, or require a conspiracy. Indeed, *Lugar*, did not involve any conspiracy whatsoever, yet defendant was held to have acted under the color of state law.

The rule articulated by this Court in *Lugar* and its progeny, as well as in *United States v. Price*, 383 U.S. 787, 794, 86 S. Ct. 1152, 1157, 16 L. Ed. 2d 267, 272, *Adickes*, 398 U.S. at 152, and *Dennis v. Sparks*, 449 U.S. 24, 27-28 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980) ***is now supplanted*** by the Fifth Circuit's decision in every district court in Texas, Louisiana, and Mississippi, which are bound to follow Fifth Circuit precedence.[1] In any §1983 action filed in the Fifth Circuit the decision essentially overturns *Lugar sub silentio*. It will also likely be considered persuasive guidance in every §1983 action throughout the country against private individuals and federal employees alike.

For the acts of a "private actor" to be attributable to the State, Fifth Circuit precedence[2] now requires all of

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[1] See *Bonvillian Marine Serv. v. Pellegrin (In re Bonvillian Marine Serv.)*, 19 F.4th 787, 790 (5th Cir. 2021), ("The district court there *correctly found itself bound* by the rule we set forth in *Eckstein* in *RLB Contracting.*", emphasis added.)

[2] The Fifth Circuit case cited by the majority in reaching its decision was an unpublished decision, which under Fifth Circuit Local Rule 47, except under the doctrine of res judicata, collateral estoppel or law of the case, is not precedent. The decision here,

the following: an agreement with a state official *to conspire to deprive* an individual of federal rights, *evidence* or *details* of that agreement or conspiracy, the conspiracy must be to achieve the particular deprivation of rights actually committed by defendant – here the *excessive use of force*, the agreement must be with the defendant who deprived the plaintiff of his rights – irrespective of what he knew or did, *and joint participation* with a state official.

The Fifth Circuit essentially disregarded *Lugar*'s discussion of determining whether an individual's actions are fairly attributed to the State and fashioned a new multi-layered requirement that bears no semblance to the rule expressed by this Court in its various decisions on this issue. The first of the two-part approach in *Lugar* addressed the source of the party's authority to act, "First the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State *or by a person for whom the State is responsible*." *Lugar*, 457 U.S. at 922, emphasis added. The absence of conspiracy with a "person *for whom the State is responsible*" does not prevent that person, for whom the State is responsible, from delegating the authority to act. Herein, Driskel was a person for whom the State was responsible and, as shown below, was the only source of Defendant's authority to pursuit and seize Hernandez, satisfying the first part of *Lugar*'s two-part approach.

The second of this two-part approach is that "the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may

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though, is published, and, as such, is precedence.

be because he is a state official, or *because he has acted together with or has obtained significant aid from state officials*, or because his conduct is otherwise chargeable to the State." *Lugar*, 457 U.S. at 922, emphasis added. Again, there is no qualifier that in addition to acting together with state officials, that there must also be a conspiracy with those state officials in order to be deemed a state actor.

Further departing from *Lugar*, the Fifth Circuit concluded that Hernandez failed to allege the details of a conspiracy or agreement between Causey and the state officials to use excessive force, which herein was to shoot Plaintiff.

As the district court correctly observed:

> [N]owhere in his proposed fourth amended complaint does Hernandez allege any *facts* that Causey came to an agreement or meeting of the minds with Laurel police officers to seize Hernandez — much less to shoot him.

(*Pet. App. A p.19a*).

The Fifth Circuit requires, then, an agreement or conspiracy between the state official and the individual who committed the deprivation of rights to commit the act that deprived plaintiff of constitutional rights. This essentially mandates a conspiracy or agreement with the defendant to commit the particular constitutional violation before the actual joint activity takes place. Such a requirement effectively eviscerates any §1983 action for the use of excessive or deadly force against a non-state actor, such as by security guards or other private individuals assisting police, by requiring an agreement or conspiracy with police to shoot someone before the joint activity began. Even if such a conspiracy ever occurred, which is

unlikely, it would be virtually impossible to plead *details* to support such an allegation. Establishing details of a prior conspiracy or agreement with state officials to violate someone's rights, much less a prior agreement or conspiracy to shoot someone, is simply not possible absent an admission by a witness or participant to the conspiracy.

Additionally, requiring that the agreement must be with the individual who actually committed the act creates a dichotomy when, as here, several individuals actively participate in a joint activity with state officials. In a situation where two or more individuals act jointly with a state official as a group, but only one spoke directly with the state official, identical acts by the participants would have completely opposite results depending on who spoke with the state official, notwithstanding that the reason for and the source of the authority to participate in the activity was the same state official. Joint participation with state officials by several individuals as a group does not require an agreement between each of them and the state official to be deemed acting under the color of state law. It is the knowing and willful participation with state officials in a state matter that renders the individual a state actor, not having an agreement to conspire with the state official.

This Court instructed in *Adickes, supra*, *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155-155, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978) and *Lugar*, 457 U.S. at 930, that that there are two separate and distinct areas of inquiries in a §1983 action, which are 1) whether the defendant deprived an individual of constitutional or federal statutory rights, and 2) whether the defendant did so while acting under the color of state authority. The Fifth Circuit contorts

the second inquiry, by requiring an agreement between the state actor and the private actor *"to engage in a conspiracy to deprive the plaintiff of a constitutional right"*, *and* the private actor be a willing participant in joint activity with the state or its agents."

The first inquiry was satisfied here when Causey deprived Hernandez of constitutionally protected rights by the unreasonable use of deadly force to seize him. The second inquiry was satisfied by Causey's active participation with state officials in pursuing and stopping Hernandez when he shot Hernandez. All of the ICE agents who participated with the local police in the pursuit and seizure of Hernandez were acting under the color of state law, by virtue of their joint participation with local police in this purely local matter. It was only Causey, though, who deprived Plaintiff of constitutional rights by shooting him while acting under the color of state law by virtue of his joint participation with state officials. As to Causey, then, both areas of separate inquiries in a §1983 action were met and a §1983 action lies against him.

The Fifth Circuit's opinion fashioned an improper and ill-conceived test to determine when an individual's conduct is fairly attributed to the State. Plaintiff submits that granting Plaintiff's Petition in necessary so this Court may properly establish when an individual's joint participation with state officials in a state activity is acting under the color of state law, irrespective of whether the individual is a "private party" or a federal employee.

B. Questions of Exceptional Importance.

This Court has not addressed when the actions of a federal employee are fairly attributable to the State.

However, under the holdings and reasoning of this Court, the determination of whether an individual's actions are fairly attributed to the State is not dependent on who employed that individual, but rather the source of his authority for his actions. See *Lindke v. Freed*, 601 U.S. 187, 197, 144 S. Ct. 758, 766, 218 L. Ed. 2d 121, 132 (2024); *Lugar, supra*, 457 U.S. at 939; *Griffin v. Maryland*, 378 U.S. 130 at 132, 84 S. Ct. 1770, 12 L. Ed. 2d 754 (1964).

The Fifth Circuit, however, focused on the Defendant's employment, explicitly holding that the "joint action test," is "applicable to private actors not federal actors" (*Pet. App. A p.17a*).[3] Although it established a nearly identical "joint action" test for "private actors" as it did for federal employees, implicit in the Fifth Circuit's decision is that federal employees are treated differently under §1983 than individuals other than federal employees. It held,

> Applying *§1983* liability to a *federal* actor requires further allegations that place the constitutional deprivation under state rather than federal law. Where the federal actor could have derived their authority to act under federal law, the consensus of circuit courts is that *§1983* necessitates evidence of a conspiracy between the federal actor and a state actor to deprive the plaintiff of his rights under color of *state* law.

(*Pet. App. A p.17a*, emphasis in original).

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[3] The Fifth Circuit reads too much into the use of the term "private actor" in the jurisprudence on this matter, creating a distinction for federal employees, which it termed "federal actors". Plaintiff submits that the term "private actors" was meant only in the context of individuals not otherwise being a state actor.

Plaintiff disagrees the consensus of circuit courts is "that *§1983* necessitates evidence of a conspiracy between the federal actor and a state actor". Most circuit courts faced with §1983 actions against federal officers held there were alternative bases for federal officials being deemed acting under the color of state law, either by conspiring with or by jointly participating with state officials.

Although the Second Circuit in *Morales v. City of New York*, 753 F. 3d 234, 237 (2nd Cir., 2014) did state that federal officials in the absent of allegations of a conspiracy are "presumed to have acted under Federal authority", the en banc decision it referenced, *Arar v. Ashcroft*, 585 F.3d 559, 568 (2d Cir. 2009), merely said that a federal official conspiring with a state official "*may act* under color of state law", that because "'federal officials typically act under color of *federal* law,' they are rarely deemed to have acted under color of state law", emphasis added.

The Tenth Circuit in *Big Cats of Serenity Springs, Inc., v. Rhodes*, 843 F. 3d 853 (10th Cir. 2016) actually held,

> To hold federal officials subject to §1983 liability based on joint action, a plaintiff must at least allege that federal and state actors shared a "common, unconstitutional goal," *or point to* a "substantial degree of cooperative action" *or* "overt and significant state participation."

Big Cats, *Id*., at 870, emphasis added.

Big Cats cited its prior decision of *Schaffer v. Salt Lake City Corp*., 814 F.3d 1151, 1157 (10th Cir. 2016), holding that "concerted action", an alternative to §1983 liability under the "conspiracy approach", "may

be found where 'there is a substantial degree of cooperative action between state and private officials' or if there is 'overt and significant state participation' in the deprivation of a plaintiff's constitutional rights."

In *Cabrera v. Martin*, 973 F.2d 735, (9th Cir., 1992), the Ninth Circuit, citing its earlier decisions, held,

> Although federal officials acting under federal authority are generally not considered to be state actors, they may be liable under §1983 if they are found to have conspired with *or acted in concert with state officials to some substantial degree*.

Id., at 742, emphasis added.

The Seventh Circuit in *Case v. Milewski*, 327 F.3d 564, at 567 (7th Cir., 2003), likewise held a §1983 action can lie against "federal employees--as it can against private individuals--if they conspire *or act in concert with state officials*", emphasis added.

The Sixth Circuit, in *Strictland v. Shalala*, 123 F. 3d 863, 866-867 (6th Cir., 1997), noted that other courts found that a *federal* official acts under color of state law "only when there is evidence that federal and state officials engaged in a conspiracy <u>*or*</u> *"symbiotic" venture* to violate a person's rights under the Constitution or federal law", (emphasis added) but stressed that the "evaluation of whether particular conduct constitutes action taken under the color of state law[] *must focus on the actual nature and character of that action*", emphasis added.

The Third Circuit in *Hindes v. F.D.I.C.*, 137 F. 3d 148, 158 (3rd Cir., 1998) gave conspiracy as an example of when a federal official may have acted under the color of state law, ("where they have acted

under color of state law, *for example* in conspiracy with state officials" (emphasis added.)

In *Kletschka v. Driver*, 411 F.2d 436 (2nd Cir., 1969), although the case involved specific allegations of conspiracy under both 42 U.S.C. 1985 and 42 U.S.C. 1983, the Second Circuit held "the test under the Fourteenth Amendment and §1983 is whether the State *or its officials played a 'significant' role in the result*'", *Id*. at 449, emphasis added.

Even the Fifth Circuit in *Knights of Ku Klux Klan Realm v. E. Baton Rouge Par. Sch. Bd*., 735 F.2d 895, 900 (5th Cir. 1984), held that when federal officials "conspire *or act jointly with state officials* to deny constitutional rights, the state officials provide the requisite state action", emphasis added.[4]

Judge Dennis disagreed with the panel majority's disregard of *Knights'* holding.

> Despite the use of the word "or", the majority reads *Knights* to require a conspiracy and rejects Hernandez's argument that the joint action test applies to federal officers. *Ante*, at 14. In my view, *Knights* explicitly dictates that we find federal officials act under color of state law when the federal government "act[s] jointly with state officials to deny constitutional rights."

(*Pet. App. A p.23a*).

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[4] The majority opinion distinguished *Knights* because it was the state official who actually implemented the deprivation, essentially a distinguishment without a difference as the issue was whether the federal actor had acted under the color of state law.

Similarly, several district courts allowed §1983 actions against federal employees based on allegations of acting or participating with state actors without evidence of a conspiracy. See *Adams v. Springmeyer*, 2012 WL 1865736, 2012 U.S. Dist. LEXIS 71136, * 23-24, ("conspiracy between federal and state officials is only one way in which section 1983 liability may extend to federal official"); *Gomez v. Feissner*, 2010 WL 5463245, 2010 U.S. Dist. LEXIS 137388 *16, ("conspiracy is only one of a number of ways in which a federal official might be countenanced as operating under state law for purposes of §1983"); *Economan v. Cockrell*, 2020 WL 6874134, 2020 U.S. Dist. LEXIS 218589 * 5, (claims against federal officers were viable under §1983 "based on their alleged actions and conduct in concert with state officers in state proceedings"); *Reynoso v. City & County of San Francisco*, 2012 WL 646232, 2012 U.S. Dist. LEXIS 25584 *15, ("federal defendants 'significantly participated' in the search in question and therefore acted under color of state law"); *Brown v. Stewart*, 910 F. Supp. 1064, 1069 (1996), (actions taken by federal agents "in participating in the arrest of plaintiff Brown are so bound up with the operation of Commonwealth law that . . . we find action under color of state law attributable to them".)

The Fifth Circuit's reference to the "[w]here the federal actor *could have derived their authority* to act under federal law", (emphasis added), besides being simply another way of saying federal employees "typically act under federal law", it begs the question of where a federal employee actually derived his authority to act in any particular case. Plaintiff submits there is no basis to hold that because an individual is a federal employee, only a conspiracy with a state actor can make an act fairly attributable

to the State. This Court in *Lindke* reiterated that "the distinction between private conduct and state action turns on substance, not labels", having earlier noted that in *Griffin v. Maryland*, 378 U.S. at 132, "the source of the power, *not the identity of the employer controlled*." *Lindke*, 601 U.S. at 195-196, emphasis added.

Addressing the first of the two-part approach expressed in *Lugar* to when an individual's conduct is fairly attributed to the State, the only source of authority for Causey to pursue and seize Plaintiff was Driskel, the Laurel Police Officer who requested assistance and who directed the pursuit. Driskel was a "person for whom the State was responsible", from whom, as noted in *Lugar*, State authority could emanate. Driskel's initial request for assistance and then active direction as to who to seize, effectively "deputized" all of the ICE agents present, including Causey, in the pursuit and seizure of Hernandez. Defendant would not have been present but for the request of Driskel. Causey was not present at the scene of the traffic stop to perform immigration enforcement duties.

Under federal law Causey had no right or authority to pursue and stop Hernandez for questioning, and no authority under federal law to arrest him. 8 CFR 287.8 mandates that every immigration officer involved in enforcement activities "*must adhere* to the enforcement standards established by those regulations", emphasis added. 8 CFR 287.8 (b)(2) provides that an immigration officer may briefly detain someone for questioning *if* "the immigration officer has a reasonable suspicion, *based on specific articulable facts*, that the person being questioned is, or is attempting to be engaged in an offense against the

United States or is an alien illegally in the United States", emphasis added. See also *United States v. Brignoni-Ponce*, 422 U.S. 873, 884, 95 S. Ct. 2574, 2582, 45 L. Ed. 2d 607, 618 (1975) holding that Mexican heredity alone does not justify stopping individuals, requiring "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that the individuals are aliens who may be illegally in the country. 8 CFR 287.8 (c)(2)(i), has the same requirements for a deportation officer to arrest anyone.

The only thing known to any of the ICE agents was that Driskel had requested assistance in a traffic stop, and when they arrived at the scene that Driskel wanted to pursue and seize Hernandez. Causey had no articulable basis to believe Hernandez had committed an offense against the United States or was in the country illegally. The right to pursue and stop Hernandez did not emanate from federal law or because of any immigration enforcement action that Causey performs under federal law, but rather from the state officer who requested his assistance and who enlisted and directed him in the pursuit of Hernandez. When he joined in and actively worked with Driskel and Robertson to pursue and stop Hernandez it was not because of any immigration enforcement duties or pursuant to any authority under federal law to do so, but rather because of Driskel's request and directions in Hernandez's pursuit and seizure.

As Judge Dennis observed in his dissent,

> Neither the majority, the district Court, nor the Government point to any federal law or regulation that Causey acted pursuant to when he came to the scene as Officer Driskell's translator, when he began to chase

> after Hernandez who was leaving a state law traffic investigation, or when he eventually shot Hernandez to seize him. To the contrary, the Government disavows that the ICE Agents were on the scene to perform immigration operations—they were only there as the Laurel Police Department's translators to accomplish the state's purpose of enforcing its traffic laws. *Stymann v. San Francisco*, 557 F.2d 1399 (9th Cir. 1977) (holding that a towing company acting at the behest of a police officer to accomplish the state's purpose of enforcing its traffic laws acted under color of state law) (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974).

(*Pet. App. A pp.25a-26a*).

The panel majority's holding that to apply "*§1983* liability to a *federal* actor requires further allegations" (Pet. App. A p.20a) establishes Fifth Circuit precedence that "federal actors" are treated differently than "private actors" in determining whether acts of federal officials are attributable to the State. There is no basis for such a distinction when determining when a federal employee acted under the color of state law.

This Court in *Tanzin v. Tanvir*, 592 U.S. 43, 141 S. Ct. 486, 208 L. Ed. 2d 295 (2020), relying on §1983 jurisprudence, allowed suits against FBI agents individually under the Religious Freedom Restoration Act (RFRA), noting that since the RFRA used the "same terminology as §1983 in the very same field of civil rights law", it was reasonable "that the terminology bears a consistent meaning." *Id* at 48. Importantly, this Court, in determining whether damages were an appropriate remedy against federal

officers in their individual capacity noted that Congress was free to create a policy-based shield for federal employees against lawsuits, but that the Court was not. *Tanzin*, *id* at 52.

Although the question presented here is slightly different, Petitioner submits the reasoning in *Tanzin* is equally applicable. Courts are not at liberty to create a policy-based presumption for federal employees that effectively shields them from liability under 42 U.S.C. §1983 by requiring an additional elements of an agreement with state officials to conspire to deprive someone of federal rights, details of the agreement, and that the conspiracy be to commit the deprivation of rights that occurred. The inquiry should be the source of the federal officer's authority for his acts, as it is for any non-state actor.

42 USC 1983 applies to "every person" without exception or limitation. It does not list or even infer any exceptions or limitations for being a federal employee. Nor does it suggest that federal employees should be treated differently from any other "person" who under the color of state law deprives an individual of rights guaranteed by the Constitution or laws of the United States. In enacting 42 U.S.C. §1983, Congress did not provide for treating federal employees differently than any other person. Congress did not provide for any policy-based presumptions in favor of federal employees that they, unlike any other person, can only act under the color of state law by conspiring with state officials.

The test established by the Fifth Circuit for federal employees is a judicial creation, not a congressional one. This Court needs to address whether any basis exist for federal employees to be treated differently than non-federal employees under 42 U.S.C. §1983

when they jointly participate with state officials in a State matter. All lower courts, circuit courts as well as district courts, would benefit from this Court's guidance in determining when federal officials may be deemed acting under the color of state law.

II. *BIVENS* CAUSE OF ACTION.

Plaintiff believes Causey was acting under the color of state law when he assisted local law enforcement in seizing Hernandez, and as such, a cause of action properly lies under 42 U.S.C. §1983. Alternatively, *Bivens* being the federal analog to an action under §1983, in the event Causey was deemed to have been acting under federal law while participating in this local law enforcement action Plaintiff alleged a cause of action under *Bivens*.

In affirming the dismissal of Plaintiff's *Bivens* claim, the Fifth Circuit too narrowly restricted the context in which *Bivens* arose to "manacling the plaintiff in front of his family in his home and strip-searching him in violation of the Fourth Amendment", holding "'[v]irtually everything else is a 'new context'". (*Pet. App. A pp.9a-10a*). Such a narrow restriction effectively evicarates *Bivens* as the "guiding principles of law" for federal law enforcement officers in the context of search-and-seizure in which it arose.

This Court in *Ziglar v. Abbasi*, 582 U.S. 120, 134, 137 S. Ct. 1843, 1856-1857, 198 L. Ed. 290, 308 (2017), stressed the continued force and "even necessity" of *Bivens* in the "search-and-seizure context in which it arose", and that "the settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law" were "powerful reasons to retain it in that sphere". *Ziglar*, 582 U.S. at 134. A *Bivens* action

against Defendant here is not a "new context or new category of defendants" from the search and seizure context in which *Bivens* arose. Defendant's excessive use of force occurred during a law enforcement operation to pursue and seize Hernandez.

It must be remembered that in *Bivens, supra*, the plaintiff's claims included the excessive use of force in his arrest, for which the *Bivens* Court allowed damages for the violation of the Fourth Amendment's command that the "right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches *and seizures*, shall not be violated . . . .". *Bivens*, 403 U.S. at 389, emphasis added. Also this Court noted in *Graham v. Conner*, 490 U.S. 386,394-395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), that where an excessive force claim arises in the context of an arrest or investigatory stop, "it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons . . . against unreasonable . . . seizures' of the person."

When this Court in *Ziglar*, 490 U.S. at 395, reinforced its determination that expanding the *Bivens* remedy was a "disfavored" judicial activity, and how it had "consistently refused to extend *Bivens* to any new context or new category of defendants" it was not referring to the search and seizure context in which *Bivens* arose. The discussion that *Bivens* was a "disfavored judicial activity" occurred directly after it admonished "that this *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." *Ziglar*, 582 U.S. at 134, emphasis added. Having just pronounced the necessity and continued force of *Bivens* in the search and seizure context of

law enforcement, it can hardly be said that *Ziglar* considered the sphere of law enforcement, especially in the context of search-and-seizure, as a new context or that any law enforcement officer other than an officer with the Federal Bureau of Narcotics, as a new category of defendant. Besides, the Federal Bureau of Narcotics was dissolved before *Bivens* was decided. Neither *Bivens*, not *Ziglar*, considered the category of defendants in law enforcement to be only law enforcement officers in one particular branch or agency of the United States.

Retaining *Bivens* in the sphere of law enforcement as against any federal law enforcement officer, irrespective of agency or department, is consistent with this Court's earlier determination that Congress, in amending 28 U.S.C. § 2680 (h), to create a cause of action against the United States for intentional torts committed by federal law enforcement officers, intended that *Bivens* and the Federal Tort Claims Act be "parallel, complementary causes of action". *Carlson v. Green*, 446 U.S. 14, 19-20, 100 S. Ct. 1468, 1472, 64 L. Ed. 2d 15, 24 (1980). The definition of law enforcement officers in that legislation, which was intended as a parallel action under *Bivens*, is not restricted to any one particular agency or department. Neither should the sphere of law enforcement in which *Ziglar* asserted *Bivens* was a continuing force be restricted to only one particular branch or division of law enforcement.

The same can be said of Congress' intent when it enacted the Westfall Act, amending 28 U.S.C. §2679 (b), precluding any "civil action or proceeding for money damages for damages" against federal employees, except those "brought for a violation of the Constitution of the United States". In *Hui v.*

Castaneda, 559 U.S. 799, 808-810, 130 S. Ct. 1845, 1852-1853, 176 L. Ed. 703, 713 (2010), this Court referred to that provision as the "*Bivens* exception".

The findings and purpose of the Westfall Act was to correct what Congress saw as "an immediate crisis involving the *prospect of personal liability* and the threat of *protracted personal tort litigation for the entire Federal workforce*", that would "seriously *undermine the morale* and well-being of Federal employees, *impede the ability of agencies to carry out their missions*". See Section 2 Findings and Purpose, (a) (5) and (6), Public Law 100-694, "Federal Employees Liability Reform and Tort Compensation Act of 1988", emphasis added. Clearly, Congress in allowing suits against federal employees for violations of the Constitution considered "the impact on governmental operations systemwide", including "the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself", which *Ziglar* pointed to as reasons that Congress may not want "the Judiciary to entertain a damages suit in a given case". *Ziglar v. Abbasi*, 582 U.S. 136-137.

Indeed, *Ziglar* felt it was fair to assume that Congress, in allowing civil suits against federal employees for violations of the Constitution weighed concerns such as "the extent to which, monetary and other liabilities should be imposed upon individual officers of the United States", including the "time and administrative costs attendant upon intrusions resulting from the discovery and trial process". *Ziglar*, 582 U.S. at 134. These are the same concerns raised by this Court in *Egbert v. Boule*, 596 U.S. 482, 491, 142 S. Ct. 1793, 213 L. Ed. 2d 54, 65 (2022).

If indeed, *Bivens* remains a continued force and a guiding principle in the search-and-seizure context in which it arose, a federal law enforcement officer, participating in a law enforcement operation to seize an individual is not a new category of defendant and a suit for violation of the Fourth Amendment for the excessive use of force is not a new context.

CONCLUSION

The Fifth Circuit determined a cause of action under §1983 against a *federal* actor require further allegations that "place the constitutional deprivation under state rather than federal law", which under now Fifth Circuit precedence, are details of a conspiracy or prior agreement with the state officials to conspire to commit the specific act by the federal officer that deprived a plaintiff of his rights. In doing so, the Fifth Circuit lost sight of the fundamental question when determining whether an individual acted under the color of state law – whether the act is fairly attributable to the state. Instead, it simply looked to who employed the actor. Here, the only source of authority for Defendant's acts was the implicit request by a local police officer to assist him in a local matter, the pursuit and seizure of Plaintiff.

As unfortunate, if not more so, is the Fifth Circuit's holding that a §1983 action against a "private actor", must plead "*facts showing an agreement or meeting of the minds between the state actor and the private actor to engage in a conspiracy to deprive the plaintiff of a constitutional right*, *and* that the private actor was a willing participant in joint activity with the state or its agents." This is now binding precedence in the Fifth Circuit and effectively overrules *Lugar*, and its progeny.

Plaintiff prays that this Court grant this Petition in order to properly establish when the actions of any individual, whether or not a federal employee, acts under the color of state law.

Should it be determined that defendant acted under federal law, Plaintiff request this Court to reinforce the continued need for *Bivens* as a controlling principle of law for federal law enforcement officers in the context of search-and-seizure, and that in such matters *Bivens* remains a continued force.

Respectfully submitted,

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March 4, 2025

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed: December 23, 2024]

No. 24-60080

GABINO RAMOS HERNANDEZ,

Plaintiff-Appellant,

versus

PHILLIP CAUSEY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 2:17-CV-123

Before ELROD, *Chief Judge*, DENNIS and HIGGINSON, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:

This appeal arises from a traffic-stop-turned-officer-shooting. After Immigration and Customs Enforcement Agent Phillip Causey shot plaintiff-appellant Gabino Ramos Hernandez, Hernandez sued Causey under 42 U.S.C. § 1983 and *Bivens*. The district court granted Causey's motion to dismiss and denied Hernandez's motion for leave to amend the complaint. Hernandez timely appealed.

The district court correctly recognized that finding the availability of a Bivens remedy here would expand Bivens to a new context in contravention of the Supreme Court's guidance in *Egbert*. The court also correctly found that, even though Hernandez had properly pled an excessive force claim for the shooting, Causey did not act under color of state law as is required to sustain a claim under § 1983. We accordingly AFFIRM the dismissal of the appealed claims and AFFIRM the denial of leave to amend the complaint as further amendment would be futile.

I.

On July 20, 2016, Laurel Police Department Officer David Driskell observed Hernandez fail to come to a complete stop at a stop sign. Officer Driskell observed the vehicle behind Hernandez's appeared to have an intoxicated driver; the vehicle was being driven by Hernandez's brother, Jose Mendoza. Officer Driskell stopped both vehicles and initially tried to question Mendoza while Hernandez spent "time standing by and waiting."[1] After verbally requesting clarification on Mendoza's answers several times, Officer Driskell called ICE Agents McGhee and Sharff; the body camera footage showed Officer Driskell asking, "Can you assist me with some Spanish?" to request interpretation services for his questioning of Mendoza.

Officer Driskell then saw Hernandez approaching and shouted, "Do you speak English?" Hernandez responded, "What's the problem?" Officer Driskell indicated Mendoza and replied, "He's drunk." Officer

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[1] Hernandez describes his amended complaints as "supplemental and amended" complaints. His allegations in prior complaints—such as the First Amended Complaint quoted here—therefore remain live.

Driskell and Hernandez continued speaking for a few seconds but had trouble understanding each other. Officer Driskell said, "I tell you what, I got somebody who don't understand you. So, hang tight right there, okay?" As the ICE Agents arrived, Hernandez left the area of the traffic stop. Hernandez alleges that, at some point around the time of Agent McGhee's arrival, he "decided to leave the scene, initially intending to simply enter his residence, but then deciding to go to his uncle's home nearby."

Officer Driskell observed to Agent McGhee, "He's going down the block! He's running south!" Agent McGhee pursued on foot, shouting, "Get down! Get the f**k down!" Officer Driskell appeared to shine his flashlight at Hernandez. At the same time, other ICE agents, including Agent Causey, converged on the scene while Agent McGhee shouted directions. At minute 17:14 of Officer Driskel's body camera video, a shot is heard on the footage; at 18:03, Officer Driskell arrived on the scene and witnessed Agent Causey shouting, "Man, you shouldn't have put your hand in your f**king pocket!" The district court noted that other law enforcement witnesses corroborated Agent Causey's testimony that Hernandez was reaching into his pocket. Hernandez alleges that he "had his hands raised in surrender" when Agent Causey shot him in the right arm.

Hernandez filed suit on July 20, 2017. Hernandez initially brought claims against Causey under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), 42 U.S.C. § 1983, and Mississippi tort law. He later amended his complaint to allege negligence and intentional tort claims against the United States under the Federal Tort Claims Act. The district court denied summary judgment to

Causey on qualified immunity, concluding that there was "a material factual dispute to resolve" as to where Hernandez's hands were positioned and whether Causey's use of force was reasonable.

In 2022, Causey filed for reconsideration, arguing that the Supreme Court's ruling in *Egbert v. Boule*, 596 U.S. 482 (2022), limited *Bivens* claims such as Hernandez's. The district court agreed that post-*Egbert*, Hernandez's claim presented a new distinct context from prior *Bivens* claims and that Hernandez's claim was now foreclosed. The defendants then moved to dismiss Hernandez's remaining claims against Causey pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court granted Causey's motion to dismiss from the bench, concluding that, to the extent Hernandez alleged Causey was acting under color of *federal* law, Hernandez's § 1983 claim must be dismissed. But the court granted Hernandez leave to file a motion to amend his complaint to replead his § 1983 claim that Causey acted under color of *state* law.

Hernandez then moved for leave to file a Fourth Amended Complaint, but the district court denied the motion, holding that Hernandez "fail[ed] to state an unlawful seizure claim against Causey and d[id] not allege that Causey was acting under color of state law for purposes of his excessive force claim." The district court found that Hernandez alleged no facts to support an inference that Officer Driskell conspired with ICE to request interpretation services as a pretext, including no facts to show that Causey was part of such an alleged agreement. The district court held that Hernandez had failed to plead a constitutional violation because he did not allege that he was improperly detained prior to ICE's arrival and did not allege the initial traffic stop lacked probable cause.

The court held that although Hernandez had plausibly alleged a claim that Causey violated his right to be free from excessive force, any amendment would be futile because § 1983 "does not apply to 'actions [] taken pursuant to federal law by federal agents.'" Although federal officials may act under color of state law in rare circumstances, such as when the federal officials acted "in conspiracy with state officials," *Hindes v. FDIC*, 137 F.3d 148, 158 (3d Cir. 1998), the district court found that the amended complaint did not plead any such circumstances. The court dismissed all claims against Causey with prejudice.[2]

Hernandez filed a notice of appeal from the court's partial judgment on February 15, 2024. On March 12, 2024, the district court certified its partial judgment for immediate appeal pursuant to Federal Rule of Civil Procedure 54(b), dismissing all claims against Causey and concluding that there was "no just reason to delay the appeal of Hernandez's claims against Causey under Bivens and [42] U.S.C. Section 1983." The notice of appeal matured on March 12, 2024. *Brown v. Mississippi Valley State Univ.*, 311 F.3d 328, 332 (5th Cir. 2002). Only Hernandez's claims against Causey in his individual capacity are at issue in this appeal.

II.

"We review a district court's dismissal of claims under Federal Rule of Civil Procedure 12(b)(6) de novo." *Clyce v. Butler*, 876 F.3d 145, 148 (5th Cir. 2017). A court must dismiss a complaint as a matter of law when the plaintiff fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To withstand a Rule 12(b)(6) motion, "a complaint must

[2] Hernandez's intentional tort claims against the United States remain pending before the district court.

contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The court "accept[s] well-pleaded facts as true" and "view[s] them in the light most favorable to the plaintiff." *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 735 (5th Cir. 2019) (quoting *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir. 1986)). Dismissal is appropriate if the facts pled are not enough to state a facially plausible claim for relief. *Leal v. McHugh*, 731 F.3d 405, 410 (5th Cir. 2013). Plausibility is not akin to probability, but instead, "it asks for more than a sheer possibility that a defendant has acted unlawfully." *Walker*, 938 F.3d at 735 (quoting *Iqbal*, 556 U.S. at 678). "All questions of fact and any ambiguities in the current controlling substantive law must be resolved in the plaintiff's favor." *Lewis v. Fresne*, 252 F.3d 352, 357 (5th Cir. 2001).[3]

III.

Hernandez appeals the district court's dismissal of his *Bivens* claim against Causey, arguing that his claim does not present a new *Bivens* context.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court authorized damages actions against federal officers for arresting an individual in his home and searching the home "from stem to stern" without a warrant. 403 U.S. 388, 389 (1971). *Bivens* "broke new ground by holding that a person claiming to be the victim of an unlawful arrest and search could bring a Fourth Amendment

[3] In reviewing the district court's determinations de novo, we consider the allegations presented in the proposed Fourth Amended Complaint in addition to the operative complaints.

claim for damages against the responsible agents even though no federal statute authorized such a claim." *Hernández v. Mesa*, 589 U.S. 93, 99 (2020). In the decade following *Bivens*, the Supreme Court expanded Bivens actions to encompass a former congressional staffer's sex discrimination claim under the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228 (1979), and a federal prisoner's Eighth Amendment claim based on inadequate healthcare, *Carlson v. Green*, 446 U.S. 14 (1980).

But over the next 42 years, the Supreme Court "declined 11 times to imply a similar cause of action for other alleged constitutional violations." *Egbert v. Boule*, 596 U.S. 482, 486 (2022); *see also Hernandez*, 589 U.S. at 102. Reflecting on *Bivens* actions, the Supreme Court has explained that *Bivens* was decided at a time where, "as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself." *Ziglar v. Abbasi*, 582 U.S. 120, 132 (2017). But "[i]n cases decided after Bivens, and after the statutory implied cause-of-action cases that Bivens itself relied upon, the Court adopted a far more cautious course before finding implied causes of action." *Id.* "[E]xpanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Id.* at 135 (quoting *Iqbal*, 556 U.S. at 675). The Court's precedent has "made clear that, in all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts." *Egbert*, 596 U.S. at 486. "Congress is best positioned to evaluate whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government' based on constitutional torts." *Hernandez*, 589 U.S. at 101 (2020) (quoting *Abbasi*, 582 U.S. at 134). "[I]f [the Supreme Court] were called to decide *Bivens* today, [it] would

decline to discover any implied causes of action in the Constitution." *Egbert*, 596 U.S. at 502.

Hernandez claims that his "case is distinguishable from *Egbert*" because "when Causey shot Plaintiff herein, he was actively participating as a law enforcement officer in a purely local law enforcement operation" while "Egbert was performing his duties as a Border Patrol officer to secure the border." He claims 28 U.S.C. § 2680(h) and the FTCA show a Congressional intent for *Bivens* actions by entitling "the victim of an assault and battery by a law enforcement officer . . . to a *Bivins* [sic] action." He raises the same grounds in his reply brief. Section 2680(h), however, does not contain language authorizing *Bivens* actions. As for the FTCA, the Supreme Court has previously held that the provision in question "does not suggest . . . that Congress intended for a robust enforcement of *Bivens* remedies. . . . It is not a license to create a new *Bivens* remedy in a context we have never before addressed." *Hernandez*, 589 U.S. at 111 n.9 (internal quotation marks and citation omitted). Hernandez's claim must instead be analyzed under the typical *Bivens* rubric.

The Supreme Court has "framed the inquiry as proceeding in two steps." *Egbert*, 596 U.S. at 492. First, we must determine whether Hernandez's claim

> presents a new Bivens context—*i.e.*, is it meaningfully different from the three cases in which the Court has implied a damages action." *Id.* (cleaned up). The Supreme Court has previously detailed "differences that are meaningful enough to make a given context a new one": "the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent

> of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

Abbasi, 582 U.S. at 139–40. The Court's "understanding of a new context' is broad." *Hernandez*, 589 U.S. at 102. Second, if the claim implicates a new context, "a *Bivens* remedy is unavailable if there are special factors indicating that the Judiciary is at least arguably less equipped than Congress to weigh the costs and benefits of allowing a damages action to proceed." *Egbert*, 596 U.S. at 492 (cleaned up). Although the "Court has not defined the phrase 'special factors counselling hesitation,'" it has explained "that the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Abbasi*, 582 U.S. at 136. And the Court's recent decision in *Egbert* makes clear that a *Bivens* action should not proceed where "there is *any* rational reason (even one) to think that *Congress* is better suited" to make that determination. *Egbert*, 596 U.S. at 496.

In applying the Supreme Court's precedent disfavoring *Bivens* actions, we have limited *Bivens* claims to three narrow circumstances:

> (1) manacling the plaintiff in front of his family in his home and strip-searching him in violation of the Fourth Amendment, *see Bivens*, 403 U.S. at 389–90, 91 S.Ct. 1999; (2) discrimination on the basis of sex by a

> congressman against a staff person in violation of the Fifth Amendment, *see Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979); and (3) failure to provide medical attention to an asthmatic prisoner in federal custody in violation of the Eighth Amendment, *see Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980).

Oliva v. Nivar, 973 F.3d 438, 442 (5th Cir. 2020). Outside of these three narrowly defined categories, "[v]irtually everything else is a new context." *Id.*

Hernandez seems to argue that his claim falls within the first, original *Bivens* context. In *Bivens*, the plaintiff alleged that federal agents from the Federal Bureau of Narcotics violated his Fourth Amendment rights with an unlawful search—searching his home without a warrant or probable cause and excessive force—handcuffing him in front of his family. *Bivens*, 403 U.S. at 389. Here, both the type of defendant and type of unconstitutional conduct differ from *Bivens*.

Hernandez brings his claim against an ICE agent. The Court in *Egbert* held that "the Judiciary is comparatively ill suited to decide whether a damages remedy against any Border Patrol agent is appropriate." *Egbert*, 596 U.S. at 495. Unlike the Federal Bureau of Narcotics, which falls under the Department of the Treasury, both ICE and Border Patrol fall under the Department of Homeland Security—a "new category of defendants." *See Abbasi*, 582 U.S. at 135 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)). Although this circuit has not reached the question of whether to apply *Bivens* to ICE agents, other circuits have held that ICE agents are new defendants for the purposes of *Bivens*. *See Alvarez v. U.S. Immigr. & Customs Enf't*, 818 F.3d 1194 (11th Cir. 2016) (no

Bivens remedy in immigration context); *Tun-Cos v. Perrotte*, 922 F.3d 514 (4th Cir. 2019); *Barry v. Anderson*, No. 22-3098, 2023 WL 8449246 (3d Cir. Dec. 6, 2023); *see also De La Paz v. Coy*, 786 F.3d 367 (5th Cir. 2015) (declining to extend *Bivens* to CBP agents for illegal stops and arrests).

In addition, the circumstances of the alleged constitutional violations in this case are "meaningfully different" than those in *Bivens*. While Bivens's home was searched without a warrant, Hernandez was legally stopped for a traffic violation. Bivens claimed there was no probable cause to detain him; Hernandez claims Causey's use of force in pursuing Hernandez was unconstitutionally excessive. We have recognized in the context of *Bivens* claims that "'[j]udicial guidance' differs across the various kinds of Fourth Amendment violations—like seizures by deadly force, searches by wiretap, *Terry* stops, executions of warrants, seizures without legal process ('false arrest'), seizures with wrongful legal process ('malicious prosecution'), etc." *Cantú v. Moody*, 933 F.3d 414, 423 (5th Cir. 2019). We explained in Cantú that just as "[n]o one thinks *Davis* . . . means the entirety of the Fifth Amendment's Due Process Clause is fair game in a *Bivens* action," even a violation of the same clause of the same amendment does not authorize a *Bivens* action if the factual circumstances are different. *Id*. at 422. We have held that a claim where a Department of Homeland Security officer drew a gun and threatened the plaintiff, *Byrd v. Lamb*, 990 F.3d 879, 880 (5th Cir. 2021), and a claim where Veterans Affairs police put the plaintiff in a chokehold, *Oliva*, 973 F.3d at 440, presented new contexts under *Bivens*. In both cases, we declined to extend *Bivens* to encompass these Fourth Amendment excessive force claims.

In *Egbert*, the Supreme Court noted that "a court may not fashion a *Bivens* remedy if Congress already has provided, or has authorized the Executive to provide, 'an alternative remedial structure.'" 596 U.S. at 493 (quoting *Abbasi*, 582 U.S. at 137). Alternative remedies existed for the plaintiff in *Egbert*: under 8 C.F.R. § 287.10, the Department of Homeland Security was required to "investigate[] expeditiously" any "[a]lleged violations of the standards for enforcement activities" reported by "[a]ny persons wishing to lodge a complaint." 8 C.F.R. § 287.10; *Egbert*, 596 U.S. at 497. This same grievance procedure applies here because ICE is part of the Department of Homeland Security. Causey also correctly points out that Congress has authorized the Secretary of the Department of Homeland Security to investigate "noncriminal allegations of misconduct" and "impose disciplinary action on any employee of U.S. Immigration and Customs Enforcement." 6 U.S.C. §§ 253–254. "So long as Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a *Bivens* remedy." *Egbert*, 596 U.S. at 498.

Finally, Hernandez points to the FTCA's waiver of sovereign immunity for certain tort suits. He argues that because the Westfall Act modified the FTCA to create an exception to the FTCA's exclusivity provision for "suits against federal employees for constitutional violations," this is akin to Congressional authorization for his *Bivens* claim. But this is a misreading of the statute. The Supreme Court has explained that the FTCA "is not a license to create a new *Bivens* remedy in a context we have never before addressed" but instead "left *Bivens* where it found it." *Hernandez*, 589 U.S. at 111 n.9.

Hernandez's claim does indeed present a new context for *Bivens*—it implicates new defendants, presents a different basis for a Fourth Amendment violation, and has an alternative remedial structure provided by Congress. The district court properly dismissed the *Bivens* claim against Causey.

IV.

Hernandez also appeals the district court's dismissal of his § 1983 claim. "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988).

A.

At oral argument, Hernandez's counsel argued that the stop, questioning, and request for translation all amounted to a pretextual seizure separate from the excessive-force claim arising from the shooting. But Hernandez's briefing does not address the district court's finding that Hernandez failed to allege that he "was improperly detained pending the arrival of ICE agents." ROA.2077. "[T]he Fourth Amendment protects against detention, not questioning." *United States v. Pack*, 612 F.3d 341, 350 (5th Cir.), *opinion modified on denial of reh'g*, 622 F.3d 383 (5th Cir. 2010). In fact, although Hernandez states "the pretext alleged was the supposed need for translation assistance," he acknowledges that he is not alleging a pretextual stop.

In general, "[a] party who inadequately briefs an issue is considered to have abandoned the claim." *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994); *see Rollins v. Home Depot USA*, 8 F.4th 393, 397–98 (5th Cir. 2021). "To be adequate, a brief must address the

district court's analysis and explain how it erred.'" *Sec. & Exch. Comm'n v. Hallam*, 42 F.4th 316, 327 (5th Cir. 2022) (quoting *Rollins*, 8 F.4th at 397 n.1); *see Guillot ex rel. T.A.G. v. Russell*, 59 F.4th 743, 751 (5th Cir. 2023) (the appellant should "attempt to rebut [the] judgment"). Where a party's "opening brief barely addresse[s] the district court's analysis' and wholly neglect[s] to explain how it erred,'" *Smith, etc. v. Sch. Bd. of Concordia Par.*, 88 F.4th 588, 594 (5th Cir. 2023) (quoting Russell, 59 F.4th at 751), the party forfeits that argument.

Hernandez's opening brief discussed only "the constitutional right to be free from an unreasonable seizure by the use of excessive force"—that is, the claim arising from the shooting. He did not address the district court's finding that there were "no allegations that Hernandez was improperly detained pending the arrival of ICE agents." Because Hernandez did not explain how the district court's detention-as-seizure analysis erred, his claim is forfeited, if not relinquished. Even if the claim was not forfeited or relinquished, his unlawful detention-as-seizure claim would still fail for the reasons below—Hernandez did not allege that Causey acted under color of state law.

B.

Section 1983 applies "only when the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority.'" *Lindke v. Freed*, 601 U.S. 187, 198 (2024) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982) "[U]nder the 'joint action test', *private* actors will be considered state actors where they are 'willful participant[s] in joint action with the State or its agents'." *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 550 (5th Cir. 2005) (emphasis added) (quoting *Dennis v. Sparks*, 449

U.S. 24, 27 (1980)). Hernandez challenges the district court's dismissal of his excessive-force claim from the shooting under § 1983 on the proposition that the "joint action test" should apply to federal officers as well as private individuals and also argues that the district court erred in requiring evidence of a conspiracy.

"[W]hen federal officials conspire or act jointly with state officials to deny constitutional rights, the state officials provide the requisite state action to make the entire conspiracy actionable under section 1983.'" *Knights of Ku Klux Klan, Realm of La. v. E. Baton Rouge Par. Sch. Bd.*, 735 F.2d 895, 900 (5th Cir. 1984) (quoting *Hampton v. Hanrahan*, 600 F.2d 600, 623 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980)). Hernandez points to *Knights* to argue that so long as Causey "willful[ly] participat[ed] . . . in a joint activity with local police," Causey acted under the color of state law. But in *Knights*, the acting authority responsible for the constitutional deprivation was a local school board. "Whether the Board was willing to risk loss of federal funds to allow the Klan to hold their meeting . . . was a decision made under color of state law." *Knights*, 735 F.2d at 900. Hernandez cites other cases applying the joint-action test, but both similarly involve *private* actors working with state actors to deprive a plaintiff of their constitutional rights—and in both, the court still found the private actor did not act under color of state law. *See Earnest v. Lowentritt*, 690 F.2d 1198, 1226 (5th Cir. 1982); *Phillips v. Vandygriff*, 711 F.2d 1217 (5th Cir. 1983).[4]

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[4] Hernandez also argues that *Rodriguez v. Handy*, 873 F.2d 814 (5th Cir. 1989) applied § 1983 to federal Border Patrol agents assisting local law enforcement officials. But *Rodriguez* actually concerns application of the Federal Tort Claims Act and only

This case law aligns with *Lindke*'s emphasis that "state action exists only when" the constitutional deprivation "ha[s] its source in state authority." *Lindke*, 601 U.S. at 198 (quoting *Lugar*, 457 U.S. 939).[5] As cases cited by Hernandez confirm, a federal officer acting under his agency's authority but assisting a state officer generally acts under color of federal law. *See Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 870 n.8 (10th Cir. 2016) (recognizing a "presumption that where federal and state actors come together, they are acting pursuant to supreme [federal] law."); *Case v. Milewski*, 327 F.3d 564, 567-68 (7th Cir. 2003) ("Case's argument that the [federal] defendants[] ceased to be operating under color of federal law once they left the federally owned [property] is without merit," even when the federal officers cited Case for

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mentions in passing that the agents "were acting under color of state law and could be found liable under § 1983." *Id.* at 817 n.3. Because no § 1983 claim was briefed before this court in *Rodriguez*, the court's footnote statement, in dicta, is hypothetical.

[5] Hernandez further claims that the Supreme Court authorized suits against federal officers under § 1983 in *Tanzin v. Tanvir*, 592 U.S. 43 (2020). *Tanzin* held that "[b]ecause RFRA uses the same terminology as § 1983 in the very same field of civil rights law, it is reasonable to believe that the terminology bears a consistent meaning.'" *Id.* at 48 (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 323 (2012)). Hernandez argues that "[i]t would be quite inconsistent for the Court, on the one hand, to allow damage suits against federal officials under one federal statute by relying on § 1983 jurisprudence . . . but to then disregard important parts of that very same § 1983 jurisprudence so as to shield federal officials from damage suits under § 1983." But this is a fundamental misreading of *Tanzin*, which was concerned with whether a "'government,' under RFRA, extends . . . to include officials." *Tanzin*, 592 U.S. at 47. Looking to § 1983 for guidance, the Supreme Court concluded that it did. This analysis does not speak to the availability of a § 1983 cause of action against federal officials.

state crimes); *Cabrera v. Martin*, 973 F.2d 735, 743 (9th Cir. 1992) ("We have not found a single precedent which would support a holding that a federal agency acting under its own guidelines could be considered to have acted 'under color of state law' merely because it was induced by the actions of a state actor . . . .").

Even if we were to apply Hernandez's proposed "joint action test," which is applicable to private actors not federal actors, to determine ICE Agent Causey's liability, willful participation alone is insufficient. Hernandez would still be required to allege some agreement, whether explicit or implicit, between Causey and state officers to deprive Hernandez of his rights in order to claim liability under § 1983. We have held that, to satisfy the joint action test for a private actor, a plaintiff must plead "facts showing an agreement or meeting of the minds between the state actor and the private actor to engage in a conspiracy to deprive the plaintiff of a constitutional right, and that the private actor was a willing participant in joint activity with the state or its agents." *Pikaluk v. Horseshoe Ent., L.P.*, 810 F. App'x 243, 247 (5th Cir. 2020) (quoting *Polacek v. Kemper Cnty*, 739 F. Supp. 2d 948, 952 (S.D. Miss. 2010)). Hernandez argues that *Pikaluk* is "nonauthoritative" because it is unpublished and contradicts prior case law. But our older, published case law actually supports the standard articulated in *Pikaluk*—for example, we looked for "evidence to establish a conspiracy" in *Knights*, 735 F.2d at 900, and affirmed a district court's dismissal of a § 1983 against a private actor when "the evidence was insufficient to show that [the private actor] and the [state actors] had agreed to commit an illegal act" in *Mylett v. Jeane*, 879 F.2d 1272, 1275 (5th Cir. 1989).

Hernandez argues that we did not explicitly search for a conspiracy in the more recent private-actor case *Cherry Knoll, L.L.C. v. Jones*, 922 F.3d 309 (5th Cir. 2019). But the issue in *Cherry Knoll* was whether the pleadings were sufficient to state a claim that a private actor was a "willful participant in joint action" with state actors in the complained-of deprivation. *Id.* at 319–20. The district court "determined that . . . [the private actor] should be dismissed because it was not part of a conspiracy." *Id.* at 316. But we found that several specific allegations in the pleadings, including the fact that the private actor "was hired by the City to handle all aspects of the City's acquisition of property from the various landowners affected," combined with a long history of interactions between the private and state actors, were sufficient to state a claim. *Id.* at 319–20. Our decision in *Cherry Knoll* reflects the requirement that a plaintiff must plead some type of agreement to pursue a § 1983 claim against a private actor.

Applying § 1983 liability to a *federal* actor requires further allegations that place the constitutional deprivation under state rather than federal law. Where the federal actor could have derived their authority to act under federal law, the consensus of circuit courts is that § 1983 necessitates evidence of a conspiracy between the federal actor and a state actor to deprive the plaintiff of his rights under color of *state* law. *See Hindes*, 137 F.3d at 158 ("[F]ederal officials are subject to section 1983 liability . . . where they have acted under color of state law, for example in conspiracy with state officials."); *Strickland ex rel. Strickland v. Shalala*, 123 F.3d 863, 868 (6th Cir. 1997) ("Without proof of . . . a conspiracy, the federal officials cannot be found to have acted under color of state law." (cleaned up)); *Olson v. Norman*, 830 F.2d 811, 821 (8th

Cir. 1987) ("Where federal officials conspire with state officials . . . they may be held liable" under § 1983.). We agree. Although the conspiracy need not be explicit, a § 1983 plaintiff suing a federal actor must show some evidence of an agreement between the federal and state actors to undertake the unconstitutional acts.

Hernandez points to his allegation that "there was a pretextual request for translation assistance" and argues this is sufficient to allege such an agreement. But his claims are conclusory. His proposed amended complaint states that "Causey[] was aware" of "the pretext of a need for translation assistance to question any Hispanic male." In support, he states that Officer Driskell was able to use a few Spanish words to communicate with Mendoza and administer a breathalyzer before the ICE officers arrived and that this implies pretext. Even if Officer Driskell's call to ICE was pretextual—and the fact that some words of Spanish and English were exchanged is not enough to support this inference—Hernandez's allegations do not support an agreement with Causey. Crucially, Hernandez's proposed complaint admits that Causey not only was called in by other ICE agents but then also was instructed to pursue Hernandez by ICE Agent McGhee. As the district court correctly observed:

> [N]owhere in his proposed fourth amended complaint does Hernandez allege any *facts* that Causey came to an agreement or meeting of the minds with Laurel police officers to seize Hernandez—much less to shoot him. In fact, each allegation concerning the shooting focuses solely on Causey's conduct, which gives rise to the inference that the decision to shoot Hernandez was Causey's decision alone, not the result of some prior agreement.

Federal officers who are called in to assist a state officer can be liable under § 1983 when there is evidence of a conspiracy to deprive and the constitutional deprivation "ha[s] its source in state authority." *Lindke*, 601 U.S. at 198 (quoting *Lugar*, 457 U.S. at 939). But because Causey did not act under color of state law, and because Hernandez has alleged neither details of a conspiracy between Causey and the state officials nor any agreement with them to use excessive force, much less any state authority directive to do so, the district court properly dismissed Hernandez's § 1983 claims.

* * *

For the foregoing reasons, we AFFIRM the district court's dismissal of both the *Bivens* and § 1983 claims against Causey. We AFFIRM the district court's denial of Hernandez's motion for leave to amend the complaint as further amendment would be futile.

JAMES L. DENNIS, *Circuit Judge*, concurring in part and dissenting in part:

On July 20, 2016, Officer Driskell of the Laurel Police Department pulled over two vehicles, one driven by Plaintiff-Appellant Gabino Ramos Hernandez and another driven by his brother, for routine state law traffic violations in Laurel, Mississippi. Requiring "translation services" for the second time that same day, Officer Driskell called federal U.S. Immigration and Customs Enforcement ("ICE") Agents to the scene.

When the ICE van transporting the *de facto* translators arrived, Hernandez—who was not detained by Officer Driskell (only his brother was)—left the scene by foot in a hurry. Officer Driskell then instructed his translator, ICE Agent McGhee, that Hernandez had "go[ne] down the block! He's running south!" McGhee, in turn, instructed ICE Agent Causey, another potential translator, to pursue Hernandez. Causey complied, chased after Hernandez, and then seized Hernandez by shooting him in the arm, which "obliterat[ed] part of the radius in [his] forearm." Hernandez filed suit against Causey, bringing a *Bivens* claim[1] and a Fourth Amendment excessive force claim through 42 U.S.C. § 1983. No one challenges the district court's ruling that Causey's alleged actions constituted excessive force in violation of the Fourth Amendment.

I agree with the majority that Hernandez's *Bivens* claim is foreclosed by the Supreme Court's decision in *Egbert v. Boule*, 596 U.S. 482 (2022). *Ante*, at 6–11 (majority opinion). However, and with great respect for my esteemed colleagues, I would find that Hernandez

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[1] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

has pleaded a § 1983 claim upon which relief can be granted. To plausibly plead that Causey acted under color of state law, rather than federal law, our cases do not require Hernandez to have alleged a conspiracy between the Laurel Police and ICE officers to seize Hernandez. *Ante*, at 15–18 (majority opinion mistakenly imposing that overly exacting standard). Instead, when federal officials either conspire or act jointly with state officials to deny constitutional rights, the state officials provide the requisite state action to support § 1983 claims against the federal officials. *Knights of Ku Klux Klan, Realm of La. v. E. Baton Rouge Par. Sch. Bd.*, 735 F.2d 895, 900 (5th Cir. 1984).

Because I would reverse the district court's dismissal of Hernandez's § 1983 excessive force claim against Causey,[2] I respectfully concur in part and dissent in part.

* * *

Section 1983 authorizes a claim for relief only against persons who acted under color of state law. See 42 U.S.C. § 1983. Federal officials who act pursuant to federal law do not act under color of state law, but rather act under color of federal law. *Mack v. Alexander*, 575 F.2d 488, 489 (5th Cir. 1978) (holding that § 1983 "provide[s] a remedy for deprivation of rights under color of state law and do[es] not apply [to] defendants . . . acting under color of federal law"). When a federal official acts together with state or local officials, the critical determination is whether she acted under color of state or federal law. On this, the

[2] I agree with the majority that Hernandez's § 1983 unlawful detention claim is not briefed before us, meaning any challenge to the district court's dismissal of that claim is forfeited. *Ante*, at 12–13.

majority and I agree. We diverge, however, on the test that should apply to answer this question.

Contrary to the majority's view, I read *Knights of Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Board*, 735 F.2d 895 (5th Cir. 1984), to apply the so-called joint action test to federal officers. *Ante*, at 13–14. There, we held "when federal officials conspire *or* act jointly with state officials to deny constitutional rights, 'the state officials provide the requisite state action'" for purposes of § 1983. Knights, 735 F.2d at 900 (emphasis added) (quoting *Hampton v. Hanrahan*, 600 F.2d 600, 623 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980)). Despite the use of the word "or," the majority reads *Knights* to require a conspiracy and rejects Hernandez's argument that the joint action test applies to federal officers. *Ante*, at 14. In my view, *Knights* explicitly dictates that we find federal officials act under color of state law when the federal government "act[s] jointly with state officials to deny constitutional rights." 735 F.2d at 900. Our cases following *Knights* confirm as much. *See*, *e.g.*, *Rodriguez v. Handy*, 873 F.2d 814, 817 n.3 (5th Cir. 1989) (noting that Border Patrol Agents assisting local law enforcement officials "were acting under color of state law and could be found liable under § 1983"). Given its significant reliance on out-of-circuit authority, it is apparent that the majority wants our circuit's precedents to conform with some other circuits' precedents, which admittedly do impose a strict conspiracy requirement. *See*, *e.g.*, *Ante*, at 15 (relying on caselaw from the Seventh, Ninth, and Tenth Circuits that do not align with *Knights*); *Ante*, at 16–17 (similar); *but see Jorden v. Nat'l Guard Bureau*, 799 F.2d 99, 111 n.17 (3d Cir. 1986) (citing with approval *Knights* for the proposition that "federal officials who conspire or act jointly with state officials may be liable under § 1983"

(emphasis added)). While the pursuit of conformity is an important one, under our rule of orderliness, we are duty bound to apply *Knights*' explication of the law at this stage. *See Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999) ("It is a firm rule of this circuit that in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court, a panel cannot overrule a prior panel's decision."). I therefore cannot join the part of the majority's opinion that *sub silentio* overturns a prior published panel opinion.

Furthermore, I respectfully disagree with the majority's alternative holding that the joint action test itself requires evidence of a conspiracy, and I find the majority's reliance on an unpublished Fifth Circuit opinion unpersuasive. *Ante*, at 15–16. Specifically, the majority adverts to *Pikaluk v. Horseshoe Ent., L.P.*, 810 F. App'x 243 (5th Cir. 2020) (unpublished), and says "[e]ven if" the joint action test does apply to federal actors, to satisfy that test, "a plaintiff must plead facts showing an agreement or meeting of the minds between the state actor and the private actor *to engage in a conspiracy* to deprive the plaintiff of a constitutional right, *and* that the private actor was a willing participant in joint activity with the state or its agents.'" *Ante*, at 15 (quoting *Pikaluk*, 810 F. App'x at 247) (emphasis added). While that is what *Pikaluk* states, I believe it misstates the standard.

Notably, the panel in *Pikaluk* cited to a district court's opinion as support that the joint action test requires a conspiracy. 810 F. App'x at 247 (citing *Polacek v. Kemper Cnty.*, 739 F. Supp. 2d 948, 952 (S.D. Miss. 2010)). The district court's opinion in *Polacek*, however, cites to *Mylett v. Jeane*, 879 F.3d 1272, 1275 (5th Cir. 1989) (emphasis added), a prece-

dential opinion where our court held "in order to find a private citizen liable under section 1983, the plaintiff must allege and prove that the citizen conspired with or *acted in concert with state actors*." *Mylett*'s recitation of the law jibes with other Fifth Circuit and Supreme Court precedents, which hold "under the 'joint action test,' private actors will be considered state actors where they are [merely] 'willful participant[s] in joint action with he State or its agents.'" *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 550 (5th Cir. 2005) (quoting *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)); *see also Cherry Knoll, L.L.C. v. Jones*, 922 F.3d 309, 319 (5th Cir. 2019) ("Under Supreme Court precedent, to act under color of state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents." (citations and quotations omitted)); *accord O'Handley v. Weber*, 62 F.4th 1145, 1159 (9th Cir. 2023), *cert. denied*, 144 S.Ct. 2715 (mem.) (2024) (explaining how the joint action test can be satisfied either by showing a conspiracy *or* by showing willful participation in joint action). Accordingly, I respectfully disagree that the joint action test requires allegations of a conspiracy. And to the extent a nonbinding opinion of our court—*Pikaluk*, 810 F. App'x at 247—holds otherwise, I would clarify that the correct standard is found in *Cornish*, 402 F.3d at 550 (quoting *Dennis*, 449 U.S. at 27) and *Mylett*, 879 F.3d at 1275.

Applying the joint action test derived from binding precedents to the facts of this case, I would find that Hernandez plausibly alleged that translator Causey acted under color of state law when he seized Hernandez with a gunshot/excessive force. Neither the majority, the district court, nor the Government point to any federal law or regulation that Causey acted pursuant

to when he came to the scene as Officer Driskell's translator, when he began to chase after Hernandez who was leaving a state law traffic investigation, or when he eventually shot Hernandez to seize him. To the contrary, the Government disavows that the ICE Agents were on the scene to perform immigration operations—they were only there as the Laurel Police Department's translators to accomplish the state's purpose of enforcing its traffic laws. *Stypmann v. City & Cnty. of San Francisco*, 557 F.3d 1338 (9th Cir. 1977) (holding that a towing company acting at the behest of a police officer to accomplish the state's purpose of enforcing its traffic laws acted under color of state law) (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974))). Further still, according to Officer Driskell, the ICE translators were an "additional tool in his toolbox" and he had relied on them in the past for translation assistance when stopping Hispanic people. The level of interdependence manifested in this case by Laurel Police Department Officer Driskell, acting pursuant to state law, instructing ICE Agents to partake in a local police matter as translators and then to pursue and seize Hernandez. Causey followed that instruction and seized Hernandez by shooting him in the arm, in contravention of the Fourth Amendment's guarantee that individuals be free from an unreasonable government seizure by the use of excessive force. *Knights*, 735 F.2d at 900 (holding federal officials act under color of state law when the federal government "act[s] jointly with state officials to deny constitutional rights").

Viewing the alleged facts in the light most favorable to Hernandez leads me to conclude that Causey was a "willful participant in joint action with the State or its agents." *Dennis*, 449 U.S. at 27. I would reverse the district court's dismissal of Hernandez's § 1983 excessive force claim against Causey. Still, for the

reasons assigned by the majority, I agree that we must affirm the district court's dismissal of Hernandez's *Bivens* claim. I respectfully concur in part and dissent in part.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed: December 23, 2024]

No. 24-60080

GABINO RAMOS HERNANDEZ,

Plaintiff-Appellant,

versus

PHILLIP CAUSEY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 2:17-CV-123

Before ELROD, *Chief Judge,* DENNIS, and HIGGINSON, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED. For the foregoing reasons, we AFFIRM the district court's dismissal of both the *Bivens* and § 1983 claims against Causey. We AFFIRM the district court's denial of Hernandez's motion for leave to amend the complaint as further amendment would be futile.

IT IS FURTHER ORDERED that appellant pay to appellee the costs on appeal to be taxed by the Clerk of this Court.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. See Fed. R. App. P. 41(b). The court may shorten or extend the time by order. See 5th Cir. R. 41 I.O.P.

JAMES L. DENNIS, *Circuit Judge*, concurring in part and dissenting in part.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

Civil Action No. 2:17-cv-123-TBM-MTP

GABINO RAMOS HERNANDEZ

Plaintiff

v.

PHILLIP CAUSEY and
THE UNITED STATES OF AMERICA

Defendants

ORDER

On the evening of July 16, 2016, Immigration and Customs Enforcement ("ICE") agents received a call from a Laurel Police Department officer requesting assistance with translation services. The request was made in connection with a traffic stop for routine traffic violations involving two Hispanic males. The Plaintiff, Gabino Ramos Hernandez, rolled through a stop sign, and Hernandez's brother, who was following behind him in his own vehicle, appeared to be driving while intoxicated. Once the ICE van arrived on scene, Hernandez ran away. Two ICE agents, including Defendant Phillip Causey, then chased Hernandez. Hernandez stopped running and claims that he had his hands raised when Causey shot him, though this heavily disputed by Causey.

Now before the Court is Hernandez's Motion for Leave to File a Fourth Amended Complaint [143] against Causey pursuant to 42 U.S.C. § 1983. For the reasons fully discussed below, Hernandez fails to state an unlawful seizure claim against Causey and does not allege that Causey was acting under color of state law for purposes of his excessive force claim. Accordingly, Hernandez's Motion is denied as any amendment would be futile. To the extent any Section 1983 claims against Causey remain, they are dismissed with prejudice.[1]

I. FACTS AND PROCEDURAL HISTORY

This Court has addressed the facts extensively in prior opinions and will therefore provide only a summary here.[2] On July 20, 2016, Laurel Police Department Officer David Driskell initiated a traffic stop after observing two separate vehicles commit routine traffic violations. [1], pg. 2. Hernandez failed to come to a complete stop at a stop sign, and his brother, who was following behind him in a separate vehicle, appeared to be driving while intoxicated. [1], pg. 2. After initiating the stop, Officer Driskell tried to question Hernandez's brother in English, but discovered that his primary language was Spanish. [68-1], ¶ 3. While Officer Driskell obtained basic information from

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[1] While the claims against Causey are dismissed, this action will proceed against the United States on Hernandez's remaining claims arising under the Federal Tort Claims Act.

[2] Although some of these facts have been revealed through discovery, the Court offers them for context only—as the facts relied on for purposes of this Motion are those offered within Hernandez's Complaint, amendments to the Complaint, and the facts offered in his proposed fourth amended complaint which adopts and amends his prior Complaints. [1]; [5]; [20]; [106]; [143-1]. Summary judgment evidence is not relied upon since the Court applies a 12(b)(6) standard in deciding this Motion.

Hernandez's brother in English, the language barrier made it difficult to continue the questioning. [68-1], ¶ 3.

Officer Driskell knew that ICE agents were in the area performing immigration operations, and he called ICE agent Mike McGhee to request translation services. [143-1], pg. 2. Mike McGhee then called Causey and another ICE agent to respond to the scene. At this point, Officer Driskell had not yet spoken to Hernandez. [75-3], pg. 103:5-14. And Officer Driskell never indicated to Hernandez or the ICE agents on the scene that Hernandez was getting a ticket for a traffic offense, was suspected of committing a crime, that he was being detained, or that he was armed or dangerous. [143-1], pg. 2; [75-3], pg. 81:13-23; [75-8] at 0:00-16:28. Instead, the ICE agents were only told that Hernandez was "mouthy." [143-1], pg. 3.

Once ICE agent Mike McGhee arrived, Police Officer Driskell left Hernandez's brother with ICE agent McGhee, and he went to talk to Hernandez. [68-1], ¶ 4. At that time, Hernandez was talking on the phone to a friend about what would happen to his brother. [75-22], at 42:3-10. Then, Hernandez saw the ICE transportation van, and he ran. *See* [143-1], pg. 2; [75-22], at 42:10-14. Hernandez was already running when the Defendant, ICE agent Phillip Causey, and ICE agent Kyle Le arrived on the scene. [68-3], ¶ 2; [68-4], ¶ 2; *see also* [143-1], pg. 3. ICE agent McGhee told ICE agents Causey and Le to "walk back down to the end of the street and see if you can locate him." [75-1], pg. 23:12-19; [143-1], pg. 4.

Pursuant to this instruction, ICE agents Causey and Le went to see if they could locate Hernandez. Officer Driskell began shining "his flashlight on Hernandez as he was walking up 11th Street, and verbally identifying him as the individual they needed to seize." [143-

1], pg. 4. ICE agents Causey and Le advanced towards Hernandez with their weapons drawn and began shouting. [143-1], pg. 5. Hernandez asserts that he had "his hands raised in surrender" when Causey shot him.[3] [143-1], pg. 5.; [1], pg. 3; [5], pg. 4; [20], pg. 4. He also alleges that the bullet struck him "in the right arm and obliterate[ed] part of the radius in [his] right forearm." [143-1], pg. 5.

Along with a tragic factual history, this case also presents a unique procedural history, as the original Complaint was filed in this Court on July 20, 2017.[4] In the original Complaint, Hernandez brought claims under *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), alleging that Causey violated his Fourth, Fifth, and Fourteenth Amendment rights to be free from an unreasonable seizure and excessive use of deadly force. Hernandez later amended his

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[3] Causey heavily disputes Hernandez's version of the facts and while the Court does not rely on summary judgment evidence for purposes of this motion, for context, the Court notes that Causey asserts in his deposition that Hernandez was reaching into his pocket when Causey discharged his firearm. [68-3], ¶ 3. The Court also notes that ICE agent Le and Laurel Police Department Officer Robertson both testified that Hernandez reached towards his pocket before the shooting. [68-4], ¶ 3; [75-1], pgs. 35:24-36:5; [75-2], pg. 33:3-8; [75-4], pg. 24:16-20; [68-2], ¶ 4.

[4] This case has been stayed many times because Causey has been, and is currently, deployed overseas on active military duty. The parties have ordinarily brought the request for a stay to the Court's attention and have agreed to the stay. *See* [29] (staying case until November 30, 2018); [31] (staying case until September 15, 2019); [107] (staying discovery and disclosure deadlines); [135] (denying Hernandez's Motion to Lift Stay and staying case through September 30, 2023); [147] (staying case through November 3, 2024). Despite the various stays, the parties have engaged in lengthy motion practice to determine the ultimate claims at issue.

Complaint to allege negligence and intentional tort claims against the United States under the Federal Tort Claims Act ("FTCA"). The Defendants filed a combined Partial Motion to Dismiss [68] for lack of subject matter jurisdiction as to the negligent training and supervision claim under the FTCA and a Motion for Summary Judgment [68] as to the other claims. This Court dismissed Hernandez's negligent training and supervision claim without prejudice for failure to state a claim and allowed Hernandez to file an amended complaint. The Court then addressed the *Bivens* question *sua sponte* and found Hernandez's *Bivens* claim against Causey was the kind of Fourth Amendment search-and-seizure case that courts have adjudicated through *Bivens* actions.[5] [89], pg. 13. After determining that Hernandez's *Bivens* claim did not present a "new context," the Court found a genuine issue of material fact as to where Hernandez's hands were positioned at the time of the shooting and denied Causey's Motion for Summary Judgment on the basis of qualified immunity.

Following the Court's Memorandum Opinion and Order [89], Hernandez filed an Amended Complaint [106] alleging that the United States is liable for the "tort[i]ous and wrongful supervision and instruction of Phillip Causey and other deportation agents involved

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[5] Despite well established Supreme Court precedent holding that the Bivens question is "antecedent" to the question of qualified immunity, Causey provided no briefing and made no objection as to whether Hernandez could bring suit under the *Bivens* framework for a Fourth Amendment excessive force claim. *Hernandez v. Mesa*, —— U.S. ——, 137 S. Ct. 2003, 2006, 198 L. Ed. 2d 625 (2017) (Hernandez I). Even after Hernandez analyzed the Bivens question in his Response in Opposition to Causey's Motion for Summary Judgment, Causey initially still raised no objection to the validity of Hernandez's claims under *Bivens*.

in Plaintiff's shooting, in direct contravention of the Plaintiff's Fourth Amendment rights." [106], ¶ XXXVII. In response, the United States filed a Motion to Dismiss [120] Hernandez's tortious supervision and training claim and partial motion to dismiss Hernandez's claim for negligent use of deadly force. The Court granted the United States' Motion to dismiss [120] finding that it lacked subject matter jurisdiction over Hernandez's tortious training and supervision claim because it is barred by the discretionary function exception of the FTCA. The Court also found that Hernandez failed to state a claim for the use of deadly force asserted against the United States with respect to conduct by any ICE agent other than Causey.

Following the Supreme Court's ruling in *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022), Causey also filed a Motion for Reconsideration [129] of the Court's Opinion [89] denying his Motion for Summary Judgment. Causey argued that based on this intervening law, Hernandez's *Bivens* claim must be dismissed as it presents a "new context" and because special factors counsel hesitation about granting an extension. After further consideration, the Court found that "in light of the Supreme Court's opinion in *Egbert v. Boule*, it is clear that *Bivens* claims are even more narrow and limited than this Court found in its prior Opinion" and that "Hernandez' Fourth Amendment claim does present a 'new context' and that special factors counsel hesitation in extending *Bivens*." [136], pp. 23-24. Accordingly, Causey's Motion for Reconsideration [129] was granted, and Hernandez's Fourth Amendment *Bivens* claim was dismissed.

The Defendants then filed a joint Motion to Dismiss [138] all remaining claims against Causey, which the Court granted in part and denied in part. [142].

Hernandez conceded that all state-law claims against Causey should be dismissed, so they were. The Court also found to the extent that Hernandez alleged a Section 1983 claim against Causey based on his actions as a federal agent acting under color of federal law, such a claim must be dismissed. And although Hernandez failed to plead sufficient facts that Causey was acting under color of state law for 42 U.S.C. § 1983 purposes, rather than dismissing this claim, the Court allowed Hernandez to file a motion for leave to amend his complaint.

In accordance with the Court's Order [142], Hernandez has now filed a Motion for Leave to File a Fourth Amended Complaint [143] against Causey under Section 1983. For the reasons discussed fully below, Hernandez's Motion is denied.[6]

II. HERNANDEZ'S MOTION FOR LEAVE TO AMEND

"[L]eave to amend under Rule 15(a) is to be freely given[; however,] that generous standard is tempered by the necessary power of a district court to manage a case." *Priester v. JP Morgan Chase Bank, N.A.*, 708

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[6] Hernandez also "reaffirms and adopts" his claims for excessive use of deadly force, negligent use of deadly force and tortious supervision and training against the United States, which were previously dismissed. [143-1], pg. 13; [136]. Although Hernandez's claim against the United States for assault and battery remains, and amendment may therefore be permissible, in its Order [143] allowing Hernandez to file the instant motion, the Court made it clear that the motion and proposed amended complaint were to focus only on "any 42 U.S.C. § 1983 claim against Causey related to whether Causey acted under color of state law." [143], pg. 2. Because Hernandez has not previously sought leave to amend his claims against the United States, his Motion is further denied on this ground.

F.3d 667, 678 (5th Cir. 2013) (quoting *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 566 (5th Cir. 2003)). In determining whether to grant leave to amend under Rule 15(a), "the court may consider factors such as 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, [and] futility of the amendment.'" *Leal v. McHugh*, 731 F.3d 405, 417 (5th Cir. 2013) (alteration in original) (citations omitted). "Futility is determined under Rule 12(b)(6) standards, meaning an amendment is considered futile if it would fail to state a claim upon which relief could be granted." *Legate v. Livingston*, 822 F.3d 207, 211 (5th Cir. 2016).

The Court has allowed Hernandez to file three Amended Complaints [5], [20], [106]. Notably, the most recent amendments apply only to the United States and not Causey. [20]; [106]. Thus, the last time Hernandez provided any amended allegations against Causey was in his second Amended Complaint [5] filed on September 22, 2017. And crucially, there has been no undue delay by Hernandez as this matter has been repeatedly stayed by agreement of the parties because of Causey's military deployment—in fact, Causey recently filed his fourth Motion [147] to stay these proceedings through November 3, 2024, which was granted. Also, a trial date has not been set because of the recurring stay orders. Finally, there has been no repeated failure to cure deficiencies, as this is the first time Hernandez has requested to amend his allegations against Causey since 2017. These factors weigh in favor of allowing the amendment.

So the only question before the Court is whether the amended complaint would be futile. *Legate*, 822 F.3d

at 211. Under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citation omitted). "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." *Iqbal*, 556 U.S. at 678. This standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* And "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* When conducting a Rule 12(b)(6) analysis, "a district court must limit itself to the contents of the pleadings, including attachments thereto." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) (citing FED. R. CIV. P. 12(b)(6)). The Court must now determine whether Hernandez has pleaded "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "If the complaint, as amended, would be subject to dismissal, then amendment is futile and the district court [is] within its discretion to deny leave to amend." *Martinez v. Nueces Cnty., Texas*, 71 F.4th 385, 391 (5th Cir. 2023).

In Hernandez's proposed fourth amended complaint, he "reaffirms and adopts" his *Bivens* claim against Causey, which has already been dismissed. [143-1], pg. 13; [136]. Accordingly, allowing an amendment as to this claim would be futile and his Motion is denied on this ground. Pursuant to the Court's Order [142], however, Hernandez also proposes amendments to his allegations against Causey pursuant to 42 U.S.C. § 1983. [143-1], pp. 8-13. Section 1983 provides that every person who acts under color of state law to

deprive another of constitutional or other federal rights shall be liable to the injured party. 42 U.S.C. § 1983. "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). The Court will consider each element in turn—and if Hernandez fails to allege any element, then the amendment is futile.

A. Deprivation of a constitutional right

"The first step in any [Section 1983] claim is to identify the specific constitutional right allegedly infringed." *Cantu v. Moody*, 933 F.3d 414, 421 n.2 (5th Cir. 2019) (citing *Albright v. Oliver*, 510 U.S. 266, 271, 114 S. Ct. 807, 127 L.Ed.2d 114 (1994)). In his proposed fourth amended complaint,[7] Hernandez claims that Causey acted under the color of state law and deprived "him of basic human rights without due process of law, by unreasonably seizing [Hernandez] without probable cause and with the callous and unreasonable use of excessive force." [143-1], pg. 9. Hernandez specifically pleads claims for unreasonable seizure and excessive force arising under the Fourth, Fifth, and Fourteenth Amendments. *Id.* The Court will first address Hernandez's unreasonable seizure claim arising out of an allegedly pretextual traffic stop and will then turn to his allegations of excessive force. *Brown v. Lynch*, 524 F. App'x 69, 79 n. 3 (5th Cir. 2013)

[7] Hernandez specifically amends and seems to incorporate by reference "the facts as stated in his First and Second Supplemental and Amending Complaints," and the Court will therefore consider all facts alleged in these prior complaints. [143-1], pg. 2.

(finding that a claim for excessive force is "separate and distinct" from an unlawful seizure claim).

1. Unreasonable seizure

"The Fourth Amendment provides that 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.'" *Terry v. Ohio*, 392 U.S. 1, 9, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). To prevail on an unlawful seizure claim, a plaintiff must prove (1) that a seizure occurred, and (2) that the seizure was unreasonable. *See Torres v. Madrid*, —— U.S. ——, 141 S. Ct. 989, 1003, 209 L. Ed. 2d 190 (2021). In his proposed fourth amended complaint Hernandez asserts that Causey seized him without probable cause in violation of the Fourth Amendment. Although unclear, it appears that Hernandez's claim arises out of an allegedly pretextual traffic stop. Because a traffic stop is considered a seizure under the Fourth Amendment, the question is whether the seizure was reasonable, i.e., whether there was probable cause that Hernandez committed a traffic violation. *Brendlin v. California*, 551 U.S. 249, 255, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007); *United States v. Rosales-Giron*, 592 F. App'x 246, 251 (5th Cir. 2014) (finding that an officer has probable cause to conduct a traffic stop when he personally observes the defendant commit the traffic violation).

While not alleged within his proposed fourth amended complaint, Hernandez argues in his Memorandum in Support of his Motion for Leave to File a Fourth Amended Complaint that "there was a meeting of the minds, or at the very least, a tacit agreement between Officer Driskell and the five ICE agents to conduct, as a joint operation with local police, an unlawful stop based solely on race. This tacit agreement was what

led directly to the joint operation to pursue and seize Hernandez." [144], pg. 8. He argues that "[s]topping Hispanics without an articulable basis to do so has been denounced by the Supreme Court as a violation of the Fourth Amendment against unreasonable seizures based solely on race in *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-887, 95 S. Ct. 2582-2583, 45 L. Ed. 2d 607, 619-620 (1975)." [144], pp. 7-8. Because Hernandez does not specifically plead a Fourth Amendment claim arising out of an allegedly pretextual traffic stop based solely on race in his proposed fourth amended complaint, the Court need not consider this argument. Thus, any such claim is futile as it is not well pled. But for clarity and completeness of the record, the Court will nevertheless address Hernandez's *argument* that the initial traffic stop was based solely on race in violation of the Fourth Amendment.

A pretextual traffic stop is illegal under Fourth Amendment standards when (1) an officer who initiated a traffic stop lacked reasonable suspicion to believe that a traffic violation occurred and (2) the officer's subsequent actions were not reasonably related in scope to the circumstances that justified the stop. *United States v. Walker*, 49 F.4th 903, 907 (5th Cir. 2022) (citation omitted); *United States v. Brigham*, 382 F.3d 500, 506 (5th Cir. 2004) (treating "routine traffic stops, whether justified by probable cause or a reasonable suspicion of a violation, as *Terry* stops."); *United States v. Escalante*, 239 F.3d 678, 680 (5th Cir. 2001) ("if it is clear that what the police observed did not constitute a violation of the cited traffic law, there is no 'objective basis' for the stop, and the stop is illegal."). The Court will consider each in turn.

a. Probable cause

Here, Hernandez asserts in his Memorandum that the initial traffic stop was "an unlawful stop based solely on race." [144], pg. 8. But Hernandez is suing Causey individually—not Officer Driskell. And there are no factual allegations within Hernandez's proposed fourth amended complaint, which incorporates by reference all factual allegations asserted in previous complaints, that *Causey* had any information pertaining to Hernandez's race. In fact, the only allegation in his proposed fourth amended complaint that Officer Driskell informed anyone of Hernandez's race stems from Officer Driskell's phone call to ICE Agent McGhee.[8] Specifically, Hernandez alleges that Officer Driskell informed ICE Agent McGhee "of his location and then requested that he assist him in a local traffic stop of a Hispanic male." [143-1], pg. 2. But Hernandez has alleged no facts that Causey was subsequently informed about Hernandez's race before arriving on the scene. *Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact).") (internal quotations omitted); *Waksman v. Cohen*, No. 95-cv-3913-WK, 1998 WL 690091, at *3 (S.D. N.Y. Sep. 30, 1998) ("[a]ny suggestion that the stop was impermissibly race-based is wholly speculative given the state of the record at present."). Without more, Hernandez does not success-

[8] Although not relied upon for purposes of the instant Motion, the Court does note that Causey testified in his deposition that he was only asked to "bring the van" and was not given any additional information. [75-1], pg. 18:14-25. This could be why no other facts on this issue are set forth in the proposed fourth amended complaint.

fully allege that Causey violated his Fourth Amendment rights by seizing Hernandez based solely on his race.

Not only are there no facts to support an inference that Hernandez was pulled over solely because of his race—or that Causey was involved in such a decision—such allegations are nevertheless insufficient in the context raised. In fact, the Supreme Court has rejected a Fourth Amendment challenge to a traffic stop allegedly based on race because an officer's motives do not invalidate "objectively justifiable behavior under the Fourth Amendment." *Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996).[9] In other words, an officer's subjective beliefs are irrelevant in determining the validity of a traffic stop under the Fourth Amendment. *United States v. Escalante*, 239 F.3d 678, 680 (5th Cir. 2001) ("[t]his is an objective test based on the facts known to the officer at the time of the stop, not on the motivations of the officer in making the stop."). Therefore, to successfully allege that a traffic stop is pretextual for Fourth Amendment purposes, Hernandez must provide factual allegations that the traffic stop was invalid or initiated without probable cause. He does not.[10]

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[9] Additionally, in *Whren*, the Supreme Court explained that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren*, 517 U.S. at 813.

[10] In support of his allegations, Hernandez relies on the Supreme Court's decision in *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2582, 45 L. Ed. 2d 607, (1975). There, border patrol officers "relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants." *Brignoni-Ponce*, 422 U.S. at 886. The Supreme Court held that "this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed

In fact, Hernandez acknowledges that ICE agents "responded to a request from local police officers to assist with translating Spanish in connection with a stop of two Hispanic individuals *for routine traffic violations*." [1], pg. 2 (emphasis added). And Hernandez further admits that he personally was pulled over for "failing to come to a complete stop." [1], pg. 2.[11] Therefore, by Hernandez's own allegations, even if the initial traffic stop were pretextual, it "[did] not violate the Fourth Amendment [because] the officer making the stop ha[d] 'probable cause to believe that a traffic violation ha[d] occurred.'" *United States v. Escalante*, 239 F.3d 678, 680 (5th Cir. 2001) (quoting *Wren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996)); *United States v. Walker*, 49 F.4th 903, 907 (5th Cir. 2022) ("A traffic stop is justified at its inception when an officer has 'an objectively reasonable suspicion that some sort of illegal activity, such as a traffic violation, occurred, or is about to occur, before

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other aliens who were illegally in the country." Id. Accordingly, the Supreme Court found that the stop violated the Fourth Amendment's protection against unreasonable seizures. In so finding, the Supreme Court held that border patrol officers must have reasonable suspicion, together with specific articulable facts, "that the vehicles contain aliens who may be illegally in the country." *Brignoni-Ponce*, 422 U.S. at 884. Not only are there no facts to support an inference that Hernandez was pulled over solely because of his race, Hernandez admits that there was reasonable suspicion for the initial stop because he was pulled over for rolling through a stop sign. Therefore, apart from reiterating that reasonable suspicion must exist before initiating a stop, the Court finds *United States v. Brignoni-Ponce* inapplicable to the facts alleged.

[11] Hernandez's brother was following behind him in a separate vehicle and was pulled over for driving under the influence. [1], pg. 2.

stopping the vehicle.'") (citation omitted).[12] Because there are no factual allegations supporting an inference that the initial traffic stop was invalid or initiated without probable cause, Hernandez fails to satisfy the first prong of the Fourth Amendment pretext analysis.

b. Reasonably related in scope

Next, the Court must determine whether Hernandez has alleged facts showing that Officer Driskell and the ICE agent's "subsequent actions were [not] reasonably related in scope to the circumstances that justified the stop." *United States v. Brigham*, 382 F.3d 500, 506 (5th Cir. 2004). To begin, the factual allegations in support of the second prong of the Fourth Amendment pretext analysis focus solely on "the pretextual need for translation assistance with *Mendoza*," Hernandez's brother, rather than Hernandez himself. [143-1], pg. 12 (emphasis added). In fact, the proposed fourth amended complaint makes no allegation that Hernandez was detained pending questioning, or that any subsequent detention of Hernandez—or Mendoza—was improperly

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[12] *Ashcroft v. al-Kidd*, 563 U.S. 731, 740, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (finding no Fourth Amendment violation where there are no allegations that the arrest was unconstitutional absent the alleged pretext); *United States v. Shaw*, No. 19-cr-157-MLH, 2020 WL 3816312, at *8 (W.D. La. Feb. 21, 2020) (finding traffic stop was justified because the officers observed the vehicle failing to "come to a complete stop at a stop sign."); *Lafleur v. City of Westwego*, No. 10-cv-363-LMA, 2011 WL 802612, at *5 (E.D. La. Feb. 28, 2011) (finding no Fourth Amendment violation because officer's decision to initiate a traffic stop was justified after observing the vehicle failing to come to a complete stop at a stop sign); *United States v. Aguilar*, No. 07-cr-844-AML, 2008 WL 11357945, at *5 (W.D. Tex. Oct. 29, 2008) (finding objectively reasonable basis for initiating the traffic stop because the officer observed the vehicle failing to come to a complete stop at a stop sign).

extended by waiting on ICE agents to arrive for translation assistance.

Instead, it is alleged that, after initiating the traffic stop, Officer Driskell conversed with Mendoza and then called ICE agent Mike McGhee for translation assistance. [143-1], pg. 10. "While waiting for all of the ICE agents to arrive, Officer Driskell began filling out a citation with Mendoza for DUI." [143-1], pg. 10. Officer Driskell also called a fellow Laurel Police Department officer and requested he bring a portable breathalyzer machine, which was administered before the ICE agents arrived. [143-1], pg. 11. According to Hernandez, "[a]fter Officer Driskell had performed the breathalyzer test, and sent for the DUI transport unit, there was nothing further he needed to do with *Mendoza*, and had no need for any translation assistance in Spanish from anyone." [143-1], pg. 11 (emphasis added). Hernandez finally alleges that "no translation assistance was ever given by any ICE agent." [143-1], pg. 12.

Based on these allegations, Hernandez has not alleged a violation of his *own* individual Fourth Amendment rights, and such allegations are therefore subject to dismissal. Indeed, "[a] party cannot assert a Section 1983 claim on behalf of someone else; he must instead establish a personal deprivation of one of his own rights or privileges secured by the Constitution." *Demarsh v. Gabriel*, No. 4:07-cv-194-RAS, 2008 WL 783463, at *2 (E.D. Tex. Mar. 25, 2008) (citing *Brumfield v. Jones*, 849 F.2d 152, 154 (5th Cir. 1988)); *Gregory v. McKennon*, 430 F. App'x 306, 310 (5th Cir. 2011) (finding the prisoner would lack standing to seek Section 1983 damages for violating other prisoners' rights); *Archuleta v. McShan*, 897 F.2d 495, 497 (10th Cir. 1990) ("a section 1983 complaint must be based

upon the violation of [a] plaintiff's personal rights, and not upon the rights of someone else."); *Coon v. Ledbetter*, 780 F.2d 1158, 1160-61 (5th Cir. 1986); *King v. Corrections Corp. of Am.*, No. 4:06-cv-77-WAP, 2006 WL 2265064 (N.D. Miss. Jul. 31, 2006).

Regardless, Hernandez provides no allegations that Causey questioned anyone at the scene or that such questioning was improper. But even if he did, "[m]ere [officer] questioning, without some nonconsensual restraint on one's liberty, is not a 'seizure' or detention" under the Fourth Amendment. *United States v. Brigham*, 382 F.3d 500, 508 (5th Cir. 2004) (citation omitted). "The reasoning behind this rule is that the Fourth Amendment protects against *detention*, not *questioning*." *Pack*, 612 F.3d 341, 350 (emphasis added); *United States v. Shabazz*, 993 F.2d 431, 436 (5th Cir. 1993) (explaining that "detention, not questioning, is the evil at which *Terry's* second prong is aimed."). And again, there are no allegations that Hernandez was improperly detained pending the arrival of ICE agents to question him. Without more, Hernandez fails to state a viable Fourth Amendment unreasonable seizure claim against Causey.

2. Excessive force

Having found that amendment of Hernandez's unreasonable seizure claim would be futile, the Court now turns to Hernandez's other Fourth Amendment claim, which is based upon excessive force. The Supreme Court has held that "our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (quoting *Terry*, 392 U.S. at

22-27). Even so, "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985); *Graham v. Connor*, 490 U.S. 386, 396–97, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). The proper application of the objective reasonableness standard "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 394. Notably, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396. So to prevail on an excessive force claim, the plaintiff must show that the use of force was excessive, and "that the excessiveness of the force was unreasonable." *Thompson v. Mercer*, 762 F.3d 433, 437 (5th Cir. 2014) (citation omitted).

According to Hernandez's factual allegations, the ICE agents knew they were being called to the scene to assist with translation services for a routine traffic stop for a Hispanic male. [143-1], pg. 2. Hernandez asserts, however, that Causey was never told that Hernandez had committed any crime, that he was under arrest or escaping, or that Hernandez was armed or dangerous. [143-1], pp. 7, 9; [1], pg. 2; [5], pg. 3; [20], pg. 4. Instead, Hernandez alleges that Causey was only told that Hernandez was "mouthy." [143-1], pg. 3. Regardless, at the time of the shooting, Hernandez alleges he had "his hands raised in surrender" when Causey shot him. [143-1], pg. 5.; [1], pg. 3; [5], pg. 4; [20], pg. 4.

The Fifth Circuit has explained that the excessive force inquiry is confined to whether the officer "was in danger at the moment of the threat that resulted in the [officer's] shooting [of the victim]." *Bazan ex rel. Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 493 (5th Cir. 2001); *Amador v. Vasquez*, 961 F.3d 721, 728 (5th Cir. 2020) (quoting *Manis v. Lawson*, 585 F.3d 839, 845 (5th Cir. 2009) ("So, the focus of the inquiry should be on 'the act that led [the officer] to discharge his weapon[.]"). And other courts have found allegations that a plaintiff's hands were raised at the time of the shooting sufficient to state a claim for excessive force. *Amador v. Vasquez*, 961 F.3d 721, 728 (5th Cir. 2020) (finding genuine issues of material fact as to reasonableness of excessive force when officers shot the plaintiff when he was standing motionless thirty feet away from the officers with his hands in the air); *Cullum v. Siemens*, No. SA-12-cv-49-DAE, 2013 WL 5781203, at *9–10 (W.D. Tex. Oct. 25, 2013) (finding deadly force was unreasonable because the armed suspect's hand was "palm-up in a 'stop' gesture" that was "submissive" and he did not present an immediate threat); *Jamison v. Metz*, 541 F. App'x. 15, 19–20 (2nd Cir. 2013) (holding that officers were not entitled to qualified immunity where the suspect had stopped and was in an act of surrendering by putting his hand in the air); *Robinson v. Nolte*, 77 F. App'x. 413, 414 (9th Cir. 2003) (holding that the use of deadly force violated the suspect's Fourth Amendment rights where the suspect had "his arms raised over his head in a classic surrender position, with a gun in his lap").

Therefore, based on Hernandez's allegation that his hands were raised when Causey shot him, Hernandez has alleged a Fourth Amendment claim for excessive force—at least at this stage—and the Court will now

turn to the second prong of the Section 1983 analysis.[13] *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 557; *Flores v. City of Palacios*, 381 F.3d 391, 396 (5th Cir. 2004); *Benavides v. Harris Cnty., Texas*, --- F. Supp. 3d ----, 2023 WL 4157160, at *6 (S.D. Tex. 2023) (finding plaintiff stated a claim for excessive force under Section 1983 because the plaintiff "(1) posed no threat, (2) was not resisting, (3) was not fleeing, (4) was unarmed, and (5) was shot 'almost instantaneously.'").

B. Under color of state law

Having found that Hernandez has alleged a deprivation of his Fourth Amendment right to be free from excessive force, the question now becomes whether Hernandez has alleged that Causey acted under color of state law as required for Section 1983 liability. "Section 1983 is of limited scope." *District of Columbia v. Carter*, 409 U.S. 418, 425, 93 S. Ct. 602, 34 L. Ed. 2d 613 (1973). Indeed, Section 1983 provides a remedy only if the deprivation of federal rights takes place "'under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory,' more commonly known as the 'under color of state law' or 'state action' requirement." *Ballard v. Wall*, 413 F.3d 510, 518 (5th Cir. 2005) (quoting *Lugar v. Edmondson*

[13] It appears from his proposed fourth amended complaint that Hernandez pleads, in the alternative, that his excessive force claim is actionable under the due process clause of the Fifth Amendment and Fourteenth Amendment. *See Hernandez v. United States*, 757 F.3d at 26 (explaining that "when a claim is not covered by the Fourth Amendment, we have recognized that an excessive-force claim may be asserted as a violation of due process."). Since plaintiffs may plead conflicting theories in their complaint, an amendment would not be futile on allegations of excessive force in violation of the due process clause of the Fifth Amendment and Fourteenth Amendment. *See Fredonia Broad. Corp., Inc. v. RCA Corp.*, 481 F.2d 781, 801 (5th Cir. 1973).

Oil Co., 457 U.S. 922, 929 (1982) (explaining that if the conduct at issue constitutes "state action," then it is "also action under color of state law and will support a suit under § 1983.")). "To constitute state action, 'the deprivation must be caused by the exercise of some right or privilege created by the State . . . or by a person for whom the State is responsible,' and 'the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" *West v. Atkins*, 487 U.S. 42, 49, 108 S. Ct. 2250, 101 L. Ed. 2d. 40 (1988) (citation omitted).

Because Section 1983 "only provides redress for actions taken under color of state law," it is well established that Section 1983 does not apply to "actions [] taken pursuant to federal law by federal agents." *Zernial v. United States*, 714 F.2d 431, 435 (5th Cir. 1983) (citing *Broadway v. Block*, 694 F.2d 979, 981 (5th Cir. 1982) (actions of federal officials taken under color of federal law cannot support a claim under section 1983) (additional citations omitted)); *Cantu v. Moody*, 933 F.3d 414, 419 (5th Cir. 2019). In fact, "actions of the Federal Government and its officers are at least facially exempt from" Section 1983 liability. *District of Columbia v. Carter*, 409 U.S. 418, 424-25, 93 S. Ct. 602, 34 L. Ed. 2d 613 (1973). Despite this facial exemption, courts have held that "federal officials are subject to section 1983 liability . . . where they have acted under color of state law, for example in conspiracy with state officials." *Hindes v. F.D.I.C.*, 137 F.3d 148, 158 (3rd Cir. 1998); *Knights of Ku Klux Klan Realm v. East Baton Rouge Par. Sch. Bd.*, 735 F.2d 895, 900 (5th Cir. 1984) ("Ordinarily, when federal officials conspire or act jointly with state officials to deny constitutional rights, 'the state officials provide the requisite state action to make the entire conspiracy actionable under section 1983.'").

Contrary to this authority, however, Hernandez argues that to state a Section 1983 claim against Causey, he need not allege that there was a conspiracy between Causey and state officials. Instead, Hernandez argues that Causey may be held liable under Section 1983 merely because Causey was "a willing participant in a joint activity with state actors." [144], pg. 3. Hernandez is incorrect. First, Hernandez's attempt to hold Causey liable under what is known as "the joint action test" is misguided, as this test applies only to private individuals—not federal officials. Second, even if it did apply to federal officials, Hernandez misconstrues what is required to state a Section 1983 claim within the Fifth Circuit under the joint action test. Indeed, in this Circuit, both the joint action test and the traditional conspiracy analysis nevertheless require Hernandez to allege facts that would support an inference that Causey and Laurel police officers came to an *agreement* to commit an *illegal* or *unconstitutional* act.[14] As detailed below, he fails to do

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[14] To "maintain a claim that a private citizen is liable under § 1983 based on joint action with state officials," a plaintiff must allege, "facts showing an *agreement* or meeting of the minds between the state actor and the private actor to engage in a conspiracy to deprive the plaintiff of a constitutional right, and that the private actor was a willing participant in joint activity with the state or its agents." *Pikaluk v. Horseshoe Ent., L.P.*, 810 F. App'x 243, 247 (5th Cir. 2020) (quoting *Polacek v. Kemper Cnty.*, 739 F. Supp. 2d 948, 952 (S.D. Miss. 2010) (emphasis added)). While *Pikaluk* is unpublished, this Court does find it persuasive that some form of agreement is required over and above simply action. Similarly, to a establish a Section 1983 conspiracy claim, a plaintiff must allege facts that indicate (1) "an *agreement* between the . . . defendants to commit an illegal act" and (2) "an actual deprivation of constitutional rights." *Terwilliger v. Reyna*, 4 F.4th 270, 285 (5th Cir. 2021) (quoting *Cinel v. Connick*, 15 F.3d 1338, 1343 (5th Cir. 1994) (emphasis added)).

so. Finally, Hernandez wholly fails to allege a conspiracy claim against Causey. For these reasons, any amendment to Hernandez's Section 1983 Fourth Amendment excessive force claim against Causey would be futile.

1. The "joint action test" applies to private individuals rather than federal officers

A private individual ordinarily cannot be held liable under Section 1983 because liability under the statute requires action taken under color of state law. "The United States Supreme Court has utilized numerous tests to determine whether the conduct of a private actor can be fairly attributed to the state." *Turnage v. Mississippi Power Company*, 2023 WL 8643632, *2 (5th Cir. 2023). Relevant here is the "joint action test," which asks, in part, "whether private actors were 'willful participant[s] in joint action with the State or its agents.'" *Pikaluk v. Horseshoe Entertainment, L.P.*, 810 F. App'x 243, 246 (5th Cir. 2020) (quoting *Cornish v. Correctional Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005)). Hernandez argues that Causey is liable under Section 1983 because he "was a willing participant in a joint activity with Laurel police officers to pursue, locate, and seize Hernandez." [143-1], pg. 8. Despite Hernandez's argument to the contrary, the "joint action test" applies to private individuals—not federal officials. While it can be confusing, what is perfectly clear is that to allege a Section 1983 claim against a federal official, Hernandez must allege that Causey acted under color of state law by engaging in a conspiracy with Laurel Police Department officers to violate Hernandez's Fourth Amendment right to be free from excessive force.

Although similar in application, the potential need for different tests in some circuits for private

individuals and federal officials does make sense. Private individuals, unlike federal officials, have no inherent authority to act under color of law. *Moody v. Farrell*, 868 F.3d 348, 352 (5th Cir. 2017) ("Private individuals generally are not considered to act under color of law."); *West v. Atkins*, 487 U.S. 42, 49 (1988) ("The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'"); *Auster Oil & Gas, Inc. v. Stream*, 764 F.2d 381, 387 (5th Cir. 1985) ("private conduct constitutes 'state action' if the connection between the state and the acts justifies treating the private actor as an agent of the state or otherwise warrants attributing [his] behavior to the state."). With no inherent authority to act under color of law, a private individual's action cannot be deemed state action, unless of course, the private individual engages in such joint activity with a state actor who has such inherent authority to act under color of state law. But without this joint activity, the private individual's conduct remains purely private and outside the scope of Section 1983. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999) ("[T]he under-color-of-state-law element of § 1983 excludes from its reach merely private conduct."). As referenced previously, in this Circuit, an agreement is required as well.

Federal officials are different from private individuals though. Federal officials have inherent authority to act under color of law. *See Zernial v. United States*, 714 F.2d 431, 435 (5th Cir. 1983) (citing *Broadway v. Block*, 694 F.2d 979, 981 (5th Cir. 1982). Thus, the question for imposing Section 1983 liability against a federal official is not whether the federal official acted under

color of law, but whether the federal official acted under color of state law. And the majority of courts confronted with this issue have held that allegations of "joint participation" alone are insufficient to successfully allege a Section 1983 conspiracy against federal officers. *Adams v. Springmeyer*, No. 11-cv-790-NBF, 2012 WL 1865736, at *6 (W.D. Pa. May 22, 2012) (finding allegations of a "joint conspiracy, not joint participation," are required for Section 1983 liability against federal officers).[15]

Such a conclusion makes sense because a federal official who simply engages in a joint activity with a state actor does not act under color of state law unless there is an agreement. *Morales v. City of New York*, 752 F.3d 234, 237 (2nd Cir. 2014) ("Absent specific allegations that [defendant] conspired with State agents to violate [plaintiff's] rights, [defendant] is therefore presumed to have acted under Federal authority."). In fact, "[m]ost courts agree that conspiracy with state actors is a requirement to finding that federal actors jointly acted under color of state law." *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 869 (10th Cir. 2016) (emphasis added) (citing *Strickland ex rel. Strickland v. Shalala*, 123 F.3d 863, 866–67 (6th

[15] *Economan v. Cockrell*, No. 1:20-cv-32-WCL, 2020 WL 6874134, at *20 (N.D. Ind. Nov. 23, 2020) ("We see no reason why a joint conspiracy between federal and state officials should not carry the same consequences under Section 1983 as does joint action by state officials and private persons); *Fernandes v. City of Broken Arrow*, No. 16-cv-630-CVE, 2017 WL 471561, at *4 (N.D. Okla. Feb. 3, 2017) (finding that allegations of "joint operation" insufficient to find federal officers to be acting under color of state and noting that the plaintiff did not allege that the federal officers conspired with the state actors); *Kletschka*, 411 F.2d at 448 (finding federal official may be liable for joint conspiracy with state officials under Section 1983).

Cir. 1997)); *Knights of Ku Klux Klan Realm*, 735 F.2d at 900.[16] Because Causey is a federal officer and not a private individual, allegations of conspiracy—rather than joint action—are necessary to allege a Section 1983 claim against him.

2. Regardless, at least in this Circuit, the first step in both the "joint action test" and the traditional conspiracy analysis require allegations of an agreement with a state actor

The Fifth Circuit has held that to "maintain a claim that a private citizen is liable under § 1983 based on joint action with state officials," a plaintiff must allege, (1) "facts showing an agreement or meeting of the minds between the state actor and the private actor to engage in a conspiracy to deprive the plaintiff of a constitutional right" and (2) "that the private actor was a willing participant in joint activity with the state or its agents." *Pikaluk v. Horseshoe Ent., L.P.*, 810 F. App'x 243, 247 (5th Cir. 2020) (quoting *Polacek v. Kemper Cnty.*, 739 F. Supp. 2d 948, 952 (S.D. Miss. 2010) (emphasis added)). Similarly, to a establish a Section 1983 conspiracy claim, a plaintiff must allege facts that indicate (1) "an *agreement* between the . . . defendants to commit an illegal act" and (2) "an actual deprivation of constitutional rights." *Terwilliger v.*

[16] *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 869 (10th Cir. 2016) (finding that allegations of conspiracy are necessary to hold federal officials liable under Section 1983 for joint action with state actors); *Arar v. Ashcroft*, 585 F.3d 559, 568 (2nd Cir. 2009); *Hindes*, 137 F.3d at 158; *Strickland ex rel. Strickland v. Shalala*, 123 F.3d 863, 866-67 (6th Cir. 1997); *Olson v. Norman*, 830 F.2d 811, 821 (8th Cir. 1987); *Scott v. Rosenberg*, 702 F.2d 1263, 1268–69 (9th Cir. 1983); *Kletschka v. Driver*, 411 F.2d 436, 448 (2nd Cir. 1969).

Reyna, 4 F.4th 270, 285 (5th Cir. 2021) (quoting *Cinel v. Connick*, 15 F.3d 1338, 1343 (5th Cir. 1994) (emphasis added)); *Priester v. Lowndes Cnty.*, 354 F.3d 414, 420 (5th Cir. 2004) (explaining that to succeed on a Section 1983 conspiracy claim, a plaintiff "must plead specific, nonconclusory facts that establish that there was an agreement among the defendants to violate his federal civil rights."). Therefore, to succeed under *either* theory, Hernandez must first allege that Causey came to an agreement or meeting of the minds with Laurel Police Department officers to violate Hernandez's Fourth Amendment rights to be free from excessive force. He fails to do so.[17]

In his proposed fourth amended complaint, Hernandez alleges that "immediately upon arrival,

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[17] Hernandez does allege that there was a pretextual agreement between Officer Driskell and the ICE agents that Officer Driskell "would request assistance in translating Spanish, even though no translation assistance was needed or ever intended to be given, in order that ICE agents could have the opportunity to question any Hispanic male Driskell may have stopped." [143-1], pg. 9. But not only does Hernandez fail to allege that such an agreement violates the constitution, he wholly fails to plead any facts that could demonstrate how such a request for translation services was the proximate cause for Hernandez's injury. Indeed, Hernandez alleges no facts whatsoever that Causey was asked to provide translation services, that Causey was ever informed of Hernandez's race before arriving on scene, or even facts pertaining to Causey's knowledge about the request for translation services. Instead, Hernandez appears to plead these facts as an attempt to bolster his unreasonable seizure claim. Of course, courts only decide cases and controversies—and without a well-pleaded cause of action, it is not for this Court to opine on whether the request for translation services at issue was unconstitutional or not. Accordingly, with no constitutional violation alleged, the Court will not consider the allegedly pretextual request for translation services at the second step of the Section 1983 analysis.

[Causey] began working jointly with Officer Driskell and Officer Robertson to pursue, stop, and seize Hernandez for questioning in this local police operation, although no probable cause existed to seize Hernandez." [143-1], pg. 3. As factual support, Hernandez alleges that Police Officer Driskell, "in order to assist [Causey] in locating and seizing Hernandez, began shinning (sic) his flashlight on Hernandez as he was walking up 11th Street, and verbally identifying him as the individual they needed to seize." [143-1], pg. 4. Hernandez also alleges that after "corralling Hernandez . . . Causey effectuated the seizure of Hernandez by shooting to kill, although Hernandez was unarmed, presented no threat or danger to anyone, and had his hands raised in surrender." [143-1], pg. 5.

But "it is not enough merely to recite that there was an agreement or that defendants conspired or acted in concert, for these are *conclusions*, not *facts*." *Polacek v. Kemper Cnty., Mississippi*, 739 F. Supp. 2d 948, 953 (S.D. Miss. 2010) (emphasis in original). To meet his burden, Hernandez must provide specific facts to support his claim. *Harrison v. Jones, Walker, Waechter, Poitevent, Carrere & Denegre*, ——F. App'x ——, 2006 WL 558902, *1 (5th Cir. Mar. 8, 2006) (recognizing that while "a non-state actor may be liable under [§] 1983 if the private citizen was a willful participant in joint activity with the State or its agents," "[a]llegations that are merely conclusory, without reference to specific facts, will not suffice"). Upon careful review, nowhere in his proposed fourth amended complaint does Hernandez allege any *facts* that Causey came to an agreement or meeting of the minds with Laurel police officers to seize Hernandez—much less to shoot him. In fact, each allegation concerning the shooting focuses solely on Causey's conduct, which gives rise to

the inference that the decision to shoot Hernandez was Causey's decision alone, not the result of some prior agreement. [143-1], pp. 5, 6, 9, 12.

So even if the joint action test applied to federal officials—which it does not—Hernandez nevertheless fails to meet his burden under the first element and allowing the amendment of Hernandez's excessive force claim under this theory would be futile. *See Polacek*, 739 F. Supp. at 953 (finding similarly bare factual allegations "accepted as true, do not indicate the type of joint action necessary to convert the private defendants' actions into state action."); *see also Johnson v. Dettmering*, No. 19-cv-744-BAJ, 2021 WL 3234623, at *4 (M.D. La. Jul. 29, 2021).

But even if Laurel Police Department officers did come to an agreement with Causey to seize Hernandez—which they did not—such an agreement would not be illegal under these facts as required to state a Section 1983 conspiracy claim. As previously discussed, Hernandez acknowledges that he was pulled over for failing to come to a complete stop at a stop sign. [1], pg. 2. And the Fourth Amendment is not violated where officers seize, with reasonable force, an individual fleeing from a traffic stop. *See Lytle v. Bexar Cnty., Texas*, 560 F.3d 404, 416 (5th Cir. 2009); *Wardlaw v. Pickett*, 1 F.3d 1297, 1303 (D.C. Cir. 1993) ("[W]hatever the circumstances prompting law enforcement officers to use force, whether it be self-defense, defense of another or resistance to arrest, where, as here, a fourth amendment violation is alleged, the inquiry remains whether the force applied was reasonable."). Without any facts alleging an agreement between Laurel Police Department officers and Causey to commit an illegal act—such as an alleged shooting of an armed man with his hands up—

he cannot state a Section 1983 conspiracy claim against Causey and amendment would be futile. *Leggett v. Williams*, 277 F. App'x 498, 501 (5th Cir. 2008) ("Mere conclusory allegations of conspiracy cannot, absent reference to material facts, state a substantial claim of federal conspiracy under 42 U.S.C.A. § 1983."); *Rodriguez v. Neeley*, 169 F.3d 220, 222 (5th Cir. 1999) ("A conclusory allegation of conspiracy is insufficient.") (citation omitted).

3. Hernandez fails to state a conspiracy claim

Hernandez explicitly argues in his Memorandum in support of his Motion "that Defendant Causey deprived Hernandez of rights under the Constitution because he was the one who shot [Hernandez], who was unarmed with his hands raised in surrender, *not because he was a co-conspirator to violate Constitutional rights*." [144], pg. 7 (emphasis added). Accordingly, by Hernandez's own pleadings, he concedes any claim for conspiracy and the Court need not continue as amendment of any Section 1983 claim would clearly be futile. But even if he had not conceded his conspiracy claim, it would still be futile because as discussed at length above, Hernandez fails to allege any facts that there was an agreement between Laurel Police Department officers and Causey to violate Hernandez's Fourth Amendment rights.

III. CONCLUSION

IT IS THEREFORE ORDERED AND ADJUDGED that Hernandez's Motion for Leave to Amend [143] is DENIED. To the extent that any 42 U.S.C. § 1983 claims against Causey remain, such claims are DISMISSED WITH PREJUDICE.

This, the 14th day of February, 2024.

/s/ Taylor B. McNeel
TAYLOR B. McNEEL
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-60080

GABINO RAMOS HERNANDEZ,

Plaintiff-Appellant,

versus

PHILLIP CAUSEY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 2:17-CV-123

ON PETITION FOR REHEARING AND
REHEARING EN BANC

Before ELROD, Chief Judge, DENNIS and HIGGINSON, Circuit Judges.

PER CURIAM:

The petition for panel rehearing is DENIED.[1] Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P.40 and 5TH CIR. R.40), the petition for rehearing en banc is DENIED.

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[1] JUDGE DENNIS would grant the petition for rehearing.

APPENDIX D

UNITED STATES DISTRICT COURT
IN AND FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

Civil Action No. 2:17 cv 123 KS MTP

GABINO RAMOS HERNANDEZ

Plaintiff

vs.

PHILLIP CAUSEY, AND JOHN DOE, AN UNKNOWN IMMIGRATION AND CUSTOM ENFORCEMENT OFFICER

Defendants

PLAINTIFF'S FIRST AMENDED COMPLAINT AND JURY DEMAND

Now, through undersigned counsel, comes Plaintiff, Gabino Ramos Hernandez, who, pursuant to Rule 15 (a) of the Federal Rules of Civil Procedure, herewith amends his Complaint in its entirety, as follows:

Plaintiff brings this action against Phillip Causey and John Doe, agents or officers with the Immigration and Customs Enforcement Agency, in their individual capacity for their actions and conduct in performing their duties in this matter as employees of Immigration and Customs Enforcement, pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and 42 U.S.C. 1983 for violating Plaintiff's Fourth, Fifth, and Fourteenth Amendment rights by

the excessive and unreasonable use of deadly force, shooting Plaintiff without cause or justification, who with his hands raised was clearly unarmed, hitting him in the forearm, shattering the radius of his right arm, resulting in large segmental bone loss, and permanent nerve and tendon damage.

Plaintiff additionally asserts a cause of action under state law for damages from the personal injury and infliction of pain and suffering and mental anguish caused by Defendants. In support of this Complaint, Gabino Ramos Hernandez herewith asserts that,

I.

Made defendants herein are:

PHILLIP CAUSEY, an officer or agent with the Immigration and Custom Enforcement Agency (ICE), who was acting withing the course and scope of his employment as an officer or agent of ICE; and,

JOHN DOE, an unknown officer or agent with the Immigration and Custom Enforcement Agency (ICE), who was acting withing the course and scope of his employment as an officer or agent of ICE.

II.

This Court has jurisdiction pursuant to 28 U.S.C. 1331, in that Plaintiff is bringing this action pursuant to *Bivens, supra*, and 28 U.S.C. 1983, with the matter exceeding the sum of $10,000.00. Venue is proper under 29 U.S.C. 1391, in that the conduct giving rise to Plaintiff's cause of action took place in this judicial district.

III.

On July 20, 2016 at or near the intersection of 13th Avenue and 11th Street, in Laurel, Mississippi, Defendants responded to a request from local police officers to assist with translating Spanish in connection with a stop of two Hispanic individuals for routine traffic violations, failing to come to a complete stop, one of whom was the Plaintiff herein, and another individual who appeared to be driving while intoxicated.

IV.

Defendants, having communicated with and heard the communications from and between the local police, knew or should have known that Plaintiff presented no threat to their safety or well being, that he was not wanted for any suspected criminal activity, was not armed or dangerous, or even suspected of being armed, and in fact had been in the presence of local police officers for some time, while those officers interviewed the other Hispanic male who was believed to have been driving while intoxicated.

V.

After some time standing by and waiting while the local police dealt with the other Hispanic male, Plaintiff decided to leave the scene, initially intending to simply enter his residence, but then deciding to go to his uncle's home nearby, at which time at least one of the local police officers pursued him, and further enlisted the aid of Defendants to stop Plaintiff.

VI.

Defendants, having spotted Plaintiff with the assistance of the local police officer who had illuminated Plaintiff with a flashlight, began yelling at Plaintiff,

first in what seemed to be Spanish, but then in English.

VII.

Plaintiff, whose does not speak English and whose understanding of English is extremely limited, stopped , turned around, and reasonably believing that they were ordering him to come forward, took a few short steps toward the Defendants with his hands raised, in that Defendants had drawn and aimed their guns at him.

VIII.

As Plaintiff did so, with his hands in the air, obviously presenting no threat or danger to Defendants, and without provocation or reason, Defendants shot Plaintiff, severely injuring him.

IX.

Because of Plaintiff's critical condition resulting from the massive bleeding, horrific open wound and severe injuries, Defendants and local police had Plaintiff transported by an emergency ambulance service to Forrest General Hospital, where he underwent emergency surgery.

X.

One or two days later, Plaintiff was interviewed by two individuals who appeared to be agents or officers of Immigration and Customs Enforcement. To Plaintiff's knowledge, he was never charged with any crime, state or federal, or with any traffic violation or citation, as a result of anything that occurred that night. Indeed, Plaintiff had not engaged in any criminal conduct and was merely trying to understand what was happening and why, when he was unexplainably shot by Defendants.

XI.

Defendants violated Plaintiff's rights under the Fourth Amendment and Fifth Amendment, with an unconstitutional and physically intrusive seizure, depriving him of due process of law and basic human rights, by using excessive deadly force when Plaintiff was unarmed and presented no threat to Defendants, with absolutely no justification for such excessive force. Defendants severely abused their position as officers or agents of the Immigration and Customs Enforcement Agency, by callously and arrogantly engaging in conduct that shocks the conscience, knowingly violating Plaintiff's established constitutional rights, and interfering with human rights implicit in the concept of ordered liberty.

XII.

As a result of Defendants unlawful conduct and callous disregard of Plaintiffs' Fourth and Fifth Amendment rights, Plaintiff has suffered enormous pain and suffering, severe mental anguish, permanent disability and disfigurement, loss of use of his right arm, lost earning capacity, past medical bills and is in need of future specialized surgery to try to restore at least some functionality to his right arm, all of which damages are in excess of $1,000,000.00.

FIRST CAUSE OF ACTION PURSUANT TO
BIVENS V. SIX UNKNOWN NAMED AGENTS OF FEDERAL BUREAU OF NARCOTICS, SUPRA

XIII.

Plaintiff reiterates and incorporates here as though copied in extenso all of the foregoing allegations of fact in paragraphs III through XII.

XIV.

The United States Supreme Court jurisdictionally created a cause of action in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, *supra*, a cause of action for money damages against any federal agents or officers who violates a person's constitutional rights when performing their duties as an employee of the federal agency by whom they are employed.

XV.

Defendants, acting in their capacity as agents or officers of Immigration and Customs Enforcement, a federal agency, deprived Plaintiff of rights afforded by the Fourth Amendment and Fifth Amendment of the United States Constitution, with an unconstitutional and physically intrusive seizure, by using excessive, deadly force when Plaintiff was unarmed, presenting no threat to Defendants, with his hands raised in the air, and by engaging in conduct that shocks the conscience, knowingly violating Plaintiff's established constitutional rights, and severely interfering with rights implicit in the concept of ordered liberty.

XVI.

Defendants were aware at the time of this incident that their conduct was violating established rights of Plaintiff under the Fourth and Fifth Amendments, that such conduct would constitute an unconstitutional and physically intrusive seizure, deprive Plaintiff of due process of law, and constitute conduct that shocks the conscience, and interferes with rights implicit in the concept of ordered liberty, but despite such awareness, continued with the wrongful conduct nonetheless.

XVII.

As a result of Defendant's wrongful conduct, Plaintiff is entitled to recover damages for his personal injury, the infliction of physical pain and suffering, past and future, mental anguish, economic damages, and for all past and future medical care.

XVIII.

Plaintiff is entitled under a *Bivins* cause action to recover punitive damages, reasonable attorney fees, the cost of this litigation, and the costs of these proceedings.

XIX.

Plaintiff is entitled to a trial by jury under *Bivins*, and herewith requests one.

SECOND CAUSE OF ACTION PURSUANT TO
42 U. S. C. 1983

XX.

Plaintiff reiterates and incorporates here as though copied in extenso all of the foregoing allegations of fact in paragraphs III through XII.

XXI.

Under 42 U. S. C. 1983 any person who, under the color of any state or local statute, ordinance, or regulation subjects a person within the jurisdiction to the deprivation of any rights, privileges, or immunities secured by the Constitution, shall be liable to the party injured in an action at law.

XXII.

Defendants, actively assisting and working under the directions of the local police department, as well as the custom and usage between the local police and

officers of the Immigration and Customs Enforcement agency to assist each other in their respective duties, thereby acted under the color of apparent authority as law enforcement officers or agents with the local police department, and in so acting under such color of state or local authority subjected Plaintiff, who was within the jurisdiction of this Court, to the deprivation of rights afforded by the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution, depriving him of basic human rights without due process of law, by the callous and arrogant use of excessive force, shooting him without reason or justification, when he was obviously unarmed and presented no danger to the Defendants.

XXIII.

Defendants were aware at the time that their conduct was violating an established right of Plaintiff, depriving him of basic rights without due process of law, but continued in such wrongful conduct nonetheless.

XXIV.

As a result of Defendant's wrongful conduct, Plaintiff is entitled to recover damages for his personal injury, the infliction of physical pain and suffering, past and future, mental anguish, economic damages, and for all past and future medical care.

XXV

Plaintiff is entitled under 42 U.S. C. 1983 to recover punitive damages, reasonable attorney fees, the cost of this litigation, and the costs of these proceedings.

XXVI.

Plaintiff is entitled to a trial by jury under 42 U.S.C 1983, and herewith requests one.

THIRD CAUSE OF ACTION UNDER STATE LAW

XXVII.

Plaintiff reiterates and incorporates here as though copied *in extenso* all of the foregoing allegations of fact in paragraphs III through XII.

XXVIII.

As a result of Defendant's tortious conduct, Plaintiff has suffered severe personal injuries, past and future physical pain and suffering, mental anguish, permanent disability and disfigurement, economic damages, and incurred substantial debt for his past medical care, and will require future medical care, for which damages Defendants are liable under Mississippi law and jurisprudence.

XXIX.

Plaintiff is entitled under Mississippi law to recover punitive damages, reasonable attorney fees, the cost of this litigation, and the costs of these proceedings.

XXX.

Plaintiff is entitled to and herewith prays for a trial by jury.

WHEREFORE, Plaintiff prays that Defendants be served with this Amended Complaint, and be made to appear herein, and that after due proceedings had, there be Judgment in Plaintiff's favor, for damages in an amount to be determined at trial for the personal injuries caused by Defendants, his permanent disfigurement and disability, past and future pain and suffering and mental anguish, medical costs, and punitive damages.

Plaintiff further prays for reasonable attorney fees, the costs of this litigation, and the costs of these proceedings.

Plaintiff prays for a trial by jury.

Respectfully submitted,

s/ Timothy W. Cerniglia
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Resident Attorney

APPENDIX E

UNITED STATES DISTRICT COURT
IN AND FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

Civil Action 2:17-cv-00123 TBM-MTP

GABINO RAMOS HERNANDEZ

Plaintiff

vs.

PHILLIP CAUSEY, AND JOHN DOE, AN UNKNOWN IMMIGRATION AND CUSTOMS ENFORCEMENT OFFICER, THE UNITED STATES OF AMERICA, THE DEPARTMENT OF HOMELAND SECURITY, AND THE BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,

Defendants

PLAINTIFF'S FOURTH SUPPLEMENTAL AND AMENDED COMPLAINT

Now, through undersigned counsel, comes Plaintiff, Gabino Ramos Hernandez, who, pursuant to Rule 15 (a)(2) of the Federal Rules of Civil Procedure, herewith amends his Complaint, and all Supplemental and Amended Complaints in this matter, to more specifically allege the facts and allegations of his SECOND CAUSE OF ACTION PURSUANT TO 42 U. S. C. 1983, as set forth in Paragraphs XX through XXVI, and the facts supporting that cause of action, found in Paragraphs III through XII of his First Supplemental and Amending Complaint.

Plaintiff further amends his THIRD CAUSE OF ACTION PURSUANT TO STATE LAW, by withdrawing that cause of action, as found in Paragraphs XXVIII, XXIX, and XXX.

1.

Plaintiff herewith amends, in total, the facts as stated in his First and Second Supplemental and Amending Complaints, which were adopted in his Third Supplemental and Amended Complaint, as follows:

III.

On July 20, 2016 at or near the intersection of 13th Avenue and 11th Street, in Laurel, Mississippi, Laurel police officer, Jake Driskell, called agents with Immigration and Customs Enforcement (ICE), first to ICE Agent McGhee, informing Agent McGhee of his location and then requested that he assist him in a local traffic stop of a Hispanic male, and then immediately after speaking with Agent McGhee, called ICE Agent Sharff requested that he assist him with a local traffic stop he had made, because:

1) Driskell considered these ICE Agents, whom he knew were in the area, to be an "additional tool in his toolbox" that he could use;

2) The additional ICE officers would provide safety in numbers for this particular stop;

3) Driskell knew they would come, because there was an understanding or a meeting of the minds that if and when Driskell called these ICE agents for assistance with a stop of any Hispanic male, that they would come, participate and assist him with his operation, which would then present the ICE agents the opportunity to

question any Hispanic male Driskell may have stopped;

4) Earlier that same day, the same ICE agents, including Defendant Causey, came to assist Driskell when he had called and asked for assistance with an earlier stop of a Hispanic male.

IV

Defendant, Causey, along with four other ICE agents, responded to Officer Driskell's request for assistance, the ICE agents having communicated with each other about this operation after Officer Driskell had spoken with Agent McGhee and Agent Sharrf, and then, immediately upon arrival, began working jointly with Officer Driskel and Officer Robertson to pursue, stop, and seize Hernandez for questioning in this local police operation, although no probable cause existed to seize Hernandez and to the knowledge of Officer Driskell and all ICE agents, including Defendant Causey, Hernandez had not violated any laws, was not wanted for any crime, or suspected of having committed any crime, was not armed or dangerous, ICE agents only being told by Officer Driskell that this individual was "mouthy".

V

Defendant Causey was a willing participant in this joint action with local police officers, Officer Robertson and Officer Driskell, to pursue, stop, and seize Hernandez, with a total of five ICE agents descending on the scene, essentially surrounding Hernandez, two ICE Agents going after Hernandez from W. 13th Ave., two ICE agents from 11th Street, and one ICE Agent in the alley behind Hernandez's house with Officer Driskell, while local police officer, Officer Robertson,

physically chased Hernandez, and while Officer Driskell was directing and instructing everyone in this joint operation to pursue, stop, and seize Hernandez, in the following particulars:

1) After ICE Agent McGhee arrived behind Hernandez's house where Officer Driskell was positioned, Driskell again called ICE Agent Sharrf to determine where he was, informing him that Agent McGhee had arrived, and then continued to give Agent Sharff further directions to his location;

2) ICE Agents Mike McGhee, Robert Dinnen, Rodney Sharff, and Kyle Le, in addition to Defendant, Causey, descended on the scene, deployed from different directions, essentially surrounding the area, in order to work with, participate in, and join Officers Driskel and Robertson in this joint operation to pursue, locate, and seize Hernandez in this local matter;

3) All of these agents, including Causey, upon arrival immediately began participating in the joint activity to pursue, locate, and seize Hernandez in this purely local matter, acting as one cohesive unit, consisting of ICE Agents and local police officers Driskel and Robertson, under the directions and instructions of Officer Driskell;

4) Officer Driskel sent Officer Robertson after Hernandez whom he had seen running south on W. 13th Avenue;

5) Officer Driskel told ICE agent McGhee that Hernandez was running south down W. 13th Ave;

6) ICE Agents Dinnen and Sharff, who had pulled up on W. 13th Street from the north, began chasing a Hispanic male south on W. 13th Avenue, whom they thought was the individual Officers Driskel and Robertson were after, the Plaintiff herein, Hernandez;

7) Officer Robertson momentarily ran in the direction of ICE Agents Dinnen and Sharff to assist them, as they had caught and seized an individual they all thought was Hernandez;

8) However, Officer Driskell shouted to Dinnen and Sharff that the individual they seized was the wrong person;

9) Robertson then turned and continued in pursuit of Hernandez south on W. 13th Ave. and then up 11th Street;

10) As part of this continued joint operation to seize Hernandez, Agents Dinnen and Sharff seized and handcuffed the individual they initially mistook for Hernandez, so as to neutralize any potential threat from him while the pursuit of Hernandez continued;

11) Also, as part of this continued joint operation to seize Hernandez, McGhee told Causey and Le that the individual they were after was running, which Agent Le had also heard, and for them to go down 11th Street to try to locate the individual Officers Robertson was pursuing;

12) Officer Driskell, in order to assist Defendant, Causey, and ICE agent Le in locating and seizing Hernandez, began shinning his flashlight on Hernandez as he was walking up 11th Street,

and verbally identifying him as the individual they needed to seize;

13) Defendant Causey, along with ICE agent Le, willingly participated in this joint action to purse, locate, and seize Hernandez, with Officer Robertson pursuing Hernandez from the corner of W. 13th Avenue, and then west on 11th Street, while Agents Sharff and Dinnen, still on W. 13th Ave., was handling the other Hispanic male they had handcuffed, with Causey and Le approaching Hernandez from the west on 11th Street, with guns drawn and aimed at Hernandez, as Driskell continued to shine his flashlight on Hernandez in order to assist Causey and Le in seizing Hernandez;

14) Intending to effectuate the seizure of Hernandez for Officers Driskell and Robertson, Defendant, Causey and ICE agent Le, continued to advance toward Hernandez from the west on 11th Street, with weapons drawn and aimed at Hernandez, yelling at him in loud and confusing language, first with a few words in Spanish, but then in English;

15) At this time, Officer Robertson who had continued to chase Hernandez, came up from behind Hernandez on 11th Street, effectively corralling Hernandez between himself and Defendant, Causey, and Agent Le, both of whom had continued to approach Hernandez from the west on 11th Street with weapons drawn and aimed at Hernandez, yelling the entire time, while Officer Driskell continued to shine his flashlight on Hernandez;

16) Then Defendant, Causey, effectuated the seizure of Hernandez by shooting to kill, although Hernandez was unarmed, presented no threat or danger to anyone, and had his hands raised in surrender, striking him in the right arm and obliterating part of the radius in Plaintiff's right forearm.

VI.

Defendant, Causey, had no reason to suspect the Plaintiff was armed or dangerous, knew that at worse this encounter and chase by and with local police was related to a traffic stop of someone else, having communicated with the other ICE agents, and/or having been informed by one or more of the other ICE agents participating in this joint operation, that Driskell had only described Plaintiff as being "mouthy", and knew or should have known that Plaintiff was not wanted for or suspected of any criminal activity, was not armed or dangerous, or even suspected of being armed or dangerous, and knew or should have known that with his hands raised, Hernandez presented no threat to anyone's safety and wellbeing and that there was no probable cause to seize Plaintiff.

VII.

Plaintiff, whose does not speak English and whose understanding of English is extremely limited, stopped, turned around, and reasonably believing that Defendant, Causey, and Agent Le, were ordering him to come forward, took a few short steps toward the Defendants with his hands raised in surrender, in that Defendant, Causey, and ICE Agent Le, had drawn and aimed their guns at him.

VIII.

As Plaintiff did so, with his hands in the air, obviously presenting no threat or danger to Defendant, Causey, without provocation or reason, shot to kill Plaintiff, severely injuring him.

IX.

Because of Plaintiff's critical condition resulting from the massive bleeding, horrific open wound and severe injuries, the local police had Plaintiff transported by an emergency ambulance service to South Central Regional Medical Center in Laurel, and after emergency treatment for his wound was transferred later that night to Forrest General Hospital, where he underwent surgery.

X.

One or two days later, Plaintiff was interviewed by two individuals who appeared to be agents or officers of Immigration and Customs Enforcement. To Plaintiff's knowledge, he was never charged with any crime, state or federal, or with any traffic violation or citation, as a result of anything that occurred that night. Indeed, Plaintiff had not engaged in any criminal conduct and was merely trying to understand what was happening and why, when he was unexplainably shot by Defendants.

XI.

Defendant, Causey, while willingly participating in this joint operation with and under the direction of Officer Driskell, to pursue, locate, and seize Hernandez, violated Plaintiff's rights under the Fourth Amendment and Fifth Amendment, with an unconstitutional and physically intrusive seizure, depriving him of due process of law and basic human rights, by using

excessive deadly force when Plaintiff was unarmed and presented no threat to Defendant, Causey, with absolutely no justification for such excessive force. Defendant severely abused his position as an officer or agents of the Immigration and Customs Enforcement Agency, by callously and arrogantly engaging in conduct that shocks the conscience, knowingly violating Plaintiff's established constitutional rights, and interfering with human rights implicit in the concept of ordered liberty.

XII.

As a result of Defendant, Causey's, unlawful conduct and callous disregard of Plaintiffs' Fourth and Fifth Amendment rights, Plaintiff has suffered enormous pain and suffering, severe mental anguish, permanent disability and disfigurement, loss of use of his right arm, lost earning capacity, past medical bills and is in need of future specialized surgery to try to restore at least some functionality to his right arm, all of which damages are in excess of $1,000,000.00.

Plaintiff in order to more precisely set forth his SECOND CAUSE OF ACTION PURSUANT TO 42 U. S. C. 1983, herewith amends, in total, Paragraphs XX through, and including, Paragraph XXVI, as follows.

SECOND CAUSE OF ACTION PURSUANT TO
42 U. S. C. 1983

XX.

Plaintiff reiterates and incorporates here as though copied in extenso all of the foregoing allegations of fact in paragraphs III through XII.

XXI.

Under 42 U. S. C. 1983 any person who, under the color of any state or local statute, ordinance, or regulation subjects a person within the jurisdiction to

the deprivation of any rights, privileges, or immunities secured by the Constitution, shall be liable to the party injured in an action at law.

XXII.

Defendant, Causey, as set forth in the allegations of facts in paragraphs III through XII, was a willing participant in a joint activity with Laurel police officers to pursue, locate, and seize Hernandez, actively assisting and working with Officers Robertson and Officer Driskell, under the directions of and with the assistance of Officer Driskell, tacitly coming to an understanding and a meeting of the minds with Officers Robertson and Driskell to assist and work with them in pursuing, locating, and seizing Hernandez for the benefit of local police in what was a purely local police matter. In doing so, Defendant, Causey, thereby acted under the color of state law, and while so acting under such color of state or local authority deprived Plaintiff of rights afforded by the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution, depriving him of basic human rights without due process of law, by unreasonably seizing Plaintiff without probable cause and with the callous and unreasonable use of excessive force, shooting to kill Plaintiff, without reason or justification, although Plaintiff had not committed any crime, was not suspected of having committed any crime, was unarmed, presented no danger to the Defendant or anyone else present, and had his hands raised in surrender at the time Defendant, Causey, shot him.

XXIII.

Plaintiff further alleges that the initial request for assistance from Officer Driskell was pretextual, and that at some time prior, including, but not limited to,

an earlier stop by Officer Driskell of a Hispanic male where ICE agents McGhee, Sharff, Dinnen, Le, and Defendant, Causey, responded to a request for assistance from Officer Driskell, these ICE agents, including Defendant, Causey, had come to an understanding or a meeting of the minds with Officer Driskell that they would respond to a call from Officer Driskell when he would request assistance in translating Spanish, even though no translation assistance was needed or ever intended to be given, in order that ICE agents could have the opportunity to question any Hispanic male Driskell may have stopped, notwithstanding the fact that they had no articulable basis or reason to stop and question any such Hispanic male, all as is shown by the following circumstances:

1) When Officer Driskell stopped Mendoza behind Plaintiff's house, after Mendoza exited his vehicle, Officer Driskell gave instructions to Mendoza in Spanish to raise his hands, which Mendoza did;

2) Officer Driskell instructed Mendoza to give him the car keys, which Mendoza did;

3) Officer Driskell escorted Mendoza to the rear of Mendoza's vehicle and instructed him in Spanish to sit, and Mendoza began to sit on the ground;

4) Officer Driskell told Mendoza to sit on the back of his car, not the ground, which Mendoza did;

5) Officer Driskell could and did speak some Spanish;

6) Mendoza could and did speak some English;

7) Although Officer Driskell had effectively communicated with Mendoza, had him raise his

hands, turn over his car keys, and had him sit on the back of his car, and before any further questioning, discussions or actions by either Officer Driskell or Mendoza, Officer Driskell called ICE Agent McGhee on his mobile telephone by finding Agent McGhee's telephone number in his list of contacts on his phone;

8) Officer Driskell had called ICE agent McGhee earlier that same day for assistance with the stop of a Hispanic male, and ICE Agents McGhee, Sharff, Dinnen, Le, and Defendant, Causey, went to and assisted Officer Driskell with that stop;

9) When Officer Driskell stopped Mendoza, Officer Driskell first gave agent McGhee his exact location, and then only after relaying his location, asked if McGhee would assist him with some Spanish;

10) Immediately after hanging up with Agent McGhee, Officer Driskell called ICE Agent Sharff, gave him his location and asked if he could assist him with Spanish;

11) Shortly after Agent McGhee hung up with Officer Driskell he contacted ICE agents Sharff and Dinnen, instructing them to go to Officer Driskell's location;

12) ICE Agent McGhee also called Defendant, Causey, and Agent Le, who were driving a caged van for the transport of detainees, and told them to bring the van to Officer Driskell's location;

13) While waiting for all the ICE agents to arrive, Officer Driskell began filling out a citation with Mendoza for DUI, and entered into a protracted

conversation with Mendoza, mostly in English, on topics ranging from the fact that he lived at the house where they were standing, to where he worked, if he had a driver's license, to which Mendoza told him was in his house, and how much Mendoza had to drink, all without any need for translation assistance;

14) Officer Driskell entered in a conversation with Mendoza's brother, Plaintiff herein, responding to questions by Hernandez, including responding to Hernandez's question as to what the problem was, responding that the problem was that Mendoza was drunk;

15) When Hernandez contacted someone, who could speak Spanish and English on his phone, and who could assist Officer Driskell if he needed any help with translation, Officer Driskell declined and continued with his paper work on Mendoza.

16) Officer Driskell called for a portable breathalyzer machine which was delivered by Officer Robertson;

17) Officer Robertson arrived with the breathalyzer and Officer Driskell administered the initial breathalyzer test to Mendoza, again without any need for assistance in translating Spanish;

18) Officer Robertson also carried on a conversation with Mendoza without problems or a need for any assistance with translation;

19) Officer Driskell sent for the DUI transporter unit, which would take custody of Mendoza, and bring him to the local prison, where Mendoza would be given his Miranda warnings and a

form to sign indicating he had been advised of his rights;

20) If any further questioning of Mendoza was needed, it would be done by either the DUI transporting officers or an officer at the local prison, after having advised Mendoza of his rights, and not by Officer Driskell;

21) After Officer Driskell had performed the breathalyzer test, and sent for the DUI transport unit, there was nothing further he needed to do with Mendoza, and had no need for any translation assistance in Spanish from anyone;

22) Nonetheless, Officer Driskell continued to call ICE Agents to ostensibly continue his request assistance to translate Spanish, although everything he needed to do with Mendoza had been done, and notwithstanding the fact that he had no need for any assistance with translating Spanish;

23) Officer Driskell again called ICE agent Sharff, after having completed the breathalyzer and sending for the DUI transport unit, to see where ICE agent Sharff was, when Agent McGhee arrived on the scene while Officer Driskell was speaking with Agent Sharrf;

24) Officer Driskell relayed to Agent Sharff that Agent McGhee had arrived, and then continued to give Agent Sharff directions to his location, although there was nothing further he needed to question Mendoza about, and even if should some need to do so might arise, Agent McGhee whom, Officer Driskell had called first, was present who could do it;

25) Despite being called to scene for the pretextual need for translation assistance with Mendoza, no translation assistance was ever given by any ICE agent, and in fact no translation assistance was ever needed by Officer Driskell;

26) In fact, Mendoza was taken to the county prison by the DUI transport unit, where he was advised of his rights, and given a form to sign acknowledging he had been given his rights, all as would have been done anyway, without any need for the assistance Driskell requested from ICE agents immediately after stopping Mendoza and having him sit on the back of his car.

XXIV.

Defendant, Causey, was aware that his and the other ICE agents conduct, using the pretext of a need for translation assistance to question any Hispanic male Officer Driskell may stop, although none of the ICE agents had any articulable basis or reason to do so, was violating an established right of Plaintiff, depriving him of basic rights without due process of law, but continued in such wrongful conduct nonetheless, and further, while actively participating in the local police operation to seize Hernandez, shot Hernandez, who was unarmed and with his hands raised in surrender, which Defendant, Causey, knew violated rights afforded to Hernandez under the Constitution against unreasonable seizures and the use of deadly force when Plaintiff was unarmed and presented no danger to him or anyone else who may have been present.

XXV

As a result of Defendant's wrongful conduct while acting under the color of state law, Plaintiff is entitled to recover damages for his personal injury, the

infliction of physical pain and suffering, past and future mental anguish, economic damages, and for all past and future medical care, pre-judgment interest, punitive damages, reasonable attorney fees, and the cost of this litigation and proceedings.

XXVI.

Plaintiff is entitled to a trial by jury under 42 U.S.C 1983, and herewith requests one.

4.

Plaintiff herewith amends, in total, his THIRD CAUSE OF ACTION PURSUANT TO STATE LAW, by withdrawing in total that cause of action, as was set forth in Paragraphs XXVII through and including Paragraph XXX.

5.

Plaintiff reaffirms and adopts his, FIRST CAUSE OF ACTION PURSUANT TO BIVENS V. SIX UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS, SUPRA, as if copied here *in extenso*, against Defendant, Causey, and reaffirms and adopts his remaining Causes of Action against the United States as set forth in his Second and Third Supplemental and Amended Complaints for EXCESSIVE USE OF DEADLY FORCE, NEGLIGENT USE OF DEADLY FORCE, WRONGFUL ASSAULT, BATTERY, SEIZURE AND ARREST, AND TORTIOUS SUPERVISION AND TRAINING, as if copied here *in extenso*.

6.

Plaintiff here with adopts and reaffirms all his prayers for relief against Defendant, Causey, including his prayer for punitive damages, attorney fees, and a trial by jury, and against the United States under the Federal Tort Claims Act, 28 U.S.C. 2674, *et seq.*, as set

forth in all of Plaintiff's Supplemental and Amended Complaints, as though copied here *in extenso*.

Respectfully submitted

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Certificate of Service

I hereby certify that on this 24th day of July, 2023, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to Ms. Angela Davis, Esq. and Ms. Lauren Dick, Esq.

/s/ Timothy W. Cerniglia

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

Civil Action No. 2:17-cv-123-TBM-MTP

GABINO RAMOS HERNANDEZ

Plaintiff,

v.

PHILLIP CAUSEY and
THE UNITED STATES OF AMERICA

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING THE UNITED STATES' RENEWED MOTION TO DISMISS AND GRANTING PHILLIP CAUSEY'S MOTION FOR RECONSIDERATION

On the evening of July 16, 2016, Immigration and Customs Enforcement ("ICE") Officer Phillip Causey was called to Gabino Ramos Hernandez's home to allegedly assist with translation services for an unrelated traffic stop. Hernandez was standing in the garage when the ICE van arrived, and upon seeing the van, Hernandez ran away. Two ICE agents, including Phillip Causey, chased Hernandez. Hernandez stopped running and, in the light most favorable to Hernandez, had his hands raised when Causey shot him. Now before the Court is the United States' Motion to Dismiss [120] Hernandez's tortious supervision and training claim and partial motion to dismiss Hernandez's claim for negligent use of deadly force, and Causey's

Motion for Reconsideration [129] of the Court's Opinion [89] denying his Motion for Summary Judgment. For the reasons discussed fully below, the United States' Motion to Dismiss [120] is granted and Causey's Motion for Reconsideration [129] is granted.

I. PROCEDURAL HISTORY

Hernandez filed suit in this Court on July 20, 2017. He argues that Causey violated his Fourth, Fifth, and Fourteenth Amendment rights to be free from an unreasonable and excessive use of deadly force pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). Hernandez also asserts three separate causes of action against the United States pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b): 1) use of deadly force; 2) assault and battery; and 3) negligent training and supervision.

On August 31, 2018, this Court stayed the case because Causey was deployed overseas on active military duty.[1] After Causey completed his deployment, the Defendants filed a combined Partial Motion to Dismiss [68] for lack of subject matter jurisdiction as to the negligent training and supervision claim under the FTCA and a Motion for Summary Judgment [68] as to the other claims. In its Memorandum Opinion and Order [89], this Court first addressed Hernandez's negligent training and supervision claim and dismissed it without prejudice for failure to state a claim.[2] This

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[1] Throughout this action Causey has been, and is currently, deployed overseas. *See* [29] (staying case until November 30, 2018); [31] (staying case until September 15, 2019); [107] (staying discovery and disclosure deadlines).

[2] The United States' Motion to Dismiss only sought dismissal of Hernandez's negligent training and supervision claim, as discovery

Court found that by failing to plead a constitutional violation Hernandez did not meet the minimum pleading requirements to withstand dismissal under the discretionary function exception to the FTCA. Despite failing to meet his burden, the Court allowed Hernandez to file an amended complaint alleging a proper constitutional violation.

This Court then turned to Causey's Motion for Summary Judgment. Despite well-established Supreme Court precedent holding that the *Bivens* question is "antecedent" to the question of qualified immunity, Causey provided no briefing and made no objection as to whether Hernandez could bring suit under the *Bivens* framework for a Fourth Amendment excessive force claim. *Hernandez v. Mesa*, —— U.S. ——, 137 S. Ct. 2003, 2006, 198 L. Ed. 2d 625 (2017) (*Hernandez I*). Even after Hernandez analyzed the *Bivens* question in his Response in Opposition to Causey's Motion for Summary Judgment, Causey still raised no objection to the validity of Hernandez's claims under *Bivens*. Accordingly, the Court addressed the *Bivens* question *sua sponte* and found Hernandez's *Bivens* claim against Causey was the kind of Fourth Amendment search-and-seizure case that courts have adjudicated through *Bivens* actions. [89], pg. 13. After determining that Hernandez's *Bivens* claim did not present a "new context," the Court found a genuine issue of material fact as to where Hernandez's hands were positioned at the time of the shooting and denied Causey's Motion for Summary Judgment on the basis of qualified immunity.

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related to the intentional tort claims was ongoing. Accordingly, Hernandez's claims for use of deadly force and assault and battery were not addressed in the Court's Opinion [89].

Following the dismissal of Hernandez's negligent training and supervision claim, Hernandez filed an Amended Complaint [106] alleging that the United States is liable for the "tort[i]ous and wrongful supervision and instruction of Phillip Causey and other deportation agents involved in Plaintiff's shooting, in direct contravention of the Plaintiff's Fourth Amendment rights." [106], ¶ XXXVII. Hernandez asserts that ICE supervisors instructed Causey to conduct unreasonable seizures "based solely on a person's Mexican or Hispanic ancestry," by assisting local police officers with pretextual requests for translation services. *Id.*

Now before the Court is the United States' renewed Motion to Dismiss [120] Hernandez's tortious supervision and training claim and partial motion to dismiss Hernandez's claim for negligent use of deadly force. Causey has also filed a Motion for Reconsideration [129] of the Court's Opinion [89] denying his Motion for Summary Judgment based on the Supreme Court's ruling in *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022).[3] Hernandez does not argue that Casey waived reconsideration of the *Bivens* issue by not addressing it previously. For the reasons discussed fully below, the United States' Motion to Dismiss [120] is granted and Causey's Motion for Reconsideration [129] is granted. Specifically, this Court lacks subject matter jurisdiction over Hernandez's tortious training and supervision claim because it is barred by the discretionary function exception of the FTCA. Additionally, Hernandez fails to state claim for the use of deadly force asserted against the United States with respect to conduct by any ICE agent other than Causey. Finally, Hernandez's

[3] Causey timely filed his original Motion for Reconsideration [102] on June 18, 2021, which the Court denied without prejudice pending the outcome of the Supreme Court's decision in *Egbert*.

Fourth Amendment claim presents a new context under *Bivens*, and since special factors counsel hesitation in extending the *Bivens* remedy to this context, this Court cannot find a *Bivens* remedy.

II. THE UNITED STATES' MOTION TO DISMISS HERNANDEZ'S TORTIOUS AND WRONGFUL TRAINING AND SUPERVISION CLAIM

In his Amended Complaint, Hernandez asserts a tortious and wrongful training and supervision claim against the United States, alleging that "[n]ot withstanding the prohibition of the Fourth Amendment against unreasonable seizures based solely on race . . . ICE supervisors allowed, encouraged and instructed Phillip Causey . . . to stop and question any Hispanic who might be stopped by a local police officer under a pretextual request for assistance with Spanish," without reasonable suspicion. [106], ¶ XXXVIII. The United States argues that Hernandez's tortious training and supervision claim must be dismissed for lack of subject matter jurisdiction because Hernandez's claim is barred by the discretionary function exception of the FTCA. Specifically, the United States argues that Hernandez cannot escape the discretionary function exception to the FTCA by "couching his claim in terms of a constitutional violation." [112], pg. 1. In his Response, Hernandez asserts that his tortious training and supervision claim is not barred by the discretionary function exception because government officials have no discretion to violate the constitution. The question before the Court, then, is whether an alleged constitutional violation—rather than a statutory, regulatory, or policy violation—precludes the application of the discretionary function exception.

A. Standard of review

"Motions filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure allow a party to challenge the subject matter jurisdiction of the district court to hear a case." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). A court may find lack of subject matter jurisdiction "on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996) (citation omitted). "[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Wells v. Ali*, 304 Fed. App'x 292, 293 (5th Cir. 2008) (citation omitted). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming*, 281 F.3d at 161.

B. The Federal Tort Claims Act and the discretionary function exception

"Courts consider whether the FTCA applies via a Rule 12(b)(1) motion, because whether the government has waived its sovereign immunity goes to the court's subject matter jurisdiction." *Campos v. United States*, 888 F.3d 724, 730 (5th Cir. 2018) (citation omitted). "Sovereign immunity protects the federal government from being sued without its consent." *Doe v. United States*, 831 F.3d 309, 319 (5th Cir. 2016) (citation omitted). It is well established that Congress has waived the sovereign immunity of the United States by giving courts jurisdiction over certain torts committed by government employees under the FTCA. 28 U.S.C. § 1346(b).

The FTCA provides consent for suit against the United States "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). The FTCA was "designed to afford easy and simple access to the federal courts for persons injured by the activities of government without the need to resort to private bills for the purpose of obtaining compensation." *Sutton v. United States*, 819 F.2d 1289, 1292 (5th Cir. 1987) (internal quotations omitted) (quoting *Collins v. United States*, 783 F.2d 1225, 1233 (5th Cir. 1986)). Its passage grew out of "a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." *Dalehite v. United States*, 346 U.S. 15, 27–28, 73 S. Ct. 956, 964, 97 L. Ed. 1427, 1436 (1953).

"The liability of the United States under the FTCA, however, is subject to various exceptions contained in 28 U.S.C. § 2680, including the 'discretionary function' exception." *Spotts v. United States*, 613, F.3d 559, 566 (5th Cir. 2010). "The discretionary function exception withdraws the FTCA's waiver of sovereign immunity in situations in which, although a government employee's actions may have been actionable under state tort law, those actions were required by, or were within the discretion committed to, that employee under federal statute, regulation, or policy[.]" *United States v. Gaubert*, 499 U.S. 315, 322, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991). Specifically, the discretionary function exception bars "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." *Gibson v.*

United States, 809 F.3d 807, 811 (5th Cir. 2016) (quoting 28 U.S.C. § 26080(a)). If a case falls within this statutory exception to the FTCA, the court lacks subject matter jurisdiction. *Campos*, 888 F.3d at 730.

Courts employ a two-part test in determining whether the discretionary function exception applies: (1) "the conduct must be a 'matter of choice for the acting employee;'" and (2) "the judgment [must be] of the kind that the discretionary function exception was designed to shield.'" *Tsolmon v. United States*, 841 F.3d 378, 382 (5th Cir. 2016) (citations omitted). "[T]he purpose of the exception is to 'prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Gaubert*, 499 U.S. at 322. Thus, "when properly construed, the exception 'protects only governmental actions and decisions based on considerations of public policy.'" *Id.* (quoting *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 537, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988)).

Here, Hernandez does not dispute that the "decision to assist a local police officer with translating Spanish would involve an 'element of judgment or choice.'" [122], pg. 21. Instead, Hernandez argues that, under the second prong of the *Gaubert* test, "the decision to assist a local police officer with translation in a DUI stop was not grounded in public policy, and as such was not the type of decision the discretionary function exception seeks to protect." *Id.* at 20-21. The basic premise of Hernandez's argument is that "the supposed decision to assist local police with translation was merely a pretext to avoid the mandates of the Fourth Amendment, and as such, is not subject to the discretionary function exception." [122], pg. 20.

C. Whether a constitutional violation precludes the application of the discretionary function exception

The Supreme Court has held that if "a statute, regulation, or policy leaves it to a federal agency to determine when and how to take action, the agency is not bound to act in a particular manner and the exercise of its authority is discretionary." *Spotts*, 613 F.3d at 567 (citing *Gaubert*, 499 U.S. at 329). Alternatively, if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow [,]" then the action is mandatory and cannot be shielded under the discretionary function exception. *Berkovitz*, 486 U.S. at 536; *Gaubert*, 499 U.S. at 322-25. "In other words, the discretionary function exception does not apply if the challenged actions in fact violated a federal statute, regulation, or policy." *Spotts*, 613 F.3d at 567 (citing *Gaubert*, 499 U.S. at 324).

Hernandez explains that he does not bring a cause of action against the United States for a Fourth Amendment violation, "but rather for the injuries he suffered under Mississippi law as a result of the negligent manner in which the entire operation was conducted." [122], pg. 13. Hernandez's Fourth Amendment violations are therefore asserted only to negate the United States' discretionary function defense—not as part of his FTCA claim. Under this "creative dichotomy, an FTCA plaintiff would prove (1) first the substantive FTCA state-law negligence claim, and (2) next, a federal violation of the [constitution by a Government employee] that would negate the defendant United States' discretionary function defense to the plaintiff's state-law claim." *Shivers v. United States*, 1 4th 924, 928 (11th Cir. 2021). This

argument is, in effect, a "constitutional-claims exclusion." *Shivers*, 1 4th at 928.

Whether a constitutional violation, rather than a statutory, regulatory, or policy violation, precludes the application of the discretionary function exception has been an area of much discussion over the years. Many courts have disagreed on how to handle it. And the Fifth Circuit has not decided the issue. Indeed, "[w]hether a properly plead constitutional violation allows a plaintiff to circumvent the discretionary function exception is an open question in this circuit." *Doe v. United States*, 831 F.3d 309, 319 (5th Cir. 2016).[4]

While there is controversy over this question, it is this Court's duty "to construe a statute consistent with the intent of Congress as expressed in the plain meaning of its language. 'There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.'" *Sutton*, 829 F.2d at 1292 (quoting *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543, 60 S. Ct. 1059, 1063, 84 L. Ed. 1345, 1350–51 (1940)). The Court's objective when construing an exception to the FTCA "is to identify 'those circumstances which are within the words and reason of the

[4] *Doe*, 831 F.3d at 319-20 (finding that because the plaintiff failed to plead a proper constitutional violation, the question is not before the court); *see also Lopez v. U.S. Immigr. & Customs Enf't*, 455 F. App'x 427 (5th Cir. 2011) (declining to address the issue); *Castro v. United States*, 560 F.3d 381 (5th Cir. 2009) (*Castro I*) (reversing and remanding for the district court to consider to what extent the alleged constitutional violations are cognizable under the FTCA); *Castro v. United States*, 608 F.3d 266 (5th Cir. 2010) (*Castro II*) (en banc) (concluding that the discretionary function exception applies and affirming the district court's finding that the constitutional claims are moot).

exception'—no less and no more." *Kosak v. United States*, 465 U.S. 848, 853 n.9, 104 S. Ct. 1519, 79 L. Ed. 2d 860 (1984) (quotation omitted).

Thus, to determine whether a properly pleaded constitutional violation circumvents the discretionary function exception, the Court must begin with an analysis of the text of the statute itself. The discretionary function exception provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 26080(a).

Significantly, "the language Congress chose in § 2680(a) is unqualified—there is nothing in the statutory language that limits application of this exception based on the 'degree' of the abuse of discretion or the egregiousness of the employee's performance." *Shivers v. United States*, 1 F.4th 924, 930 (11th Cir. 2021). In fact, the word "[a]ny" suggests that the discretionary function exception applies despite the nature of the claim, and regardless of whether the discretion was exercised in a permissible manner. Nowhere within the plain language of FTCA does it provide that a constitutional violation may serve as a basis for casting aside the discretionary

function exception. Thus, the statutory language does not support Hernandez's argument.

Since the Fifth Circuit has not addressed the issue, it is important to note there is a circuit split.[5] As a result, the Court will address the opinions most persuasive beginning first with the Seventh Circuit's opinion in *Linder v. United States*, 937 F.3d 1087 (7th Cir. 2019), cert. denied, —— U.S. ——, 141 S. Ct. 159, 207 L. Ed. 2d 1097 (2020), and then turning to the Eleventh Circuit's opinion in *Shivers v. United States*, 1 F.4th 924, 931 (2021), cert. denied, --- U.S. ----, 142 S. Ct. 1361, 212 L. Ed. 2d 322 (2022).

In *Linder* the Seventh Circuit held "the theme that 'no one has discretion to violate the Constitution' has

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[5] *Loumiet v. United States*, 828 F.3d 935, 944–46 (D.C. Cir. 2016) (finding that discretionary function exception does not "provide blanket immunity against tortious conduct that a plaintiff plausibly alleges also flouts a constitutional prescription."); *Limone v. United States*, 579 F.3d 79, 101–02 (1st Cir. 2009) (finding that where the plaintiffs proved allegations of unconstitutional conduct, that such conduct "negat[es] the discretionary function defense"); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003) (concluding that the discretionary function exception did not apply to allegations that the FBI conducted surveillance activities in violation of the First and Fourth Amendments); *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) (holding that "the Constitution can limit the discretion of federal officials such that the FTCA's discretionary function exception will not apply."). Conversely, the Seventh and Eleventh Circuits have looked to the text of the FTCA and found an alleged constitutional violation does not circumvent the discretionary function exception of the FTCA because the FTCA applies to violations of statutes, regulations, or policies—not constitutional violations. *Linder v. United States*, 937 F.3d 1087 (7th Cir. 2019), cert. denied, —— U.S. ——, 141 S. Ct. 159, 207 L. Ed. 2d 1097 (2020); *Shivers v. United States*, 1 F.4th 924, 931 (2021), cert. denied, --- U.S. ----, 142 S. Ct. 1361, 212 L. Ed. 2d 322 (2022).

nothing to do with the Federal Tort Claims Act, which does not apply to constitutional violations. It applies to torts, as defined by state law[.]" *Linder*, 937 F.3d at 1090. The court went on to explain that:

> The limited coverage of the FTCA, and its inapplicability to constitutional torts, is why the Supreme Court created the *Bivens* remedy against individual federal employees. And when, in the wake of *Bivens*, Congress adopted the Westfall Act to permit the Attorney General to substitute the United States as a defendant in lieu of a federal employee, it prohibited this step when the plaintiff's claim rests on the Constitution. 28 U.S.C. § 2679(b)(2)(A). This leaves the FTCA as a means to seek damages for common-law torts, without regard to constitutional theories.

Id. According to the Seventh Circuit, "unless § 2680(a) is to be drained of meaning, it must apply to discretionary acts that are tortious. That's the point of an exception: It forecloses an award of damages that otherwise would be justified by a tort." *Id.* (emphasis in original). Thus, the Seventh Circuit found that the discretionary function exception applied to the tort claims arising from an alleged constitutional violation.

Since the Seventh Circuit's opinion in *Linder*, other courts have agreed with its finding that the FTCA does not apply to constitutional violations, including the Eleventh Circuit, the district court for the District of Utah, and the district court for the District of New Mexico. *Shivers*, 1 F.4th 924; *Ramirez v. Reddish*, No.

2:18-cv-176-DME, 2020 WL 1955366 (D. Utah Apr. 23, 2020).[6]

In *Shivers v. United States*, the Eleventh Circuit held that because "the FTCA is not based on alleged constitutional violations, . . . a plaintiff cannot circumvent the limitations on constitutional tort actions under *Bivens*—including the qualified-immunity doctrine—by recasting the same allegations (1) as a common-law tort claim under the FTCA that is not subject to the discretionary function exception or (2) as negating the discretionary function defense." Shivers, 1 F.4th at 931. The Eleventh Circuit highlighted that the inquiry under the FTCA is "not about how poorly, abusively, or unconstitutionally the employee exercised his or her discretion but whether the underlying function or duty itself was a discretionary one." *Id.* at 931. Because the plaintiff did not identify a statute, regulation, or policy that specifically pre-

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[6] In *Ramirez v. Reddish*, the plaintiffs failed "to identify any federal statute, regulation or policy that specifically prescribed the course of action Task Force members should have taken" and instead, asserted only that federal employees have no discretion to violate the Constitution. *Ramirez*, 2020 WL 1955366, at *28. The court found that the "discretionary function inquiry is not whether federal law grants an employee affirmative 'discretion to violate the Constitution.'" *Id.* Instead, the court explained that the inquiry focuses on "whether the conduct at issue in a given case involved a federal employee's exercise of discretion or was, instead, specifically mandated by federal statute, regulation, or policy such that the federal officer really had no discretion as to how to act—at least with regard to his challenged conduct." *Id.* The court declined, "without explicit congressional, Supreme Court, or Tenth Circuit direction," to analyze "the constitutionality of the federal employee's conduct challenged under the FTCA into the otherwise straightforward inquiry that § 2680(a) and the Supreme Court have prescribed[.]" *Id.*; *see also Ashley v. United States*, No. 1:20-cv-154-SWS, 2020 WL 8996805 (D. N.M. Nov. 2, 2020).

scribed a course of action that the prison employees failed to follow—and because "the Eighth Amendment itself contains no such specific directives"—the court found that the discretionary function exception applied even if the prison officials violated the plaintiff's Eighth Amendment rights. *Shivers*, 1 F.4th at 931.

Here, as in the cases discussed above, Hernandez does not identify a specific statute, regulation, or policy that specifically prescribes a course of action that Causey, or fellow ICE agents, failed to follow. Instead, Hernandez argues that the United States is liable for the "tort[i]ous and wrongful supervision and instruction of Phillip Causey and other deportation agents involved in Plaintiff's shooting, in direct contravention of the Plaintiff's Fourth Amendment rights." [106], ¶ XXXVII. However, Congress enacted the FTCA to address violations of "state tort law" by governmental employees—not constitutional violations. "Congress left no room for the extra-textual 'constitutional-claims exclusion' for which [Hernandez] advocates." *Shivers*, 1 F.4th at 930. As the Supreme Court has stated, "[t]here is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it." *Rayonier Inc. v. United States*, 352 U.S. 315, 320, 77 S. Ct. 374, 1 L. Ed. 2d 354 (1957).

Because only Congress may waive sovereign immunity, this Court is bound by the explicit waiver found within the discretionary function exception itself. In construing the text of the FTCA as it is written, as this Court must do absent Fifth Circuit or Supreme Court authority on this issue, the United States has not waived sovereign immunity for alleged constitutional violations under

the FTCA. *F.D.I.C. v. Meyer*, 510 U.S. 471, 477, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994) (finding that the FTCA "does not provide a cause of action" for a constitutional tort claim). While the Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," it does not contain a specific directive as to the conduct of ICE agents for purposes of this narrow claim. U.S. CONST. amend. IV. Thus, the conduct at issue here—the training and supervision of the ICE agents involved in the allegedly pretextual stop and the decision to assist local police with translation services for a DUI stop—was discretionary. Any allegedly "tortious acts (including allegedly unconstitutional tortious acts) in exercising that function fall within § 2680(a)'s discretionary function exception." *Shivers*, 1 F.4th at 933.[7]

Because Hernandez's tortious and wrongful supervision claim falls within the discretionary function exception to the FTCA, the Court lacks subject matter jurisdiction, and the claim must be dismissed. *Campos v. United States*, 888 F.3d 724, 730 (5th Cir. 2018).

III. THE UNITED STATES' PARTIAL MOTION TO DISMISS HERNANDEZ'S NEGLIGENT USE OF DEADLY FORCE CLAIM

In its Motion to Dismiss, the United States submits that "during a recent status conference with the Court, [Hernandez] asserted for the first time that his negligence claim encompassed the alleged negligent conduct of all ICE officers on the scene on the night of the shooting." [120], pp. 1-2. Based on these representations, the United States seeks to dismiss

[7] The Court makes no finding as to whether Hernandez has stated a claim for a Fourth Amendment violation.

Hernandez's negligent use of deadly force claims based on the actions of anyone at the scene of the shooting other than Causey. The United States asserts that Hernandez fails to meet his burden because he "cannot simply group a bunch of federal employees together and hope that discovery will shake out some information that will aid his claim." [124], pg. 3. In his Response, Hernandez states that his "position is that the United States can be liable under the FTCA for the negligence of any or all the deportation officers present that night." [122], pg. 4. Accordingly, the only question before the Court is whether Hernandez has stated a claim for negligent use of deadly force against the United States with respect to the actions of unnamed ICE agents on the night of the shooting.

A. Standard of review

"The pleading standards for a Rule 12(b)(6) motion to dismiss are derived from Rule 8 of the Federal Rules of Civil Procedure, which provides, in relevant part, that a pleading stating a claim for relief must contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *In re McCoy*, 666 F.3d 924, 926 (5th Cir. 2012). To survive dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The Fifth Circuit has explained the *Iqbal / Twombly* standard as follows:

> In order for a claim to be plausible at the pleading stage, the complaint need not strike the reviewing court as probably meritorious, but it must raise 'more than a sheer possibility' that the defendant has violated

> the law as alleged. The factual allegations must be 'enough to raise a right to relief above the speculative level.'

Oceanic Expl. v. Phillips Petroleum Co. ZOC, 352 F. App'x 945, 950 (5th Cir. 2009) (citing *Twombly*, 550 U.S. at 570).

The Court need not "accept as true conclusory allegations or unwarranted deductions of fact." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) (quoting *Tuchman v. DSC Commc'ns Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994)). However, "[t]he complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the complaint must be taken as true." *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997) (citing *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir. 1986)). Dismissal is only appropriate when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. (citation omitted). "The issue is not whether the plaintiffs will ultimately prevail, but whether they are entitled to offer evidence to support their claims." *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007).

B. Hernandez's negligent use of deadly force claim under the FTCA

While a plaintiff seeking relief under the FTCA brings his tort claims directly against the United States, the FTCA nonetheless requires that a private person would be liable for the same conduct under the state law where the claim arose. 28 U.S.C. § 1346(b); *see Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 1472–73, 64 L. Ed. 2d 15 (1980). Here, Hernandez asserts a negligent use of deadly force claim against the United

States under Mississippi law. To state a claim for negligence in Mississippi, a plaintiff must allege that there was a "duty or standard of care, breach of that duty or standard, proximate causation, and damages or injury." *Sanderson Farms, Inc. v. McCullough*, 212 So. 3d 69, 78 (Miss. 2017). The United States does not dispute that Hernandez has sufficiently alleged "what Officer Causey's duty and conduct were" on the night of the shooting. [124], pg. 4. Instead, the United States asserts that Hernandez has failed to plead a negligent use of deadly force claim with respect to any conduct by any ICE officer other than Causey.

Specifically, the United States argues that "Hernandez provides no facts that would allow the Court to conclude whether the alleged conduct [of the unnamed ICE officers] would constitute a private party tort under Mississippi law." [121], pg. 6. In his Amended Complaint, Hernandez asserts that "an unknown Immigration and Customs Enforcement officer or agent caused Plaintiff significant and grievous injury by the negligent use of deadly force." [20], ¶ pg. 4. "[A]s a result of the wrongful or negligent conduct of Phillip Causey and John Doe, and the negligence or fault of Defendants, The United States of America, and its agencies, . . . Plaintiff has suffered enormous pain and suffering." *Id.*

"At the pleading stage, the plaintiff must allege facts that demonstrate unlawful conduct." *Joseph on behalf of Est. of Joseph v. Bartlett*, 981 F.3d 319, 329 (5th Cir. 2020) n. 18 (5th Cir. 2020). But here, Hernandez's pleadings do not sufficiently identify the conduct of specific ICE agents, apart from Causey. Instead, Hernandez relies on conclusory allegations that unknown ICE agents were involved or participated in the events

leading to the shooting.[8] Even if the Court accepts these allegations as true, Hernandez does not plead "'enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary claims or elements." *In re S. Scrap Material Co., LLC*, 541 F.3d 584, 587 (5th Cir. 2008) (citing *Twombly,* 550 U.S. at 556). Indeed, Hernandez alleges a single use of deadly force: Causey shooting him. In failing to identify the other ICE agents, or their alleged wrongful behavior, Hernandez has failed to allege "'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Gonzales v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 662).

Accordingly, the Court finds that Hernandez fails to meet his burden at the pleadings stage. His claim for negligent use of deadly force against the United States, at least the claim that is based on the actions of anyone at the scene of the shooting other than Causey, is dismissed.

IV. CAUSEY'S MOTION FOR RECONSIDERATION

On July 18, 2022, Causey filed a Motion for Reconsideration [102] of the Court's Memorandum Opinion and Order [89] denying his Motion for Summary Judgment. Causey argues that based on the Supreme Court's ruling in *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022), and the

Fifth Circuit's ruling in *Byrd v. Lamb*, 990 F.3d 879, 882 (5th Cir. 2021), Hernandez's *Bivens* claim must be

[8] A number of depositions were taken and written discovery exchanged before Hernandez filed his Amended Complaint.

dismissed as it is a "new context" and because special factors counsel hesitation about granting an extension.

The Court notes that while this matter has been pending since 2017, Causey made no argument prior to the filing of his initial Motion for Reconsideration [102] that Hernandez's *Bivens* claim is unavailable for Hernandez's excessive force claim. Indeed, Causey did not argue that a *Bivens* remedy was unavailable in his initial Answer [39] or any of his summary judgment briefing—despite Hernandez's discussion of this issue in his Response in Opposition to Causey's Motion for Summary Judgment—or at the hearing on his Motion for Summary Judgment after briefing was complete.[9] *See* Answer [39]; Motion for Summary Judgment [68]; Memorandum in Support [69] of Motion for Summary Judgment; Motion to Strike [81]; Memorandum in Support [82] of Motion to Strike; Reply in Support [83] of Motion for Summary Judgment; Amended Answer [110].

A. Standard of review

Causey seeks reconsideration under Federal Rules of Civil Procedure 59 and 60. But because the Memorandum Opinion and Order [89] denying summary judgment was interlocutory, the Court must consider

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[9] Although Hernandez acknowledges that Causey failed to address the *Bivens* issue, he does not argue that Causey waived it by failing to address it at the summary judgment stage. *See Hernandez*, 137 S. Ct. at 2006 (vacating and remanding for the Fifth Circuit to address the *Bivens* question); *Byrd v. Lamb*, 990 F.3d 879, 882 (5th Cir. 2021) (dismissing plaintiff's *Bivens* claim even though the *Bivens* issue was not raised in the district court and the district court did not *sua sponte* address it); *Butts v. Martin*, 877 F.3d 571 (5th Cir. 2017) (remanding for the district court to consider whether a "new context" under *Bivens* was presented when that issue was not addressed previously).

Causey's request for reconsideration under Federal Rule of Civil Procedure Rule 54(b). *Cabral v. Brennan*, 853 F.3d 763, 766 (5th Cir. 2017) (finding that it is Rule 54 rather than Rule 59 that allows district courts to revise interlocutory orders); see also FED. R. CIV. P. 60(b) advisory committee's note to 1946 amendment (stating that "interlocutory judgments are not brought within the restrictions of [Rule 60], but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires").

Rule 54(b) provides that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all of the parties . . . may be revised at any time before the entry of judgment adjudicating all the claims and all the parties' rights and liabilities." FED. R. CIV. P. 54(b). "Rule 54(b) allows parties to seek reconsideration of interlocutory orders and authorizes the district court to 'revise[ ] at any time' 'any order or other decision . . . [that] does not end the action.'" *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 336 (5th Cir. 2017). While the Rule 54(b) standard is less exacting than Rule 59(e), "courts have looked to the kinds of consideration under those rules for guidance." *Livingston Downs Racing Ass'n, Inc. v. Jefferson Downs Corp.*, 259 F. Supp. 2d 471, 475 (M.D. La. September 23, 2002) (citation omitted); *Hillie v. Williams*, No. 4:17-CV-69-DMB, 2018 WL 280531, at *1 (N.D. Miss. Jan. 3, 2018) (citing *eTools Dev., Inc. v. Nat'l Semiconductor Corp.*, 881 F. Supp. 2d 745, 748 (E.D. Tex. Jul. 31, 2012) (collecting cases)). Specifically, some courts consider whether (1) the judgment is based upon a manifest error of fact or law; (2) newly discovered or previously unavailable evidence exists; (3) the initial decision was manifestly unjust; (4) counsel engaged in serious misconduct; and

(5) an intervening change in the law alters the appropriate outcome. *Livingston Downs Racing Ass'n.*, 259 F. Supp. 2d at 475-76. It is well established that courts have broad discretion in deciding whether to grant a motion for reconsideration. *McKay v. Novartis Pharm. Corp.*, 751 F.3d 694, 701 (5th Cir. 2014); *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 355 (5th Cir. 1993).

B. *Bivens* jurisprudence

As noted in the Court's prior Opinion, the Supreme Court in Bivens recognized an implied right of action for damages against federal officers who are alleged to have violated a citizen's constitutional rights. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). The "core holding of *Bivens*," the Supreme Court later instructed, is "recognizing in limited circumstances a claim for money damages against federal officers who abuse their constitutional authority." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 67, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001).

Following Bivens, however, the Supreme Court has "adopted a far more cautious course" in finding implied causes of action. *Ziglar v. Abbasi*, 198 L. Ed. 2d 290, 137 S. Ct. 1843, 1855–56 (2017). Indeed, the Supreme Court has "made clear that expanding the Bivens remedy is now a 'disfavored' judicial activity" and it has done so only twice since deciding *Bivens*. *Id.* at 1857 (citation omitted); *see Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980) (finding Eighth Amendment's Cruel and Unusual Punishments Clause provided a prisoner's estate with a remedy for failing to provide adequate medical treatment); *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979) (finding Fifth Amendment Due Process

Clause gave a Congressman's assistant a damages remedy for gender discrimination). Since the Supreme Court's decision in *Carlson* in 1980, it has "consistently refused to extend *Bivens* to any new context or new category of defendants." *Ziglar*, 137 S. Ct. at 1857 (collecting cases).

"[R]ather than dispense with *Bivens* altogether," the Supreme Court has instructed lower courts to proceed with caution when asked to find a *Bivens* remedy. *Egbert*, 142 S. Ct. at 1803. When considering whether to extend *Bivens*, courts apply a two-part test. Under this test, courts should first consider whether the case presents a new context. *Hernandez v. Mesa*, --- U.S. ----, 140 S. Ct. 735, 743, 206 L. Ed. 2d 29 (2020). "Only where a claim arises in a new context should courts then proceed to the second step of the inquiry, and contemplate whether there are 'any special facts that counsel hesitation about granting the extension.'" *Byrd*, 990 F.3d at 881.

i. New context

Today, *Bivens* claims generally are limited to the circumstances of the Supreme Court's trilogy of cases in this area: (1) manacling the plaintiff in front of his family in his home and strip-searching him in violation of the Fourth Amendment, (2) discrimination on the basis of sex by a congressman against a staff person in violation of the Fifth Amendment, and (3) failure to provide medical attention to an asthmatic prisoner in federal custody in violation of the Eighth Amendment. *Oliva v. Nivar*, 973 F.3d 438, 442 (5th Cir. 2020) (citing *Bivens*, 403 U.S. at 389–90; *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979); *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980)). Virtually everything else is a "new context." *Ziglar*, 137 S. Ct. at 1865 (explaining

that "the new-context inquiry is easily satisfied"); Byrd, 990 F.3d at 882.

Thus, to determine whether a case presents a new context, the Court must determine whether this case falls squarely into one of the established *Bivens* categories, or if it is "different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court." *Oliva*, 973 F.3d at 441–42 (citing *Ziglar*, 137 S. Ct. at 1859). The Supreme Court has provided several examples for how a case might be meaningfully different:

> A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

Ziglar, 137 S. Ct. at 1860.

Here, Hernandez alleges a Fourth Amendment claim for being shot while unarmed and with his hands allegedly in the air. This claim is unfortunately indistinguishable from countless such claims brought against federal, state, and local law enforcement officials—except that Causey is an ICE agent. While Hernandez alleges a Fourth Amendment violation like the plaintiff in *Bivens*, this case differs from the facts presented in *Bivens*. First, Hernandez's Fourth

Amendment claims arose on a public street, and not in a private home like in *Bivens*. Second, there was no warrantless search for narcotics—indeed, narcotics were not involved in this case. Instead, the dispute that gave rise to Hernandez's claims involved a shooting by an ICE agent. Third, Causey did not manacle Hernandez in front of his family and did not strip-search him, as was the case in *Bivens*, but rather shot him in his right forearm. While the Supreme Court has extended *Bivens* to include additional contexts such as discrimination based on sex and failure to provide medical attention, neither of these extensions apply here. *See Davis v. Passman*, 442 U.S. 228, 230, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979); *see also Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980). Because "even a modest extension is still an extension," the Court finds that this is a new context and must now determine whether any special factors counsel against extending *Bivens*. *Ziglar*, 137 S. Ct. at 1865.

ii. Special factor analysis

In deciding whether any special factors counsel hesitation about granting the extension, courts consider whether there is a "risk of interfering with the authority of the other branches," whether "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy," and "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Hernandez*, 140 S. Ct. at 743. The Supreme Court has found that "'even a single sound reason to defer to Congress' is enough to require a court to refrain from creating such a remedy." *Egbert*, 142 S. Ct. at 1803 (quoting *Nestlé USA, Inc. v. Doe*, 593 U. S. ——

–, ——, 141 S. Ct. 1931, 1937, 210 L. Ed. 2d 207 (2021) (plurality opinion)). The central question of the special factor analysis is, "who should decide whether to provide for a damages remedy, Congress or the courts?" *Ziglar*, 137 S. Ct. at 1857 (quoting *Bush v. Lucas*, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983)). The Supreme Court's recent decision in *Egbert v. Boule* makes it clear that the answer to this question is almost always Congress. *Egbert*, 142 S. Ct. at 1803.

In *Egbert*, the Supreme Court considered a Fourth Amendment excessive force claim that "present[ed] 'almost parallel circumstances'" to *Bivens* itself. *Id.* The plaintiff, a United States Border Patrol confidential informant, ran a bed-and-breakfast on the United States and Canada border called the "Smuggler's Inn." *Id.* at 1800. The plaintiff claims that a United States Border Patrol agent entered his property and refused to leave. *Id.* at 1801. The plaintiff claimed that the Border Patrol Agent lifted him off the ground, threw him against an SUV, and then threw him to the ground. *Id.* The plaintiff asserted that the Border Patrol Agent used excessive force and caused him physical injury. *Id.* at 1802. The Supreme Court found that even though *Bivens* and *Egbert* involved "similar allegations of excessive force and thus present 'almost parallel circumstances' or a similar 'mechanism of injury,'" there was no *Bivens* cause of action.

In its ruling, the Supreme Court clearly announced that even in cases involving "conventional" excessive force claims, "the judiciary is comparatively ill suited to decide whether a damages remedy against any Border Patrol agent is appropriate." *Egbert*, 142 S. Ct. at 1805. The Supreme Court explained that the *Bivens* inquiry does not invite courts to "independently assess

the costs and benefits of implying a cause of action. A court faces only one question: whether there is *any* rational reason (even one) to think that *Congress* is better suited to 'weigh the costs and benefits of allowing a damages action to proceed." *Egbert*, 142 S. Ct. at 1805 (quoting *Ziglar*, 137 S. Ct. at 1858). And "[i]f there is a rational reason to think that the answer is 'Congress'—as it will be in most every case, *see Ziglar*, 137 S. Ct. at 1857–1858—no *Bivens* action may lie." *Egbert*, 142 S. Ct. at 1803. As Justice Gorsuch states in his concurrence, "[i]f the costs and benefits do not justify a new *Bivens* action on facts so analogous to *Bivens* itself, it's hard to see how they ever could." *Egbert*, 142 S. Ct. at 1809 (Gorsuch, J. concurring).

Because the facts before this Court draw even more of a distinction from *Bivens* than those in *Egbert*, and in light of the Supreme Court's mandate that Congress is nearly always better suited to provide a damages remedy, the Court finds that it "may not recognize a *Bivens* remedy." *Hernandez*, 140 S. Ct. at 743.

C. Hernandez may not bring a *Bivens* action

In its prior Opinion [89], this Court found that Hernandez's Fourth Amendment excessive force claim did not present a "new context" under *Bivens*.[10] But in

[10] This Court relied on the Supreme Court's decision in *Hernandez v. Mesa*, where the Court declined to extend *Bivens* to the context of a cross-border shooting but the Government did not argue that the shooting of an unarmed individual, by itself, is a new context. *Hernandez*, 140 S. Ct. at 758 (*Ginsburg, J. dissenting*) ("Using lethal force against a person who 'poses no immediate threat to the officer and no threat to others' surely qualifies as an unreasonable seizure.") Because the Supreme Court focused on the location of the shooting—the United States and Mexico border—rather than declining to extend *Bivens* to Fourth Amendment unarmed shooting claims altogether, this

light of the Supreme Court's opinion in *Egbert v. Boule*, it is clear that *Bivens* claims are even more narrow and limited than this Court found in its prior Opinion. In applying *Egbert* to the facts of this case, the Court finds that Hernandez' Fourth Amendment claim does present a "new context" and that special factors counsel hesitation in extending *Bivens*. Because *Egbert* represents an intervening change in the law, Causey's Motion for Reconsideration [129] is granted. Hernandez may not bring a *Bivens* action against Causey for violations of his Fourth Amendment rights. Hernandez's Fourth Amendment claim is dismissed.

IV. CONCLUSION

IT IS THEREFORE ORDERED AND ADJUDGED that the United States' Motion to Dismiss [120] is GRANTED. Hernandez's tortious supervision and training claim is DISMISSED WITHOUT PREJUDICE and Hernandez's claim for negligent use of deadly force against the United States with respect to the actions of other unnamed ICE agents on the night of the shooting is DISMISSED WITHOUT PREJUDICE.[11]

Court took the position that the Supreme Court was not prohibiting such unarmed shooting cases from qualifying as a *Bivens* claim. Similarly, other courts had long recognized *Bivens* claims in the Fourth Amendment excessive force context. This Court also relied on *Ziglar v. Abbasi*, where the Supreme Court acknowledged the "fixed principle" that plaintiffs may bring *Bivens* suits against federal law enforcement officers for "seizure[s] that violate the Fourth Amendment." *Ziglar*, 137 S. Ct. at 1877. Nevertheless, *Egbert* makes clear now that the type of claim at issue here cannot be brought as a *Bivens* claim under the governing analysis.

[11] Hernandez's intentional tort claim for assault and battery remains outstanding under the FTCA.

IT IS FURTHER ORDERED AND ADJUDGED that Causey's Motion for Reconsideration [129] is GRANTED and Hernandez's Bivens claim is DISMISSED WITH PREJUDICE.

This, the 29th day of September, 2022.

/s/ Taylor B. McNeel
TAYLOR B. McNEEL
UNITED STATES DISTRICT JUDGE